EUROPEAN PROCUREMENT LAW SERIES

AWARD OF CONTRACTS IN EU PROCUREMENTS

Mario Comba &
Steen Treumer (Eds.)

DJØF PUBLISHING

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European Procurement Law Series

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DJØF Publishing
Copenhagen 2013

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1. edition

Cover: Bo Helsted
Print: Toptryk Grafisk, Gråsten

Printed in Denmark 2013
ISBN 978-87-574-3153-7

Sold and distributed in Scandinavia by:
DJØF Publishing
Copenhagen, Denmark
Email: forlag@djoef.dk
www.djoef-forlag.dk

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Foreword by the Editors of the European Procurement Law Series

This is the fifth volume in the Series with an analysis of one of the most important elements of EU public procurement law: Award of the public contract. The award phase is of crucial importance for the outcome of the competition for the contract and it is therefore not surprising that it has been considered in thousands of public procurement disputes in the Member States of the EU. This implies that the elaboration of this book has been demanding for all involved and has taken considerable time and effort.

The subject of this book has for obvious reasons already received scholarly attention in the many books and articles on EU public procurement law. However, the existing literature has seldom been based on a comparative approach covering a broad range of Member States of the European Union with diversified national approaches to EU public procurement law. The present publication is original in this sense and consequently provides the reader with an insight that cannot be found elsewhere. This publication includes specific chapters on the state of law and developments in Germany, France, United Kingdom, Spain, Italy, Poland, Romania and Denmark. The authors of these chapters have been asked to follow the same structure while addressing an elaborate common research agenda. In addition, the present publication contains a number of comparative chapters on specific issues that we considered to be of particular interest in theory and practice.

The European Procurement Law Series is the result of the collaboration within a European research group made of academics specialized in procurement law who consider a comparative approach both valuable and necessary. Comparative information and analysis of procurement law and practice in the various Member States is an important tool for the development of procurement regulation and practice in the EU. Both convergences and divergences are important signals to the EU and national law makers, including the Court of Justice of the European Union. Comparative knowledge may inspire

new approaches and help to avoid mistakes to what are in the end the same principles and rules. Moreover, it is valuable for practitioners in the Member States to be aware of practices, regulation, case law, and interpretations of procurement law throughout the EU as this can assist them both in understanding the rules applicable and in developing best practices.

Furthermore, As the Court of Justice reminds us on its official website, the courts of the Member States are the 'ordinary courts in matters of EU law'. National courts and review bodies may, and in some cases must, refer questions to the Court of Justice. With more and more Member States leading to increased delays in the preliminary reference procedures, national courts and review bodies will more often have to look for answers elsewhere. Precedents from other national courts or review bodies giving application to the common European rules and principles are a precious source of inspiration.

It should not be overlooked that the Court of Justice too is aware of the value of the comparative approach and some of its rulings are influenced by a development or a trend in regulation or practice at national level. Increased comparative knowledge of the case law of different Member States may alert the Court of Justice to the difficulties national courts and review bodies are facing in giving full effect to European law. Finally, the comparative approach can make the other EU institutions aware of common trends developing at national level, a spontaneous *jus commune* which it is better guided than opposed or worse ignored.

It is our hope that the European Procurement Law Series will contribute to a strengthened dialogue between the various legal cultures in the field of procurement and that it will become a well-known source of inspiration.

Our next volume will address the reform of the EU Public Procurement Directive where we will focus on selected novelties in the new public procurement regime at EU level.

We would like to thank Professor Mario E. Comba for co-editing the present volume and our most helpful publisher, Vivi Antonsen, always ready to forgive our many shortcomings.

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Professor Martin Burgi frequently attends international conferences on procurement law, contributes as a speaker and hosted the U.S.-European Leadership Roundtable in Düsseldorf (November 2010). His broad area of expertise includes modernization and privatization in the international context, legal protection at international courts, the roles of regions and municipalities in the global change. He serves as Official expert for parliamentary institutions and legal consultant for stock exchange enterprises, states and local municipalities.

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1 Award criteria under EU law (old and new)

Roberto Caranta

1. Introduction

This book has a wider coverage than just award criteria. EU rules on the rejection of bids, abnormally low offers, and e-procurement are, however, dealt with in details in some of the following chapters, so this chapter will focus on award criteria.[1]

A fresh approach to the definition of award criteria (and of other public procurement concepts) is long overdue, and a first section will be devoted to this. It will provide an opportunity to address the question of the distinction between selection and award criteria. The provisions on award criteria (lowest price and most advantageous economic offer – MEAT) in Directive 2004/18/EC and the relative case law will be analysed next, with the role played by transparency being a quite relevant issue. The changes to the EU legal framework following the adoption of the new Public sector directive will be examined next. A short conclusion will follow.

2. What are award criteria? A heterodox view

In Directive 2004/18/EC there is no definition of what an award criterion is. Article 53 thereof is content with indicating which the award criteria are. This is probably so because in many jurisdictions, award criteria have been around

1. EU law on rejection of abnormally low and non compliant tenders is dealt with by A. Sanchez Graells in chapter 10, while EU law on e-procurement is dealt with by G. Racca in chapter 11.

for centuries and therefore they are supposed to be a known entity to be regulated rather than defined. Similarly, there is no definition of a number of the fundamental concepts scattered along the procurement cycle.

The procurement cycle usually goes through a number of steps, or phases, or stages with adaptations according to the award procedure chosen. Technical specifications are drafted to describe the subject matter of the contract. Selection criteria are designed to provide a picture of those economic operators which will be allowed to take part in the procedure based on their economic or financial standing and on their technical and/or professional ability (Articles 47 and 48). Additional and specific grounds for exclusion covering a closed list of grounds are also foreseen in the legislation (Article 45). The distinction between exclusion grounds and selection criteria is that the former are qualitative or absolute. Economic operators caught by them cannot take part in any public procurement procedure. Selection criteria are quantitative in that economic operators are to pass a given threshold (e.g. concerning turnover or experience) to qualify.[2]

As necessary (but not sufficient) conditions to be awarded a contract, an economic operator must qualify, and its tender must comply with the technical specifications. Additionally, its tender must be ranked the best according to the award criteria, which again are normally advertised alongside with technical specifications and selection criteria. Finally, according to the EU Commission, performance conditions or clauses are supposed to be distinct from technical specifications and capable to be met by all economic operators.[3]

Summing up, we are thought to deal with technical specifications, selection criteria, award criteria, and performance conditions as discrete entities pertaining to different phases of the procedure.

This might well have been so in the past.[4] Now, it is suggested that the picture is much more nuanced or, to be more precise, the different phases of

2. See generally M. Steinicke 'Qualification and Shortlisting' in M. Trybus, R. Caranta, G. Edelstam (eds.) *The EU Law of Public Contracts* (Bruxelles, Bruyllant, 2013) 105.
3. See for instance the recent *Buying social. A Guide to Taking Account of Social Considerations in Public Procurement*, p. 43 ff, and the *Buying Green!* handbook (http://ec.europa.eu/environment/gpp/pdf/handbook.pdf, at page 46).
4. The distinction for instance between qualification and award criteria was quite clear in Case 31/87, *Beentjes* [1988] ECR 4635, paragraph 15; this approach was followed in Case C-315/01 *GAT* [2003] ECR I-6351, paragraphs 59 ff; Case C-532/06 *Lianakis and Others* [2008] ECR I-251, paragraphs 26 ff, and Case C-199/07 *Commission* v *Greece* [2009] ECR I-10669, paragraphs 51 ff. As it will be shown, the new directive goes in another way.

the procedure still deserve to be distinguished, but they do not refer to ontologically different things. Only, what may be the same 'thing' is treated – in a way, processed – differently, in different phases. And this flexibility is needed to achieve best value for money.[5]

What is still true is that both technical specifications and selection criteria have to be assessed on a pass or fail basis. This truism is codified in Article 33(2) Directive 2004/18/EC with specific reference to dynamic purchasing systems: "All the tenderers satisfying the selection criteria and having submitted an indicative tender which complies with the specification and any possible additional documents shall be admitted to the system". Award criteria are more *souple* in that they allow for differentiating tenderers along a scale. Price is the most obvious scale to be used in this context, but far from being the only one.

Both technical specifications and selection criteria set minimal requirements which must be met. Concerning technical specifications, this obviously does not encourage economic operators to include in their tenders goods or services overshooting the minimum required and thus normally more expensive. In a way, this was a very good reason to go beyond the lowest price award criterion and to refer to the MEAT. Quality, technical merit, functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance are all aspects usually dealt with in technical specifications, at a stage where minimal requirements are to be assessed on a pass or fail basis. But the same elements may then come up as criteria to assess the MEAT (and indeed they have been taken from the list in Article 53(1)(a) of Directive 2004/18/EC). Only, at the award stage there is no pass or fail, rather tenders are ranked according to weighting mechanisms appropriate for each criterion. More precisely, the starting point for ranking is the very same cut off between pass or fail which is set in the technical specifications.

With the MEAT, contracting authorities are empowered to pay more for better quality. So much so that under Article 24(1) they may allow variants, i.e. deviations from the technical specifications, in case the contract is to be awarded according to the MEAT criterion. Otherwise said, the technical specifications may allow for a degree of flexibility impacting on the choice of the best tender at award stage.

5. See, with reference to the *Lianakis* case, S. Treumer 'The Distinction between Selection and Award Criteria in EC Public Procurement Law: A Rule without Exception?' *Public Procurement L. Rev.*, 2009, 111.

To a superficial observer the same is not the case with reference to selection criteria. And indeed this is not the case with the criteria for economic and financial standing, such as balance sheets and turnover (Article 47 of Directive 2004/18/EC). The selection criteria just referred to are set having in mind the interest of contracting authorities to deal with economic operators whose economic standing is adequate to the contract at issue. There is no reason why they should be ready to pay more economic operators having more than adequate standing, and this anyway will favor larger companies pushing SMEs out of the market and ultimately reducing competition.[6]

The situation is only partly the same with reference to technical and professional ability. For sure here again contracting authorities are after contractors whose ability is adequate to the contract at issue. Moreover, and this also applies with reference to economic and financial standards, the subject matter of the contract is different from both the contractor and the actual people implementing the contract.[7] However, as it is of common knowledge, in most cases a technically or professionally abler person will deliver a better quality service. All physicians and all lawyers must be professionally qualified (and the requirements have been to a higher or lesser extent harmonised in the EU). There is a pass or fail in education and professional exams as well. However, some physicians and some lawyers are better than others, and members of the general public are ready to pay more for them. There is no reason why contracting authorities should not be able to do the same when in similar situations, again putting a price on quality, including by giving a premium to better references from previous customers as a tool to assess quality.[8]

To give another instance, under Article 48(2)(e) of Directive 2004/18/EC, evidence of the economic operators' technical abilities may be furnished by referring to "the educational and professional qualifications of the service provider or contractor and/or those of the undertaking's managerial staff and, in particular, those of the person or persons responsible for providing the services or managing the work". At selection stage a minimum qualification will

6. This is also why economic and financial requirements should not be used when shortlisting applicants while different considerations could apply to technical and/or professional ability: see with different nuances, M. Steinicke 'Qualification and Shortlisting' above fn. 1, 120.
7. This might be the rationale behind the line of cases starting with Case 31/87, *Beentjes* [1988] ECR 4635, paragraph 15; see also M. Franch – M. Grau 'Contract Award Criteria' in M. Trybus, R. Caranta, G. Edelstam (eds.) *The EU Law of Public Contracts*, above fn. 1, 125.
8. But the court of Justice ruled otherwise in Case C-315/01 *GAT* [2003] ECR I-6351, paragraphs 63 ff.

be required. Economic operators will then either pass or fail this stage. But there is no reason why contracting authorities should not be allowed to put a premium on hiring contractors with higher qualification, and this will be reflected in the award criteria. As is well known, the list of possible MEAT criteria in Article 53 is open-ended, and reference for instance to 'technical assistance' might be easily read with reference to some of the economic operators' technical or professional abilities.

As for the argument that the subject matter of the contract is different from the people implementing the contract, it is sufficient to recall here the distinction between *obligation de moyens* and *obligation de resultat*, which is well known in most civil law jurisdictions. In many service contracts, the subject matter of the contract is not achieving something, rather it is the activities to be performed and who's the performer is obviously relevant.[9]

As with opera, it is difficult to separate the performance from the performer. And usually, it is pointless. In *Evans Medicals*, the Court of Justice quite rightly held that the reliability of supply can be referred to as an award criterion, but this is hardly different from the reliability of the supplier.[10] As it has been pointed out, it is difficult to achieve value for money without considering the qualities of a team providing services, including their experience.[11] So much so that the General Court allows reference to the experience of the team as an award criterion for services contracts when reviewing procurement by EU institutions.[12] It is hard to say why the law should be different for contracting authorities from the Member States.[13]

9. M. Franch – M. Grau 'Contract Award Criteria' above fn. 6, 129.
10. *Evans Medical and Macfarlan Smith* [1995] ECR I-563, paragraph 41; the judgment is referred to with approval in Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 39, which, however, seems to admit the possibility that this criterion refers to factual elements which will be known precisely only after the contract has been awarded, which does not make sense, since the tenders must be all evaluated before concluding the contract. The distinction is tried in Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527, paragraph 70.
11. Ph. Lee 'Implications of the *Lianakis* decision' *Public Procurement Law Review*, 2010, 56.
12. Case T-589/08 *Evropaïki Dynamiki* v. *Commission* [2011] ECR II-40; the Court of Justice seems to have decided not to look very hard in the question and simply considered inadmissible a ground of appeal claiming that the General Court had misconstrued *Lianakis* because the ground was not really reasoned: C-235/11 P *Evropaïki Dynamiki* v. *Commission*, nyr.
13. See Z. Petersen 'Refining the rules on the distinction between selection and award criteria – *Evropaiki Dynamik i – Proigmena Systimata Tilepikoinonion Pliroforikis*

To add further complications, we also have performance clauses. Without going into this all over again, it is sufficient here to recall that in the 'Plan Lycées' case, an 'additional criterion' relating to the promotion of employment had been included in the award criteria.[14] The Commission claimed that such a requirement could be used only as a contract performance condition, not as an award criterion, but the Court of Justice held that the Procurement Directives do not "preclude all possibility for the contracting authorities to use as a criterion a condition linked to the campaign against unemployment".[15] The same requirement may therefore be used both an award criterion and a performance condition.[16] It can be added that in many services contracts the same conditions could very well – *pace* the Commission – be construed as a technical specification.[17]

When seeking a definition of award criteria, the conclusion is therefore that the lowest price is the mechanism according to which tenders complying with the technical specifications submitted by tenderers having passed the selection stage are ranked according to the price offered. The MEAT award criteria is the mechanism to rank tenderers having passed the selection stage and whose tender complies with the technical specifications on the basis of the evaluation of elements which may have been already considered when setting and checking technical specifications and selection criteria, along with the price and possibly along further elements, possibly including those referred to the way the contract has to be implemented.

kai Tilematikis AE v *European Commission* (T-589/08)' *Public Procurement Law Review* 2011, NA248.

14. Case C-225/98, *Commission* v *France* [2000] ECR I-7445.
15. Paragraphs 50 f.; critically J. Arnould 'A Turning Point in the Use of Additional Award Criteria?' *Public Procurement Law Review* 2001, NA15 f.
16. See, considering clause relevant in Case C-225/98, *Commission* v *France* [2000] ECR I-7445, as an award criterion C.H. Bovis *EU Public Procurement Law* (Cheltenham, Elgar, 2007) 276.
17. Please refer to R. Caranta 'Sustainable Procurement' in M. Trybus, R. Caranta, G. Edelstam (eds.) *The EU Law of Public Contracts*, above fn. 1, 165. This is not contradicted by the judgment in the *Max Havelaar* case, which concerned a goods procurement: Case C-368/10, *Commission* v *Netherlands*, nyr, paragraph 73 ff; see also paragraphs 77 ff of the conclusions.

3. Award criteria: the law as it is

Award criteria are listed and regulated under Article 53 of Directive 2004718/EC.[18] It is already apparent from the text that the two award criteria listed there are exclusive, and no other one is allowed. It is either the MEAT or the lowest price (*soit soit* in the French version).[19] This is explained in Recital 46 to the Directive, which links the choice to have two award criteria only to the need that contracts are awarded on the basis of objective criteria which ensure compliance with the general principles of the Treaty as developed starting with the well-known *Telaustria* case.[20]

The case law has provided some guidance as to whether Member States can limit recourse to any of these two criteria. In *Sintesi*, the issue was the legality of an Italian provision which in view of limiting the discretion of contracting officers allowed award to the lowest price only. The Court of Justice held that

> the abstract and general fixing by the national legislature of a single criterion for the award of public works contracts deprives the contracting authorities of the possibility of taking into consideration the nature and specific characteristics of such contracts, taken in isolation, by choosing for each of them the criterion most likely to ensure free competition and thus to ensure that the best tender will be accepted.[21]

The lowest price criterion has not attracted significant litigation at EU level. Its operation is easy, and as a criterion is rather dumb and as a matter of good procurement management its use should be limited to simple procurement.[22]

From *SIAC*, it would seem that the price criterion can be referred both to the overall price and to the sum of the prices for estimated quantities. The case concerned a measure-and-value contract, under which the quantities estimated for each item are set out in the bill of quantities; the tenderer completes the bill of quantities by filling in a rate for each item and a total price

18. For no apparent good reason, the corresponding provision of Article 55 of Directive 2004717/EC is drafted differently even if its content is usually considered to be equivalent: M. Franch – M. Grau 'Contract Award Criteria' above fn. 6, 165.
19. M. Franch – M. Grau 'Contract Award Criteria' above fn. 6, 126.
20. Case C-324/98 *Telaustria* [2000] ECR I-10745; see R. Caranta, *The Borders of EU Public Procurement law*, in D. Dragos – R. Caranta (eds.) *Outside the EU Procurement Directives – Inside the Treaty?*, Copenhagen, DJØF, 2012, 25, and C. Risvig Hansen, *Contract not covered or not fully covered by the Public Sector Directive*, Copenhagen, DJØF, 2012.
21. Case 247/02 *Sintesi* [2004] ECR I-9231, paragraph 40.
22. *E.g.* M. Franch – M. Grau 'Contract Award Criteria' above fn. 6, 134.

for the estimated quantity; the price actually payable is determined by measuring the actual quantities on completion of the work and valuing them at the rates quoted in the tender.[23]

The problem here is the extent to which deviance from the estimated quantities might imply such a variation of the contractual terms to require retendering under the *Pressetext* case law.[24]

The show has been stolen by the MEAT, which indeed has attracted all the attention of the European lawmakers. This has happened also visually: while for instance Article 30 of Directive 93/37/EEC on the award of public procurement for works still listed (a) lowest price, and (b) MEAT, the order has changed in the 2004 Directive.

Codifying the case law, Article 53(1)(a) of Directive 2004/18/EC provides a list of criteria which may be referred to in an award procedure according to the MEAT criterion *and* stresses that the criteria chosen by the contracting authority must be linked to the subject matter of the contract.

As for the list, the well-known *Concordia Bus* case made it clear both that the list was not exhaustive,[25] and that, and possibly more important, the provisions on the MEAT

> cannot be interpreted as meaning that each of the award criteria used by the contracting authority to identify the economically most advantageous tender must necessarily be of a purely economic nature. It cannot be excluded that factors which are not purely economic may influence the value of a tender from the point of view of the contracting authority.[26]

This has opened up the possibility to refer to what have been termed as secondary or horizontal policy considerations when drafting the award criteria, with the *Concordia Bus* judgment being referred to in Recital 1 of Directive 2004/18/EC.[27]

In a way to compensate this opportunity, or to limit the risk of abuse, in *Concordia Bus* the Court of Justice spelt out a number of conditions to legally

23. Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 5; see M. Franch – M. Grau 'Contract Award Criteria' above fn. 6, 144.
24. Case C-454/06 *pressetext Nachrichtenagentur* [2008] ECR I-4401.
25. Case C-513/99, *Concordia Bus* [2002] ECR I-7213, paragraph 54, referring to Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 35.
26. Paragraph 55; 'value' does not however mean 'measurable in economic terms': differently M. Franch – M. Grau 'Contract Award Criteria' above fn. 6, 148.
27. Please refer to R. Caranta 'Sustainable Public Procurement in the EU' in R. Caranta and M. Trybus (eds.) *The Law of Green and Social Procurements in Europe*, Copenhagen, DJØF, 2010, 15, and to the other papers in the same volume.

insert award criteria not having a purely economic nature, the first one being the link to the subject matter of the contract. The Court referred to a line of precedents beginning with *Beentjes* stating that award criteria must be aimed at identifying the economically most advantageous tender to conclude that

> Since a tender necessarily relates to the subject-matter of the contract, it follows that the award criteria which may be applied in accordance with that provision must themselves also be linked to the subject-matter of the contract.[28]

So for instance, it was held not to be linked to the subject matter of the contract an award criterion which referred to the provision of energy from renewable sources to users different from the contracting authority.[29]

The link to the subject matter of the contract has been kind of a holy grail in the fight between internal market apprehension and sustainable public procurement, the Commission at times referring to it with reference to phases of the procurement cycle different from award to try and limit perceived risks to the fundamental market freedoms.[30]

The question has been probably settled by the *Max Havelaar* judgment.[31] The province of North Holland had set an award criterion consisting of the fact that the ingredients to be supplied were to bear the Eko and/or Max Havelaar labels. The Commission *inter alia* lamented that the link to the subject-matter of the contract was absent in so far as those labels do not concern the products to be supplied themselves, but the general policy of the tenderers (especially in the case of the Max Havelaar label). This was consistent with the Commission's approach that reference to a specific production process is possible only if this does help to specify the 'visible or invisible' characteristics of the product or service purchased.[32] This approach was rejected by the Advocate General reasoning that the Eko label directly concerns the product

28. Paragraph 59; see also, expressly referring to *Beentjes*, Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 36.
29. Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527, paragraphs 67 ff; the case is discussed by C.H. Bovis *EU Public Procurement Law* above fn 15, 281 ff.
30. E.g., concerning the contract performance clauses the second edition of the *Buying Green!* handbook specifies that "contract clauses should be linked to performance of the contract" (http://ec.europa.eu/environment/gpp/pdf/handbook.pdf, at page 46); in sweeping terms the Green paper on *The modernisation of EU public procurement policy – Towards a more efficient European Procurement Market* COM/2011/0015 final, at 40.
31. Case C-368/10, *Commission* v. *Netherlands* nyr.
32. COM(2001) 274 final, point II.1.2.; see also COM(2001) 566 final, point 1.2.

characteristics – more precisely the environmental characteristics – of the ingredients to be supplied. While not defining any product characteristics in the strict sense, it does, however, provide information on whether or not the goods to be supplied were traded fairly.[33] The conclusions were fully followed by the Court of Justice, holding that contracting authorities are

> authorised to choose the award criteria based on considerations of a social nature, which may concern the persons using or receiving the works, supplies or services which are the object of the contract, but also other persons.[34]

It is submitted that the *Max Havelaar* judgment clearly indicates that anything taking place during the life cycle of a product or service is linked to the subject-matter of the contract. Direct reference to the life-cycle costing would probably dissipate all the confusion which has arisen at EU level around the requirement that award criteria are linked to the subject matter of the contract. The national papers in this collection seem anyway to show that there was much ado about nothing concerning the link to the subject matter of the contract which is hardly litigated if ever.

4. The MEAT requirements flowing from the principles of equal treatment and transparency

The lowest price is a dumb criterion. It is, however, an eminently objective one. Its application can't be but fully consistent with equal treatment and fair competition which lie at the very heart of EU public procurement law.[35]

The MEAT poses a number of challenges under this respect. The MEAT criterion is actually made up of a number of different criteria. Some of them do not naturally lead to the same kind of objective assessment as it is the case with price. Suffice it to think of 'technical merit' or 'aesthetic and functional characteristics'.[36] Beside this, the same possibility to refer to different criteria can make the preferences of the contracting authorities opaque. The case law and later the legislation have taken steps to safeguard equal treatment of the

33. Paragraphs 109 f.
34. Paragraph 85; see also paragraph 91: "there is no requirement that an award criterion relates to an intrinsic characteristic of a product".
35. Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 33, with reference to the principle of equal treatment of tenderers.
36. See M. Franch – M. Grau 'Contract Award Criteria' above fn. 6, 133.

economic operators and fair competition among them by enhancing transparency.[37]

Some of the measures taken focus on how the criteria are set, other on the new paragraf criteria themselves.

The setting of the criteria may be seen as a procedure in the wider overall procedure. The leading case concerned an infringement procedure against Belgium. The Court of Justice held that

> The requirement under Article 27(2) of the Directive for the contracting entities to state "in the contract documents or in the tender notice all the criteria they intend to apply to the award, where possible in descending order of importance" is intended precisely to inform potential tenderers of the features to be taken into account in identifying the economically most advantageous offer. All the tenderers are thus aware of the award criteria to be satisfied by their tenders and the relative importance of those criteria. Moreover, that requirement ensures the observance of the principles of equal treatment of tenderers and of transparency.[38]

Beyond and above specific provisions such as now Article 53 of Directive 2004/18/EC,[39] the principle of transparency requires that the award criteria must be spelled out in the contract documents or the contract notice,[40] and must be formulated in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way.[41] To this end, Article 53(2) has made more onerous the burden on contracting authorities to advertise the relative weight of the criteria chosen. Additionally, the obligation of transparency also means that the adjudicating authority must in-

37. See generally M. Trybus 'Public Contracts in European Union Internal Market Law: Foundations and requirements' and R. Caranta 'Transparence et concurrence' both in R. Noguellou U. – Stelkens (eds.) *Droit comparé des contrats publics. Comparative Law on Public Contracts* (Bruxelles, Bruylant, 2010), 98 ff., and 145 ff.
38. Case C-87/94 *Commission* v *Belgium* [1996] ECR I-2043, paragraph 88; the directive applicable to the case was 90/531/EEC; the judgment was followed as laying down a general principle applicable to all stages of award procedures in Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 98, which was a case concerning selection rather than award criteria; the same was stressed again in Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527, paragraph 56.
39. See also Recital 46.
40. E.g. Case C-513/99, *Concordia Bus* [2002] ECR I-7213, paragraph 62 "all such criteria must be expressly mentioned in the contract documents or the tender notice, where possible in descending order of importance, so that operators are in a position to be aware of their existence and scope"; see also Case C-331/04 *ATI EAC and Viaggi di Maio and Others* [2005] ECR I-10109, paragraph 24.
41. Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraphs 40 ff; Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527, paragraph 57.

terpret the award criteria in the same way throughout the entire procedure,[42] which *a fortiori* rules out the legality of any change not just to the criteria themselves but to their weightings and sub-weightings as well once the tenders are known to the jury charged with selecting the MEAT.[43] Finally, when tenders are being assessed, the award criteria must be applied objectively and uniformly to all tenderers.[44]

What is not yet fully clear is the extent to which the jury charged with awarding the contract or the person who has to choose the best tender can specify the criteria which have been published. According to *ATI EAC*, a breach of EU law would be established in any of the following three situations: *a*) when the decision applying such weighting altered the criteria for the award of the contract set out in the contract documents or the contract notice; *b*) when the decision contains elements which, if they had been known at the time the tenders were prepared, could have affected that preparation, and *c*) when the jury adopted the decision to apply weighting on the basis of matters likely to give rise to discrimination against one of the tenderers.[45] These conditions, and especially the second one, are potentially quite restrictive since in principle every bit of additional information is liable to push potential tenderes to reorient their tender.[46] True if the burden of proof concerning the materiality of those conditions is put on the claimant they will probably end up being less stringent. However, in *Lianakis* the Court of Justice distinguished *ATI EAC*, a case where the criteria were only listed in the contract notice and subsequently weighted by the jury, holding that the jury is allowed to specify the weighting factors to be applied to sub-criteria, and this before the tenders are opened, while is it unlawful to stipulate both the weighting factors and the sub-criteria after opening the applications expressing interest.[47]

42. Paragraph 43.
43. Case C-226/09 *Commission* v. *Ireland* [2010] ECR I-11807, paragraphs 57 ff.
44. Paragraph 44; Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527, paragraph 48.
45. Case C-331/04 *ATI EAC and Viaggi di Maio and Others* [2005] ECR I-10109, paragraphs 26 ff.
46. It is therefore difficult to understand how Case C-226/09 *Commission* v. *Ireland* [2010] ECR I-11807, paragraph 48, could claim that "the relative weighting of the award criteria communicated to the members of the evaluation committee in the form of a matrix would not have provided potential tenderers, had they been aware of that weighting at the time the bids were prepared, with information which could have had a significant effect on that preparation".
47. C-532/06 *Lianakis and Others* [2008] ECR I-251, paragraphs 42 ff.

Provided that the distinction between criteria and sub-criteria is not set in stone but depends very much from a choice made by the contracting authority when drafting the criteria, it may be in practice difficult to distinguish between allowed specifications and unlawful changes to the award criteria.

The problem is even more complicated with reference to competitive dialogue. On the one hand, Article 29(4) and (7) seems quite clear in referring to the 'award criteria laid down in the contract notice or the descriptive document' as the appropriate scale to be used all along the procedure. On the other hand, this is a procedure which should be inherently adaptive to the learning process the contracting authority engages in by choosing it. The more balanced view seems then to allow generously the specification of sub-criteria, while ruling out any change to the same criteria, which should rather warrant the start of a new procedure. Of course, contracting authorities should not bind their hands to much by being excessively detailed when describing the award criteria in the notice or other document while still complying with the minimum requirements of objectivity and transparency laid down in the case law which will be examined next (which of course is a delicate balancing exercise as any).[48]

As for the criteria themselves, the starting point is the discretion of contracting authorities in choosing the criteria which make up the MEAT.[49] Contracting authorities are free both to choose the criteria *and* to give to each criterion chosen the weight they consider appropriate. This mirrors the freedom contracting authorities normally enjoy in defining the subject matter of the contract.[50] They decide what to buy, including by setting what for them is the appropriate price/quality ratio.[51]

48. Different readings of the provision are contrasted in S. Arrowsmith – S. Treumer 'Competitive dialogue in EU law: a critical review' in S. Arrowsmith – S. Treumer (eds.) *Competitive dialogue in EU procurement* (Cambridge, Cambridge University Press, 2012, 88 ff.
49. See M. Franch – M. Grau 'Contract Award Criteria' above fn. 6, 144, and the Green paper on *The modernisation of EU public procurement policy – Towards a more efficient European Procurement Market* COM/2011/0015 final, at 37. In the case law Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527, paragraph 37; C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 36.
50. M. Burgi 'Specification' in M. Trybus, R. Caranta, G. Edelstam (eds.) *The EU Law of Public Contracts*, above fn. 1, 99.
51. See Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527, paragraph 39: "provided they comply with the requirements of Community law, contracting authorities are free not only to choose the criteria for awarding the contract but also to determine the weighting of such criteria, provided that the weighting enables an overall evalua-

However, an award criterion having the effect of conferring on the adjudicating authority an unrestricted freedom of choice as regards the awarding of the contract in question to a tenderer would be inconsistent with EU public procurement law.[52] This means that the criteria must be capable of objective evaluation.[53]

As already recalled, while the older case law stressed in a somewhat circuitous way that the criteria chosen had to be aimed at identifying the offer which is economically the most advantageous,[54] after *Concordia Bus*, it was made clear that the choice of award criteria in the MEAT is limited by the requirement that they must be linked to the subject matter of the contract.[55]

This limit on the discretion of contracting authorities may also impact on the weighting of the criteria, in that an excessive weighting of one criterion could break the link with the subject matter of the contract (e.g. a 50 % weight to aesthetical merit in a procurement for cars); a 45 % weight for the provision of energy from renewable sources was instead held to be consistent with (then) Community law.[56]

Last but not least, the criteria must comply with all the fundamental principles of EU law, "in particular the principle of non-discrimination as it follows from the provisions of the Treaty on the right of establishment and the freedom to provide services".[57]

The reference to the principle makes sure that the gist of the rules discussed above will be applicable also to contracts presently falling outside the

tion to be made of the criteria applied in order to identify the most economically advantageous tender.

52. Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 37 (referring to then Article 29 of Directive 71/305/EEC); Case C-513/99, *Concordia Bus* [2002] ECR I-7213, paragraph 61; Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527, paragraph 37.
53. Case C-513/99, *Concordia Bus* [2002] ECR I-7213, paragraph 60.
54. Paragraph 59; see also, expressly referring to *Beentjes*, Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 36.
55. The evolution is clear in Case C-513/99, *Concordia Bus* [2002] ECR I-7213, paragraph 59, already referred to.
56. Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527, paragraph 42.
57. Case C-513/99, *Concordia Bus* [2002] ECR I-7213, paragraph 63; see M. Trybus 'Public Contracts in European Union Internal Market Law: Foundations and requirements', above fn. 36, 98 ff; see also, recalling all of the conditions listed above Case C-448/01 *EVN and Wienstrom* [2003] ECR I-14527, paragraph 33, and Case C-331/04 *ATI EAC and Viaggi di Maio and Others* [2005] ECR I-10109, paragraph 21 expressly referring to equal treatment, non-discrimination and transparency.

scope of the EU public procurement directives.[58] In an infringement procedure against Ireland, the Court of Justice held considered the rules on award criteria as requirements designed to ensure transparency of procedures and equal treatment of tenderers.[59] However, it also held that the scope of the principle of equal treatment and the obligation of transparency do not extend to requiring that the relative weighting of criteria used by the contracting authority is to be determined in advance and notified to potential tenderers when they are invited to submit their bids.[60]

Reference to the principles – and to the fundamental market freedoms – may lead to strike down award criteria which give preferences to local or locally established economic operators, for instance awarding extra points to those having an office or a plant within a given distance from the place where a service has to be provided.[61]

5. The reform: modernising award criteria

The 2011 Green paper on *The modernisation of EU public procurement policy –Towards a more efficient European Procurement Market* has launched the reform process by asking stakeholders and civil society to answer a number of questions.[62] Some of them concerned award criteria and they focused on *a*) the possibility for contracting authority to check the qualifications of tenderers after awarding (to avoid the administrative burden to review the qualification documents of loads of economic operators),[63] and *b*) on the desiderability to

58. See also the Commission interpretative communication on the 'Community law applicable to contract awards not or not fully subject to the provisions of the "Public Procurement" Directives' 2006/C 179/02, on which see, beside the contributions in the previous volume of this series: D. Dragos – R. Caranta (eds.) *Outside the EU Procurement Directives – Inside the Treaty?*, above fn. 19, and C. Risvig Hansen, *Contract not covered or not fully covered by the Public Sector Directive*, again fn. 19, A. Brown 'Seeing Through Transparency: the Requirement to Advertise Public Contracts and Concessions Under the EC Treaty' [2007] PPLR 1.
59. Case C-226/09 *Commission* v. *Ireland* [2010] ECR I-11807.
60. Paragraph 43.
61. Case C-234/03 *Contse* [2005] I-9315, paragraphs 49 ff; the Court of Justice was not sure whether the latter case was not a service concession, but the qualification was not material since the general principle of non discrimination was applied; see also Case C-315/01 GAT [2003] ECR I-6351, paragraphs 71 ff (this was an above the threshold supply contract.
62. COM/2011/0015 final.
63. Question 23.

take a more flexible approach to the distinction between qualification and award phases, including taking into account of references at the award stage.[64] A further set of questions were to elicit contributions on the role of award criteria in fostering sustainable – or, as they are now called, strategic – procurements, possibly limiting recourse to the lowest price and developing life cycle costing analysis.[65] This was further developed in a series of questions concerning the opportunity to delete or limit the requirement of the 'link to the subject-matter of the contract' which, according to the Commission, holds true with reference to all the stages of the procurement process (while the case law referring to it only concerns award criteria).[66]

The proposal tabled by the Commission at the end of 2011 dealt with the award of the contract in Articles 66 to 69, introducing life cycle costing, allowing contracting authorities to rate tenders based on the organisation, qualification and experience of staff and giving the Member States the power to rule out the use of the lowest price for certain contracts. The proposal has undergone many changes during the process for its approval.

Based on the text approved by the COREPER on July 12th 2013, the changes to the present regime are quite important. At the level of terminology, we have now only one criterion, the MEAT. Article 66(1) of the new Public Sector Directive now privides that "contracting authorities shall base the award of public contracts on the most economically advantageous tender". The categorisation of award criteria now distinguishes within the (new) MEAT. Article 66(2), which should lay down the different award criteria, has been heavily redrafted a number of times during the procedure leading to the adoption of the new directive. The final text of Article 66(2) owes much to the text approved by the European Parliament, only if possible made more difficult to understand. The first part of the provision now reads:

> The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach, *such as* life-cycle costing in accordance with Article 67, and *may* include the best price-qualitative, environmental and/or social aspects linked to the subject-matter of the public contract in question.[67]

64. Questions 24 and 25.
65. Questions 71 ff; see also question 97.1.1. with reference to social procurements.
66. Questions 79 ff.
67. Emphasis added.

Recital 38, which probably was not brought up to date with the changes made in the provision, rather points to cost as being distinguished in price only or cost-effectiveness. Article 66(2) instead distinguishes price and cost *and* equates cost and cost-effectiveness. From the point of language, however, the biggest problem is *'which'*. What is that must be assessed on the basis of the criteria listed in the provision? Is it cost? Is it the best price quality ratio? If the latter, than we have three award criteria now: the resurrected (lowest) price, cost-effectiveness, and best price-quality ratio. The problem is that distinguishing cost-effectiveness from price-quality ratio is highly artificial. It is worth stressing that award criteria are considered to be linked to the subject-matter of the public contract where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle. Again, it would probably help making the law simpler to refer directly to the life cycle rather than using the intermediate notion of 'linked to the subject matter of the contract'. What is difficult to understand is why the life cycle is part of both 'cost' and 'best price quality-ratio' when the two are treated as discrete entities, with contracting authorities having ('shall') to refer to price or cost while having the power but no obligation ('may') to award to the 'best price quality-ratio'.

The criteria for selecting the best price quality-ratio now include organisation, qualification and experience of staff assigned to performing the contract all times that the quality of the staff employed can significantly impact the level of performance of the contract. A long line of cases stretching from *Beentjes* to *Lianakis* has thus been shelved for good.[68]

Finally, on the possibility to amend award criteria during competitive dialogue procedures to take into account the developments from the dialogue, the new Article 28 still indicates that the award criteria are indicated in contract notice or descriptive document. Both Article 27 on the competitive procedure with negotiation and Article 29 on the new innovation partnership procedure make it clear that award criteria are non-negotiable.

6. Conclusions

Award criteria are obviously a very relevant element in the procurement process. While one cannot deny that the case law has contributed in making

68. Case 31/87, *Beentjes* [1988] ECR 4635, and Case C-532/06 *Lianakis and Others* [2008] ECR I-251.

some of the rules clearer, and in the past has even spurred changes later enacted in Directive 2004718/EC, a number of questions remain unanswered and some (unneeded) rigidity is still around (for instance concerning the distinction between selection and award criteria).

The new directive itself seems to be due for a mixed review. It has indeed both taken stock of and improved on the case law and it has regulated relevant innovations such as life cycle costing. However, interpreting the new provisions on award criteria is going to be a nightmare, like trying to sort out a train crash. Concepts have bumped into each other, and collapsed one on the other. The underlying tension between the desire to promote strategic procurement and the fear that social and environmental consideration could be abused does feel very much in the provisions as finally drafted. The recitals, far from helping do not just bear witness to this tension, but at times make the problems worse because of a lack of last minute coordination between the different parts of the directive.

Be prepared for a tough ride!

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2 Award of contracts covered by the EU Public Procurement rules in Denmark

Steen Treumer

1. Introduction

Danish procurement law is largely limited to what is required by the EU membership.[1] This tendency is outspoken and also reflected in the legislation implementing the EU Public Procurement Directives. This applies in general and also with regard to the issues covered in this publication. The Danish legislator has essentially abstained from supplementing the provisions of the Public Procurement Directives even though the Public Procurement Directives leave considerable room for national regulation. The exact text of the directives was maintained when they were implemented as § 1 of the Decree implementing the Public Sector Directive. It simply states that contracting entities shall observe the provisions in the Directive. Annex 1 to the Decree is the Public Sector Directive without any changes. The same approach was used when the Utilities Directive was implemented. However, it is foreseen that the Danish legislator will adopt a fundamentally different approach when the next wave of EU Public Procurement Directives has to be adopted in the near future.

Nevertheless, numerous and very important interpretations on issues linked to the award of contracts has been made in the case law from especially the Complaints Board for Public Procurement (hereafter the Complaints Board). Ever since the establishment of the Complaints Board in the early 1990s, it has been an exception that a case has been brought before the ordinary courts instead of the Complaints Board. The Complaints Board has the power to grant interim measures, the power to establish that the rules have

1. See S. Treumer, chapter 2 at p. 64 in D. Dragos & R. Caranta, *Outside the EU Procurement Directives – Inside the Treaty?*, DJØF Publishing 2012.

been violated and the power to issue set aside orders to contracting authorities. It can also declare a contract ineffective and award damages.

The Tender Act[2] contains in all essential the Danish legislation on contracts *outside* of the scope of the Public Procurement Directives. The current publication and chapter is focused on the state of law for contracts fully covered by the Public Procurement Directives.[3]

2. Selection and award criteria

The separation of selection and award criteria, including exclusion of reputation indicators like references to experience, performance and CV's from award criteria has in recent years been given high attention in case law and legal theory. The background for this is that recent case law from the Court of Justice of the European Union[4] has generated considerable legal uncertainty. As pointed out[5] the case-law of the Court could be interpreted as in principle ruling out the use of award criteria and evidence relating to experience, CV's, references and relative risk of non-performance in the award stage. This is problematic as contracting authorities frequently consider the above to be of obvious relevance for the award of namely services contracts. Furthermore, the approach of national courts and review boards is typically based on a fundamental acceptance of the use of such criteria and evidence also in the award stage even though under certain conditions.[6] It should be stressed that this so-called flexible approach in the majority of the Member States has not been supported by the European Commission that until recently has insisted on a restrictive approach to the issue.

2. Abbreviated "Tilbudsloven" in Danish. Act no. 1410 of 7 December 2007 with subsequent changes.
3. For an analysis of the Danish approach to the EU public procurement rules outside the EU Procurement Directives see S. Treumer chapter 2 p. 61 in D. Dragos & R. Caranta, fn. 1 above.
4. See in particular C-532/06, *Lianakis* [2008] E.C.R. I-251.
5. See chapter 1 in the current publication.
6. See the Special Issue of the Public Procurement Law Review with seven articles on the application and implications of the ECJ's decision in Lianakis on the separation of selection and award criteria from 2009, pp. 103-164 (ed. by S. Treumer) and in particular section 3 of the article of S. Treumer, "The Distinction between Selection and Award Criteria in EC Public Procurement Law: A Rule without Exception", p. 103 (pp. 106-109 on trends in national case law).

The use in the award stage of what is normally considered as criteria and evidence at the selection stage has very frequently been seen in Danish public procurement practice over the years.[7] The Complaints Board but also the Danish Competition and Consumer Authority (hereafter the Competition Authority) have taken particular care to set in against this violation. As a consequence this type of breach of the EU public procurement rules has been one of the most common ones to be established in Denmark.[8] Nevertheless, both the Complaints Board and Competition Authority have in principle accepted the flexible approach: The use of criteria and evidence in the award stage that would normally be considered as relevant to the selection stage.[9]

From the time that the Complaints Board issued its first ruling in the autumn of 1992 until 2000, the Board followed the restrictive approach[10] regarding the distinction between selection and award criteria. It even considered the issue ex officio on some occasions. However, in the spring of 2000, the first step towards the flexible approach was taken in the ruling of 2 May 2000, *Uniqsoft 1998 ApS* v *Odense Kommune*. The Complaints Board remarked that it is not excluded that an element can be considered both in the selection and in the award stage. However, the Board did not find this relevant in the concrete case. The ruling of 23 February 2001, *Kæmpes Taxi og Nordfyns Busser* v *Søndersø Kommune*, was the first example of an acceptance of the flexible approach. The case concerned a service – the transportation of school kids. Several of the award criteria were challenged by the complainant that argued that the contracting authority had applied selection

7. This was also pointed out by S. Treumer in the Ph.D. dissertation "*Ligebehandlingsprincippet i EU's udbudsregler" (The Principle of Equal Treatment of Tenderers in the EC Public Procurement Rules)*, Jurist- og Økonomforbundets Forlag 2000, p. 40.
8. For an analysis and presentation of the trends in enforcement of the EC public procurement rules in Denmark and the "typical" case before the Danish Complaints Board please see S. Treumer, "Enforcement of the EC Public Procurement Rules in Denmark" Public Procurement Law Review 2005 NA 186 (NA 189 concerns illegal award criteria).
9. See S. Treumer,"The Distinction between Selection and Award Criteria in EC Public Procurement Law: The Danish Approach", Public Procurement Law Review 2009 p. 146 especially section 2.2 on case law from the Competition Authority.
10. See i.e. ruling of 23 January 1996, *Praktiserende Arkitekters Råd* v *Glostrup Kommune*; ruling of 30 May 1996, *A/S Iver Pedersen* v *I/S Reno Syd*; ruling of 22 May 1997, *Højgaard & Schultz* v *Hundested Almennyttige Boligselskab*; ruling of 1 March 1999, *Enemærke & Petersen* v *Fællesorganisationens Boligforening*; ruling of 17 December 1999, *Renoflex A/S* v *Søllerød Kommune*; ruling of 16 May 2000, *Dansk Transport og Logistik* v *I/S Reno Syd* and ruling of 27 September 2000, *Svend B. Thomsen A/S* v *Blåvandshuk Kommune*.

criteria as award criteria. One of the selection criteria was "a list over the most important deliveries within the past 3 years, their value, the schedule and the private or public costumers". One of the award criteria in the economically most advantageous bid was "reference from similar transportation including compliance with the scheduled times of delivery and picking-up". The Board accepted the use of the above-mentioned criterion with the following reasons. The selection criteria on the deliveries aimed at ensuring that the tenderer generally had sufficient experience with this type of service. The award criterion in contrast aimed at taking into consideration the outcome of the tenderers previous activity in the field. The Board subsequently held that the criterion to the award criteria was not overlapping with the selection criteria with regard to content and found it suited to identify the economically most advantageous bid.

In the years after the initial introduction of the flexible approach, the issue has been considered several times in the practice of the Complaints Board. The Board has in the majority of the cases established that the contracting authorities have violated the EU public procurement rules by using criteria in the award phase that rightly belonged in the selection phase. However, a flexible approach has been accepted in some cases.[11] The majority of these cases have been decided prior to the landmark case in C-532/06, *Lianakis*, but a few have been decided afterwards. One of them is the ruling of 10 December 2008, *Nordjysk Kloak- og Industriservice A/S* v *Aalborg Kommune* where the Board accepted a flexible approach to the distinction between selection and award criteria. The complainant did not invoke the Lianakis case nor did the Complaints Board make any explicit reference to the case. However, it is reasonable to presume that the members of the Board were fully aware of the case.[12]

The ruling of 10 December 2008 concerned a services contract for emptying wells under gutters and removal of sludge and the tender followed the restricted procedure. The contracting authority had applied the following crite-

11. See the analysis of S. Treumer, fn. 9 above with reference to the following rulings from the Complaints Board: ruling of 11 October 2004, *Iver C. Weilbach og CO A/S* v *Kort- og Matrikelstyrelsen*; ruling of 11 March 2005, *MT Højgaard A/S* v *Frederiksborg Boligfond*, ruling of 13 September 2005, *Navigent* v *Arbejdsmarkedsstyrelsen*; ruling of 6 September 2006, *Sahva A/S* v *Københavns Kommune* and ruling of 10 December 2008 in *Nordjysk Kloak- og Industriservice A/S* v *Aalborg Kommune.*
12. The Complaints Board had at the time of the decision a webpage which contained its rulings in extenso but also other types of information including high quality summaries of the case law of the Court of Justice in the field of public procurement.

ria to the award criteria the most advantageous tender: 1) price 2) completion of the task and 3) environmental considerations. The second criterion was the disputed one which was divided into 2 sub-criteria: a) reliability of supply (the relative risk of non-performance) and b) the ability of the tenderer and competence of its management and key personnel. From the tender notice followed that the applicants in the selection phase should submit information about their general professional and technical competences including references to experiences with similar tasks. It followed that the tender should contain a description of the intended method for completion of the services, the equipment they intended to use and the competence of the personnel that was expected to deliver the concrete service. The contracting authority stated in the case that the complainant had submitted the same general information about its organization and equipment in both the selection and award phase which made it difficult to make an in-debt assessment of the criteria "completion of the task". The Complaints Board's ruling on the issue was remarkably short and essentially consisted of two lines stating that there was not a basis for establishing that selection and award criteria have been confused by the contracting authority.

The most interesting case after the Lianakis ruling from the Complaints Board for Public Procurement is probably the ruling of 26 August 2009, *Barslund A/S* v *Københavns Kommune* with a dissenting opinion. In this case, the Board knew of the analysis in the Special Issue of the Public Procurement Law Review[13] focusing on the dominant flexible trend in European national case law and practice. The Complaints Board upheld its flexible approach although with a dissenting opinion from the Professor in the Board at that time. The latter referred in particular to paragraph 31 of the Lianakis-case and to the wording of provision on selection in the relevant directive.

The case law of the Competition Authority shall not be developed in further detail here except for the case of 28 April 2008, *Københavns Kommunes udbud af revisionsopgaver.* This case is an interesting example of acceptance of the flexible approach after the ruling of Court of Justice in C-532/06, *Lianakis* with explicit reference to the Lianakis case. The contract concerned auditing services concerning the municipality of Copenhagen. The contracting authority had applied the following award criteria: a) price b) experience and competence c) quality control system. The Competition Authority made various general remarks about the distinction between selection and award criteria before addressing the concrete circumstances in the case. The Authority

13. See fn. 6 above.

pointed out the fundamental differences between the selection and award stage and stated that this implies that the criteria used in the two stages also must be of a different nature. The criteria in the award phase should address the tender whereas the selection criteria should address whether the tenderers have the general ability to solve the task. It then stressed that you can apply award criteria with a content that has been or could also have been addressed in the selection phase. However, this presupposes that the element has not been applied in the same manner in the two stages of the procedure and that the element is suited to identify the economically most advantageous tender. So the criterion has to add something extra which distinguishes it from what has already been assessed in the selection phase.

The Competition Authority also made a reference to C-532/06, *Lianakis* and stated that the result in the case before the Authority did not unequivocally follow from the Lianakis case. The Authority remarked that the fact that the Court of Justice in the latter case had rejected the criteria "personnel and equipment" did not necessarily imply that the criterion "quality control system" cannot be applied as an award criterion. The Authority would therefore not exclude that such a criterion was suited to identify the economically most advantageous tender and concluded that the contracting authority had not confused the selection and award criteria.

The absolute majority of cases in which the flexible approach have been accepted in Danish case law concerns services of a more complex nature where there is a close link between the qualifications of personnel, management, quality control systems etc. and the quality you get as a buyer and a close correlation to the degree of certainty of delivery.[14] However, it is not only with regard to services that the flexible approach, *in principle*, has been accepted. The first case where the Complaints Board in principle clarified that it would accept the flexible approach concerned supplies, cf. ruling of 2 May 2000, *Uniqsoft 1998 ApS* v *Odense Kommune.*[15]

From the case law follows other conditions than the close link between the value of the tender and the applied criteria in order for the flexible approach to be accepted. The selection or award criteria should not be identical and if

14. The Complaints Board has on one occasion made similar remarks. See the ruling of 13 September 2005, *Navigent* v *Arbejdsmarkedsstyrelsen* analyzed earlier. The Board compared supplies and services and remarked regarding services that the task can to a higher degree relate to the ability of the employees and the quality of the accomplishment will in certain cases be based on the persons that are solving the task.
15. See also the ruling of 11 March 2005, *MT Højgaard A/S v Frederiksborg Boligfond*, which concerned public works.

they concern the same element, for instance experience, it is a condition that the award criteria add something which is suited to identify the economically most advantageous tender. The case law shows a high degree of awareness of this condition and the Complaints Board and the Competition Authority are relatively strict in their interpretation of this condition. A lack of clarity in this respect will normally have as a consequence that an otherwise acceptable criteria is rejected as confusion of the selection and award criteria.[16]

There has been considerable awareness and debate about the implications of C-523/06, *Lianakis* in Denmark for the distinction between the selection and award criteria. Practitioners are now much more reluctant to draft their selection and award criteria in accordance with the flexible approach. Many practitioners simply avoid insertion of criteria that could be challenged as not accepting the fundamental distinction between selection and award criteria. Others, often more resourceful contracting authorities, are fully aware of the potential risk of challenge but pursue the flexible approach and take utmost care when drafting the selection and award criteria. It is submitted that this is an unfortunate development as the flexible approach accepted in the Danish case law of the Complaints Board, and the Competition Authority generally[17] appears to be in compliance with EU public procurement law. Further argumentation for this point of view can be found in the overview article on this issue in the PPLR.[18]

3. Lowest price

The Danish legislation is not providing for award criteria that are different from the lowest price and the most economically advantageous tender. The award criterion lowest price is clearly not used as much as the most economically advantageous tender criterion (hereafter the MEAT criterion) in Den-

16. An example form the Complaints Board's practice is ruling of 11 March 2005, *MT Højgaard A/S* v *Frederiksborg Boligfond.* The case of 1 February 2006, *Kort & Matrikelstyrelsens udbud af fotoflyvning og skanning m.v.* is a good illustration from the case law of the Competition Authority. The Authority specified in this case that the selection and award criteria must be different and consequently that criteria applied in the selection phase cannot be applied in the award phase.
17. Admittedly the result in a few cases could be questioned such as the ruling of 3 January 2002, *AC Trafik* v *Frederiksborg Amt* analyzed in section 2.1. of S. Treumer, fn. 9 above. However, this is fully understandable taking into consideration later developments and the complexity of the issue.
18. See S. Treumer, fn. 6 above.

mark. However, the frequency varies depending on the type of tender procedure used. The contracting authorities using the restricted procedure have an outspoken tendency to apply the MEAT criterion. The award criterion the lowest price appears only to be applied in about 10 % of these procedures. Where the open procedure has been applied instead, the frequency of the criterion the lowest price is relatively higher and is used in about 33 % of the procedures.[19] Open procedures and restricted procedures are both frequently used in Denmark even though the number of open procedures seems to be slightly higher than the number of restricted procedures.[20]

The criterion lowest price is most frequently used for goods but there is also a relatively high use of the criterion for services.[21] It is an exception that it is used for works. The lowest price can be calculated with reference to the total price of the contract or on the basis of the price split up on components. It appears that the dominant trend is to calculate the price with reference to the total price.[22]

The scenario where two or more tenders are considered to be equal has not been given much attention in Danish theory[23] and practice. The Public Procurement Directives do not consider the issue nor does the Danish transposition of the Directives. The occurrence of the phenomenon in practice is unlikely when it comes to awards based on the MEAT criterion whereas the likelihood is much higher when it comes to awards based on lowest price. The Danish Complaints Board for Public Procurement has in its recent practice accepted that this challenge can be solved by drawing a lot at least where this has been stipulated in the tender conditions in advance.[24] It is submitted that this is in accordance with EU public procurement law. Drawing a lot is

19. This figure is based on a random selection of tender notices from 2012.
20. The open procedure had been applied about 2000 times in 2012 until 1 September 2012 whereas the restricted procedure had been applied about 1500 times in the same period.
21. See S.T. Poulsen, P.S. Jakobsen og S.E. Kalsmose-Hjelmborg, *EU Udbudsretten*, Jurist- og Økonomforbundets Forlag, 2nd Ed. 2011 at p. 474.
22. See S.T. Poulsen, P.S. Jakobsen og S.E. Kalsmose-Hjelmborg, fn. 21 above.
23. See as an example J. Fabricius, *Offentlige indkøb i praksis*, Karnov Group Denmark A/S, 2nd ed. 2012, p. 339.
24. See Ruling of 13 October 2010, *Norpharma A/S* v *Amgros I/S*. See J. Fabricius, fn. 23 above.

also applied in some Member States when it comes to shortlisting of qualified tenderers in the selection phase.[25]

Finally, it should be added that the procedures for award on the basis of the lowest price in principle are the same as for procedures where the award is based on MEAT.

4. Most economically advantageous tender (MEAT)

The provisions of the Public Procurement Directives contain a number of examples of possible award criteria.[26] This list has not been extended in the Danish legislation implementing the Public Procurement Directives. However, as outlined in Section 2 the use of criteria that has traditionally been linked to the selection phase has been common and has also to some extent been accepted in the case law of the Complaints Board. In addition, the Complaints Board considered in ruling of 30 January 2001, *DTL* v *Haderslev Kommune* that it is legal to take into consideration the advantage of having only one contractor.

As stated above in Section 3, it is unlikely that two or more tenders are considered to be equal and that an assessment of the award criteria does not lead to an identification of the winner of the competition for the contract. However, the phenomenon can occur in practice as demonstrated in the ruling of 16 December 2011, *O. V. Engstrøm A/S mod Sydfyns Elforsyning* and the question is then whether the contracting authority can solve the problem by drawing a lot. The contracting authority in this case had applied the MEAT criterion in a so-called reverse tender on public works covered by the Utilities Directive. The contracting authority had not specified any award criteria. Instead the tenderers should deliver as many prioritized elements for a fixed amount. It was only possible to offer a lower price where all of the prioritized elements were covered by the tender. Two tenderers submitted bids that were equally good. The contracting authority then asked for a second round of bids and a third round of bids as the bids were still equal. The bids remained equal and, finally, the contracting authority decided to draw a lot in the presence of the tenderers. This possibility had been outlined by the contracting authority prior to second round of bids. The Complaints Board con-

25. See S. Treumer, "The Selection of Qualified Firms to be Invited to Tender under the E.C. Procurement Directives" Public Procurement Law Review 1998 p. 147 (pp. 152-153).
26. See Article 53 of the Public Sector Directive and Article 55 of the Utilities Directive.

sidered that the contracting authority had not breached the principles of equal treatment and transparency. The Board emphasized that the possibility of drawing a lot had been announced prior to the second round of bids.

The Complaints Board adopted a flexible approach when it considered the possible award criteria in a case where the contract was covered by what is now Annex II B of the Public Sector Directive. The Board established in the ruling of 2 September 2005, *Tipo Danmark A/S* v *Københavns Kommune* that the contracting authority had been free *not* to apply the award criteria the lowest bid or the economically most advantageous bid. The obligatory application of these criteria is fundamental for contracts fully covered by the provisions of the Public Procurement Directives. The contracting authority had instead assessed the extent to which the bids complied with the requirements to the complex services and assessed whether the bids did not exceed certain maximum values indicated in advance.[27] The Board also accepted that the contracting authority had not established any prioritization or weighting of the award criteria.

It has been argued by various complainants that price should be allocated a certain minimum weight. The Complaints Board has rejected this point of view repeatedly.[28] However, the Board has ruled that the contracting authority as a principle must consider price as an award criteria when MEAT is applied.[29] The Board has in a ruling considered that a contracting authority did not breach the Services Directive (now the Public Sector Directive) in an assessment based on the MEAT criteria even though it exclusively had considered the price.[30]

It follows from the provisions of the EU Public Procurement Directives[31] that the contracting authority shall specify the relative weighting of the *award criteria* in the contract notice or the contract documents when the authority

27. See also section 7.12. of S. Treumer, fn. 1 above. The Complaints Board stressed that the contracting authority had a considerable freedom in the operation of the tender procedure as it was not covered by Annex I B, cf. page 21 of the ruling.
28. See ruling of 11 March 2005, *MT Højgaard* v *Frederiksberg Boligfond*, ruling of 13 September 2005, *Navigent* v *Arbejdsmarkedsstyrelsen* and ruling of 12 September 2008, *Master Data* v *Københavns Kommune*.
29. See ruling of 10 February 1997, *Dafeta Trans ApS* v *Lynettefælleskabet I/S.* Nevertheless, this principle does not apply when it comes to reverse tendering as accepted in ruling of 16 December 2011*, O. V. Engstrøm A/S mod Sydfyns Elforsyning.*
30. See ruling of 16 July 1999, *Holst Sørensen* v *Vendsyssel Øst*. The rationale behind this ruling is difficult to follow and is not convincing.
31. See Article 53(2) of the Public Sector Directive and Article 55(2) of the Utilities Directive.

applies the MEAT criterion. The Complaints Board has in various cases established that this provision has been breached.[32] It is not stipulated in the above-mentioned provisions of the EU Public Procurement Directives that the *sub-criteria* to the award criteria shall be announced to the tenderers. Nevertheless, that this is the rule has been established in the case law of the Court of Justice. The Complaints Board considered whether Article 53 and the principle of transparency had been breached in the ruling of 25 August 2011, *WelMed Scanbio ApS* v *Gentofte Kommune* where the sub-criteria had been weighted in the evaluation phase without prior announcement. The award criteria were price and quality and the sub-criteria to quality had been attributed weightings between 2 % and 30 %. The Complaints Board established that the principle of transparency had been breached and emphasized that these weightings could have affected the tenders had they been known at the time of the preparation of the tenders. The Board explicitly referred to the conditions outlined in C-331/04, *ATI* when addressing the complaint.

It is an exception in Danish procurement practice that a contracting authority considers that weighting is not possible[33] and that the criteria therefore can be indicated in descending order of importance instead as exceptionally provided for in the EU Public Procurement Directives.[34] The number of cases where the lack of weighting has been challenged is therefore limited but the discretionary access to omit weighting will normally be under close scrutiny. As an example, the contracting authority argued in the case leading to the ruling of 19 July 2007, *ISS* v *Skejby Sygehus* that it had been entitled not to indicate the weighting as a consequence of the size, complexity and sensitivity of the service in question. The contract related to cleaning of hospitals. The Complaints Board did not consider that the contracting authority had proved that weighting was impossible.

However, the contracting authority had not indicated the weighting of the award criteria in the case that led to the ruling of the Complaints Board for Public Procurement of 14 September 2009, *Konsortiet Vision Area* v *Københavns Bymuseum.* The contracting authority had listed the criteria in order of

32. See for example ruling of 13 July 2007, Magnus v Skat and ruling of 29 February 2008, *Aktieselskabet Karl Jensen Murer- og Entrepenørfirma* v *Hobro Boligforening*.
33. The lack of indication of weighting in the ruling of 29 February 2008, *Aktieselskabet Karl Jensen Murer- og Entrepenørfirma* v *Hobro Boligforening*, was caused by a mistake and it made no difference that the weighting had been indicated later to the tenderers shortly before the deadline for submission of tenders.
34. See Article 53(2) in fine of the Public Sector Directive and Article 55(2) in fine of the Utilities Directive.

prioritization in accordance with the Article 29(7) and Article 53(2) of the Public Sector Directive. The Complaints Board did not consider that the complainant had breached Article 2 of the Public Sector Directive or the principle of transparency when it established and applied the award criteria.[35] It should be noted that the contracting authority had applied the competitive dialogue procedure and that the Complaints Board considered that the conditions for the use of this procedure were fulfilled. The Board had therefore considered the contract to be "particularly complex" as required in Article 29 of the Public Sector Directive. Derogation from the duty to indicate weighting is in particular likely to occur "on account of the complexity of the contract" as specified in Recital 46 of the Preamble to the Public Sector Directive.

It is important in practice whether the contracting authority is entitled to develop or change the award criteria or their weighting during the tender procedure.[36] As for development, the issue is whether the criteria or weighting must be drafted and fully disclosed before a specific time or phase in the tender procedure. In other words, whether more detailed criteria and weightings may be developed which should not be confused with the concept of a change as such.

The case law on these issues is rather limited. A contracting authority that applied the MEAT criterion deleted one of the award criteria in a design contest in the case leading to ruling of 27 June 2008, *DA* v *Handels- og Søfartsmuseet* from the Complaints Board. The contracting authority established that this was a breach of the principle of equal treatment of tenderers as it was a change of the award criteria.

More interesting was the examination of the legality of development of award criteria in the Complaints Board ruling of 8 January 2008, *WAP Wöhr Automatikparksystem GmbH and Co. KG* v *Ørestadsparkering A/S*.[37] It followed from the tender notice that the award was to be based on the MEAT criterion and two award criteria were specified in this competitive dialogue tender procedure. The contracting authority specified sub-criteria to the criteria during the dialogue and in a final version of the criteria after the conclusion of the dialogue. The complainant challenged the development of the sub-

35. See p. 9 of the ruling.
36. See S. Arrowsmith And S. Treumer, "Competitive Dialouge in EU Law: A Critical Review" at p. 88 In S. Arrowsmith And S. Treumer (eds.), *Competitive Dialogue in the EU*, Cambridge University Press 2012.
37. See S. Treumer, "Competitive Dialogue in Denmark" at p. 361 in S. Arrowsmith and S. Treumer (eds.), fn. 36 above.

criteria with explicit reference to the Explanatory Note on Competitive Dialogue from the European Commission. The Note states that "the award criteria (and the order of their importance) may not be changed during the tender procedures (this is at the latest after the transmissions of the invitations to participate in the dialogue) for obvious reasons of equal treatment".[38]

The Complaints Board rejected the complaint on this point. The Board stated that it had only been possible to establish the final version of the sub-criteria after the dialogue phase. The Board added that the contracting authority did not appear to have misled the tenderers during the process by establishing "entirely different" sub-criteria and the evaluation strictly had followed the established criteria. Whether or not this is in compliance with EU law is an issue of debate and of conflicting case law in the Member States.[39]

Finally, the Complaints Board for Public Procurement and also the Danish courts have assumed that a contracting authority was allowed to substitute the MEAT criterion with the lowest bid criterion when it has become clear that it was illegal to apply the announced award criteria.[40] A similar assumption has previously been made in case law from United Kingdom and Sweden and by Advocate General Darmon in C-31/87, *Beentjes*.[41] However, the early Danish case law on this point appears to have been overruled in subsequent case law from the Complaints Board.[42] It can be added that the legality of the approach was questioned in Danish legal literature at an early stage.[43]

The use of a mathematical matrix for evaluation of the bids is common in Danish practice but not considered obligatory. The Complaints Board has ruled that a contracting authority is not obliged to apply a mathematical matrix in the evaluation.[44] The Board has also accepted that a model based on

38. See section 3.1, p. 6 of the Note.
39. See S. Arrowsmith and S. Treumer, fn. 36 above at pp. 89-91.
40. See ruling of 12 October 2004, *Køster Entreprise A/S* v *Morsø Kommune* as confirmed by the Court of Appeal (Østre Landsret), judgment of 19. December 2005 in case B-3256-04; ruling of 9 July 2004, *H.O. Service* v *Boligforeningen 32* and ruling of 29 September 2004, *Dansk Byggeri* v *Sundby-Hvorup Boligselskab.*
41. Consideration 38 of the proposal regarding Case C-31/87, *Beentjes* [1988] ECR I - 4637. See the analysis of S. Treumer, fn. 7 above at pp. 243-245.
42. See ruling of 5 November 2009, *Brøndum A/S* v *Boligforeningen Ringgården* and ruling of 14 October 2009, *Frederik Pedersen Alu-Glas A/S* v *Viborg Kommune*.
43. See S. Treumer, fn. 7 above where it was submitted that such an assumption was contrary to EU public procurement law for a number of reasons and that substitution of the criteria was not a legal alternative to termination of the tender procedure in such a situation. See now also J. Fabricius, fn. 48 above at p. 499.
44. See ruling of 3 October 2008, *Creative* v *Århus Kommune.*

linguistic evaluation (i.e. excellent, very good, satisfactory, poor, non-satisfactory) in principle is legal[45] even though it has considered some concrete models and applications to be illegal.[46]

A remarkable tendency in recent case law of the Complaints Board has been challenges of the use of the applied mathematical matrix and evaluation models. This is surprising as one could have expected that the Complaints Board would be reluctant to establish that a given model could not be used in general or in a specific case and that such challenges therefore were the exception.[47] However, this is by far the case and this trend has for obvious reasons drawn the attention in practice and theory.[48] There is currently considerable legal uncertainty in Denmark with regard to this issue that is of utmost importance in practice.

The Complaints Board has ruled that it is illegal to make a *relative assessment* of the *qualitative assessment criteria* (quality, tecnical value etc. but not price and other quantitative criteria) as this is considered to be a breach of the principle of equal treatment of tenderers.[49] It follows from this case law that the contracting authority instead shall assess the quality of a tender by considering to which degree it fulfills the requirements outlined in the tender conditions. This implies that the best tender is not automatically given the highest number of points and that the assessement of a given tender is inde-

45. See ruling of 10 March 2010, Manova v Undervisningsministeriet; ruling of 13 April 2011, *Assamble* v Økonomistyrelsen and ruling of 3 March 2012, *VKS* v *Hjemmeværnskommandoen.*
46. See ruling of 16 July 2010, *Kongsvang mod Retten i Århus* and judgment of 16 August in this case by Retten i Horsens and ruling of 28 February 2012, *Mediq* v *Københavns Kommune*.
47. Compare with the remarks in section 5 on the wide discretion that a contracting authority in principle enjoys with regard to the evaluation of the bids.
48. See for instance C. Berg, *Udbudsret i byggeriet*, Jurist- og Økonomforbundets Forlag 2012 at pp. 722-741; N. Tiedemann, "Om Klagenævnet for Udbuds prøvelse i RenoNorden", Ugeskrift for Retsvæsen B 2012 p. 334; J. Fabricius, fn. 23 above at pp. 351-356; S.T. Poulsen, P.S. Jakobsen og S.E. Kalsmose-Hjelmborg, fn. 21 above at pp. 485-491; M. Steinicke and L. Groesmeyer, *EU's udbudsdirektiver med kommentarer*, Jurist- og Økonomforbundets Forlag, 2nd Ed. 2008 at pp. 1282-1288.
49. See ruling of 13 March 2006, *Kirudan A/S* v *Kolding Kommune*; ruling of 12 February 2007, *Dansk Høreteknik* v *Københavns Kommune*; ruling of 29 August 2007, *Sectra A/S* v *Region Syddanmark* as confirmed by the Court of Appeal in judgment of 30 March 2009 in case B-2541-07. See also ruling of 14 February 2008, *Jysk Erhvervbeklædning* v *Hjørring Kommune* and ruling of 12 September 2008, *Master Data* v *Københavns Kommune*. The contracting authority was not considered to have breached the ban against relative assessment in the latter ruling.

pendant of the quality of the other tenders. This development in the case law has been recieved with some scepticism.[50]

The Board has also considered the use of a so-called *relative assessment* model of *price* to be illegal in a recent ruling of 9 January 2012, *RenoNorden A/S* v *Skive Kommune* which has lead to considerable legal uncertainty and legal debate in Denmark.[51] The model is called relative because the other tenders score by comparison with the lowest price.[52] The Board considered the model to be unsuitable as the basis for the *concrete* award in this case where price was given a weighting of 30 % and where the bids were close. The ruling is controversial as the model for instance is used by the European institutions, including the European Commission and the World Bank. A similar model also appears to have been applied by the Finish contracting authority in C-513/99, *Concordia* (see paragraph 22).

The Complaints Board has also rejected the use of several other models on the basis of the principle of equal treatment of tenderers and the principle of transparency. It has dismissed the use of negative points for price and various models that it did not consider reflected price differences to a sufficient degree.[53]

It follows from regular case law of the Complaints Board for Public Procurement that it is not required that the mathematical matrix or evaluation models are communicated to the tenderers *prior* to the submission of bid.[54] It has been argued in Danish legal literature that it is questionable whether this interpretation is in compliance with the case law of the Court of Justice on

50. See for instance C. Berg, fn 48 above at p. 732. The author submits that it is at least unrealistic that a contracting authority should not squint at the level of the other tenders when giving point to a specific tender.
51. See N. Tiedemann, fn. 48 above. The concrete ruling and its implications has also been on the agenda of several Danish public procurement conferences in Denmark.
52. As an example the tender with the lowest price is given the score 10 (being the highest possible) and the other tenders is given a proportional score according to the matrix: score = 10 x lowest price divided by the price of the tender in question.
53. See for instance ruling of 21 December 2009, *Ergolet* v *Københavns Kommune* (principle of transparency), ruling of 12 February 2010, *Nøhr & Sigsgaard mod Kriminalforsorgen* (the principles of equal treatment and of transparency) and ruling of 13 April 2010, *KMD* v *Frederiksberg Kommune* (principle of equal treatment).
54. See for instance ruling of 22 October 2007, *Grønbech Construction A/S mod Albertslund Boligselskab m.fl*, ruling of 17 December 2008, *Bandagist Centret A/S* v *Århus Kommune* and ruling of 4 August 2009, *Mölnlycke Health Care ApS* v *Region Hovedstaden*.

this point.[55] As this issue is considered from a general perspective in the introduction chapter it shall not be analyzed in detail here.[56]

Nevertheless, the ruling of 13 November 2012, *Recall Danmark A/S* v *Arbejdsmarkedets Tillægspension* illustrates that the case law of the Complaints Board might lead to breaches of the principles of equal treatment. The contracting authority had in this case initially evaluated the price in the submitted tenders by using three different models and subsequently chosen to use one of these models in the final assessment leading to the award of the contract. The various models had not come to the attention of the tenderers prior to submission of bids. The complainant argued that this approach had breached the principles of equal treatment and transparency as the contracting authority in reality freely had chosen the winner of the competition for the contract. The Compliants Board dismissed the complaint based on the following reasoning. As the contracting authority had not in advance announced the model to be applied it was not obliged to use a specific model. However, the Board emphazised that the contracting authority was obliged to ensure that the model to be applied was suitable to identification of the economically most advantageous tender. The Board added that the contracting authority was under an obligation to change the model if this was not the case. Furthermore, the Board did not consider that the contracting authority in reality have had a free choice with regard to the identification of the winning bid and concluded that the principles of eqal treatment and transparency had not been breached.

It is submitted that the Board most likely would have considered the principle of equal treatment for breached had there been concrete indications of favoritism. Surely, similar cases will occur in the future as complainants will be inclined to challenge the Complaints Board's rather flexible interpretation of EU public procurement law on this point.

5. Procedure for evaluating MEAT, juries, transparency and judicial review

The Public Procurement Directives do not require that the Member States regulate the evaluation phase in detail and the Danish legislator has not regulated the issue. It is therefore not required that Danish contracting authorities establish committees for drafting award criteria or juries for their evaluation.

55. See J. Fabricius, fn. 23 above (see in particular pp. 352-353).
56. See chapter 1.

They are in principle free to decide how they will tackle these crucial issues in practice.

Nevertheless, the Complaints Board established in ruling of 15 March 2013, *Cowi A/S* v *Statens og Kommunernes Indkøbs Service A/S* that a contracting entity had not ensured a sufficient control of competence and quality with regard to the evaluation in a concrete case that concerned a major framework agreement. As a consequence, the Board considered that the principles of transparency and equality had been breached. It follows from the reasoning of the ruling that it was heavily based on the concrete circumstances of the case and the Board explicitly stressed that a contracting authority has a very wide discretion with regard to the choice of evaluation procedure. The Chairman of the Board has subsequently written that the ruling should not be perceived as if the Board replaces the discretion of the contracting authority with its own or as an omen of future case law dictating how the contracting authorities should run an evaluation.[57]

It is common in Danish public procurement practice that employees of the contracting authority with particular knowledge of the required works, services or goods take part in the evaluation of the bids. Likewise, it is often seen in practice that an external advisor that has taken part in the preparation of the tender procedure also takes part in the subsequent evaluation of the bids. It is also common that the decision maker gets the input from different levels in the organisation before it makes its decision. On rare occasions, the contracting authorities have hired a group of advisors consisting of independent experts in the field to evaluate the bids.[58] E-auctions are not used or hardly used in Denmark and the experience using the MEAT criterion in this context is therefore certainly limited if present at all.

The contracting authority enjoys in principle a wide discretion with regard to establishment of award criteria and evaluation of the bids.[59] The Complaints Board and ordinary courts will as a starting point only establish apparent breaches and abstain from indicating what they consider to be the correct

57. This follows from the article of M. Ellehauge, "Erfaringer med håndhævelsen af EU's udbudsregler", Ugeskrift for Retsvæsen 2013 B p. 241 (see p. 243).
58. As an example a Danish contracting authority hired a group of five experts including two professors who had a clear interest in maintaining their reputation as objective and impartial.
59. See C. Berg, fn. 48 above at p. 713, J. Fabricius, fn. 23 above at p. 341, M. Steinicke and L. Groesmeyer, fn. 48 above at p. 1245.

evaluation.[60] It could therefore be expected that the number of challenges of concrete assessments was low and that it was extremely rare that it was established that a concrete assessment was flawed. However, there have been many challenges of this sort and the Complaints Board has several times ruled that a concrete evaluation was flawed.[61]

The issue of opening of the bids is neither regulated in the Public Procurement Directives or in the Danish implementation of the Directives. The various elements of the tender are normally not split up but gathered in the same document and handed in to the contracting authority in one envelope. It therefore typically comes to the attention of the contracting authority at the same time.[62] As a consequence, there is a hypothetical risk that good prices influence the assessment of the other elements to be evaluated. Issues linked to the opening of the bids have rarely given rise to disputes in Denmark.

6. Reservations and rejection of non-compliant tenders

Acceptance of non-compliant tenders is in general prohibited. This principle was established by the Court of Justice in C-243/89, *Commission* v *Denmark* that has influenced the Danish approach to the EU public procurement rules in general.[63] This ruling is part of the explanation behind the high prioritization of compliance with the EU public procurement rules in Denmark and the method of implementation of the EU Public Procurement Directives outlined in section 1. The European reader must bear this in mind when reading the following as the Danish approach otherwise might appear surprisingly restrictive.

60. The complaints was rejected in the ruling of 11 September 2009, *Mecanoo Architecten b.v.* v *Århus Kommune* and the Board emphasized that it according to its settled case law does not substitute the discretion of the contracting authority with its own discretion. See also ruling of 28 May 2010, *Clear Channel* v *Odense Kommune*; ruling of 5 May 2011, *Dansk Halbyggeri* v *Aalborg Kommune* and ruling of 18 January 2012, *Software Innovation* v *Patientombuddet.*
61. See ruling of 6 July 2006, *Logstor A/S* v *Viborg fjernvarme*; ruling of 12 September 2008, *Master Data* v *Københavns Kommune*; ruling of 14 July 2009, *Updata* v *Lyngby-Taarbæk Kommune*; ruling of 15 February 2012, *Activ Care* v *Billund Kommune*; ruling of 28 February 2012, *Mediq* v *Københavns Kommune* and ruling of 12 July 2012, *A.P. Botved* v *Fællesindkøb Fyn.*
62. C. Berg, fn. 48 above briefly addresses the issue at p. 741.
63. This approach deviated fundamentally from the much more flexible approach adopted in Denmark on the basis of the national regulation of procurement of works. See C. Berg, fn. 48 above at p. 496.

Below is made a distinction between non-compliance with substantive requirements and procedural requirements. Non-compliance with substantive requirements such as specifications has very frequently been invoked in the case law before the Danish Complaints Board. Non-compliance with procedural requirements (for instance relating to the number of copies to be submitted, language, time limit for submission of the bid) is seen as well in the case law but clearly not as frequent.

6.1. Non-compliance with substantive requirements

The Complaints Board has on numerous occasions established that a tender should have been rejected because of non-compliance with fundamental tender conditions relating to the substantive requirements. This is one of the most frequent types of breaches of the EU public procurement rules established in the case law of the Board. It has also consistently been held in the case law that the contracting authority *may* reject a tender that does not observe *non-fundamental* tender conditions but that the contracting authority shall not do so. The ordinary Danish courts have applied the same approach but the number of cases that has been pending before the ordinary courts is limited. The concept of "fundamental" is interpreted restrictively in Denmark and thus non-compliance often leads to a duty to reject the tender. It can in practice be very difficult to assess whether a tender should be rejected or not. Danish contracting authorities will often hesitate to reject tenders as they do not want to reduce competition and surely many assessments made in practice will not be able to pass further scrutiny by the Complaints Board.

It is well-known that it follows from EU public procurement law that a contracting authority as an exception may or shall clarify elements of a tender. Such a clarification will in some instances secure that the contracting authority is entitled to consider the tender even though it needed clarification. The case law from the Court of Justice and the General Court on this issue is based on a very restrictive approach. This implies that lack of clarity should normally lead to rejection of the tender and that clarification is only allowed where it is apparent that there is a mistake or ambiguity and that clarification is needed. It is therefore of particular interest to establish where the borderline has been drawn in Danish public procurement law. The issue has been considered in several Danish cases.[64]

64. See S. Treumer, fn. 7 above at pp. 187-200 for an analysis of the early Danish case law.

The typical approach in the Danish case law has been to let any doubt as to the content of the tender fall back on the tenderer in question. It has therefore normally been established that lack of clarity should lead to rejection of the tender. However, the Complaints Board has in a number of cases considered that it was not required to reject an unclear tender where the tender conditions were also unclear on the same point.[65] In such a situation the matter requiring clarification arises not solely because the tenderer did not exercise due diligence in tender preparation but also – or mainly – because the contracting authority failed in establishing tender conditions with a clear content. The ruling of 23 November 1998, *Marius Hansen A/S* v *Forskningsministeriet* illustrates this tendency in the case law. The Board explicitly outlined the main rule and the need for a modification where the tender conditions are unclear but not on a point that is so essential that the tenderer ought to have asked for a clarification of the tender conditions prior to tendering. The case law of the Court of Justice on this issue is extremely limited but it appears that the Court in the *Slovensko-case* based itself on the assumption that the need of clarification arise solely because the tenderer have not exercised due diligence in tender preparation.[66] This assumption is too simplistic and does not reflect the reality in practice.[67] It is questionable whether the flexible Danish approach – where also the tender conditions are ambiguous – is in accordance with the current case law of the Court of Justice. However, it is submitted that the Court of Justice also would adopt a flexible interpretation in a case where it was obvious that the root of the problem in the first place was the contracting authority's lack of due diligence.

Another interesting aspect is the understanding of "apparent" need of clarification or an "apparent" mistake. It follows from the limited case law of the Court of Justice and the General Court that this concept should be interpreted extremely narrowly. The approach in the Danish case law is also restrictive but tends to be more pragmatic and flexible as follows from the case law outlined below.

Clarification with regard to price is of particular interest as it obvious that because adjustments are likely to have an impact on the outcome of the competition. The ruling of 8 October 1997, *Praktiserende Arkitekters Råd* v *Københavns Pædagogseminarium* from the Complaints Board concerned clari-

65. See C. Berg, fn. 48 above at p. 517.
66. Judgment of 29 March 2012 in C-599/10, *SAG ELV Slovensko a.s* (not yet reported in ECR). See paragraph 38.
67. See also D. Mcgowan, "An obligation to investigate abnormally low bids? *SAG ELV Slovensko a.s.* (C-599/10)", Public Procurement Law Review 2012 NA 165.

fication of the price.[68] The contracting authority had asked for clarification in a situation where all of the tenders exceeded the budget frame of the contracting authority. When the contracting authority asked for clarification it explained to the tenderers that it had become aware that the tender conditions on certain price elements could be misunderstood. The clarification resulted in a price reduction in two of the tenders and the contract was subsequently awarded to one of those tenderers. The Complaints Board considered that the tender conditions on the price elements had been clear and precise and stressed that clarification of this type entails a risk of breach of the principle of equal treatment. The Board held that the principle of equal treatment had been breached when the contracting authority asked for clarification. The Board added as an obiter dictum that clarification of price elements can only legally take place when it is apparent that one or more of the tenders are flawed and after an assessment of all bids. As for the limitation on timing it is noteworthy that this corresponds to the statement of the Court of Justice in the Slovensko-case.[69] However, the ruling of the Complaints Board appears to be too flexible when it comes to the access to ask for clarification as such. It follows from the subsequent ruling of the Court of First Instance (now the General Court) in T-19/95, *Adia Interim SA* v *Commission of the European Communities* that not only shall it be apparent that there is a mistake but more importantly it shall be possible to ascertain its exact nature or cause. In other words, it should be clear how the misunderstanding occurred and what the correct figures in the tender should have been. This widened understanding of the concept of "apparent" was not applied by the Board in the case but is important to bear in mind in practice.

The Complaints Board has also very recently adopted a pragmatic approach in a couple of rulings outlined below where the unclear element did not relate to the price. In the ruling of 21 September 2012, *KARL STORZ Endoskopi Danmark A/S mod Region Hovedstaden*, the tenderer had prior to the tender demonstrated one type of medical camera to the contracting authority but eventually submitted a tender with a reference to a different type. Even so, the brochure that accompanied the tender related to the camera that had been demonstrated and it was a tender condition that demonstrated products should also be those that eventually were offered. The contracting authority assumed – apparently without asking for a clarification – that the tenderer had

68. See S. Treumer, fn. 9 above, pp. 189-191.
69. See paragraph 42. This part of the judgment is criticized by D. Mcgowan, fn. 67 above at NA168). McGowan considers this as "an overly unnecessarily prescriptive requirement that in many instances will serve no useful purpose".

offered the type of camera that had been demonstrated and that the deviation was caused by a slip of the pen. The Complaints Board considered that the contracting authority had been entitled to consider the reference in the tender as a clear and apparent mistake.

The contracting authority asked for a clarification in the ruling of 14 September 2012, *Merrild Coffee Systems A/S* v *Forsvarets Bygnings- og Etablissementstjeneste* where a tender did not fulfil the requirements in the tender conditions on two specific points. Firstly, the tenderers should stand by their offers until a given data and secondly, certain price elements should relate to a given period of time. The flawed data in the tender in question corresponded to the data relevant to a previous tender procedure that had been terminated by the contracting authority without an award. The contracting authority asked the tender whether the flawed data was copy and paste from the tender that it had submitted in the tender procedure that was terminated without an award. The tenderer confirmed this to be the case. The Complaints Board stated that the tender conditions in question were fundamental but that the mistake was apparent and the Board implicitly accepted the clarification of the tender.

6.2. Non-compliance with procedural formalities

The Complaints Board has as a rule established that contracting authorities have a right and a duty to reject tenders that do not comply with procedural formalities. The approach has typically been formalistic and restrictive even though examples of a more pragmatic approach exist.[70] The ruling of 6 October 2001, *Oxford Research A/S* v *Faaborg Kommune* is a good example. It followed from the tender conditions in this case that the tenderers should be a maximum of 15 pages. The Board considered that the contracting authority had been entitled to and obliged to reject a tender that consisted of 16 pages. The Competition Authority has essentially adopted the same approach. A complaints case from the Competition Authority regarding services of a social nature covered by Annex II B in the Public Sector Directive gives anoth-

70. See for instance ruling of 4 August 2009, *Mölnlycke Health Care ApS* v *Region Hovedstaden* where the Board on several points accepted deviations from the requirements on documentation. As an example the tenderer had submitted a limited part of the documention in German even the tender conditions had not opened up for this. The Board considered that the contracting authority had been entitled but not obliged to reject the tender on this basis.

er illustration of the usually very restrictive approach.[71] In this case dated 3 December 2008, *Jobcenter Odenses udbud af beskæftigelsesopgaver*, a tenderer had been rejected because it did not comply with a formal tender condition according to which each tender should be a maximum of six pages. The complainant had submitted one additional page that only contained a scanned copy of the last page of the tender with the relevant signatures. The Competition Authority assessed that the contracting authority had been entitled and obliged to reject the tender as the condition followed explicitly from the tender conditions. The approach in this case is questionable. When a contracting authority stipulates that the tenders must not exceed a given number of pages, the underlying reason is presumably that it has estimated that the number of pages is sufficient and that it does not have or do not wish to use resources on considering more content – measured in pages. Surely, it will not take any contracting authority more than a couple of minutes to print and to relate to the extra page with a signature. In addition, the tenderer in question did not obtain a competitive advantage as it did not have more pages to promote its tender than all the other tenderers and had limited the substance of the tender to six pages as stipulated by the contracting authority. Such a restrictive approach discourages in general tenderers from participating in Danish tender procedures.

The above-mentioned generally restrictive approach has not surprisingly been heavily criticized by Danish practitioners over the years. This criticism led to a change in the Danish public procurement regulation in 2011.[72] It now follows from § 12 in the Act implementing the Public Sector Directive[73] that contracting authorities that receive applications or tenders that do not fulfill certain formal requirements can reject those or can chose to a) neglect the mistake or lacking information provided that the contracting authority itself is in possession of the required information or documentation b) to collect the information or documentation provided that it is publically accessible or c) request that the applicants or tenderers remedy the mistake or lack within a certain deadline. However, this presupposes that the principles of equal treatment and transparency are observed. It is specified in § 12 that it i.e. can

71. See S. Treumer, "Green Public Procurement and Socially Responsible Public Procurement: An Analysis of Danish Regulation and Practice" at p. 68 in R. Caranta and M. Trybus (eds.), *The Law of Green and Social Procurement in Europe*, DJØF Publishing 2010.
72. Decree no. 712 of 15 June 2011 implementing the Public Sector Directive.
73. The same principles will surely apply for tenders covered by the Utilities Directives. See also C. Berg, fn. 48 above at p. 465.

be applied where the applications or tenders lack signatures or is not dated, the specified number of copies has not been forwarded or the specified format has not been followed and where requirements regarding pagination and stamping have not been observed. The Danish legislator has obviously intended to open up for a more flexible approach to non-observance of procedural formalities. However, there is still considerable uncertainty as to the limits in practice and the Complaints Board is still obliged to consider whether the principles of equal treatment and transparency have been complied with in the concrete case.

Furthermore, it follows from § 12 that the contracting authority always is entitled to reject the application or tender that is non-compliant with the formalities. The cautious contracting authority will therefore reject the tender in order to avoid complaints. It appears that there is no Danish case law where it has been established that the contracting authority was obliged to consider a tender even though it disregarded a procedural formality. Such a claim could possibly be founded on the principle of proportionality.[74] The case law interpreting § 12 is still so limited that it is not possible to assess whether it has led to a fundamentally different approach to non-compliance with procedural formalities.

7. Abnormally low tenders

The Danish legislation has not established criteria or a general methodology to be used to identify an apparently abnormally low tender. Nor does this legislation require the contracting authority to outline the criteria or method for assessment of whether a tender is abnormally low in the tender conditions.

The Complaints Board has established that the fact that the tender of the lowest bidder is 30 % lower than the price of the second lowest does not imply that the tender can be considered as abnormally low in ruling of 4 April 2007, *COWI A/S* v *Sønderjyllands Amt*. The Complaints Board had in ruling of 30 January 2001, *DTL* v *Haderslev Kommune* previously established that the price difference of 24 % between the lowest bidder and the second lowest bidder could not lead to the conclusion that the tender was abnormally low. The recent ruling of 10 October 2012, *Søndersø Entreprenør og Vognmandsforretning A/S* v *Middelfart Kommune* is interesting because the Com-

74. Compare with the analogeous reasoning of the Court of First Instance (now the General Court) in T-195/08, *Antwerpse Bouwwerken NV* [2009] ECR II-4439 on the duty to clarify the substance of a tender.

plaints Board overruled the assessment of the contracting authority in rather special circumstances. The contracting authority had considered the bid as abnormally low after having received details of the constituent elements of the tender. The tender of the complainant was 8 % less expensive than the second lowest bidder that had not been rejected and the tenderer in question had been running its business with deficit for the past 3 years. The tenderer was a smaller haulage contractor and the contracting authority feared that the company would not be able to perform the contract due to bankruptcy. The Complaints Board stressed that it is for the contracting authority to prove that a bid can be considered as abnormally low and that this has not been proved in the concrete case. It can be added, that it follows from the ruling of 13 January 2004, *E. Pihl og Søn A/S* v *Hadsund Kommune* from the Complaints Board that the assessment of whether a tender is abnormally low relates to the total price of the tender and not to specific elements of the price. The Complaints Board has a few times considered a tender to be abnormally low.[75]

There is not a mandatory requirement to reject abnormally low tenders according to the Danish legislation and the contracting authorities enjoy in principle a wide discretion in this respect as follows from the Public Procurement Directives. Several complainants have in cases before the Complaints Board argued that the contracting authority in question was obliged to reject the concrete tender because it was abnormally low. Nevertheless, the Complaints Board has maintained that it is in principle not mandatory to reject a tender even if it is abnormally low. However, it specified in ruling of 13 January 2004, *E. Pihl og Søn A/S* v *Hadsund Kommune* that this is only the starting point and from the ruling can be deduced that such an obligation can be present in very special circumstances.[76] This has later been confirmed in the ruling of 21 July 2011, *Graphic Wave* v *Økonomistyrelsen* even though the Board neither considered the tender to be abnormally low or very special circumstances to be present. The Board did not specify what constitutes very special circumstances.

75. See ruling of 19 December 1995, *Kirkebjerg* v *HS*; ruling of 8 March 1999, *FRI* v *Nykøbing Falster Kommune*; ruling of 22 February 2007, *Platech Arkitekter* v *Rødding Kommune* and ruling of 23 January 2012, *Prooffice* v *SKI*.
76. Such circumstances are according to the Board present when there as a consequence of the abnormally low price is a risk that it would be necessary to correct the price subsequently. It should be added that such a price correction often would breach the EU public procurement rules as this would entail a material change and lead to a duty to retender the contract.

It is interesting to note that recent practice from the Court of Justice could support the idea that there depending on the circumstances can be a *duty* to reject an abnormally low tender. The Court specified in C-599/10, *Slovensko* that one of the purposes of the regulation of abnormally low bids is to require that the awarding authority examine the details of tenders that appear abnormally low in order to establish that the tenders are genuine. Furthermore, the Court stressed that checking that the tender is genuine constitutes a fundamental requirement of Directive 2004/18, in order to prevent the contracting authority from acting in an arbitrary manner and to ensure healthy competition between undertakings.[77] The first part of this purpose is often considered as the main purpose or the only purpose[78] of the procedure with regard to abnormally low bids. If you interpret the provision on this basis there would presumably not be a duty to reject a tender that is abnormally low.[79] However, it seems logical to deduce from the above reasoning of the Court that the contracting authority can be obliged to reject a tender it does not consider as genuine at least when it is apparent that the tender is not genuine and works against healthy competition between undertakings. The Court's view that contracting authorities are obliged to investigate all abnormally low bids is therefore not necessarily the most notable and significant aspect of the judgment as the implications of the judgment could be more farreaching: transforming Article 55 from a protection of the rights of a tenderer that risks exclusion into a measure that can protect other tenderers from unhealthy competition.[80]

The case law on abnormally low tenders is relatively limited in Denmark. Most Danish contracting authorities consider it irrelevant to reject what appears to be an abnormally low tender and as a consequence rejections on this basis are relatively rare.[81] The linkage between abnormally low tenders and illegal state aid is particular interesting and it is therefore noteworthy that a couple of tender procedures on the issue have been considered by the Com-

77. See paragraphs 28 and 29 of the judgment.
78. See also the reasoning of the General Court in T-48/04, *TQ3 Travel Solutions Belgium* v *Commission*, E.C.R II 2630 paragraph 49.
79. See S.T. Poulsen, P.S. Jakobsen and S.E. Kalsmose-Hjelmborg, fn. 21 above assumes at p. 495 that there is never a duty to reject tenders that the contracting authority considers as abnormally low.
80. Compare with D. Mcgowan, fn. 67 above especially at NA167.
81. Compare with the reflection on the issue in J. Fabricius, fn. 23 above at p. 517 where it is stated that the phenomenon probably occurs more often in other Member States.

plaints Board for Public Procurement. It should be added that both tender procedures concerned passenger transport by railway.

The first tender procedure – the Jutland case[82] – led to the rulings of the Complaints Board of 4 October 2002 and 10 October 2003, *Statsansattes Kartel* v *Trafikministeriet.* The issues in these cases concerned the first Danish tender of passenger transport by railway. The tender took place in 2001-2002 and was partly covered by the Services Directive as this sort of service is a non-priority service.[83] The contracting authority was the Ministry of Transport that was very keen on ensuring that the relevant legislation including the EU public procurement rules and competition rules was observed. One of the tenderers was the previous national monopoly provider Danske Stats Baner (hereafter DSB) owned by the Ministry of Transport. The Ministry issued so-called Competition Guidelines for DSB and made these guidelines part of the tender terms and conditions. DSB submitted a low tender that surprisingly was rejected by the Ministry of Transport and the contract was awarded to a Danish subsidiary of the British company Arriva plc. The initial consequence of the low bid submitted by DSB was that the Ministry sought to establish whether the submitted tender was abnormally low. However, the Competition Guidelines were formally[84] used as the legal basis for the rejection of the tender even though the tender appeared abnormally low to the contracting authority.[85] The Ministry assessed that the tender was so low that the only way the contract could be fulfilled was through cross-subsidisation but this could not justify rejection based on a so-called risk of non-performance approach that followed from the regulation of abnormally low offers at that time.[86] DSB was, despite the very low tender, not in risk of non-performance.

82. Named as such in the in-depth analysis in chapter 7, Section 7.5 of G.S. Ølykke, *Abnormally Low Tenders With an Emphasis on Public Tenderers*, DJØF Publishing 2010.
83. See now Annex II B to the Public Sector Directive.
84. It followed from a subsequent report from the Ministry of Transport that this was only part of the reasoning for the rejection of the tender. The other reasons were that DSB also lacked experience from previous tenders and in various other contexts had made inprecise economic assessments and imprecise assessments of implications of changes in traffic patterns. See pp. 3-4 of the ruling of the Complaints Board of 4 October 2002, *Statsansattes Kartel* v *Trafikministeriet*.
85. See G.S. Ølykke, fn. 82 above at p. 237 with reference to interviews with the employees of the Ministry of Transport.
86. From the non-performance approach follows that a tender that is abnormally low due to the receipt of unlawful State aid can only be rejected if there is a risk of non-performance, as a consequence of potential repayment of the State aid. See G.S. Ølykke, fn. 82 above at p. 244 and p. 235.

The subsequent complaints were not filed by DSB but by an organisation of State employees that had locus standi. The rulings did not lead to a clarification of whether the tenderer was abnormally low or if the case entailed unlawful State aid.

The second tender procedure that touched upon abnormally low tenders and illegal State aid took place in December 2005 and led to the Complaints Board ruling of 7 November 2007 in the case *SJ AB* v *Trafikstyrelsen for jernbane og færger*. The contract concerned regional train traffic and a Swedish tenderer complained after the award of the contract to a company established in Denmark. The complainant argued that the tenderer had acted in breach of the EU public procurement rules as it had not undertaken sufficient investigations of whether the low price of the winning tenderer was caused by illegal State aid. The complainant considered that the price was unrealistically low and that this was caused by illegal State aid to DSB.[87]

The Complaints Board stated that it was not competent to consider whether DSB had received illegal State aid from the Danish State but that it could consider how a contracting authority shall react if circumstances show or indicate that a tenderer has received illegal State aid. Nevertheless, the Complaints Board did not consider this issue in further detail as it did consider that the winning tenderer was abnormally low.[88]

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87. DSB owned 75 % of the company Kystbanen A/S that was awarded the contract.
88. The Board used the term "unrealistically low tender" in its ruling. However, this formulation mirrored the claim of the complainant.

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3 Award of contracts covered by the EU Public Procurement rules in France

Francois Lichere

1. Introduction

Public procurements are mainly regulated through the public procurement contracts code adopted initially in 1964 and completely renewed in 2001, 2004 and 2006. This code deals with the contracts of most of the public authorities (Ministers, local authorities, most of public entities). By code we mean a code in the French sense, id est a gathering of different binding texts linked with the same subject matter and not code in the English sense, as for codes of conducts for instance. The Ordinance of 6 June 2005 (and its two decrees completing this ordinance, decree of 20 October 2005 for contracting authorities and decree of 30 December 2005 for contracting entities) regards the public procurement contracts of all the other contracting authorities or entities in the European meaning, i.e. other public bodies (in the French meaning) such as public establishments of an economic nature ("Etablissement public industriel et commercial" such as the Société Nationale des Chemins de fer Français for example) and all the private bodies ("societies", "associations") under the influence of contracting authorities. There are also specific provisions for public private partnerships (PPP), notably the Ordinance of 17 June 2004 on partnerships contracts but all the PPP contracts are in France considered as public procurement contracts as the Conseil d'Etat stated[1] and therefore subject to the corresponding European directives.

The method of implementation differs from one to another. The Ordinance and its decrees simply transpose the EU directives on public contracts while the Code often goes beyond them. For example, the Code imposes by princi-

1. CE 29 oct. 2004, Sueur et autres, n°269814

ple the duty to divide the contracts in differents lots (article 10), a duty absent for the contracting authorities and entities subject to the Ordinance of 6 June 2005.

The case law is of utmost importance since it supplements to a great deal the texts by giving an interpretation of many provisions. This is due to the fact that public procurement rules have been enforced by the administrative courts in France since the very beginning (XIXth century) and because of the great number of litigations. The first characteristic means that public authorities are used to look closely at the case law as administrative law is built upon the case law. Even if public procurement is highly regulated, there is an expectation that the administrative courts will interpret almost any provision and sometimes supplement them. This is also the consequence of the fact that the public procurement contracts code is adopted by a decree and as such likely to be challenged by judicial review ("recours pour excès de pouvoir"). Indeed, the last 3 codes have been challenged before the Conseil d'Etat and this has led to changes to a certain extent in the code itself as the principle of equality had the consequence of a provision of the Code 2006 meant at favouring small and medium enterprises being declared void.[2]

This expectation is reinforced by the second characteristic. The numerous litigations due to the easiness and low cost of judicial review encourage litigants to challenge the award of a public procurement contract. It must be recalled, however, that because of the broad scope of EU directives, certain private bodies have to implement those rules and therefore the civil courts may have jurisdiction over the award of those contracts considered as "private" contracts in the French meaning (i.e. subject to private courts). In this field, the case law is much less developed than before the administrative courts for no apparent reasons.

Regarding the award criteria, although these are quite regulated in article 53 in the public procurement contracts code, the case law of the Conseil d'Etat gives binding interpretations, mainly about the consequences of the transparency principle but also about weighting of criteria and link to the subject matter of the contract.

2. Code 2001: CE Ass. 5 March 2003, n°233372; code 2003, CE 23 feb. 2005, n°264712; Code 2006, CE, 9 July 2007, n° 297711

2. Selection and award criteria

Both the national legislation and the case law provide for a neat distinction between selection and award criteria. The public procurement contract code (and the other relevant provisions for the other contracting authorities or entities) distinguishes clearly the two in article 52 and article 53 and the case law has been separating the two phases since 1994.

French law seems at first sight to be consistent with the Lianakis case (which is in the continuity of the GAT case to a certain extent[3]). According to Prof. Folliot Lalliot in her PPLR 2009 article (P. 162), "In its recent Lianakis decision, the Court of Justice has strengthened the separation between the qualification phase and the award phase. This solution appears to be in line with the French approach".

We do agree with this assessment: the Conseil d'Etat is strict on the distinction not only towards the contracting authorities but also towards lower courts. For instance, the Conseil d'Etat ruled out a court of appeal judgment on the following basis: the Court has incorrectly estimated that the contracting authority had made a manifest error in assessing as equivalent two bids, since the Court illegally ruled that the technical offer of firm A was better than the one of firm B because firm A had much more experience in the field corresponding to the subject matter of the contract.[4]

However, this does not exclude that, when assessing the technical bid, the contracting authority may take into account the number and the quality of people and material that the candidates intend to use for the completion of the contract. In fact, it is even compulsory to do so when the technical criterion is at stake according to the Conseil d'Etat.[5] Otherwise, it would be difficult to assess the technical aspects of each bid. The main issue here regards the criterion of the experience of the bidder: while an administrative court of appeal had ruled that it cannot be used as an award criteria (when assessing the technical offer),[6] the Conseil d'Etat ruled the opposite.[7] The latter case law might

3. ECJ, 19 june 2003, C-315/01, § 67: "In the light of the foregoing considerations, the reply to be given to the second question is that Directive 93/36 precludes the contracting authority, in a procedure to award a public supply contract, from taking account of the number of references relating to the products offered by the tenderers to other customers not as a criterion for establishing their suitability for carrying out the contract but as a criterion for awarding the contract"
4. CE 8 feb. 2010, Commune de la Rochelle, req. N°314075
5. Ibid.
6. CAA Nancy, 5 August 2010, n°09NC00016

not be in line with the Lianakis rationale if one interprets it in a strict way, which is not, however, how it should be interpreted in our opinion.

3. Lowest price

The National legislation providing for award criteria is not different from the lowest price and the most economically advantageous tender (MEAT). It has been so since the 2001 code onward (see above answer to question 2 for a historical approach).

It is hard to assess if the lowest price is widely used since the only data available deals with economics approach (classifications of the number and value of public contracts by their subject matter or their amount). However, the history of the lowest price may prove that it is now very rarely used. Until 2001, the lowest price was clearly distinguished from the MEAT since it was two separate award procedures named differently ("adjudication" for the lowest price, "appel d'offres" for the MEAT). In 2001, the lowest price was so rarely present in practise that it has been decided to ban it. This radical solution was also justified by the critics to lowest price: unable to ensure quality, favouring illegal collusion between firms, pushing firms to abnormally low prices that lead to a succession of amendments post award. In 2004, following the new directive, it was decided to reintroduce the lowest price not as a separate award procedure but as an alternative to the MEAT whatever is the award procedure chosen. However, the lowest price is only permitted "in relation to the subject matter of the contract" (art. 53 of the Code). Neither the case law nor the guidelines have made clear what is at stake here. The doctrine seems to consider that only standardised goods or services may respond

7. CE, 2 August 2011, Société Parc naturel régional des Grandes Causses, req. n°348254: "le marché litigieux est relatif à soixante-dix pré-diagnostics énergétiques sur des bâtiments publics, écoles, mairies, logements communaux, salles des fêtes ainsi que sur des établissements de santé, des campings, gîtes ruraux, centres de vacances et hôtels; qu'il prévoit la réalisation d'un bilan énergétique sur chaque bâtiment ainsi qu'une évaluation des gisements d'économie d'énergie et une orientation vers des interventions simples à mettre en œuvre ou des études approfondies; qu'eu égard à la technicité de ces prestations, l'objet du marché justifie objectivement le recours au critère, pondéré à hauteur de 20 %, tenant aux références des candidats afin de prendre en considération leur expérience; que la prise en compte de ce critère n'a pas eu d'effet discriminatoire".

to this condition.[8] The case law of the Conseil d'Etat set aside an award procedure based on the sole price criterion for a "complex contract" dealing with public works,[9] an annulment which does not encourage the use of this criterion without other criteria.

Since then, it is very unlikely that the sole criterion of lowest price is often used. First of all, it is a conditional criterion which is not clearly defined and this uncertainty might preclude practitioners to have recourse to it in order to avoid litigations. In a very contentious context, one may not take any risk in this regard. Secondly, the case law allows for the use of MEAT with a strong weighting of the price.[10] The only constraint is to make sure that the price is not the only criterion used to assess the bid which basically is a simple question of giving right motives.[11] Thirdly, the guidelines for the implementation of the code have constantly called for the use of the MEAT rather than the lowest price since 1991.[12]

Total price of the contract (and not only of the components) is required by the case law or even by statutes (see Ordinance 17 June 2004 on partnership contracts), unless the contracting authority authorizes price only on components.

The way the price is taken into account is left for the contracting authorities or entities to decide. The practise shows very elaborated methods (see below question 4.3). As the Conseil d'Etat ruled that the matrix is to be transparent, a wide discretion favour different methods (see below on transparency of the award criteria).

8. Olivier Guézou, in Guézou et Lichère, Droit des marchés publics et contrats publics spéciaux, Le moniteur, fasc. III.431.1.
9. CE 6 april 2007, Département de l'Isère, n°298594: "Considérant qu'il ressort des pièces du dossier soumis au juge des référés que les travaux de réalisation d'un itinéraire alternatif à la route départementale RD 1075 sur la commune de Morestel comprenaient la construction d'un barreau de liaison, d'un carrefour giratoire et d'un ouvrage d'assainissement; que compte tenu de la complexité de ces travaux, souverainement appréciée par le juge des référés, celui-ci a pu en déduire, sans commettre d'erreur de droit, que le département avait méconnu les dispositions de l'article 53 du code des marchés publics, et ainsi ses obligations de mise en concurrence, en retenant le seul critère du prix pour apprécier l'offre économiquement la plus avantageuse."
10. CE 10 juillet 2009, Département de l'Aisne, n° 324156: "Aucune disposition du code des marchés publics n'interdit à un pouvoir adjudicateur de donner au critère du prix une valeur prépondérante".
11. CAA Lyon, 30 december 2003, Préfet de l'Ain, n°00LY02619.
12. As in the last circular: circulaire du 14 février 2012, § 15.1.1: "Il est, en général, préférable de choisir plusieurs critères".

There are preference in case of a tie: Article 53.IV envisages three hypotheses:[13]

"In the event of identical prices or equivalent bids for a contract, a preferential right is granted to bids submitted by a workers' production cooperative, an agricultural producers' group, a craftsman, a craftsmen's cooperative society or an artists' cooperative society or an adapted company.

When the contracts relate, wholly or partly, to works likely to be executed by craftsmen or craft companies or trade cooperatives or workers' production cooperatives or adapted companies, the public contracting bodies must, before initiating the tendering process, define the public works, services or supplies which, within the limit of one quarter of the amount of those supplies, shall, in the event of equivalence of bids, be awarded prioritarily to any other bidders, to craftsmen or to craftsmen's cooperative societies or workers' production cooperatives or adapted companies.

When the contracts relate, wholly or partly, to works of an artistic nature and the prices are identical or the bids are equivalent as envisaged in II, priority shall be given to artists or to artists' cooperative societies for up to one half of the value of those works.".

A fourth hypothesis has been recently withdrawn from the code: "*Certain contracts or certain batches of a contract may be reserved for the protected workshops referred to in Article L. 323-31 of the Labour Code or the vocational rehabilitation centres referred to in Article L. 344-2 of the Social Action and Families Code. In such cases, the greater part of the contracts or batches is performed by handicapped persons who, on account of the nature or seriousness of their handicap, cannot work under normal conditions. The publicity notice refers to the present provision".*

13. "IV.-1° Lors de la passation d'un marché, un droit de préférence est attribué, à égalité de prix ou à équivalence d'offres, à l'offre présentée par une société coopérative ouvrière de production, par un groupement de producteurs agricoles, par un artisan, une société coopérative d'artisans ou par une société coopérative d'artistes ou par des entreprises adaptées.

2° Lorsque les marchés portent, en tout ou partie, sur des prestations susceptibles d'être exécutées par des artisans ou des sociétés d'artisans ou des sociétés coopératives d'artisans ou des sociétés coopératives ouvrières de production ou des entreprises adaptées, les pouvoirs adjudicateurs contractants doivent, préalablement à la mise en concurrence, définir les travaux, fournitures ou services qui, à ce titre, et dans la limite du quart du montant de ces prestations, à équivalence d'offres, seront attribués de préférence à tous autres candidats, aux artisans ou aux sociétés coopératives d'artisans ou aux sociétés coopératives ouvrières de production ou à des entreprises adaptées.

3° Lorsque les marchés portent, en tout ou partie, sur des travaux à caractère artistique, la préférence, à égalité de prix ou à équivalence d'offres prévue au 2°, s'exerce jusqu'à concurrence de la moitié du montant de ces travaux, au profit des artisans d'art ou des sociétés coopératives d'artistes.

However, these provisions raise a lot of concerns about their compatibility with EU law. An administrative court of first instance has asked for a preliminary ruling.[14] Unfortunately, the claimant has renounced to the claim which has led the ECJ to delist the case.[15]

The code does not distinguish anymore between the procedure based on the sole price criterion and the MEAT. They are therefore identical, providing – of course – that when using the MEAT, the contracting authority or entity must weight each criterion except in the case of impossibility (see below), a requirement which by hypothesis is not present with a sole criterion.

4. Most economically advantageous tender (MEAT)

The Code lists the same criteria as the ones present in the directive but adds seven others. The one present in the directives are the following: quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion. The ones added in the Code are:

- performance in terms of direct supplying of agricultural goods
- performance in terms of occupational integration of populations in difficulty (i.e. social criterion),
- life cycling cost
- profitability of the bid
- its innovative nature
- security of supplying
- interoperability and operational characteristics.

Although explicitly present since 2004 (for environmental criterion) and 2005 (for the social criterion), the use of social and environmental criteria seems to be very limited in practice, especially the social criteria, since the Conseil d'Etat adopted a restrictive approach of the necessity to prove a link with the subject matter of the contract in 2001.[16]

14. For the question: http://www.economie.gouv.fr/files/directions_services/daj/publications/lettre-daj/2010/lettre79/TAMontreuil.pdf
15. http://curia.europa.eu/juris/document/document.jsf?text=&docid=82279&pageIndex=0&doclang=fr&mode=lst&dir=&occ=first&part=1&cid=1047762
16. CE 25 July 2001, Commune de Gravelines, N° 229666.

However, no data can confirm this assertion. The only data available regard the social and environmental "clauses" which can give an insight into the practice related to environmental and social award criteria. In 2010, only 2.5 % of the public contracts above 90,000 euros had social clauses and 5.1 % had environmental clauses.[17] This is relatively low, but one should consider the dynamic perspective of it: these figures have almost doubled in one year (1.9 and 2.6 in 2009).

Life cycle costing has only been recently introduced in the Code as a possible criterion but does not seem to be widely used in practice and has not been the subject of any case law.

However, the case law of the Conseil d'Etat just moved towards a much more pro strategic use of public procurement, including regarding the social considerations as being used as an award criteria. In a 2013 case, Département de l'Isère,[18] it clearly reversed its 2001 case law by allowing such a social criterion in circumstances where it would not have allowed it before. The case concerns a framework agreement for the completion of public works regarding the renewal of roads, the maintenance of green paths and of the surroundings of public building of this important local authority. Four criteria were set: the price (65 %) the technical value of the offer (10 %), the performance in terms of environmental protection (10 %), the performance in terms of occupational integration of populations in difficulty (15 %). The main issue was to assess whether this last criterion had a link with the subject matter of the contract. Several considerations have led the rapporteur public to propose to the Conseil d'Etat to adopt a new approach with regard to the social criterion. Firstly, the restricted approach of the 2001 case law renders very unlikely the use of such criterion legally speaking, with the exception of public contracts having as their subject matter the integration of populations in difficulty. Secondly, the intent of the French legislator which introduced in 2005 an explicit reference to the social criterion is obvious, and is in line with the intent of the government which insisted in 2006 that public procurement should take into account sustainable development. Although the legislator did not delete the condition that this criterion, as any others, must have a link with the subject matter of the contract, the 2005 statute law reinforces the will of the legislator to favour such criterion. Thirdly, the fact that such link is not required for the social clauses is not an argument. In other words, the existence of a more flexible approach with regard to the social clauses does not

17. http://www.economie.gouv.fr/files/files/directions_services/daj/marches_publics/oeap/recensement/Chiffres-recensement-2010.pdf
18. CE 15 march 2013, Département de l'Isère, n°364950.

impede to adopt a more flexible approach with regard to the social criterion since the former is more difficult to put in place in practice and the contracting authorities may fear that such a clause would discourage bidders to bid. Fourthly, the even more pro social criterion of EU law, either from the European Commission (which was less favourable a few years ago) or the ECJ with the case C-368/10 of 12 May 2012.

Although we can't see which argument(s) convinced the Conseil d'Etat, it eventually resulted in a new position of the latter. The Conseil d'Etat held that "with regard to an award procedure of a market that, having regard to its purpose, is likely to be executed, at least in part, by people engaged in a process of integration, the contracting authority may legally provide to assess the tenders in the light of the criterion of employability in difficulty when this criterion is not discriminatory and allows him to objectively assess these offers".[19] This new case law introduces a somewhat unclear condition by which the purpose must be executable by people engaged in a process of integration. We can't really see which type of contract such people may not be able to perform. Maybe the vagueness of this condition comes from the vagueness of the category itself (people engaged in a process of integration) that neither the Conseil d'Etat nor its rapporteur public tried to define. But if we can't see what this condition means, we can at least see which conditions are not present. In particular, there is no requirement for the presence of social clauses nor, apparently, that the contract notice has made explicit reference to this social aspect in the definition of the subject matter of the contract itself. In any case, the implementation of this new position led the Conseil d'Etat to admit the legality of the social criterion, provided that it was transparent enough, which gives the Court the opportunity to enlighten the readers about how to make such a criterion transparent: "Article 6 of the contract documents indicates that the performance in terms of employability of people in difficulty must be assessed in light of the evidence given by the bidder, which shall in particular indicate the reception and integration arrangements of people recruited by insertion through the performance of the contract, submit its refer-

19. "Dans le cadre d'une procédure d'attribution d'un marché qui, eu égard à son objet, est susceptible d'être exécuté, au moins en partie, par des personnels engagés dans une démarche d'insertion, le pouvoir adjudicateur peut légalement prévoir d'apprécier les offres au regard du critère d'insertion professionnelle des publics en difficulté dès lors que ce critère n'est pas discriminatoire et lui permet d'apprécier objectivement ces offres".

ent with its possible training for tutoring or indicate the progress and training of the person recruited".[20]

As for the statute law regarding partnerships contracts, its sets other criteria than the one present in the public procurement contract code:

- percentage of the contract to be subcontracted to SME's
- architectural quality of the project
- performance objectives linked to the subject matter of the contract in particular in the field of sustainable development.[21] Contrary to the Code, these three criteria are obligatory with the exception of the second one when the conception is not included in the partnership contract.

Additional criteria are allowed. However, given the long list already present in the statutes and the duty to ensure that an additional criterion has a link with the subject matter of the contract and must not be discriminatory, the likelihood to find other criteria is low. Nonetheless, there are a few examples in practice: cleanliness of the working site and proximity of the firm. The latter needs lots of carefulness in order to avoid the local preference argument. This requirement means first that under no circumstances shall the contracting authority demand that the firm has its head office in the area. In addition, the proximity of a firm or of a branch of the firm must be justified by the subject matter of the contract. The case law is very demanding in this regard and has annulled such criterion in many circumstances by lack of justification.[22] And the simple commitment of a candidate to open a local branch in case of award makes him equal to a firm having already such a local branch.[23] In practice, such a criterion is only justifiable for maintenance and only when such maintenance requires a quick intervention (like heating or air conditioning in hospitals).

Neither legislative provision nor case law limits the discretion of the relevance of price. However, the price may not be used under certain circum-

20. "l'article 6 du règlement de consultation indique que cette performance en matière d'insertion professionnelle des publics en difficulté doit être appréciée au vu des éléments indiqués par les candidats, lesquels doivent notamment indiquer les modalités d'accueil et d'intégration de la personne en insertion recrutée dans le cadre de l'exécution du marché, présenter son référent avec son éventuelle formation au tutorat ou indiquer la progression et la formation de la personne en insertion recrutée".
21. Ordinance of 17 june 2004, article 8.
22. CE 29 July 1994, Commune de Ventenac en Minervois, n°131562; CE 16 october 1995, Préfet de Haute Garonne, n°162739.
23. CE 14 Jan. 1998, Société Martin-Fourquin, N° 168688.

stances: this is the case when the public procurement contract implies no public expenditure such as for street furniture ("marchés de mobilier urbain" where the contractor is paid by the advertisement put on the bus shelter or on the electronic panels). The Conseil d'Etat ruled that the contracting authority was right in avoiding the price criterion since the only financial aspects (the price to be given to the public authority for the private occupation of public property) was set in advance by the public authority.[24] One could also argue that it was even compulsory to do so under such circumstances. But it is very specific to those public procurement contracts where there are no direct incomes to the contractor from the contracting authorities. In any other cases, it is difficult to imagine a public procurement without the price as at least one of the criteria.

The weighting is freely established. It can even lead to criteria having the same weighting (for example 50 % each when only 2 criteria are set). The courts leave discretion to contracting authorities to this regard. The main constraint regarding the weighting is linked to the transparency principle: if a criterion is important, it must be sufficiently described by the contract documents. The Conseil d'Etat has ruled out an "aesthetic" criterion not in itself but by lack of description: such a criterion with no precise requirements gives

24. CE 28 april 2006 Ville de Toulouse, n°280197: "que si ces dispositions imposent, lorsque l'objet du marché conduit à n'appliquer qu'un seul critère, de retenir celui du prix des prestations, elles n'ont ni pour objet, ni pour effet de rendre obligatoire ce critère lorsque la personne publique adopte plusieurs critères d'attribution du marché dans la mesure où les critères retenus, eu égard à l'objet du marché, permettent de déterminer l'offre économiquement la plus avantageuse. Considérant qu'il ressort des pièces du dossier soumis au juge du référé précontractuel du tribunal administratif de Toulouse que le marché de mobilier urbain envisagé par la Commune De Toulouse prévoyait que les prestations fournies par l'entreprise seraient rémunérées par les recettes provenant de l'exploitation publicitaire des mobiliers urbains; que dès lors que ce marché ne se traduisait ainsi par aucune dépense effective pour la collectivité publique et que cette dernière avait décidé, ainsi qu'elle pouvait le faire, de fixer elle-même le montant de la redevance d'occupation du domaine public sans le soumettre aux offres des candidats, la Commune De Toulouse pouvait ne pas retenir le prix des prestations comme critère d'attribution du marché; qu'ainsi, en se fondant, pour annuler la procédure de passation du marché en litige, sur ce que la commune ne pouvait, sans méconnaître les dispositions de l'article 53 du code des marchés publics, retenir trois critères d'attribution du marché dont aucun ne correspondait à un prix, le juge du référé précontractuel du tribunal administratif de Toulouse a commis une erreur de droit".

a too wide discretion to the contracting authority considering the important weighting the contracting authority had decided to give to this criterion.[25]

In addition, one issue may arise regarding the compulsory criteria of the statute law on partnership contracts. As they are mandatory, one may argue that this implies a certain weighting although the case law has not given any guidance in the matter. In practise, it is not rare to see criterion of the percentage of the contract to be subcontracted to SMEs affected by a coefficient of 2 %. One may consider that such a low weighting is similar to the absence of criterion.

A mathematical matrix seems to be well developed in practice.[26] The question of the transparency of the method is a sensitive issue in France. While the case law has demanded that the subcriteria are transparent and that the weighting of subcriteria must be transparent to the extent that their nature and importance impose this, the evaluation methods are not to be communicated to the tenderers according to a 2010 case.[27] We are convinced that transparency and equal treatment principles should expand to the evaluation methods as this evaluation process may lead to manipulations.

The Conseil d'Etat rules that they are not to be made publicly available or even only transparent for the bidders.[28] However, it recently decided to check the compatibility of these matrices with the principle of equal treatment. It rules out a method that allows negative marks as it automatically implies a change in the weighting of the criteria. On the other hand, it showed some flexibility regarding the possibility for the contracting authority to attribute the maximum mark to the bid that comes first, even though it increases the advantage of the bid classified first.[29]

However, such a control questions the pertinence of the absence of transparency regarding the methods. Now that the courts check the methods, any bidder will be tempted to challenge the award for the simple reason that only the courts can ask for the methods.

To our knowledge, there are no instances where the contracting authority held that weighting was not possible. Indeed, each time the courts have checked the absence of weighting, they have declared that there was no rea-

25. Ibid.
26. See M. Jacobs, P. Ravenel, A. Pasquier-Desvignes, L'offre économiquement la plus avantageuse, Le moniteur, 2007 (especially § 3.2.5)
27. CE 31 march 2010, Collectivité territoriale de Corse, n° 334279; CE 21 May 2010, Commune d'Ajaccio, n°333737
28. CE 18 décembre 2012, Dépt de la Guadeloupe, n°362532
29. CE 15 february 2013, Société SFR, n°363854

son to avoid it.[30] The Code now indicates that weighting may be impossible "notably in case of complexity" (article 53). There does not stem from this a clearer indication of the relevant circumstances. Interestingly, such flexibility has not been used, to our knowledge, in case of public private partnerships which are in general deemed as complex contracts in France. This is probably so since those contracts are subject to another legal text (ordinance 17 June 2004) which allow for that absence of weighting but does not make any reference to "complexity".[31] Furthermore, this text requires that the contracting authority must demonstrate that it can't, whereas in the Code it only has to be in a position where it estimates that it can demonstrate the impossibility of weighting.

As to the possibility to adjust or change the award criteria or sub-criteria prior to the bidding, the Code is silent on this topic. The code simply states that the award criteria are set in the contract notice or the contract documents. But the case law is very strict concerning the possibility of changes.

Any changes of award criteria are illegal "after the beginning of the award process" as stated by the Conseil d'Etat.[32] However, it is not entirely clear what it meant by such formulation as it seems to leave some kind of possibility of change during the beginning phase. In any case, after the beginning of the award process, no modification of the award criteria is permitted,[33] nor any adding of an important subcriterion[34] or withdrawing of an award criterion.[35]

The statute law dealing with partnership contracts has tried to introduce some flexibility in this matter as it deals with complex contracts but only when it comes to competitive dialogue. Article 7 of the ordinance of 17 June 2004 provides that at the end of the dialogue, the contracting authority defines the performance conditions, and if necessary "specify the award criteria". However, such possibility has been interpreted very strictly by the Con-

30. For example: CE 7 october 2005, C.U.M., n°276867; CE 4 november 2005, Commune de Bourges, n°280406, CE 5 april 2006, Ministre de la Défense, n°288441.
31. L 1414-9 Code général des collectivités territoriales.
32. CE, 1 apr. 2009, n° 315586.
33. Ibid.
34. CE, 1 apr. 2009, n° 321752.
35. CE, 27 apr. 2011, n° 344244.

seil d'Etat[36] which bans any modification of the award criteria or their weighting and which imposes a duty of transparency for the specification. It is assumed from this case law the contracting authority may only give information about how it will implement the award criteria. There is not much discussion in French literature on this topic, contrary to the English one.[37]

As the same situation exists in France as in Denmark with regard to the absence of duty to announce the model/matrix, there is no constraint for changing the model/matrix during the process although it also leads to some concerns along with the absence of duty of transparency of the matrix (see above).

5. Procedure for evaluating MEAT, juries, transparency and judicial review

Under French law, one must distinguish between local authorities and other contracting authorities. Every local assembly must elect a special commission for public procurement (called "Commission d'appel d'offres") which has important powers as it selects the tenderers and chasen the MEAT based on the award criteria established by the head of the executive (mayor, president of the "Département" or of the "Région") and its services. The members of this Commission d'appel d'offres are two kinds: the ones having a right to vote and the ones having only an advisory role. The first category encompasses 3 to 6 members (depending on the size of the local authority) among which the head of the executive is automatically both a member and the president of the Commission plus 2 to 5 members elected among the local assembly. This election process has existed since the 90's which means that members of the political opposition may – and often do – have one or two seats. According to practitioners, the political diversity of this Commission has played a great deal to render the award process more transparent and objec-

36. CE 29 october 2004, Sueur et autres, n°269814: "que cet article ne fait pas obstacle à ce que, à l'issue de la phase de dialogue, et avant d'inviter les candidats à remettre leur offre finale, le pouvoir adjudicateur précise, compte tenu de la ou des solutions présentées et spécifiées au cours du dialogue, les conditions dans lesquelles il entend faire application des critères d'attribution définis dans l'avis de marché ou le document descriptif, pourvu qu'il ne modifie ni les critères ainsi définis, ni leur pondération, et qu'il porte ces précisions à la connaissance des candidats de manière transparente et non discriminatoire".
37. See in particular S. Arrowsmith and S. Treumer (eds.), Competitive Dialogue in EU Procurement, Cambridge University Press at pp. 88-94.

tive. The second category is filled by technicians (employed by the contracting authority in charge or by other contracting authorities) or any person competent in the subject matter of the contract, the public accountant and a member of the competition Administration.[38] These persons are convoked by the head of the executive at his discretion.

For other contracting authorities, such commissions existed until 2006 but only with an advisory role. They were then dissolved by the 2006 Code.

Apart from this Commission competent only for local authorities, a jury is compulsory for any contracting authority awarding a public procurement contract which implies the evaluation of a "project". The members of this jury are freely chosen for the State services with the exception that there is invited the public accountant and a member of the competition Administration, but the latter only as an advisory role.

For local authorities, the members are chosen on the same basis as the "Commission d'appel d'offres" with the difference that the people chosen for their competence in the field have the right to vote. Two specificities are to be noticed compared to the above Commission d'appel d'offres: the jury has only an advisory role; if a special qualification is required from the tenderers (as being an architect for instance), at least one third of the jury must have the same qualification which means that the president of the jury will have to nominate other members to reach this percentage.

There are experiences with using MEAT in e-auctions as it is allowed by article 54 of the Code for any "quantifiable" criteria. Nonetheless, the tendency is to stick to price in practice.[39]

The Courts exercise the so-called manifest error test towards the implementation of the MEAT. Such an error is rarely admitted. This is necessarily so as the courts don't have access to the bids themselves but only to the "rapport de presentation des offres" set by the contracting authority which explains the reasons why a bid has been preferred to others. In practice, the most common irregularities lie in a lack of motives as it is almost impossible for the claimant to prove the existence of a manifest error.

The question of the matrix role during the tender is a tricky one in the French context of local authorities. As said above, the "Commission d'appel d'offres" plays a core role in choosing the MEAT. In theory, it is this Com-

38. This Administration is attached to the Ministry of Economy and not to the Competition Authority which is an independent Agency.
39. See our article on "The regulation of electronic reverse auctions in France", in Sue Arrowsmith (ed.), Reform on the uncitral model of law on procurement: procurement regulation for the 21st century, 2009, p. 455-467.

mission which has a wide discretion to this regard, only subject to the manifest error test in case of judicial review. However, the setting of the matrix is ensured by the technical services. This may mean that in fact the "Commission d'appel d'offres" has its role reduced to the strict evaluation of each bid.

In terms of the transparency in the opening process of the bids, the situation has evolved with regard to open procedures. Since 1994 onward, i.e. when the tenderer selection phase was clearly distinguished from the award phase, there was a duty for the tenderer to send two envelopes, one regarding the tenderer selection document, the other regarding any aspects of the bid (technical and financial). The case law had always demanded that the envelope containing the tenderer selection document must be opened first and that if one document was missing or if the documents did not prove a sufficient capacity, the second envelope could not be opened. The rationale of this strict solution lay in the idea that the temptation to step in a firm with no sufficient capacity but with a good bid would be too high. Since 2004, the Code now authorizes – but does not requires – the contracting authority to ask to the tenderer to send the missing document. In practice, the question was then posed as to whether when a document concerning the bid was by mistake put in the first envelope the contracting authority had a duty to dismiss the tenderer. The Conseil d'Etat adopted a flexible approach in this regard and a few months later, in 2011, the Code was amended to allow for a unique envelope for the tenderer selection process and the award process, but only of course for open procedures. It remains compulsory, nonetheless to dismiss, a tenderer with no sufficient capacity.

The opening process is not open to the public, which is not problematic when a commission is competent but which might be so when only one person is in charge.

There are no special rules for writing the minutes.

The courts do not give permission to a contracting authority to ask the candidates to complete their bid when a candidate omitted to send a document since it is admitted by the Code for the candidate selection phase (article 52 of the Code) but not for the bid phase (article 53 of the Code). Even more, the bids cannot be completed nor modified nor simply rectified in case of mistakes, unless of course in case of negotiated procedures.

The case law is quite strict in this regard: a contracting authority must by principle reject a non-compliant bid, whether it is non-compliant on the substance or on formal requirements such as format of the bid, date, language requirements, the number of copies, time and place of the bid. There are many examples in the case law for non-compliance on the substance, even when it touches what one may consider as non-central prescriptions such as the plan-

ning of the works, the date of the delivery[40] or the likelihood of possessing the materials required.[41] But there are also examples of formal non-compliance which must lead to dismiss the bid as well.[42]

The Conseil d'Etat even ruled that this compliance extends to any prescriptions present in the contract document, even for useless prescriptions, id est prescriptions which have no direct link with the subject matter of the contract.[43]

However, the case law has accepted very limited exceptions. Firstly, a public authority can rectify obvious material errors such as error of calculation.[44] Secondly, the public authority can accept an absence of a document when this is publicly available[45] or the absence of a signature on an annex.[46]

40. CE 19 mars 1969, Commune de Saint-Maur-des-Fossés, Lebon, p. 170: duty to reject a bid which had planned to build a pool after 2 other buildings whereas the contracts documents demanded the pool to be built first; CAA Nantes 30 décembre 2005, SA Hexagone 2000, req. n°04NT01167: absence of a date of delivery.
41. CE 12 janvier 2011, Département du Doubs, req. n°343324: a simple quote regarding the purchasing of a truck is insufficient to prove that the candidate will have the necessary means to fulfill its duties for winter works on roads.
42. CAA marseille 29 juin 2004, Préfet des Bouches-du-Rhône, req. n°01MA00371: document non signed.
43. CE 23 novembre 2005, SARL Axialogic, req. n°267494, Tables du Lebon: "Considérant que le règlement de la consultation d'un marché est obligatoire dans toutes ses mentions; que l'administration ne peut, dès lors, attribuer le marché à un candidat qui ne respecterait pas une des prescriptions imposées par ce règlement; qu'ainsi, en jugeant que le directeur de l'administration générale et de l'équipement du ministère de la justice avait pu accorder le marché à un candidat ne justifiant pas des trois sites d'exploitation des logiciels exigés par le règlement de la consultation du marché litigieux au seul motif que cette obligation aurait été étrangère à l'objet du marché et n'aurait pas eu de rapport avec les modalités de fixation et de règlement de son prix, la cour a commis une erreur de droit".
44. CE 16 january 2012, Département de l'Essonne, N° 353629: "que si ces dispositions s'opposent en principe à toute modification du montant de l'offre à l'initiative du candidat ou du pouvoir adjudicateur, ce principe ne saurait recevoir application dans le cas exceptionnel où il s'agit de rectifier une erreur purement matérielle, d'une nature telle que nul ne pourrait s'en prévaloir de bonne foi dans l'hypothèse où le candidat verrait son offre retenue;".
45. CE 22 décembre 2008, Ville de Marseille, req. n°314244.
46. CE 8 mars 1996, M. Pelte, req. n°133198.

Thirdly, they also can accept slight modifications which improve the project.[47] But this is not allowed if it implies a substantial change in the project.[48]

Another issue can also arise regarding the question of the variants. When they are allowed, it might be difficult to distinguish variants from substantial changes of the contract documents.[49]

6. Abnormally low tenders

There is no mandatory requirement to dismiss abnormally low tenders (ALT) in the Code. A 1996 draft of a new public procurement Code included such a mandatory requirement. There had been at the time a huge lobbying against it which delayed considerably the adoption of the Code which was only published in ... 2001 and with no mandatory requirement. It remains so in the texts.

However, the case law then moved to a duty in two steps. First the courts have decided that such a duty may be imposed, under certain circumstances, to the contracting authority to dismiss an ALT. Since 1996, the administrative courts require that any public authority in any circumstances may not favour

47. CE 29 janvier 2003, Département d'Ille-et-Vilaine, req. n°208096:"Considérant que si le groupement TPR Brougalay-Gendrot a proposé un tracé de la canalisation de drainage qui réduisait le coût de la prestation de 99 000 F (15 110 euros), cette proposition technique qui, compte tenu de sa faible importance et dans les termes où elle a été formulée, ne saurait revêtir le caractère d'une "variante" par rapport à l'objet du marché, eu égard au montant total de ce marché, n'a pas affecté les conditions de mise en concurrence; que, par suite, le moyen tiré d'une inégalité de traitement entre les candidats doit être écarté".
48. CE 4 avril 2005, Commune de Castellar, req. n°265784, Lebon; Gaz. Palais, 12 mars 2006, p. 41, J.-L. Pissaloux: la commission d'appel d'offres a retenu l'offre de la société "en faisant sienne la proposition de cette dernière de ne pas réaliser le parcours enfants prévu par le programme fonctionnel détaillé au motif qu'il était trop dangereux; que la suppression d'un des deux parcours exigés par ce programme ne saurait être regardée comme une simple précision portant sur l'étendue des besoins de la collectivité mais comme une modifications des besoins définis dans le programme fonctionnel détaillé; qu'au surplus cette modification du programme n'a pas été portée à la connaissance de la société Heaven Climber; que, par suite, la commission d'appel d'offres ne pouvait, pour analyser les mérites respectifs des deux offres qui lui étaient soumises et déterminer son choix, se fonder sur le programme ainsi modifié".
49. CE 28 juillet 1999, Institut français de recherche scientifique pour le développement en coopération et Sté OCEA, nos 186051 et 186219: the proposal to build a catamaran in aluminum instead of a monocoque in steel is not a variant but a non compliant bud.

an abuse of dominant position from firms. Therefore, if a bid may be considered to be an ALT coming from a firm in a dominant position on a relevant market, it is the duty of the contracting authority to dismiss it. However, this requirement comes from the case law of lower administrative courts and it does not seem to be well known in practice.

More recently, the Conseil d'Etat adopted a different approach with no reference to the notion abuse of dominant. The new case law seems to imply that the Courts have now to check in any circumstances if there was a duty to dismiss an ALT. Indeed, the Conseil d'Etat now searches for a manifest error in the decision not to dismiss an ALT.[50]

Price is the main concern when it comes to ALT but it cannot really be detached from technical considerations. For instance, it is considered that there is no ALT when a price is low due to the circumstance that the tenderer has another working site close to the one at stake that would considerably reduce the amount of transportation and that there is no breach of equal treatment in awarding the contract to this firm.[51]

There is no general methodology to screen an apparently abnormally low tender nor a requirement to disclose in the tender documents which criteria the contracting authority will use for these purposes. And there is no case law on abnormally low tenders due to receipt of illegal State aid. Only the provision of Article 55 of the Code makes reference to the same provision as the one present in Article 55 of the 2004/18 directive.

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4 Awarding of Contracts in German Procurement Law

Martin Burgi[*]

1. Introduction

Ever since the European Court of Justice ruled in its famous *Lianakis*[1]-case that selection and award criteria need to be distinguished strictly from each other, questions about award criteria either became a delicate topic in Member States or – as is the case with Germany – the topic turned back into focus again.

To begin with, the delicate questions relating to award criteria have been discovered rather late in German procurement law. Indeed, the criterion of the lowest price dominated in the world of German procurement law for quite a long time. Therefore, the debate began not before the contracting authorities shifted to a more quality-focused approach due to which other criteria gained attention. Then the issue of award criteria dramatically gathered speed with the introduction of the so-called secondary considerations as the award stage – among others – can be effectively used to integrate ecological criteria into a procurement procedure. Strangely, procurement experts now began to question the admissibility of the lowest price criterion with rising occurrence. Strangely indeed, as this point has apparently never raised concern in all the years before when the price has been used exclusively.

The constrictions mainly follow from the fact that award criteria are nothing more than a translation of the specifications: the more detailed and exact the specifications, the less need for meticulous award criteria. Therefore, the price is always best-suited to compare the tenders in case of either highly

* The author wishes to express his thanks to former research assistant *Frauke Koch* (Ruhr-University in Bochum) and to research assistant *Benedikt Brandmeier* (Ludwig-Maximilians-University Munich) for their valuable support in the preparation and publication of this paper.

1. ECJ of 24.01.2008, C-532/06, *Lianakis*, NZBau 2008, p. 262.

standardized products or very detailed specifications. The other way round, the price can neither appropriately indicate the differences between tenders nor identify the best tender if the product or service to be procured is particularly complex or has been specified only indistinctly. In these cases, the award needs to be made to the most economically advantageous tender instead.

Following from this, it is crucial to understand that the choice of the award criteria is inseparably linked to the subject-matter of the contract, its complexity and to the level of detail of the specification as well.[2]

Given the aforesaid, it is more than appropriate to shed some more light on Germany's approach to handle award criteria, their use in practice, important border topics and the elementary question whether the German approach finds itself in line with the European requirements and the principal rulings of the ECJ.

In order to better understand the German approach, it is essential to present the legal framework, or, more concretely, the most protruding provisions first. Given the generally complicated German procurement system,[3] the main provisions on the award can be found on the level of the GWB (Act against the restraints on Competition) and in the procurement regulations of the VOL/A-EC (Regulations on Contract Awards for Public Supplies and Services-Part A) and the VOB/A-EC (Regulations on Contract Awards for Public Works).[4]

Though generally encompassing comparably few rules about the procedure itself, the GWB contains § 97 V: "The economically most advantageous tender shall be accepted."

2. For more information on the topic of specifications, please see M. Burgi, 'Contract Specifications', in: M. Trybus/R. Caranta/G: Edelstam, *EU Law and Public Contracts*, forthcoming, Brussels 2013.
3. For detailed information about the German system and the treatment of contracts below the thresholds, please see M. Burgi/F. Koch, 'Contracts below the thresholds and list B services from a German perspective', in: R. Caranta /D. Dragos (eds.), *Outside the European Procurement Directives – Inside the Treaty?*, DJØF Publishing, Copenhagen 2012, Chapter 4.
4. The composition of the VOB/A has been assimilated to the approach undertaken with the VOL/A. Concretely, the former a-provisions of the VOB/A governing contracts above the thresholds are now found in the VOB/A-EC-part of the regulation. The other relevant act of the *cascade system* for contracts above the thresholds, the VgV (Regulation on the award of public contracts), does not contain any pertinent rules at all.

Regarding the level of the procurement regulations, the possible award criteria are listed in § 19 IX of VOL/A-EC (mirrored in § 16 VII 2 of the VOB/A-EC), while § 21 I VOL/A-EC under the headline "award" basically repeats the wording of the aforementioned § 97 V GWB.

2. Selection and award criteria

2.1. Overview

Typically, the award decision is the final decision within a very elaborate examination system. In fact, all other stages help to prepare the final award decision and identify the best tender. Each contract award procedure starts with the contracting authority thoroughly examining the submitted tenders, focusing on evident, formal mistakes, omissions and deficiencies. At the second stage of a procurement procedure, the examination of the tenderer's suitability occurs, where the criteria of capability, qualification and reliability apply.[5] As stipulated for public works contracts by § 16 II 2 VOB/A-EC resp. by § 19 V VOL/A-EC, only tenderers fulfilling these criteria deserve being short-listed[6] and compared with each other on the award stage.[7]

It needs to be said that in the context of selection criteria, the adherence to the principles of transparency, non-discrimination and competition are of utmost importance. In terms of the principle of transparency, the contracting authority needs to lay down in the notification which selection criteria it attributes relevance to. Furthermore, the certificates required to prove the suitability need to be revealed so that the tenderers can reasonably assess their chances and decide whether they want to compete or not. This also allows them to seek effective review and control whether the contracting authority stuck to its self-given rules.

5. And although it appears that these three suitability criteria are completed by the criteria of legality (§ 97 IV S. 1 GWB and § 6 III No. 1 VOB/A-EC), most legal experts rightly opine that the criterion of legality is nothing more than a concretization of the term "reliability".
6. VK Münster of 11.2.2010, VK 29/09.
7. BGH of 15.04.2008, X ZR 129/06; VK Bund of 09.09.2009, VK 2-111/09; further reference given by R. Weyand, *Praxiskommentar Vergaberecht*, 3rd ed., C.H. Beck Verlag, München 2011, § 97 GWB fn. 682.

But according to the judgments of some German courts there is – contrary to award criteria – no general obligation to announce *a priori* the order of importance or the weighting of the suitability criteria.[8]

2.2. Difference between award criteria and selection criteria – The rule that no bidder is "better suited"

Given the aforementioned, one difference in the procedural treatment of selection and award criteria has already been named. Therefore, it is interesting to dive deeper into this topic and investigate further on the most striking differences.

On the national level, § 19 V VOL/A-EC (and in different wording also § 16 II VOB/A-EC) merely states what is already clear: "When selecting tenders that are eligible for award, only tenderers may be considered who are qualified to perform the contractual obligations." Unfortunately, the norms do not contain any clarification about the concrete difference between the criteria. Nor do they provide any information if or why they possibly need to be distinguished from each other.

The ECJ found in different of its prominent rulings, among them the *Lianakis* and the *Beentjes* case, that although the Directive does not in theory preclude the simultaneous examination of the tenderer's suitability and the award of the contract, the two procedure stages are nevertheless distinct and governed by different rules. In consequence, a contracting authority is generally prevented from taking the tenderer's experience, manpower and equipment as well as its ability to perform the contract by the anticipated deadline into account as 'award criteria' rather than 'qualitative selection criteria'.[9]

Over time, these general remarks have been fully acknowledged by the German review courts, among them the BGH (Federal Court of Justice).[10] Visibly under European influence, the BGH stated in a very prominent and rather "old" judgment that once a bidder is found suitable, the contracting authority is not allowed to take into account the tenderer's concrete level of

8. OLG München of 28.04.2006, Verg 6/06; VK Niedersachsen of 11.02.2009, VgK-56/2008.
9. ECJ of 24.1.2008, Case C-532/06-*Lianakis* [2008] ECR I-251 Rn. 26, NZBau 2008, p. 262.; see, to that effect, in relation to works contracts, ECJ of 20.09.1988, Case 31/87-*Beentjes* [1988] ECR 4635, fn. 15 and 16.
10. See BGH v. 08.09.1998, NJW 1998, p. 3644 fn. 143; OLG München of 10.2.2011, Verg 24/10, ZfBR 2011 p. 407, ruling that the use of characteristics such as the experience of the personnel and experience in co-operation as award criteria will cause an infringement of procurement law as these characteristics clearly relate to the suitability of a tenderer.

suitability on the award stage again. As the BGH puts it "*it is clear that tenderers would be exposed to arbitrary decisions of the contracting authority if the latter could freely decide about the award criteria. Read in the light of constitutional legality, including the principles of predictability, measurability and transparency of public acts it is indispensable that the award criteria are previously brought to the tenderer's attention. For the rest, there is no need to take into account the suitability criteria again on the award stage*."[11]

In the aftermath of this elementary decision, the "more suitable" finding evolved into a frequently cited principle in German procurement case-law and literature.[12] When dealing with the critical topic of ambulance services, the OLG Düsseldorf, for example, held that the fact a bidder is considered more suitable than his competitors cannot be taken into account again on the evaluation stage. As each criterion applied on the award stage needs to help identify the most economically advantageous tender, the contracting authority is prevented from operating on the award stage with criteria relating to the capability, technical qualification and reliability of the tenderer.[13]

In order to better understand these judgments, it is essential to cast light on the background of the decisions, namely on the said difference between selection and award criteria: The selection criteria directly relate to the personal situation of the tenderer including his staff, the entity's equipment with machines, apparatuses, patents, know-how, etc. These criteria are "must-haves". They are a necessity remembering – once again – the wordings of § 19 V VOL/A-EC and § 16 II VOB/A-EC that no tender enters into the award stage without being found suitable before. Single selection criteria stipulate the immediate and automatic exclusion of the respective tender while other regulations provide for exclusion after the suitability check has been made. Contrary to this regime, award criteria are basically tender-focused[14] and help identify the best of all the tenders that have successfully passed the suitability check. The tenders are not excluded on this stage.

11. BGH of 08.09.1998, NJW 1998, p. 3644, fn. 143.
12. See for a comprising overview: A. Rumbach-Larsen, 'Selection and Award Criteria from a German Public Procurement Law Perspective', in: PPLR 2009, p. 112.
13. OLG Düsseldorf of 10.09.2009, Verg 12/09, ZfBR 2010, p. 104; OLG Düsseldorf of 14.01.2009, VII Verg 59/08, NZBau 2009, p. 398; OLG Celle of 12.01.2012, 13 Verg 9/11, NZBau 2012, p. 198; B. Ruhland, In: H. Pünder/M. Schellenberg (eds.), *Vergaberecht*, Nomos Verlag, Baden-Baden, 2011, § 16 VOL/A fn. 51.
14. R. Weyand, *Praxiskommentar Vergaberecht*, 3rd ed., C.H. Beck Verlag, München 2011, § 97 GWB fn. 683; also: VK Bund of 04.06.2010, VK 3-48/10.

However, regarding its decisions subsequent to the *Lianakis*-ruling, the Higher Regional Court (OLG) Düsseldorf did not entirely follow such a strict approach stating in a widely discussed ruling[15] that it would not generally be inadmissible to take into account tenderer-related aspects on the award stage.[16] Under the condition that the developed criteria are not incompatible with general German and European procurement principles (concerning mainly the correct disclosure), the court considered it as legal to take into account certain aspects of the tenderer's suitability in case they are closely linked to the correct fulfillment of the contract.

With regard to its arguments, it has to be stated that the OLG accepted a practical need for taking into account an excess in suitability on the award stage that cannot be overlooked. Depending on the concrete kind of contract to be awarded, the "more-suitable"-finding seems to be legitimate even under European law regarding the procurement principle of economic efficiency. It cannot be denied that, particularly in case of procurement for works or services, the characteristics of the person the entity has to deal with are sometimes of utmost importance for the assessment of the quality of performance.

In spite of this clear commitment, the court expressly did not dig deeper into this topic – solely by virtue of the fact it was not decisive in the case – and denied to elaborate further on the question of how to distinguish tenderer-related aspects that may be taken into account as award criteria and such that may only be considered on the selection stage. The only apparent ruling providing indication of how to draw the dividing line was adopted by the "Vergabekammer des Bundes", a public procurement tribunal. Although this decision has been widely discussed in legal literature,[17] it can't be generalized as this case was governed by special provisions for services provided by self-employed persons (the VOF) not containing an equally clear and strict differentiation between the two kinds of criteria. It has to be noted that these cases have traditionally been treated differently due to the divergent legislation so that it cannot serve as indicator for the future German approach to the question in subsequence to the *Lianakis*-decsision.

In this context, it is not less interesting to have a closer look at other ways, German authorities try to consider an excess in suitability. One alternative ap-

15. OLG Düsseldorf of 05.05.2008, Verg 5/08.
16. See for a detailed analysis of this decision: A. Rumbach-Larsen, 'Selection and Award Criteria from a German Public Procurement Law Perspective', in: PPLR 2009, p. 112 (118).
17. See only: A. Rumbach-Larsen, 'Selection and Award Criteria from a German Public Procurement Law Perspective', in: PPLR 2009, p. 112 (119).

proach is to draft the specifications of the contract in an intelligent way, for example, if the contracting authority requires special specifications or wants to buy a product as cheap as possible. Giving an example: A contracting authority, purchasing cleaning services, defines the general specifics that tenders need to fulfill by way of indicating maximum limits but ascertaining entities that have a specific suitability degree and are especially capable by admitting higher limits. This method guarantees that all tenderers that cannot keep the self-stated limits are excluded. The OLG Düsseldorf has categorized these circumstances as being suitability-relevant because the reaching or exceeding of the higher limits is dependent on more efficient equipment with cleaning apparatuses or better trained or more competent personnel.

The last option to take an excess in suitability into account in the award procedure is through the right choice of the procedure. The non-open procedure with a prior competition as well as the negotiation procedure enables the contracting authority to limit the number of participants beforehand according to their own conception of suitability. The danger of distortions of competition and missing respect of the findings of jurisprudence is relatively small in this case, given the primacy of the open procedure and the fact that the procedures are only admissible under certain circumstances.

3. Lowest Price

3.1. National legislation

Looking at the wording of § 21 I VOL/A-EC:[18] "(1) The award must be granted to the most economically advantageous tender with due consideration of all circumstances. The lowest tender price alone is not the sole decisive criterion.", one could easily assume that German procurement law opted for a solution that provides only for one award criterion, namely the most economically advantageous tender. It seems as if the lowest price criterion is literally ruled out.

Indeed, German courts were mainly focusing on this clear wording, questioning the admissibility of the lowest price as sole decisive criterion, and

18. The decision for the criterion of the most economically advantageous tender encompasses contracts above (§ 97 V GWB, § 21 I VOL/A-EC) and below the thresholds alike (§ 18 I VOL/A indistinctly adopting the wording of § 21 I VOL/A-EC); similar provisions for work contracts can be found in Art. 18 VOB/A-EC, even though the prohibition of the lowest price as sole decesive criterion is not stated that expressly.

several procurement experts in German literature[19] argued in accordance with this line. However, from the beginning on, doubts have been raised whether this interpretation could be in line with the European legal framework. Already in 2002, the VK Düsseldorf[20] considered this as a crucial point – at least in case of procurement for services – for an alternative interpretation of the national provisions, allowing for the use of the lowest price as sole award criterion – though, without mentioning the relevant European legislation.

In fact, glancing at the actual normative basis in European procurement law, there can be no doubt about the admissibility of the lowest price as an independent award criterion. Recital 46 and first and foremost Article 53 of the Directive 2004/18/EC could not be more clear: the criterion on which the contracting authority shall base the award of public contracts shall either be the most economically advantageous tender (MEAT) *or* the lowest price only. The European legislator therefore installed *two* equal options to base the award decision on.

In its famous *Sintesi*-judgment about an Italian law limiting contract awards to the lowest price criterion only, the ECJ elaborated further on this matter. On October 7th 2004, the ECJ found that, in the interest of promoting competition and taking into account the peculiarities of the contract in question, authorities must be allowed to use other criteria instead of only the lowest price, such as the tender's technical merits or the time it will take to complete the work, for example. Under these conditions, the Italian law has been dismissed.

In short, the ECJ delivered two essential messages:

1. The choice of award criteria rests solely with the contracting authority and must always be made with view to the subject-matter of the respective contract.
2. Neither the legislators in the Member State nor politics can dictate the award criteria to be used. Therefore Member States are prevented from enacting laws that dictate the price as the only award criterion. *Vice versa*,

19. O. Otting, In: R. Bechthold, *Kartellgesetz: GWB*, 6th ed., C.H. Beck Verlag, München 2010, § 97 GWB fn. 54; A. Boesen, *Vergaberecht, Kommentar zum 4. Teil des GWB*, Bundesanzeiger Verlag, Berlin, 2000, § 97 GWB fn. 144; M. Diehr, In: O. Reidt/T. Stickler/H. Glahs (eds.), *Vergaberecht,* 3rd ed., Dr. Otto Schmidt, Köln 2011, § 97 GWB fn. 106 (speaking of a "tradition" in German procurement law; unclear: J. Ziekow, In: J. Ziekow/U-C. Völlink (eds.), *Vergaberecht*, C.H. Beck Verlag, München, 2011, § 97 GWB fn. 107.
20. VK Düsseldorf of 30.09.2002, VK 26/2002-L.

national laws neither can preclude the lowestprice as the sole award criterion under certain circumstances.

Due to the well-known principle that infringements of European law need to be prevented and other, milder methods be used first, the German Courts were right in interpreting § 21 VOL/A-EC and the corresponding norms of the other procurement regulations in light of Art. 53 of the Procurement Directive in subsequence of the ECJ's ruling.[21]

As noteworthy as it seems to be that German jurisdiction has partially already ruled in accordance to this interpretation in advance of the *Sintesi*-judgment, it is equally surprising that the clear guidance provided by the ECJ has not immediately led to a consistent acceptance of the price as possible award criterion.

For a long period, it was still considered in legal literature that contracting entities would be prevented from basing their decision exclusively on the price criterion.[22] Particularly, the OLG Düsseldorf repeatedly stressed that the use of the lowest price-criterion shall be an exception and that this would only be admissible in case of particular circumstances – namely if the tenders submitted contain an absolutely homogenous offer due to very detailed specifications.[23] In this case, other relevant aspects, such as quality, delivery date and delivery period, running costs, service or warranty conditions would be pushed into the background.[24] But having a closer look at the rulings of the OLG Düsseldorf, the first signs of an adaption to the predominating German caselaw may be observed. In its more recent decisions, the court made reference to Art. 53 Directive 2004/18 as well as to the *Sintesi*-judgment of the

21. See only: VK Bund of 04.03.2008, VK 2-19/08; OLG Naumburg of 05.12.2008, 1 Verg 9/08; OLG München of 20.05.2010 – Verg 04/10; OLG Schleswig of 15.04.2011-1 Verg 10/10; very detailed: OLG Frankfurt a.M. of 05.06.2012-11 Verg 4/12; see further the various examples provided by: R. Weyand, *Praxiskommentar Vergaberecht*, 3rd ed., C.H. Beck Verlag, München 2011, § 97 GWB fn. 1257.
22. O. Otting, In: R. Bechthold*, Kartellgesetz: GWB*, 6th ed., C.H. Beck Verlag, München 2010, § 97 GWB fn. 54; A. Boesen, *Vergaberecht, Kommentar zum 4. Teil des GWB*, Bundesanzeiger Verlag, Berlin, 2000, § 97 GWB fn. 144; M. Diehr, in: O. Reidt/T. Stickler/H. Glahs (eds.), *Vergaberecht,* 3rd ed., Dr. Otto Schmidt, Köln 2011, § 97 GWB fn. 106 (speaking of a "tradition" in German procurement law; unclear: J. Ziekow, In: J. Ziekow/U-C. Völlink (eds.), *Vergaberecht*, C.H. Beck Verlag, München, 2011, § 97 GWB fn. 107.
23. OLG Düsseldorf of 02.05.2007, VII-Verg 1/07; OLG Düsseldorf of 09.02.2009, VII-Verg 66/08; OLG Düsseldorf of 09.12.2009, VII-Verg 37/09.
24. OLG Düsseldorf of 09.12.2009, VII-Verg 37/09.

ECJ and held out that "at least" in case of homogenous offers, the duty of interpreting the national law in conformity with European provision would hinder the inadmissibility of the lowest price as sole award criterion.[25]

3.2. The use of the lowest price in practice

Having learned under 3.1. that the choice of the award criteria is dependent on the "trias" of specifications, the characteristics as well as the complexity of the contract in question and an indication in the contract notice, the lowest price criterion has been widely used for the purchase of standardized and homogeneous goods,[26] such as pencils or office furniture, for example. The more specified and standardized the product to be purchased, the better as regards the use of the lowest price-criterion.

Once the price has been chosen, it has binding force for the contracting authority: other criteria cannot be considered any more. Plus, the tender with the lowest price is imperative in the sense that there is no tolerance to pick the tender with the second lowest price even if the difference in price is marginal.[27]

The advantage of the lowest price-criterion clearly is that contracting authorities can base the award on the price only without being obliged to "invent" new or other criteria and without the obligation to weight the criterion or describe it further. The criterion clearly speaks for itself.[28] And given the overall legal complexity of public award procedures, contracting authorities understandably have a very strong interest in using such easy and neutral criteria in praxis.

But despite its general advantages, the lowest price loses its attractiveness and importance with rising complexity of the contracts and the moment special know-how is needed. Therefore, the price cannot be picked as the only award criterion if public contracts relate for example to architecture or engineering services, which cannot be described in detail beforehand. The purchase of particularly complex contracts is rather destined for the criterion of the most economically advantageous tender only, which is one reason why the competitive dialogue is made only on the MEAT-criterion.

25. OLG Düsseldorf of 09.02.2009, VII-Verg 66/08.
26. R. Weyand, *Praxiskommentar Vergaberecht*, 3rd ed., C.H. Beck Verlag, München 2011, § 97 GWB fn. 1068.
27. R. Weyand, *Praxiskommentar Vergaberecht*, 3rd ed., C.H. Beck Verlag, München 2011, § § 97 GWB fn. 1071 f.
28. At the same time, the objectivity and comprehensibility of the criterion enables tenderers to seek full review in front of courts and guarantees that procurement procedures are conducted fairly.

In other areas, the contracting authority is prevented from basing the award on the lowest price because there simply is no real price competition on the respective market (book-price-binding).

In addition, it needs to be kept in mind that the lowest price leaves no room for the integration of secondary considerations. And with various political, green and social criteria having gained tremendous importance over the last few years, the use of the lowest price is very likely to decrease in the future. It is exactly due to these circumstances that the discussion about the admissibility of the lowest price is fought so heatedly today.

3.3. The calculation of the lowest price

The lowest price is generally calculated with reference to the total price of the contract instead of its single components. This method is preferable as a relatively low price for a single component of the product, works or service offered does not automatically justify the assumption that the tender is also the most economically advantageous from the overall view. A single component of the tender might be very low, but the low price regarding one aspect of the service might be compensated due to a relatively high price of another element of the contract.

Nevertheless, tenderers are still obliged to give each element of the contract a price as the contracting authority needs to examine the tender regarding the plausibility of the total price and enable the latter to identify abnormally low tenders (see under 7.). In deviation from this general rule, single components need not to be priced under certain conditions (see under 6.).

3.4. Tenders equal in pricing

In single cases, it may happen that all tenders submitted are totally equal regarding their prices. With the price being the sole award criterion, there are, of course, no other criteria that can alternatively be employed for selecting the winning tender.

As a matter of fact, the German procurement system does not provide for a special solution in case of a tie (in prices). The only approach available and developed by caselaw and procurement praxis is to decide about the final tender by lot. The VK Arnsberg considered this procedure as the best and probably most objective way to pick a tender while guaranteeing that the award procedure is terminated without a review procedure close at hand.[29]

29. VK Arnsberg of 26.07.2004, VK 2-12/2004.

3.5. Procedures for awards on the basis of the lowest price

Neither the European Directive nor the German norms on award criteria differentiate between the procurement procedures available for contract awards on the basis of the lowest price and those to the most economically advantageous tender. Quite the contrary, the procedures are largely (with exclusion of the norms governing the duties of transparency, calculation and weighting) the same. Correspondingly, the installation of the price does not involve extra workload for the contracting authority. The weighting procedure and the comparability of the price is actually easier compared to the establishment of the most economically advantageous-tender. This is because the price is, firstly, an objective criterion and, secondly, does not create a margin of discretion that is not fully open to legal review.

Nevertheless, there is *one* distinct procedural peculiarity with respect to the lowest price-criterion: In the recent past, the admissibility of the lowest price criterion has been heatedly discussed in the context of variants.[30] Some voices in German jurisdiction opined that contracting authorities are generally free to request variants irrespective of the award criterion used.[31] They refer to the wording of § § 9 V VOL/A-EC, 8 II No. 3 VOB/A-EC which generally enable the purchaser to request variants without drawing difference between the award criteria used.

Stressing the clear wording of Art. 24 of Directive 2004/18/EC, the OLG Düsseldorf, however, repeatedly insisted that variants are simply admissible in case of contracts awarded to the most economically advantageous tender.[32]

These decisions deserve applause as they rightly acknowledged that the purpose of submitting variants is rather to offer better-quality solutions which the contracting authority has not thought about, than to give tenderers the possibility to hand in two tenders with different prices fostering dumping.

Therefore, it needs to be stressed that – in compliance with European procurement law – variants are inadmissible if the tender is made to the lowest price.

30. For more information on the following discussion and on variants in the German procurement system, see: F. Koch, *Flexibilisierungspotenziale im Vergabeverfahren*, Nomos Verlag, Baden-Baden 2013.
31. See inter alia OLG Koblenz of 26.07.2010, 1 Verg 6/10 and OLG Celle of 03.06.2010, 3 Verg 6/10, ZfBR 2010, p. 75.
32. OLG Düsseldorf of 02.11.2011, VII-Verg 22/11, NZBau 2012, p. 194; OLG Düsseldorf of 18.10.2010, Verg 39/10, ZfBR 2010, p. 206; also see: VK Thüringen of 29.06.2011, 250-4002.20-2591/2011-E-004-EF, ZfBR 2011, p. 727.

4. Most economically advantageous tender (MEAT)

4.1. Award criteria

As known, Article 53 I lit. a) Directive 2004/18/EC sets the normative basis for award criteria. It entails a non-exhaustive ("for example") list of criteria linked to the subject-matter of the public contract that can be chosen from for the establishment of the most economically advantageous tender. Art. 53 I lit. a) explicitly lists "*quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion*".

The German legislator opted for a transposition 1:1. While § 97 V GWB only dictates that the award is made to the most economically advantageous tender, § 19 IX of the VOL/A-EC, consistent with § 16 VII VOB/A-EC, elaborates further on the award criteria. These provisions enlist exactly the same criteria as the Directive, meaning that the norms are identical in wording.

On the basis of the mentioned list, particularly the intensified consideration of environmental characteristics as award criterion has been forced by the German legislator on the federal level. In transposition of Directive 2010/30/EU on the indication by labeling and standard product information of the consumption of energy and other resources by energy-related products, the obligation that where energy-related products are procured, contracting authorities need to generally procure goods complying with the criterion "highest energy efficient class" was included in § 4 IV 2 VgV. Against this background, the legislators in some Länder supported this intention, e.g. by stipulating that further environmental criteria shall be considered when it comes down to identifying the most economically advantageous tender.[33] Contracting authorities are therefore instructed to apply life-cycle-costing: The most economically advantageous tender needs to be identified through the execution of a life-cycle-cost-analysis on the premise that such an analysis is possible with view to the subject-matter of the contract in question.

It generally has to be noted that the lists in both provisions are exemplary and not closed to the consequence that contracting authorities can literally draw on unlimited resources and choose out of a potpourri of different MEAT-criteria" – *nota bene* if the criteria are linked to the subject-matter of the contract, if they comply with the procurement principles and help to identify the most economically advantageous tender. However, these "new" crite-

33. See e.g. the explicit wording in § 17 VII TVgG-North-Rhine-Westphalia.

ria do not need to relate to monetary or economic aspects. In practice, additional criteria that have been spelt out by caselaw range from "creative aim" to "capacity", "rapidness", "demonstration and presentation",[34] "telephonic availability" or "proximity to the location".

4.2. Relevance of price in MEAT

As already mentioned under 3., the contracting authority can attach great importance to the price-criterion and mostly does so in case of detailed specifications or the procurement of standardized products. As regards extraordinary complex purchases, however, the contracting authority is more inclined to base the award on the most economically advantageous tender. Here, the contracting authority is likely to weight the quality criterion considerably higher than the price, oftentimes with 70 % or more as a high-standard performance is sought.[35]

Against some voices in German jurisprudence,[36] there is no such rule saying that the price needs to factor in with at least 30 % in every award procedure that is made to the most economically advantageous tender.[37] Correspondingly, there is no guess that if the weighting of the price falls short of the 30 %-limit, the award procedure is faulty.[38] As long as the price is considered among other criteria, the contracting authority is free to choose each and every percentage factor between "not marginal" and 100 %.[39] This offers the opportunity to pick tenders that are expensive but offer an outstanding quality, for example. At the same time, contracting authorities are left with enough discretion to take into consideration their financial situation.[40]

If the contracting authority finds that all tenders submitted and found suitable are equal as regards their quality, their life-cycle-costing, their aesthetic

34. Ziekow, In: J. Ziekow/U-C. Völlink (eds.), *Vergaberecht*, C.H. Beck Verlag, München 2011, § 97 GWB fn. 183.
35. R. Weyand, *Praxiskommentar Vergaberecht*, 3rd ed., C.H. Beck Verlag, München 2011, § 97 GWB fn. 1078.
36. VK Sachsen of 7.5.2007, 1/SVK/027-07; 2. VK Bund of 10.06.2005, VK 2-36/05; OLG Dresden of 05.01.2001, WVerg 11/00, WVerg 12/00.
37. R. Weyand, *Praxiskommentar Vergaberecht*, 3rd ed., C.H. Beck Verlag, München 2011, § 97 GWB fn. 1075.
38. Different: OLG Dresden of 05.01.2001, WVerg 11/00 and 12/00.
39. VK Lüneburg of 13.05.2002, 203-VgK-07/2002 having accepted a weighting of the price of 75 %.
40. R. Weyand, *Praxiskommentar Vergaberecht*, 3rd ed., C.H. Beck Verlag, München 2011, § 97 GWB fn. 1269.

or their technical merit, the price becomes the dominant factor again.[41] If the tenders are also equal in pricing, the contracting authority is – for once allowed – to select the most economically advantageous tender by way of a lot procedure.[42] What about the possibility of using MEAT without the price criterion? Is it allowed?

4.3. The weighting of MEAT

When it comes down to the final decision which tender is most economically advantageous, the contracting authority generally enjoys a wide margin of discretion – in many ways. First, the contracting authority can decide about the decisive criteria (see 4.1) and relevant sub-criteria (see under 4.5).

To the same extent that the contracting authority enjoys freedom regarding which criteria serve the purpose of identifying the most economically advantageous tender, the public purchaser can (and must) also specify their importance (weighting) in the concrete contract award procedure, so that all tenderers know about all the decisive facts the award decision is based on.

In just the same way as the Directive, the German norms stay silent on the possible ways the weighting is established. This matter has been solved by practitioners. In the IT-sector, the procurement agency of the Federal Ministry of the Interior regularly publishes a sheet demonstrating different possible formulas for the weighting of the tenders (so-called UfAB V-sheet for procurement and weighting of IT-services). So far, the suggested weighting systems have been accepted by German caselaw.

The possibilities for the establishment of weighting systems are indeed multiple: the contracting authority might evaluate the tenders individually or compare tenders, it might work with a mathematical matrix or, more simply, with a point method.

Depending on the complexity of the criteria and their weighting, contracting authorities occasionally deploy very elaborate weighting systems. This is especially true in case of ppp-projects and complex IT-system-contracts. Often, the contracting authorities work with a matrix providing criteria, sub-criteria and sub-sub-criteria including point-systems and calculation formulas.[43] Taking recourse to the judgment of the ECJ, the OLG Düsseldorf[44] rightly

41. BGH of 11.03.2008, X ZR 134/05; OLG Stuttgart of 30.04.2007, 5 U 4/06.
42. VK Düsseldorf of 22.7.2002, VK-19/2002-L stressed that the decision by lot is a measure of "ultima ratio".
43. F. Roth, 'Methodik und Bekanntgabe von Wertungsverfahren zur Ermittlung des wirtschaftlichsten Angebots', NZBau 2011, p. 75.
44. OLG Düsseldorf of 30.07.2009, VII-Verg 10/09, ZfBR 2010, p. 105.

found that the contracting authority is not obliged to develop such a complex weighting system. First, this can easily be impractical, especially if the procured good is standardized. Furthermore, each procurement procedure has a decisionistic moment that simply cannot be overcome, not even through a meticulous spallation.

The UfBA sheet suggests to rank the tenders according to their price-performance ratio. This method is known as the so-called easy-guiding-value-method (einfache Richtwertmethode).[45] The price-performance ratio of each tender can be identified through a limited point-system (1-10 points per criterion and sub-criterion) according to which the bidder with the lowest price and the best quality is granted maximum points. Of course, the quality or performance must be mirrored in points first which is a task lying in the discretion of the contracting authority.

After the contracting authority has distributed the points, the tenders are ranked according to them.

Alternatively, the contracting authority can measure the distance of each tender from the tender with the lowest price or the best quality and award points relating to the specific distance of the tender in the respective categories "price" or "quality". According to this method, each tender is directly compared with other tenders in the competition. This means, for example, that the lowest price will be granted the highest points (10) while all other tenders have to accept linear point reductions mirroring the distance to the lowest price.

Giving an example basing on the easy guiding value method of the UfAB:

> Tenderer A gets 9000 points for performance and 9000 points for the price offered. The ascertained price-performance ratio is 100. Tenderer B gets the same ratio although he is attributed only 3000 points each for performance and price.
>
> This simple example directly demonstrates the weakness of this formula as it may happen that a very expensive but high-performance tender is considered as economically advantageous as a very cheap tender offering low-performance.

In consequence, the easy guiding value method has been slightly modified in the sense that all tenders within a fluctuation margin (e.g. 10 %) are generally considered equal.[46] Then the contracting authority makes its final decision on the basis of criteria that have been previously brought to the tenderer's atten-

45. W. Bartsch/V. Gehlen/H. Hirsch, 'Mit Preisgewichtung vorbei am wirtschaftlichsten Angebot?', NZBau 2012, p. 393 (395 f.).
46. W. Bartsch/V. Gehlen/H. Hirsch, 'Mit Preisgewichtung vorbei am wirtschaftlichsten Angebot?', NZBau 2012, p. 393 (395 f.).

tion. This way, the contracting authority can give preference to the price, the overall performance or the performance as regards single aspects of the tender. In case of parity, the contracting authority needs to establish a method that explains how to finally determine the economically most advantageous tender.[47]

Despite the general admissibility of the easy guiding value method, contracting authorities intend to weight the price or the performance. As prices are weighed in money, while aspects of performance can be embodied through points, the prices need to be converted into points as well. If compatible with the general procurement principles, the entities generally enjoy a wide margin of discretion when deciding for a concrete weighting system. In the light of this, German jurisdiction seems to be rather reluctant in rejecting once applied weighting systems – except in cases of an infringement of disclosure requirements.

In procurement practice, this has led to a broad variety of weighting systems differing from entity to entity, allowing for the authorities to establish a method perfectly tailored to their particular needs. To give an example, the UfBA-II-method suggests the following:[48]

MEAT= weighting performance x (performance of the tender/best performance of all tenders) + weighting price (price of the tender/lowest price of all tenders).

This method is entirely dependent on extremes and therefore does not fully consider that the lowest price might just be an outlier.

Alternatively, as the relative price-point-method (RPPM) envisions, the tender with the lowest price is attributed full points, while the tender with the highest price gains 0 points. On this basis, the following formula has been introduced:

MEAT= weighting performance x (performance of the tender/performance of the best tender) + (highest price minus price of the tender/highest price of all tenders – lowest price of all tenders).

According to the third formula, the weighted median method (MED), which has been published by the UfAB-working group in summer 2011, the

47. In the State of Mecklenburg-Vorpommern, the law on the procurement of public contracts in Mecklenburg-Vorpommern (VgG M-V) of 07.07.2011, GVOBl. M-V 2011, S. 411 requires in § 7 V that if there is no difference between the tenders as regards quality and other MEAT-criteria, the lowest price shall be decisive.
48. See the formulas: W. Bartsch/V. Gehlen/H. Hirsch, 'Mit Preisgewichtung vorbei am wirtschaftlichsten Angebot?, NZBau 2012, p. 393 (395 f.).

contracting authority might as well operate with medians for the price and the performance of the tenders.

NOTE: this paragraph only refers to the UfAB criteria, set for IT procurements. Are they considered as general criteria? If not, is it possible to refer to case law as for criteria in other sectors of public procurements?

4.4. Weighting not held possible

In some cases, contracting authorities claim that the prior weighting of the criteria is not possible. German review bodies are generally reluctant to accept this allegation as the European legislator made clear that the weighting of the criteria is essential. Therefore, they grant a deviation only under very strict circumstances.

In this case, § 9 II 2 VOL/A-EC states: "Where, in the opinion of the contracting authorities, weighting is not possible for demonstrable reasons, the contracting authorities shall indicate the criteria in descending order of importance."

In this regard, the VOL/A-EC is compatible with the European approach enshrined in Art. 53 II subpara 3 of Directive 2004/18/EC. Everything else would question the principle of transparency for tenders, who would not know about the relevance of the award criteria and therefore could not control the award decision.

Furthermore, the principle of ex-post transparency requires that the reasons for the decision or the incapability not to weigh the criteria need to be recorded in detail in the tender documents so as to enable the tenders to seek efficient review.[49]

Regarding the exact reasons, German review bodies accepted the complexity of the contract as a justification, e.g. as is mostly the case in competitive dialogue procedures. Furthermore, the mere indication of the order of importance was held sufficient if the details of the specifications were unclear at the beginning of the award procedure.[50] Time problems or the general incapability due to a lack of knowledge were not accepted in jurisprudence.[51]

4.5. Adjustment or change of award criteria

Visibly under the influence of the transparency principle, some German Courts stipulate that the contracting authority is not only held to name the de-

49. Ziekow, in: J. Ziekow/U-C. Völlink (eds.), *Vergaberecht*, C.H. Beck Verlag, München 2011, § 97 GWB fn.189.
50. VK Nordbayern of 16.04.2008, 21. VK-3194-14/08.
51. OLG Düsseldorf of 23.01.2008, VII-Verg 31/07.

cisive criteria (such as quality, environmental characteristics or technical merit) but also obliged to concretize these further by giving sub-criteria. According to their view, the contracting authority needs to previously bring all sub-criteria that are used to the tenderer's attention so that the decision about the participation in the competition can be made. It is not necessary, however, to define each and every sub-criterion in detail. In German procurement praxis "quality" in the context of a procurement procedure for beverages can be specified through sensory-related sub-criteria, among them "colour", "taste", "smell", "complexion" and "harmony", for instance. Another generally accepted sub-criterion for quality is "percentage of employees that are subject to social insurance contribution".

According to the clear national rules in § 19 VIII VOL/A-EC and § 16 VII VOB/A-EC, the adjustment or change of once cited award criteria or sub-criteria is inadmissible. The decision of the Award Chamber of the Federal Government,[52] which is sometimes cited in this context, is in fact the only ruling apparently dealing with this issue, but neither questions this principle.

4.6. Communication of weighting rules

As the ECJ has stressed repeatedly, all potential tenderers need to be sufficiently aware of the applied award criteria as well as their relative importance when they prepare their tenders. Consequently, it is seized that a contracting authority cannot apply weighting rules, which it has not previously brought to the tenderer's attention. The duty to indicate the weighting of the criteria is explicitly stressed in § § 16 VII VOB/A-EC, 9 II VOL/A-EC. These obligations of transparency are held necessary in order to prevent manipulation and arbitrary decisions and enable tenderers to seek efficient review. Only then tenderers are placed on an equal footing throughout the procedure which is in itself the guarantee for a fair and equal competition. In the event of using a complex mathematical formula, the indication of the individual weighting of each criterion may not enable the tenderer to estimate the relative importance of the respective criterion in advance. Considering the protective purpose of the communication requirements, the contracting authority needs to openly explain the applied mathematical matrix or point system including the rules on how to convert the price into points in these cases.[53]

52. VK Bund of 04.05.2005, VK 3-25/05.
53. See: R. Weyand, *Praxiskommentar Vergaberecht*, 3rd ed., C.H. Beck Verlag, München 2011, § 97 GWB fn. 1075, referring to: VK Bund of 20.03.2009, VK 3-34/09; VK Bund of 20.03.2009, VK 3-22/09; VK Bund of 23.01.2009, VK 3-194/08.

Let it be understood, however, that the tenderers still have no subjective right to demand a particular weighting system, especially no right that the system that is most beneficial for them is used.

4.7. Adjustment of weighting criteria

As well as in the case of the award criteria themselves, an adjustment or change of the notified weighting is prohibited by the same legal provisions. According to the national jurisprudence,[54] solely the weighting coefficients to be applied on sub-criteria may be adjusted after invitation to tender but prior to the opening of the tenders under certain conditions, that correspond exactly to the requirement stated in various arbitrations of the ECJ.[55]

5. Procedure for evaluating MEAT, transparency and judicial review

5.1. Competency

It is the innate task of the contracting authority itself to evaluate the tenders submitted and finally identify the tender that is most economically advantageous.[56] Nevertheless, this concept does not in general prevent the public purchaser from including specialists, e.g. engineering consultants or project control managers as regards the evaluation and selection of the best tender. As a matter of fact, the contracting authority oftentimes, especially in complex matters, cannot evaluate the tenders without the help of experts.

The neuralgic point to be highlighted is that the responsibility for the final choice must be left with the contracting authority who is the "master of the procedure". It is therefore considered inadmissible if the contracting authority tries to dissociate from its tasks of evaluation by simply following the expert's opinion without making own efforts. The contracting authority cannot solely rely on the expertise of the specialist or the engineer's opinion. The of-

54. OLG München of 19.03.2009, Verg 2/09, NZBau 2009, p. 341 (342 f.); OLG Düsseldorf of 23.01.2008, VII-Verg 31/07, Verg 31/07, IBR 2008, p. 354.
55. ECJ of 24.01.2008, C-532/06, NZBau 2008, p. 262 (264); ECJ of 24.11.2005, C-331/04, NZBau 2006, p. 193 (194).
56. B. Ruhland In: H. Pünder/M. Schellenberg (eds.), *Vergaberecht*, Nomos Verlag, Baden-Baden, 2011) § 16 VOB/A fn. 54; OLG München, NZBau 2006, p. 472; OLG München of 29.09.2009, Verg 12/09, IBR 2009, p. 723.

ficial approval and reference to the expertise does not suffice.[57] Instead, the contracting authority must – at least – deal with the topic itself in an absorbed manner, consider the expert's recommendation thoroughly and document the main reasons for either following or not following the suggestions in the expertise.

5.2. Use of MEAT in e-auctions

Although the procurement provisions of the European Directives cannot be considered modern and unbureaucratic for most parts, European legislation did not completely fail to create a flexible procurement law. In fact, the rules on electronic auctions form an integral part of a more modern approach to procurement law. Having detected the inflexibility and cumbersomeness of the Directives, the European Commission itself tried to break new ground with its latest draft for a procurement Directive. Despite all the frequently criticised shortcomings of its details,[58] the draft paves the way for a more praxis-oriented and variable European procurement law. Amongst others, the so-called toolbox approach nourishes the hope for procurement procedures in which contracting authorities can operate via more modern and more flexible instruments. According to the current version of the draft for the Directive, electronic auctions will remain of utmost importance and are therefore considered an essential element of the toolbox approach.

Given this situation, it is justified to shed some light on electronic auctions in the German procurement system.

Art. 54 (1) of Directive 2004/18 puts the introduction of the electronic auction procedure into the discretion of the Member States.[59] The German legislator generally opted *for* the adoption of electronic auctions when implementing, § 101 VI 1 GWB providing for the use of electronic auctions within award procedures: *"An electronic auction serves to determine electronically the most economically advantageous tender. A dynamic electronic procedure is an open time-limited and completely electronic award proce-*

57. M. Fehling In: H. Pünder/M. Schellenberg (eds.), *Vergaberecht*, Nomos Verlag, Baden-Baden, 2011§ 97 GWB fn. 190; different: B. Ruhland In: H. Pünder/M. Schellenberg (eds.), *Vergaberecht*, Nomos Verlag, Baden-Baden 2011, § 16 VOB/A fn. 54.
58. See for example the criticism regarding in-house and horizontal cooperations (Art. 11 of the Commission's proposal for a new Public Procurement Directive), M. Burgi/F. Koch, 'In-House and Horizontal Cooperation Between Public Authorities', EPPL 2012, p. 86 ff.
59. T. Maibaum, in: H.-W. Behrens/O. Hattig/T. Maibaum (eds.), *Praxiskommentar Vergaberecht*, Bundeanzeiger Verlag, Berlin 2010, § 101 GWB fn. 78.

dure for the procurement of services which are customary on the market, where the specifications generally available on the market meet the requirements of the contracting entity."

Corresponding to the German procurement regulation system, Art. 5 VOL/A-EC is concretizing this general provision, particularly by listing the conditions which must be met for its admissibility. In this regard, it is noteworthy that the possibility of a *"dynamic electronic procedure"* developed as additional form of procedure but simply set up as special form of open procedure adhering as a consequence largely to the general rules governing the latter.

As the introduction of electronic auctions in the GWB as well as in the VOL/A can only be seen as a small part of a large reform of German procurement legislation, it is surprising that the simultaneous revision of the corresponding provisions in the VOB/A and the VOF did include such an adaption. As a consequence, a detailed legislation is neither existing for the procurement of works nor for the procurement of freelance services.

Given this, it comes as no surprise that contracting authorities in Germany currently do not use this procedure at all. And as electronic auctions are an optional instrument, there is no space for an analogy or a Directive-conform-interpretation either.[60] Despite the wording of § 101 VI 1 GWB, electronic auctions are practically non-existent in German procurement law!

The reasons for this approach are simple, though not comprehensible when judging from the competition-driven European perspective. First suspicions against the electronic auction procedure have been raised in 2008 by the German Federal Council.[61] It was concerned that the electronic auctions procedure could be used as an instrument negatively affecting small and middle-sized enterprises.[62] Furthermore, with the concept of reverse auctions allowing for substantial price changes, the Council also saw a serious danger of a ruinous price competition to the detriment of quality and broad competition.

5.3. Measures to prevent abuse

The award criterion of the most economically advantageous tender introduces a notable margin of discretion. As a matter of fact, there are different margins

60. See the judgment of the VK Nordbayern of 09.09.2008, 21. VK-3194-42/08.
61. Federal Council of 13.8.2008, Draft on the Modernisation of Procurement Law, BT-Drs. 16/10117, p. 30 f.
62. The competent body for the contents of the VOL/A, justified its decision against the implementation of electronic auctions with the protection of the interests of small and medium-sized enterprises as well.

of discretion opened up in favour of the contracting authority. Firstly, the contracting authority decides about the award criteria and possible sub-criteria. Secondly, the weighting itself establishes a freedom of decision. Thirdly, a significant scope of judgment is inaugurated regarding the evaluation.[63]

Against this background, the risk for abuse and arbitrary decisions is understandably higher compared to contract awards that are granted to the tenderer offering the lowest price as a rather neutral and objective criterion.

It is noteworthy that German procurement law does not entail any concrete imperatives to prevent abuse, arbitrariness or manipulation on the award stage. Accepting the discretion granted to the contracting entities, their decision is only subject to limited scrutiny by German courts. But let it be understood that the German system still provides for effective mechanisms to avoid abuses. Concretely, German case law regarding procedural and application provisions for once determined criteria is rather strict and lays focus on the adherence to the fundamental procurement principles, which contain several important guidelines ensuring that the risks of unfair competition are minimized as much as possible.

Reiterating the explanations under 4.5., German case law requires – under influence of the rulings of the ECJ – that all potential tenderers need to be sufficiently aware of the applied award criteria, possible sub-criteria as well as their relative importance when they prepare their tenders. Consequently, contracting authorities are obliged to previously bring the award criteria to the tenderers' attention. Plus, the weighting system used has to be communicated as well.

In line with European requirements and adhering to the principles of congruency and continuity, the German concept of award criteria also stipulates that the award criteria that have been named – be it the quality or the price – need to stay unchanged until the final award decision (self-binding).[64] The weighting of the criteria is not amenable for change as well.[65] Furthermore, § 24 II VOL/A-EC (and in spite of different wording, correspondingly § 20 I VOB/A-EC) obliges the contracting authority to document the reasons for several decisions taken during the procurement procedure, e.g.:

63. M. Fehling In: H. Pünder/M. Schellenberg (eds.), *Vergaberecht*, Nomos Verlag, Baden-Baden 2011, § 97 GWB fn. 194.
64. VK Sachsen of 15.08.2002, 1/SVK/075, ZfBR 2002, p. 836.
65. ECJ of 18.11.2010, Case C-226/09, ZfBR 2011, p. 96; ECJ of 24.01.2008, Case C-532/06-*Lianakis*, NZBau 2008, p. 262.

"(...)
b. the names of the candidates or tenderers taken into account and the reasons for their selection,
c. the names of the candidates or tenderers not taken into account and the reasons for their rejection,
d. the reasons for the rejection of abnormally low tenders,
(...)
j. the reasons for not providing information on the weighting of award criteria."

What is more, the award criteria that can be chosen need to be linked to the subject matter of the contract which directly ensures that the procurement principle of non-discrimination is being adhered to.[66]

All these rules guarantee that the contracting authority won't base its decision on arbitrary reasons and that tenderers are enabled to check for themselves whether the contracting authority sticks to its self-given rules. And in case of doubt, the German review chambers and OLG's (Higher Federal Chambers) possess a firm basis to screen the award procedure for failure.

5.4. Opening of the tenders

§ 17 VOL/A-EC comprehensively governs the procedure regarding the opening of the envelopes of tenders,

"1. Tenders conveyed by postal and direct delivery must be left unopened, provided with a file mark and kept under seal until the date of opening. Electronic tenders must be appropriately marked and kept in encrypted form. Tenders submitted by fax must also be given a suitable file mark and held under seal in a suitable way.
2. The opening of the tenders shall be conducted and documented jointly by at least two representatives of the contracting authority. Tenderers may not be present. A record shall be made at least of:
a. the name and address of the tenderers,
b. the final amounts of their tenders and other information concerning the price,
c. whether alternative tenders have been submitted and by whom.
3. The tenders and their annexes as well as the documentation on opening of tender must also be kept safe and confidential after completion of the award procedure."

§ 14 VOB/A-EC even goes slightly beyond the transparency and confidentiality rules enshrined in this norm by not only obliging the contracting authority to document the opening ceremony granting a right to inspect the recorded

66. M. Fehling In: H. Pünder/M. Schellenberg (eds.), *Vergaberecht*, Nomos Verlag, Baden-Baden 2011, § 97 GWB fn. 192.

documents but also enabling bidders to be present the moment the tenders are being opened.

Despitethis, German procurement law does not draw any difference regarding the content of the tender in such a way that the technical contents of the tender are opened earlier or later than its financial contents or vice versa. Neither § 17 VOL/A-EC, nor § 14 VOB/A-EC contains any information at all about the contents of the tender.

5.5. Review of the award decision

As already stated, the price is an objective criterion and therefore its weighting does not create a margin of discretion. Consequently, the award to the lowest price is fully amenable to review. Given this and notable financial and budgetary restraints in most municipalities, it is understandable that the price generally enjoys a very high if not the highest importance.[67]

Contrary to this, legal review is limited in case the award is granted to the most economically advantageous tender. This is because the overall colourful list of possible criteria confers to the contracting authority a wide margin of discretion (see 5.3.). They are rather entitled to simply control whether the contracting authority decided fairly and whether the decision can be justified as the term "most economically advantageous" by nature introduces multiple ways of decision.[68]

In concreto, the review bodies might check the following:

- whether the contracting authority based its decision on the wrong or incomplete facts,
- whether procedural norms have been adhered to,
- whether the decisions are not fungible,
- whether the information was used in breach of confidentiality,
- whether the principles of equal treatment, transparency and non-discrimination have been adhered to,
- whether common parameters of assessment have not been adhered to.

The wideness of the margin of discretion, however, can differ dramatically depending on the importance of the price in relation to the other award criteria (quality, aesthetic, life-cycle-costing etc.).

67. OLG Düsseldorf of 21.04.2009, Z 3-3-3194-1-09-02/09 and of 28.4.2008, VII-Verg 1/08.
68. VK Bund of 05.08.2005, VK 1-83/05; VK Schleswig-Holstein of 11.2.2010, VK-SH 29/09.

The more important the price, the more intense legal control.

5.6. Adjustment of award criteria by the review body

Given the aforementioned, the review body is not entitled to substitute the contracting authority's assessment decision with its own decision but has to respect the limited standard of review.

6. Reservation and rejection of non-compliant bids

The review of whether or not a submitted bid has to be rejected because of a lack of compliance with formal or substantive tender conditions has to be done at the very beginning of the four-stage examination system (see 2.1.). While the exclusion of bids due to failure on the part of the person of the tenderer at the second stage shall be at the discretion of the contracting authority, the entity is not entitled to any discretion in case of deficiencies of the submitted tender itself.[69] This is clearly provided by § 16 I Nr. 1 a)-g) VOB/A-EC and § 19 III a)-g) VOL/A-EC containing a list of exclusion criteria. It is controversial, whether those provisions are exhaustive or if the derogation from the required performance standards constitutes another, unwritten reason for exclusion (see below).

Tenders are ineligible for formal reasons, amongst others, if they have not been available at the moment of opening of tenders as well as if they do not comply with the formal specifications of the contracting entities, such as the written form or signature requirements. While there shall be made an exception of rejection due to late submission in the event that the tenderer is not responsible for the delay, there are no cases known, in which a tender was not rejected, although it was not covered in its entirety by the tenderer's signature. This is due to the fact that there will always be doubts arising with regard to the binding force of the tender, which can never be allayed by subsequent clarification.

Compared to the formal reasons of exclusion, the treatment of substantively non-compliant bids proves to be by far more diverse and more complex. Generally, the reasons for exclusion in question can be categorized in those because of a lack of price quotations respectively non-compliant price-quotations, and those concerning bids that do not correspond to the performance-related requirements as they result from the contract documents.

69. see: OLG Düsseldorf of 16.11.2005, VergabeR 2006, p. 413.

According to explicit legal provisions, a tender has to be excluded if not all required prices are indicated. This does not only cover cases of obvious gaps but also situations in which the actual costs of a position are not clear after the tenderer changed them by offsetting several positions against others as result of a mixed calculation. It should be noted that the conditions for a rejection according to this provision primarily refers to the unit price. A missing overall price may be calculated from the unit-prices, as instructed by § 16 IV Nr. 1VOB/A-EC.[70]

Specific regulations exist for the rejection of variants, provided they are generally not admitted in the concrete procurement procedure or if they don't correspond to the labeling obligations. The above cited provisions state furthermore the ineligibility of tenders *"where changes or additions have been made to the contractual documents"*. The categorization of this ruling as substantive requirement will depend on its interpretation, in concrete, whether it will include all forms of deviation of the performance-related demands[71]or solely covers forms of manipulative intervention.[72] In consequence, this second opinion – limiting the understanding of "changes" to the contractual documents to cases of manipulation – might see other forms of performance-related deviations as an additional, unwritten reason of exclusion because of non-corresponding declarations that may not lead to a contract.[73] Overall, the concrete classification of those case groups is characterized by an ongoing conceptual uncertainty. There is solely general agreement about the necessary rejection of those bids as well as about the corresponding exception in case of non-compliance with technical specifications once the tenderer proves the equivalence of his proposal.

In a principle decision, the German Federal Court of Justice[74] held that bids have to be comparable with regard to any position of the contractual

70. H. Summa, In: W. Heiermann/C. Zeiss/J. Blaufuß (eds.), *Juris PraxisKommentar Vergaberecht*, 3rd ed., Juris, Saarbrücken 2011, § 16 fn. 114; different: U. Christiani, In: H. Pünder/M. Schellenberg, *Handkommentar Vergaberecht*, 1st ed., Nomos, Baden-Baden 2011, § 16 fn. 91 ff.
71. U. Christiani, In: H. Pünder/M. Schellenberg, *Handkommentar Vergaberecht*, 1st ed., Nomos Verlag, Baden-Baden 2011, § 13 fn. 65 ff; OLG Düsseldorf of 12.03.2007, VII Verg 53/06; OLG Frankfurt of 26.06.2012, 11 Verg 12/11; fundamental: BGH of 26.09.2006, X ZB 14/06.
72. M. Vavra, In: J. Ziekow/U-C. Völlink (eds.), *Vergaberecht*, Verlag C.H. Beck, München 2011, § 16 VOB/A, fn. 6; OLG Stuttgart of 09.02.2010, Az. 10 U 76/09; OLG München of 21.02.2008, IBR 2008, p.232.
73. E.g.: OLG München of 28.07.2008, Verg 10/08.
74. BGH of 18.02.2003, Az. X ZB 43/02.

specifications, but only within the limits of reasonableness. Acknowledging this principle, the jurisdiction of some high courts denied the ineligibility in the case that the non-compliant individual item would be insignificant and would not impair competition.[75] The rejection of the complete bid could accordingly not be viewed warranted with view to the competitive-orientated selection of tenderers inducing pure formalism.

The legislator has therefore reacted in 2009 with the enactment of a new exceptional provision, prohibiting the rejection of bids with reference to the possibility of subsequent request under the same conditions, but restricting it to cases in which only one single price quotation is missing.[76] In this respect, critical voices are increasingly heard speaking out against the admission of further exceptions as developed by the former jurisdiction.[77]

The crucial point in European, as well as in German procurement practice is the possibility or even the obligation to avoid the rejection of a non-compliant bid by gaining access to clarification.

In § 19 II VOL/A-EC,[78] it is prescribed by law that "Declarations and evidence that are not submitted before expiry of the tender submission time limit as requested by the contracting authorities can be subsequently requested within an extended time limit to be determined". Beside the suitability of the tenderer itself, this mainly relates to declarations and evidence of the eligibility of variants and proposals that are not compliant with technical specifications. The contracting entities are not allowed to reject the bid before placing a request,[79] while they have to once the deadline expires.[80]

Another obligation to seek clarification applies when there are only doubts existing whether the bid is non-compliant, particularly in case of suspected offsetting. Although the subsequent disclosure of the calculation basis may

75. OLG Celle of 02.10.2008, 13, Verg 4/08; OLG Schleswig of 10.03.2006, 1 (6) Verg 13/05; OLG Jena of 08.04.2003, 6 Verg 1/03.
76. Detailed analysis provided by: M. Vavra, in: J. Ziekow/U-C. Völlink (eds.), *Vergaberecht*, Verlag C.H. Beck, München 2011, § 16 VOB/A, fn. 13.
77. See: H. Summa, In: W. Heiermann/C. Zeiss/J. Blaufuß (eds.), *Juris PraxisKommentar Vergaberecht*, 3rd ed., Juris, Saarbrücken 2011, § 16 fn. 114.
78. In accordance with the similarly formulated § 16 II VOB/A-EC.
79. In spite of the different wording in § 16 II 1 VOL/A and § 19 II 1 VOL/A-EC leaving the decision to the discretion of the contracting entities, this discretion will regularly be reduced.
80. See in detail: U. Christiani, In: H. Pünder/M. Schellenberg, *Handkommentar Vergaberecht*, 1st ed., Nomos, Baden-Baden 2011, § 16 fn. 43.

not change the fact that the actual price quotations are missing, it can clarify the suspicion.[81]

The general opportunity to seek contact with the tenderer results from § 15 VOB/A-EC resp. § 18 VOL/A-EC implementing the "ban on negotiations" in national law by stating: *"In invitations to tender, the contracting authorities may only request tenderers to provide information on the tender or their suitability. No negotiations may be conducted."* The scope of this provision is in the focus of the question, whether clarification can be accessed in other cases, – in respect to the ban on negotiations, primarily in the situation individual price quotations are missing.

The Higher Regional Court of Dresden[82] had to decide on a case nearly identical to "Antwerpse Bouwwerken"[83] and held in accordance with the jurisdiction of the European Court of Justice that a missing price quotation may not justify the rejection of a bid, if it is determinable by consideration of the total price and the quotation pertaining to another but identical item. Pursuant to § 133 BGB (German Civil Code) concerning the Interpretation of a declaration of intent, the court considered it as important to determine that such a conclusion will only be possible, if the resulting quotation is undoubted and if this solely arises from the content of the remaining part of the bid, so that the subsequent statement of the tenderer may only fulfill a supporting role. Although it is recognized that a tender is governed by the provisions concerning declarations of intent and that subsequent declarations may be used for interpretation,[84] the ruling has provoked criticism. The principles of equal treatment and transparency, in accordance with the above mentioned ruling of the German Federal Court of Justice,[85] would require full comparability. Furthermore, § 16 IV VOB/A generally prohibited such forms of recalculation.[86]

81. In accordance, e.g.: U. Christiani, In: H. Pünder/M. Schellenberg, *Handkommentar Vergaberecht*, 1st ed., Nomos, Baden-Baden 2011, § 16 Fn. 19; M. Müller-Wrede '*Die Behandlung von Mischkalkulationen unter besonderer Berücksichtigung der Darlegungs- und Beweislast'* NZBau 2006, p. 73 ff., p. 77 f.; BGH of 18.05.2004, X ZB 7/04.
82. OLG Dresden of 18.10.2001, IBR 2002, p. 272.
83. EuGH T-195/08.
84. OLG München of 21.02.2008; OLG Düsseldorf of 12.03.2007, VII Verg 53/06, with reference to: BGH of 07. 12. 2006, NZBau 2007, p. 241.
85. BGH of 24.5.2005- X ZR 243/02.
86. Christiani, in: H. Pünder/M. Schellenberg, *Handkommentar Vergaberecht*, 1st ed., Nomos, Baden-Baden 2011, § 16 Fn. 84; H. Summa, In: W. Heiermann/C. Zeiss/J. Blaufuß (eds.), *Juris Praxis Kommentar Vergaberecht*, 3rd ed., Juris, Saarbrücken 2011, § 16 Fn. 144.

With regard to this as well as to the numerous newly created legal provisions, there are serious doubts if this form of clarification will continue to be admissible.

7. Abnormally low tenders

7.1. No discretion for the contracting authority

After the examination of the tenderer's suitability, tenders appearing to be abnormally low need to be excluded from the procedure. Art. 55 No. 1 of Directive 2004/18/EC dictates that if, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority shall, before it may reject those tenders, request in writing details of the constituent elements of the tender, which it considers relevant. Recently, the ECJ stressed the mandatory manner of the contents in Art. 55 in its *SAG*-judgment of 29.03.2012.[87] Notably, in *SAG* the Court did not say that the requirement to investigate abnormally low tenders is conditional on the tender appearing to the contracting authority to be abnormally low, but rather simply stated that an abnormally low tender *must* be examined. While open to interpretation, this may mean that such an obligation arises regardless of whether the contracting authority noticed that the tender may be abnormally low or intended to reject it. The Court also noted that the contracting authority must provide sufficient information and seek clarification so that the tenderer is fully and effectively enabled to show that its tender is genuine.

Generally speaking, the rules governing abnormally low contracts are particularly essential as the correct and secure performance of the contract and a huge amount of money is put at risk if a contract is awarded to an abnormally low tender. In the worst case, the winning tenderer cannot complete the service due to a dumping offer. Therefore, the German legislator generally allows for the tender to be excluded from the ongoing award procedure in case of a tender being (suspected) abnormally low.[88]

The GWB itself does not entail any rules on abnormally low tenders. But on the level of the VOL/A-EC, § 19 VI mirrors the European provision by enshrining that:

87. See ECJ of 29.03.2012, Case C-599/10-*SAG ELV Slovensko*, NVwZ 2012, p. 745.
88. Although these provisions ostensibly protect the contracting authority by ensuring the fulfilment of public tasks, they also serve the protection of the tenderers in particular as they are informed about serious financial miscalculations.

"If a tender appears to be abnormally low in relation to the contractual performance to be rendered, the contracting authorities shall require the tenderer to provide an explanation. Tenders whose prices are evidently out of keeping with the contractual performance may not be awarded a contract."

In this regard, § 19 VI VOL/A-EC and Art. 55 of the Directive are identical. Tenders that have been officially ascertained abnormally low *shall* be rejected and excluded from the award procedure while both norms retain discretion as regards the actual decision whether to categorize a tender as abnormally low or not (see below).

With the rules on abnormally low prices being predominantly and practically relevant in contract awards for public works, it is more than justified to have a closer look on the procurement rules of the VOB/A as well: according to § 16 VI No. 1 VOB/A-EC, abnormally low *and* abnormally high tenders shall be excluded. In this regard, the norms of the VOB/A-EC go slightly beyond what is required on the European level for contracting authorities are also enabled to reject abnormally high contracts.

In case of doubts regarding the plausibility of the price offered, the contracting authority is obliged to seek clarification from the tender and verify the constituent elements of the tenders pursuant to § 16 VI No. 2 VOB/A-EC. In this regard, the VOB/A finds itself perfectly in line with Art. 55 para 2 of Directive 2004/18/EC as the duty for clarifications only relates to tenders appearing abnormally low. Contracting authorities suspecting a tender's pricing to be abnormally high can at least seek clarifications due to § 15 VOB/A-EC.

It should not go unnoticed that § 16 VI No. 2 VOB/A-EC and Art. 55 I Directive are not identical in wording. In fact, § 16 VI No. 2 VOB/A-EC adds that the contracting authority should seek clarification in writing for the total price or the price of single components. The contracting authority might even set an appropriate time-limit. This ensures a balance between the conflicting interests, namely those of the contracting authority and the competing tenderers in a relatively fast procurement procedure where public money is spendt efficiently and the interest of the tenderer to is forward all information necessary to understand the pricing of its tender.

In any case, the contracting authority needs to check the composition of the prices and consider the information/justification delivered by the tenderer thoroughly.

In comparison with the rules in the VOL/A-EC, the EC-part of the VOB/A is better paying heed to the wording of Art. 55 para 2 of Directive 2004/18/EC as the verification and clarification are designed as legal **obligations**. Furthermore, the clarifications need to be forwarded in writing in the sense of § 126b BGB (Civil Code). This way, the tenderer can also justify the prices

via e-mail. The *OLG Jena*[89] rightly opined that the provision obliging the contracting authority to go after necessary clarifications contains a subjective right for the tenders partaking in the award procedure. Thereby, they are enabled to seek to fully review whether the contracting authority has acted rightly according to its obligations.

7.2. Reasons for scrutinizing

In German procurement law, tenders are solely being scrutinized regarding their prices irrespective of the other award criteria applied. In terms of the VOB/A, a disproportion is not only given if the price offered for the service is particularly low and clearly resembles a dumping offer, but also if the price is astonishingly high (extortion).

7.3. General methodology

But when exactly is a tender considered abnormally low in the sense of German procurement law? In this regard, the current version of the European Directive does not contain any guidelines. The only thing certain is that the decision whether the tender needs to be categorized as abnormally low or not cannot be answered schematically. A relatively high or low price for a single component of the works offered, does not automatically justify the assumption that the tender is abnormally low and needs to be excluded from the procedure as the low price regarding one aspect of the service might well be compensated due to a relatively high price of another element of the works. In fact, there are no fixed criteria existing.[90] Nevertheless, national case law provides guidance: if the price offered does not correspond to the service offered in case of an obvious disproportion, the tender deserves to be called abnormally low.

The final decision whether a tender needs to be considered abnormally low or still "normal" regarding its prices is neither made with view to single prices offered for one element of the works or another nor to the prices of other tenders in the competition.[91] The decisive factor is the total price.[92] The

89. BauR 2000, p. 396.
90. M. Fehling In: H. Pünder/M. Schellenberg (eds.), *Vergaberecht*, Nomos Verlag, Baden-Baden, 2011, § 97 GWB fn. 182.
91. OLG Düsseldorf of 06.06.2007, Verg 8/07, NZBau 2008, p. 141; R. Kratzenberg, in: K. Vygen/ R. Kratzenberg (eds.), *VOB Kommentar,* 17th ed., Werner Verlag, Berlin 2010, § 16 VOB/A fn. 105. If the tender submitted is divided into different independent parts (which is the case of contracts with one-flats), the inappropriateness of a

decision whether the price has been reasonably calculated can take into account the average prices on the markets and/or prices in former comparable award procedures.[93]

In case law, some courts are of the opinion that a striking disproportion is given if the price or cost charged is more than 50 % lower than the average price or costs of the remaining tenders[94] while others consider a tender to be abnormally low if the price or cost charged is more than 10 % lower than the price or costs of the second lowest tender.[95]

As long as the visible deviations are technically and functionally justifiable, however, the tender is not excluded. This is the case if the prices in the respective sector changed dramatically, for example.

7.4. Abnormally low tenders due to State aid

As can be drawn from Article 55 I lit. e) and II of the Directive 2004/18/EC, a tender that appears abnormally low because it has obtained State aid, can be rejected on that ground alone only after consultation with the tenderer in case the latter is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was granted legally.

On the national level, § 19 VII VOL/A-EC (as well as § 16 VIII VOB/A-EC, widely identical in wording) unitarily names the conditions on which tenders can be rejected and dismissed from the award procedure:

"Tenders that are abnormally low due to state aid may only be rejected for this reason alone if on request the enterprise cannot provide evidence after an appropriate time limit set by the contracting authorities that the relevant financial assistance has been lawfully granted. Contracting authorities that reject an offer under these circumstances must duly notify the Commission of the European Communities."

tender can also be attested in case of disaccord of price and performance within this very part of the tender.

92. M. Fehling In: H. Pünder/M. Schellenberg (eds.), *Vergaberecht*, Nomos Verlag, Baden-Baden 2011, § 97 GWB fn. 182; OLG Celle of 08.11.2001, 13 Verg 12/01, VergabeR 2002, p. 176.
93. OLG Düsseldorf of 13.12.2006, Verg 54/06, NZBau 2007, p. 402; M. Vavra, in: J. Ziekow/U-C. Völlink (eds.), *Vergaberecht*, C.H. Beck Verlag, München 2011, § 97 GWB fn. 45 (for abnormally high tenders); OLG Celle of 08.11.2001, 13 Verg 12/01, VergabeR 2002, p. 176.
94. VK Südbayern of 10.02.2006, Z 3-3-3194-1-57-12/05.
95. M. Bungenberg, in: U. Loewenheim/K. Meessen/A. Riessenkampff, *Kartellrecht*, 2nd ed., C.H. Beck Verlag, München 2009, § 97 GWB fn. 72; M. Vavra, In: J. Ziekow/U-C. Völlink (eds.), *Vergaberecht*, C.H. Beck Verlag, München 2011, § 97 GWB fn. 45.

If a tenderer succeeds in demonstrating that the State aid has been granted legally, he stays in the competition. Otherwise, the contracting authority enjoys freedom how to proceed with the tenderer. In view of a fair competition, the rejection is generally the only consequence acceptable. A rejection may only be considered inadequate if the abnormally low price did not influence the ranking of the tenderer in the competition.

8. Conclusion

The close analysis of German public procurement system reveals a rather late developed awareness of problematic matters of award criteria. During the past years, the discussion concentrated on other topics, in particular e.g. the application of the legal provisions on the so-called in-house-procurement. Only since the European Court of Justice ruled in its famous *Lianakis*-case, the discussion has flared up again resulting in the enactment of several new and adapted legal provisions in the course of a general revision of German public procurement law. This legal system is closely orientated towards the requirements set by European Directives and ECJ caselaw, whereas there may be observed a lack of methodological ambition in literature and jurisprudence concerning the further elaboration of provisions, e.g. regarding the use of mathematical matrices. This phenomenon, among others, illustrates the efforts to preserve wide discretion to the contracting entities concerning the choice of award criteria. Provisions preventing from manipulation and arbitrary decisions, on the other hand, are to be found in the various procedural rules that ensure, due to rigorous enforcement, the necessary level of publicity so that the principles of transparency and non-discrimination are sufficiently considered without restricting the possibility of taking a competition-oriented award decision.

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5 Award of contracts covered by EU Public Procurement rules in Italy

Roberto Caranta and Mario E. Comba

1. Introduction: main features of the national system

Taking the lead from the 2004 directives, core public procurement legislation was codified in d.lgs. 12 april 2006, n. 163, a piece of delegate legislation[1] also referred to as the Codice dei contratti pubblici.[2] (henceforth the Code).

The Code brought together the rules previously found in many different pieces of legislation and updated them to the 2004 directives. It follows more or less the order found in the directives themselves, but it goes beyond them in that it also contains specific rules for below the thresholds contracts and on remedies. Some of the latter have, however, now migrated to d.lgs. 2 luglio 2010, n. 104.[3] To help procuring entities, an implementing statutory instrument was adopted with d.P.R. 5 October 2010, n. 207 (henceforth the Procurement regulation).[4]

Both the Code and the Procurement regulation do contain detailed rules on award criteria.

The above mentioned legal texts basically apply to all aspects of any procurement managed by every contracting authority in Italy. Attempts by some

1. On the delegating instrument R. Garofoli – M.A. Sandulli (curr.), *Il nuovo diritto degli appalti pubblici nella direttiva 2004/18/CE e nella legge comunitaria n. 62/2005* (Milano, Giuffré, 2005).
2. A number of commentaries have been published, the most complete being M.A. Sandulli, R. De Nictolis e R. Garofoli (curr.), *Trattato sui contratti* pubblici (Milano, Giuffré, 2008) in several volumes; see also R. Caranta *I contratti pubblici*, 2nd (Torino, Giappichelli, 2012).
3. R. Caranta (dir.) *Il nuovo processo amministrativo* (Torino, Zanichelli, 2011).
4. See F. Caringella – M. Protto (cur.), *Codice e regolamento unico dei contratti pubblici* (Roma, Dike, 2011), 1613 ff; C. Lacava – G. Pasquini, *Il regolamento di attuazione del codice dei contratti pubblici*, in *Giorn. dir. amm*., 2011, 718.

Regions to claim some measure of legislative competence in this area have been sharply rebuffed by the Constitutional Court.[5]

Compliance is mainly enforced through judicial review proceedings brought in front of the administrative courts (*Tribunali amministrative regionali – T.A.R.* at first instance and *Consiglio di Stato* on appeal). Litigation is widespread and the saying 'don't bite the hand that feeds you' does not hold sway in Italy. A great deal of cases focuses on award criteria.

Finally, the *Autorità di vigilanza sui contratti pubblici* has relevant monitoring and guidance roles.[6] The *Autorità* is an independent administrative authority whose members are chosen among magistrates and other experts. It is financed from contributions paid by tenderers and candidates.[7] The *Autorità di vigilanza sui contratti pubblici* has recently issued a quite articulate guidance document speficially dedicated to the MEAT.[8]

5. The leading case is C. cost., 23 novembre 2007, n. 401, in *Giorn dir. amm*., 2008, 624, note C. Lacava, *I contratti pubblici tra Stato e regioni e la tutela della concorrenza*; in *Riv. trim. appalti*, 2008, 739, notes P. Chirulli, *Tutela della concorrenza e potestà legislativa statale in materia di appalti pubblici: il fine giustifica i mezzi?*, and R. Mangani, *La tutela della concorrenza e l'ordinamento civile nel Codice dei contratti pubblici: la Corte costituzionale promuove il riparto di competenze legislative tra Stato e regioni contenuto nel d.lgs. 163 del 2006*; more recently C. cost., 7 aprile 2011, n. 114, in *Giorn. dir. amm.*, 2011, 651; C. cost., 12 febbraio 2010, n. 45, in *Corr. giur.*, 2010, 891, note C.M. Aiello, *La ripartizione delle competenze tra stato e autonomie speciali in materia di lavori pubblici: il "ripensamento" della consulta*; C. cost., 22 maggio 2009, n. 160, in *Giorn. dir. amm*., 2009, 1252, nota A. Massera, *La disciplina dei contratti pubblici: la relativa continuità in una materia instabile*, and C. cost., 17 dicembre 2008, n. 411, in *Foro amm. CdS*, 2008, 1215, nota D. Casalini, *Il recepimento nazionale del diritto europeo dei contratti pubblici tra autonomia regionale ed esigenze nazionali di "tutela dell'unità giuridica ed economica" dell'ordinamento.*
6. Please refer to R. Caranta *I contratti pubblici*, above fn 2,.
7. Which was fine with Corte cost., 6 luglio 2007, n. 256, in *Giorn. dir. amm*., 2008, 139, note G. Napolitano, *L'autofinanziamento delle autorità indipendenti al vaglio (parziale) della Corte costituzionale*, and in *Urbanistica e appalti*, 2007, 1493, note L. Cameriero, *Federalismo legislativo: sulle materie innominate vince lo Stato*; see also L. Zanettini, *Il finanziamento dell'Autorità per la vigilanza sui contratti pubblici*, in *Riv. trim. appalti*, 2009, 89.
8. Determinazione n. 7 del 24 novembre 2011 http://www.avcp.it/portal/public/classic/AttivitaAutorita/AttiDellAutorita/_Atto?ca=4846#par2 (in Italian only).

2. Selection and award criteria

While the national legislation does not expressly forbid to use as award criteria aspects already referred to at the qualification stage, the case law is presently in line with *Lianakis*[9] and is somewhat strict in keeping the two phases separated, with the exception of service procurements requiring highly qualified personnel, when past experience is an important element of the offer and can be assessed in the award procedure.[10]

So for instance a recent judgment held the requirement of having already executed contracts similar to the one to be awarded when used at the qualification stage is meant as a minimum threshold; when the threshold is passed, all the tenderers are to be considered as equal, and the experience gained in past contracts cannot be again considered as an award criteria.[11] Along the same lines, it was considered an illegal award criterion for a contract for meal vouchers giving up to 50 % of the points to the existence and dimension of a network of bars and cafeterias accepting the vouchers.[12] However, the rules for meal vouchers procurements are now specifically set forth in Article 285 of the Procurement Regulation, which states that the network of bars and cafeterias accepting the vouchers must be used as an awarding criterion (clause 7) and may also be used as a selection criterion (clause 8).

The specific legislation on the award of contracts for social services, however, expressly refers to past experiences as a relevant criterion.[13]

9. Case C-532/06 *Lianakis*, in *Urbanistica e appalti*, 2008, 571, note M. Didonna, *Predeterminazione nella "lex specialis" dei criteri di valutazione dell'offerta*; see S. Treumer, *The Distinction between Selection and Award Criteria in EC Public Procurement Law: A Rule without Exception?*, in *Public Procurement L. Rev*., 2009, 103.
10. See M.E. COMBA, *Selection Award Criteria in Italian Public Procurement Law*, in *Public Procurement L. Rev*., 2009, 122; see also Determinazione n. 7 del 24 novembre 2011 dell'*Autorità*, point 4.2, also with reference to some less strict recent cases.
11. Cons. Stato, Sez. V, 29 aprile 2009, n. 2716, in *Ragiusan*, 2009, 305-306, 112: see also Cons. Stato, Sez. V, 15 giugno 2001, n. 3187, in *Foro amm.*, 2001, 1652.
12. T.A.R. Lazio, Roma, Sez. III *ter*, 13 dicembre 2006, n. 14329, in *Urbanistica e appalti*, 2007, 770, con nota di M. DIDONNA, *Buoni pasto e diritto comunitario*; the 'residence' requirement and the quantitative relevance of the criterion were concurrent grounds for the decision.
13. See Article 4 D.P.C.M. 30 marzo 2001, Atto di indirizzo e coordinamento sui sistemi di affidamento dei servizi alla persona ai sensi dell'art. 5 della legge 8 novembre 2000, n. 328.

3. Lowest price

Under Article 81(1) of the Code, absent any provision to the contrary, the contract must be awarded either at the lowest price or to the most economic advantageous tender (henceforth MEAT). The little case law there is on this point is clear to state that no other award criterion is admitted.[14]

Some guidance as to the choice of the award criteria can be gauged from Article 55(2) of the Code. Under this provision, contracting authorities are to prefer restricted procedures when the award criterion is the MEAT. Read the other way round, the MEAT is considered to be badly suited to open procedures, since the potentially large number of tenderers will make its use cumbersome.

Concerning the kind of contracts for which the different criteria should be used or at least preferred, there is no legislative guidance. In an effort to combat frauds and corruption in the award of procurement contracts, the old statute on public works had expressed a clear preference for the lowest price award criterion which was considered to be more transparent. However, in *Sintesi*, a case stemming from a preliminary reference by an Italian court, the Court of justice held that

> the abstract and general fixing by the national legislature of a single criterion for the award of public works contracts deprives the contracting authorities of the possibility of taking into consideration the nature and specific characteristics of such contracts, taken in isolation, by choosing for each of them the criterion most likely to ensure free competition and thus to ensure that the best tender will be accepted.[15]

Today, the MEAT is to be preferred with reference to some of the contract types. For exemple, the MEAT is mandated for concession of public works (Article 142 of the Code), for project finance procurements (Article 153 of the Code), and for architectural and engineering services (Article 266 of the Procurement regulation). Moreover, under Article 285 of the Procurement Regulation the MEAT is to be preferred in case of procurement for meal vouchers and if the lowest price is used a specific reason must be given by the contracting authority. Finally, Article 286 of the Procurement Regulation, on

14. T.A.R. Lazio, Sez. Latina, 21 ottobre 1999, n. 635, in *Trib. Amm. Reg.*, 1999, I, 4292: Corte Conti, Sez. II, 10 aprile 2001, n. 135/A, in *Riv. Corte conti*, 2001, *fasc.* 2, 124, ruled out the possibility to refer to some 'equitable' considerations.
15. Case C-247/02, *Sintesi* [2004] ECR I-9215; also reported in *Giust. civ.*, 2004, I, 2893, note R. Baratta, *Sul criterio di aggiudicazione dell'appalto di lavoro pubblico di cui all'art. 30, n. 1, della direttiva 93/37/CEE*.

cleaning services, seems to impose the MEAT without exceptions, and this without any apparent good reason other than intense lobbying.

As a general rule, Article 82(2) only provides that the criterion best suited to the specific characteristic of the contract must be chosen.

The guidance document issued by the *Autorità di vigilanza sui contratti pubblici*[16] which refers both to Recital 2 of Directive 2004/18/EC and to the *Sintesi* judgment indicates that reasons must be given for the choice and that the choice must be functional to foster free competition. According to the document, the MEAT is best suited for

- Contracts including a design component;
- Contracts for social services, which are deemed to a design component;[17]
- Contracts for services having a technology component requiring innovation capabilities:
- Supply contracts when the goods available on the market have different technological characteristics, and
- Contracts for whose award the procuring entity wants to refer to green or social criteria.[18]

The implication should be that the lowest price would be suited for all other contracts, such as works when design is not involved, most supplies and simple services.

Courts are ready to annul the choice as to the award criteria only if it is irrational with reference to the specific contract.[19] This may be the case when the lowest price is preferred for technologically complex contracts, or when quality is relevant, or more generally when the contracting authority itself is referring to a plurality of criteria in the contract documents.[20] More specifically, recourse to the lowest price was deemed to be illegal with reference to a contract for the supply of meals, quality being obviously more important than price in such a case.[21]

16. AVCP, determinazione n. 7 del 24 novembre 2011.
17. In this case recourse to the MEAT is actually mandated by Article 4 l. 8 novembre 2000, n. 328, "Legge quadro per la realizzazione del sistema integrato di interventi e servizi sociali".
18. Point 2.
19. Cons. Stato Sez. V, 3 dicembre 2010, n. 8408, in *Foro amm. CdS.*, 2010, 2677.
20. Cons. Stato Sez. V, 3 dicembre 2010, n. 8408, *cit.*
21. T.A.R. Sicilia, Palermo, Sez. III, 26 giugno 2008, n. 853, in *Ragiusan*, 2009, 297-298, 110.

Article 82(2) provides that contracts may be awarded to the lowest price having as a basis either the overall work or quantities referred to the components (e.g. so many kilometres of road pavement). The Procurement regulation provides for detailed rules on the award to the lowest price of public works. More specifically, Article 118 provides for the award to the lowest price taking as point of reference a threshold set by the contracting authority. The lowest price may be referred to either the components of the contract or to the overall price for the contract. If the latter is the case, and even if the contracting authority is providing an estimate of the works necessary, it is up to tenderers and candidates to acquaint themselves with their precise extent by referring to the designs before submitting their offer. In case the lowest price is referred to the components of the contract, Article 119 of the Procurement regulation applies. The provision is giving separate and detailed rules on the way tenders must be submitted in case of restricted or open procedure.

The case of a tie is not addressed in the Code. However, Article 77(2) r.d. 23 maggio 1924, n. 827, the old statute on public accounting which is still partly in force, provides that if no one of the tenderers tied wants to lower his/her bid, the winner will be chosen by way of a lottery.[22] The rule has been held to be the expression of a general principle binding the contracting authority to look for the best contractual conditions while respecting fair competition among tenderers.[23]

As already remarked, the lowest price is preferred in case of open procedures, and this make this procedure somewhat simpler than a restricted procedure.

4. Most economically advantageous tender (MEAT)

Article 83 of the Code is basically reproducing Article 53(1)(a) of Directive 2004/18/EC, and this starting with the provision that the criteria must be linked to the subject matter of the contract and that the list therein contained is not exhaustive but only provides instances of possible criteria.

As to the list itself, all the criteria in Article 53(1)(a) of Directive 2004/18/EC figure in Article 83 of the Code as well. Moreover, 'environmental characteristics' are specified with reference to energy saving and more

22. See Cons. Stato, Sez. IV, 12 settembre 2000, n. 4822, in *Giur. it.*, 2001, 1056.
23. Cons. giust. amm. Sicilia, 2 marzo 2007, n. 78, in www.giustizia-amministrativa.it

generally limiting the use of natural resources; additionally, commitments as to spare parts, security of supply, and, in case of concessions, the duration of the contract, the approach to its management and to the calculation of users' fares are also listed. While commitments as to spare parts could already easily fit in after sales services and technical assistance, the criteria concerning concessions are obviously relevant.

In practice, the price is always relevant, but the legislation does neither set a minimum nor a maximum limit as to the weight to be given to it. The choice is thus left with the contracting authority.[24]

The case law will not disturb the choices made by the contracting authorities unless they are judged to be irrational.[25] For instance, the decision to weight the price only 1/10 of the total in a procedure for the award of a design and construction contract was upheld by the *Consiglio di Stato*.[26]

According to the guidance document issued by the *Autorità di vigilanza sui contratti pubblici*, the criteria must in any case include the price.[27]

In principle, it is up to the contracting authority to choose criteria which are appropriate for the contract to be awarded and the administrative courts will uphold this discretionary choice unless it irrational or there is a potential for discrimination.[28] It is to be noticed that the question whether a criterion is linked or not to a specific contract seems to have never been on the radar of the Italian administrative courts. In the same vein, the contracting authority has the power to set the weighting of the different criteria it has chosen, and the choice can be successfully challenged only if it is irrational.[29] Under Article 83(4), if the contracting authority lacks in-house technical personnel capable of setting the weights, it can award a contract to this end to outside experts.

24. E.g. Cons. Stato, Sez. V, 4 gennaio 2011, n. 2, in *Giorn. dir. amm.*, 2011, 750, con nota di A.M. Altieri, *La discrezionalità amministrativa nei bandi di gara per la distribuzione del gas naturale*; Cons. Stato, Sez. IV, 20 giugno 2002, n. 3368, in *Foro amm. CdS*, 2002, 1419.
25. T.A.R. Lazio, Roma, Sez. III, 26 gennaio 2009, n. 630, and T.A.R. Campania, Napoli, Sez. I, 4 maggio 2007, n. 4735, all in www.giustizia-amministrativa.it.
26. Cons. Stato, Sez. V, 23 ottobre 2000, n. 5666, in *Foro amm.*, 2000, 3184.
27. Point 4.2.
28. E.g. Cons. Stato, Sez. V, 20 aprile 2012, n. 2339 in www.giustizia-amministrativa.it; Cons. Stato, Sez. V, 17 settembre 2010, n. 6965, in *Foro amm. CdS*, 2010, 1871; Cons. Stato, Sez. IV, 17 giugno 2003, n. 4350, in *Urbanistica e appalti*, 2004, 81, con nota di G. Mangialardi, *Il sindacato del g.a. sulla valutazione di anomalia dell'offerta*.
29. See again Cons. Stato, Sez. V, 4 gennaio 2011, n. 2, above fn.

Under Article 83(5) of the Code, whichever the criteria chosen or the weight given to them, every tender must in the end be evaluated with one and just one number. To this end, the Procurement regulation was delegated to develop matrices for works, supplies, and services contracts. Annexes M and P dictate the mathematical formulas to be used in selecting the MEAT respectively concerning works (including design) and supplies and services. These methods are then analysed in details in a specific document published by the *Autorità di vigilanza sui contratti pubblici* along with the already recalled guidance document. The Decembre 2011 *Quaderno* on *Il criterio di aggiudicazione dell'offerta economicamente più vantaggiosa* is amply illustrated with graphs and formulas.[30]

Article 53(2), last indent, of the Directive has been reproduced in Article 83(3) of the Code. No instances where the contracting authority held that weighting was not possible are present in the case law, and the *Autorità di vigilanza sui contratti pubblici*, which again provides no example, has clearly indicated that these cases must be totally exceptional and limited to highly complex contracts.

5. Under Article 83(2) and (4) both the weights and possible sub-weights attributed to the different award criteria have to be indicated in the contract notice. There is no reason why mathematical matrix/point models should be treated differently – and the Court of Justice judgment in *Lianakis* points the same way[31] – and the evidence from the case law is that indeed they are so indicated.[32]

5. Public procurements for innovation

1. Italy is obviously not the most innovative country, and innovation as a criterion for the award of public procurement contracts is something quite novel, so much so that for instance it is simply ignored in the recently approved green criteria for energy services to buildings used by contracting authori-

30. http://www.avcp.it/portal/rest/jcr/repository/collaboration/Digital%20Assets/PDF/Quad.07.12.11.pdf
31. Case C-532/06 *Lianakis* and Others [2008] ECR I-251, paragraph 38.
32. E.g. Cons. Stato, Sez. VI, 17 settembre 2009, n. 5583, in *Urbanistica e appalti*, 2009, 1385; Cons. Stato, Sez. V, 9 giugno 2008, n. 2848, and Cons. Stato, Sez. V, 17 aprile 2003, n. 2063, the last two in www.giustizia-amministrativa.it.

ties.[33] In the main, discussion only started in 2011 with a big conference held in Turin.[34] Article 16(f) of the Directive, regulating the so-called pre competitive procurement is almost literally reproduced by Article 19(1)(f) of the Code, which also stresses the risk-benefit sharing at market conditions for public sector needs. However, pre-competitive procurements are not presently very much used by Italian contracting authorities, with the exception of green procurements for innovation, where features of innovation procurement and of strategic procurements (green and social) are blended together and difficult to be distinguished.[35]

Other early-market-engagement (EME) legal tools provided by Italian legislation are compulsory planning of public works (Article 12 of the Code and 271-274 of the Regulation) and technical dialogue or market survey prior to the publication of the bid; the latter is not codified in Italy, but is sometimes used by contracting authorities, of course subject to the rules set forth by the Court of Justice in *Fabricom.*[36] Competitive dialogue, design competitions and variants are as well set forth in the Code, with provisions not different from those of the Directive.

6. Procedure for evaluating MEAT, juries, transparency and judicial review

Under Article 84 of the Code, special juries are competent to select the MEAT. They are made of either three or five members. The president of the jury is an official with the procuring entity. The other members are to be experts on the subject matter of the contract. They too are normally officials with the procuring entity, but under Article 84(8) outside experts such as professionals or university professors may be called in when in-house expertise

33. E.g. D.M. 7 marzo 2012 (*G.U.* 28 marzo 2012, n. 74) *Criteri Ambientali Minimi per l'ffidamento di servizi energetici per gli edifici – servizio di illuminazione e forza motrice – servizio di riscaldamento/raffrescamento*; points 4.2. stresses that in case of award critteria, environmental considerations should weight for at least 15 %.
34. http://www.comune.torino.it/relint/PPI/
35. The recourse to pre competitive procurements in Italy is studied and described in "Appalti pubblici per l'innovazione – Indagine conoscitiva", bi IPI (Istituto per la promozione industriale), an agency of the Minsitry of economic development, published in may 2010 (http://www.progreast.eu/files/IPI%20indagine%20PCP%20italiano.pdf)
36. Joined Cases C-21/03 and C-34/03, *Fabricom* [2005] ECR I-1559

is lacking or insufficient.[37] Experts are chosen on a rotation basis from lists dressed every two years by the same contracting authority. The lists themselves may be made up through a public selection procedure or from lists provided by the competent professional organisation (if any). According to the *Autorità di vigilanza sui contratti pubblici* it is illegal the appointment based on a single name indicated by a professional organisation.[38]

Article 84(2) requires members of the commission to be expert in the specific sector of the subject matter of the contract. The *Autorità di vigilanza sui contratti pubblic*[39] has given indications that this provision only requires a general competence of the commission as a whole, excluding the need for each individual member of the Commission to be an expert in a specific field involved in the contract. A university degree is not necessarily required, if the member of the commission has a working experience in the field. For example, in a procurement procedure for a supply of meals to a hospital, the *Consiglio di Stato* considered sufficiently competent a commission composed by members with a generic experience in the field of hospital organization and management, supply of public meals, public procurement of services and, more generally "common sense and the average experience of a person with a University degree". It is not required that the commission be specifically competent for every single element of the award criteria; otherwise, external experts should be hired for most public procurement procedures, contrary to the principle that, if possible, members of the commission must be employees of the contracting authority.[40]

Article 84(4) to (7) provides for a number of exclusions such as a) those having worked to the design of the contract;[41] b) past elected officials have a cooling off period of two years; c) past jury members who were found liable for wrongdoing in selecting the best tender, and d) finally the conflict of interest exclusions provided for the exoneration of judges do also apply.

Under Article 89(10), the jury may be named only after the deadline for submitting tenders has expired.

In February 2011, Consip, the central purchasing body for the Italian Public Administrations, launched the new edition of the national e-procurement

37. See also Article 120(4) of the Procurement regulation.
38. Deliberazione 26 febbraio 2009, n. 18.
39. AVCP, Parere 21 marzo 2012, n. 46.
40. Cons. Stato, Sez. III, 21 febbraio 2011, n. 2265, point V.
41. See Cons. Stato, Sez. V, 25 luglio 2011, n. 4450, in *Giorn. dir. amm.*, 2011, 1122, holding that an external advisor having contributed to the drafting of the technical specifications could not be a member of the jury.

platform for the purchasing of public goods and services that Consip itself operates on behalf of the Ministry of Economy and Finance. The Public Administration Electronic Market (MePA) is a digital marketplace in which registered authorities can purchase goods and services offered by suppliers that have been vetted and authorized to post their catalogues on the system.[42] The new platform also houses different e-procurement tools, including now dynamic purchasing systems, which may allow for MEAT.[43]

Compliance with equal treatment and non-discrimination principles forbids the award jury to change the award criteria and their weighting and subweighting if any as stipulated in the contract notice or in the contract documents.[44] This is so even in the case that the criteria chosen are thought to be illegal; in this situation, the jury is expected to stay the procedure and to refer to the contracting authority.[45] However, it was held that the jury can revise matrices when they just don't work, provided the revision is proportionate and reasonable (and, it should be added, but the line trodden here is a narrow one, does not affect the competitors).[46]

In line with *Lianakis* and *ATI EAC*,[47] the jury can specify the weighting factors to be applied to the sub-criteria, but this only before the opening of the tenders.[48]

To counter the risk of abuses implied in the MEAT a long-standing case-law provides that the tender must be submitted in different envelopes, one for the economic offer (price) and the other one for the technical offer (all other

42. An overview in English can be found at https://www.acquistinretepa.it/opencms/opencms/menu_livello_I/header/Inglese/PROGRAM
43. E.g. http://nuke.decimocircolonapoli.it/LinkClick.aspx?fileticket=TEELFUTaAyA%3D&tabid=477&mid=1546
44. T.A.R. Puglia, Bari, Sez. I, 20 giugno 2002, n. 2859, in *Foro amm. TAR*, 2002, 2165; T.A.R. Lazio, Sez. Latina, 29 ottobre 2002, n. 961, in *Foro amm. TAR*, 2002, 3298.
45. Cons. Stato, Sez. VI, 3 marzo 1999, n. 25, in *Cons. Stato*, 1999, I, 441.
46. Cons. Stato, Sez. V, 9 aprile 2010, n. 2004, in *Foro amm. CdS*, 2010, 2400, note M. Mattalia, *L'offerte economicamente più vantaggiosa e l'applicazione della formula matematica prevista nel disciplinare di gara*; see also Cons. Stato, Sez. VI, 17 settembre 2009, n. 5583, in *Urbanistica e appalti*, 2009, 1385, with the jury modifying some quotations in the tender which, being at zero, made applying the matrix impossible.
47. Case C-532/06 *Lianakis* and Others [2008] ECR I-251, paragraph 43: Case C-331/04 *ATI EACand Others* [2005] ECR I-10109, paragraph 32.
48. Cons. Stato, Sez. VI, 16 marzo 2009, n. 1555, in *Urbanistica e appalti*, 2009, 705, note G. Fraccastoro – F. Colapinto, *I servizi pubblici fra società mista e* in-house providing.

elements of the MEAT). The first envelope is to be opened in a public meeting, after the tenders referring to all other criteria have been graded. In this way, those criteria leaving more discretion to the jury, such as aesthetical or technical merits, can't be abused to the point of making sure that even an expensive tender will win the completion.[49] This is so much engrained in the case-law that the *Adunanza plenaria* of the *Consiglio di Stato* has decided that the tender envelopes referred to non-price criteria of the MEAT must be opened at a public meeting and read out as to their constituent documents.[50]

Beside this, the procedure to be followed is now spelt out in Article 283 of the Procurement regulation. During one or more closed door meetings, the tenders are rated and graded according to the non-price criteria of the MEAT. During a public meeting, the president of the jury reads out the grades, then opens the envelopes with the economic tender and reads out the prices. Moreover, under Article 117 of the regulation and to avoid tampering with the envelopes, all envelopes must be opened and read out at the same meeting, without the possibility to adjourn it.

Article 79 of the Code lists the information that has to be present in the reports of the award committee meetings. In principle, they do not need to be drafted immediately during the meetings themselves, and there is no need to have separate records for every meeting.[51] However, all the discussions and decisions taken must be reported and they must be drafted soon afterwards so that records are still clear and all omissions are avoided.[52] Provided that all care must be taken in making sure that the tenders received are not tampered with, it is discussed whether the lack of any indication in the reports of the measures taken to this end is or not affecting the legality of the procedure.[53]

49. Cons. Stato, Ad. plen., 26 luglio 2012, n. 30, in www.giustizia-amministrativa.it; Cons. Stato, Sez. VI, 10 luglio 2002, n. 3848, in *Foro amm. CdS*, 2002, 1802; *conf.* Cons. Stato, Sez. V, 21 marzo 2011, n. 1734, in www.giustizia-amministrativa.it; Cons. Stato, Sez. V, 9 giugno 2009, n. 3575, in *Foro amm. CdS,* 2009, 1466, e Cons. Stato, Sez. V, 25 maggio 2009, n. 3217, in www.giustizia-amministrativa.it.
50. Cons. Stato, Ad. plen., 28 luglio 2011, n. 13, in Giur. it., 2012, 707, note N. Paolantonio, *La pubblicità di (alcune) sedute di gara, tra imparzialità e buon andamento*, and *Urbanistica e appalti*, 2011, 1314, note A. Valletti, *La pubblicità delle sedute di gara si estende all'offerta tecnica*; affirmed by Cons. Stato, Ad. plen., 31 luglio 2012, n. 31, in www.giustizia-amministrativa.it.
51. E.g. Cons. Stato, Sez. III, 2 agosto 2012, n. 4422; Cons. Stato, Sez. III, 5 march 2012, n. 1251; T.A.R. Lazio, Roma, Sez. III *ter*, 22 settembre 2011, n. 7510, all in www.giustizia-amministrativa.it.
52. Cons. Stato, Sez. VI, 30 giugno 2011, n. 3902, in www.giustizia-amministrativa.it.
53. Contrast on the one hand Cons. Stato, Sez. V, 7 giugno 2012, n. 3351; Cons. Stato, Sez. V, 28 marzo 2012, n. 1862; Cons. Stato, Sez. VI, 27 luglio 2011, n. 4487, the lat-

Finally, many provisions spell out specific duties to give reasons and anyway the duty to give reasons is a general principle in Italian administrative law. The relevance of reasons obviously depends on the intensity of judicial review.

In Italy, judicial review of administrative action is more peripheral than in Germany or even France, but more intense than in England.

Concerning specifically the MEAT, while as was said there is no reported case in which weighting was considered not possible, the case law focuses on two principal questions: on the one hand, the choice of and weight given to the award criteria, and on the other hand how the criteria chosen where actually applied in the evaluation of the tenders. On both questions the contracting authorities are normally said to enjoy wide discretion (*discrezionalità tecnica*).[54]

As for the first question, administrative courts will not normally disturb the choice of the criteria made by the contracting authorities; only if these choices are held to be irrational or there is a potential for discrimination those choices will be struck out.[55]

The same reasoning is repeated, and this could be very well criticized, with reference to the actual application given to the criteria chosen. The administrative courts dictate a duty to give reason, which may be discharged by marking in an analytical way all criteria and sub-criteria (if any) of every tender so that the final result flows from all the marks given.[56] However, in the presence of open-ended criteria (in the given case: 'architectural quality') neither numbers nor one word (like, excellent, good or average) evaluations are

ter stressing that the list in Article 79 of the Code is not exhaustive, and on the other han.Cons. Stato, Sez. V, 7 luglio 2011, n. 4055, all in www.giustizia-amministrativa.it.

54. On this notion please refer to R. Caranta 'On Discretion' in S. Prechal and B. van Roermund (eds.), *The Coherence of EU Law. The Search for Unity in Divergent Concepts* (Oxford, Oxford University Press, 2008) 185.
55. E.g. Cons. Stato, Sez. V, 17 settembre 2010, n. 6965, in *Foro amm. CdS*, 2010, 1871; Cons. Stato, Sez. IV, 17 giugno 2003, n. 4350, in *Urbanistica e appalti*, 2004, 81, note G. Mangialardi 'Il sindacato del g.a. sulla valutazione di anomalia dell'offerta'.
56. Cons. Stato, Sez. V, 29 novembre 2005, n. 6759, in *Foro amm. CdS*, 2006, 485, note S. Ponzio 'Il criterio dell'offerta economicamente più vantaggiosa e la valutazione in termini numerici delle offerte'.

sufficient, and the jury must explain in more details the reasons for its decision.[57]

Besides the lack of sufficient reasons, the marking itself can be reviewed only if it borders irrationality.[58] For instance, the *Consiglio di Stato* has held to fell outside its review power to investigate whether the project chosen by the jury was functional or not.[59] More specifically, administrative courts normally refuse to name expert witnesses to second guess the evaluation of the jury.[60]

One question concerns the consequences of the annulment of a decision to exclude a tender and the consequent reinstatement of the same tender *after* the other tenders had already been assessed and marked. The *Adunanza plenaria* of the *Consiglio di Stato* recently held that tenders are not to be submitted again, and the contracting authority must evaluate the new tender even if this means that the jury will at this stage already know the price quoted in the tenders previously assessed.[61]

7. Reservations and rejection of non-compliant bids

Article 46 of the Code, originally regulating request of information from the contracting authority, was modified by Decree law 15 maggio 2011, n. 70, later validated by l. 12 luglio 2011, n. 106. The new law introduced clause (1bis) and added to the title the phrase: "Exclusiveness of rejection clauses". Article 46(1bis) states that, notwithstanding any contrary clause in the tender documents, the contracting authority can reject a bid only (i) for lack of signature or other essential elements or (ii) if the envelope was broken or badly

57. Cons. Stato Sez. VI, 8 marzo 2012, n. 1332; see also *obiter* Cons. giust. amm. Sicilia, 21 novembre 2011, n. 869, all in www.giustizia-amministrativa.it (the latter actually concerning sub-weigthing decided when the tenders were already known.
58. Cons. Stato, Sez. VI, 30 settembre 2008, n. 4686, in *Foro amm. CdS*, 2008, 2511.
59. Cons. Stato, Sez. IV, 10 giugno 1999, n. 991, in *Foro amm.*, 1999, 1216.
60. E.g. Cons. Stato, Sez. VI, 22 novembre 2006, n. 6835, in *Foro it.*, 2007, III, 186; Cons. Stato, Sez. VI, 4 novembre 2002, n. 6004, in *Foro amm. CdS*, 2002, 2945, e *ivi*, 2003, 225, note A. BERTOLDINI 'La consulenza tecnica d'ufficio nella giurisprudenza del Consiglio di Stato: la ricerca della prova deve attenersi nei limiti posti al sindacato giurisdizionale sul merito dell'azione amministrativa'; T.A.R. Veneto, Sez. I, 15 gennaio 2003, n. 401, in *Foro amm. TAR*, 2003, 1184, note C. VIDETTA 'Il sindacato sulla discrezionalità tecnica della pubblica amministrazione nella giurisprudenza successiva alla decisione 9 aprile 1999 n. 601 della quarta sezione del Consiglio di Stato'.
61. Cons. Stato, Ad. Plen. 26 luglio 2012, n. 20, in www.giustizia-amministrativa.it.

closed or in any case if the principle of secrecy of tenders was violated. Any contrary clause in the tender documents is null and devoid of effects.

The clause was introduced in order to counter a very formalistic caselaw on clauses of rejection of bids: for example, the Consiglio di Stato considered admissible the rejection of an offer because the envelope was not sealed with sealing wax but only with adhesive tape,[62] as well as the rejection of an offer because it was lacking the signature of the economic operator on a page of an annexe.[63] It is, however, to be noted that a different trend in the case law already criticized those decisions, holding that the rejection of bids could not be justified with purely formal reasons but was possible only if the breach of the formal prescriptions in the contract documents was essentially preventing the bid from achieving its aims, with the consequence that, for example, if the missing information could be retrieved by the contracting authority from another source, the lack of that information was not a valid reason for rejecting the bid.[64]

Since clause (1.bis) was introduced in Article 46, dealing with request of information, it follows that the application of that new clause must be coupled with a more extensive use of the power of the contracting authority to ask for clarifications to the participants in order to prevent any illegal rejection.

Of course, request of clarifications cannot lead to a modification of the original bid[65] because that would impinge on the principle of equal treatment of the bidders, as defined by the ECJ caselaw.[66] Here, the boundary set by Italian caselaw is between the request of a new document not included in the original bid, which is not allowed, and the request of clarification of an existing document, which is: for example, if the copy of the identity document of the bidder is lacking, the contracting authority cannot use its clarification power in order to allow the document to be sent at a later date; however, if the identity document whose copy was included in the envelope has expired, the contracting authority can ask the bidder to prove that it was duly renewed.[67] The caselaw about identity documents is pretty severe; however,

62. Cons. Stato, Sez. V, 29 aprile 2010, n. 2453, in www.giustizia-amministrativa.it.
63. Cons. Stato, Sez. IV, 31 marzo 2010, n. 1832, in www.giustizia-amministrativa.it.
64. Cons. Stato, Sez. V, 2 aprile 2002, n. 1798, in *Foro amm. CdS*, 2002, 906.
65. Cons. Stato, Sez. VI, 15 marzo 2013 n. 1558; Sez. V, 23 ottobre 2012, n. 5408; Sez. VI, 6 giugno 2011, n. 3365; Sez. IV, 6 giugno 2011, n. 3404; Sez. III, 19 marzo 2011, n. 1696; Sez. III, 3 marzo 2011, n. 1371, all in www.giustizia-amministrativa.it.
66. Case C-599/10 *SAG ELV Slovensko and others*, Judgment of 29 March 2012, not yet reported.
67. Cons. Stato, Sez. VI, 18 aprile 2011, n. 2366, in www.giustizia-amministrativa.it.

this is not due to public procurement rules but to legislation on sworn declarations (D.P.R. 445/00), which provides that all documents issued by the public administration can be substituted by a sworn declaration accompanied by a copy of an identity document of the person rendering the declaration, at the same time providing for criminal sanctions in case wrong or false information is provided. The lack of the identity document renders void the self-declaration and thus implies the rejection of the bid, which is to be considered as lacking all the required documents.

8. Abnormally low tenders

Articles 86 ff of the Code are not explicit on whether contracting authorities must rather than may dismiss abnormally low tenders provided that they were not justified following the rules explained below.

The case law has read in the law a duty to do so in case of award to the lowest price, and in case of award to the MEAT when certain threshold are exceeded.[68]

Article 86(3) provides a quite open-ended clause, stating that contracting authorities may verify any tender which, based on specific circumstances, appears on its face to be abnormally low. This comes as an addition to Article 86(1) and (2), dealing with abnormally low tenders when the lowest price or the MEAT are respectively used. Given the specific requirements laid down in Article 86(2), to which we will have to revert, Article 86(3) is potentially extending the verification of abnormality to all the criteria used to make up a MEAT.

The Italian legislation has traditionally laid down thresholds for spotting abnormally low offers deserving screening or – but this is now limited under EU law – outright exclusion from the procedure.[69]

Concerning contracts awarded to the lowest price, Article 86(1) provides for a mechanism of screening based on the average discount offered by the tenderers tempered by excluding highest and lowest tenders (this to make more difficult for tenderers to collude to manipulate the average). Under Article 86(4), this does not happen when less than 5 tenders were submitted. However, in this situation screening may well be justified under Article 86(3).

68. Cons. Stato, Sez. VI, 27 luglio 2011, n. 4489, in www.giustizia-amministrativa.it; Cons. Stato, Sez. V, 8 luglio 2010, n. 4434, in *Boll. legisl. tecnica*, 2010, 9, 765.
69. See Joined Cases C-147/06 and C-148/06 *SECAP* [2008] ECR I-3565.

Article 86(2) on MEAT provides for screening of all tenders whose price quotation and the marks gotten for the criteria different from price both exceed 4/5 of the maximum marks possible. Moreover, as was already recalled, Article 86(3) provides for a quite general power to check abnormally low tenders.

It is to be remarked that, to protect the workers from exploitation and abuses, under Article 86(3 *bis*) and (3 *ter*) the costs relating to the workforce and to the security on the workplace are estimated beforehand by the contracting authority; moreover, no tenderer can submit a lower quotation concerning security on the workplace costs.[70]

In all the cases foreseen in Article 86(1) to (3), tenderers cannot be sure beforehand whether their tender will be considered to be potentially abnormally low, but this approach has been upheld by the Court of Justice.[71]

Finally, there is no case we are aware of in which an abnormally low tender was dismissed due to receipt of illegal State aid.

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70. See R. Caranta – S. Richetto 'Sustainable Procurements in Italy: Of Light and Some Shadows' in R. Caranta – M. Trybus (edds.) *The Law of Green and Social Procurements* (Copenhagen, DJØF, 2010) 158.
71. Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233.

A. Massera, 'La disciplina dei contratti pubblici: la relativa continuità in una materia instabile', in *Foro amm. CdS*, 2008, 1215
N. Paolantonio, 'La pubblicità di (alcune) sedute di gara, tra imparzialità e buon andamento', in *Urbanistica e appalti*, 2011, 1314;
M.A. Sandulli, R. De Nictolis e R. Garofoli (curr.), *Trattato sui contratti pubblici* (Milano, Giuffré, 2008) in several volumes.

6 Awarding of Contracts in Polish Procurement Law

Marcin Spyra and Piotr Szwedo

1. Introduction: the main features of the national system

The bulk of the issues related to public procurement in Poland is regulated in the Act of 29th January 2004 – Public Procurement Law[1] (hereinafter PPL). The PPL implements the Classic, the Utilities, the Military and the Remedies Directives. The scope of the PPL covers also procurement procedures below the EU-thresholds, whenever the value of the contract exceeds 14,000 €. The Polish legislator tends to apply a uniform normative framework for all procurement procedures and contracts. It follows the solutions developed in the European procurement law with a few simplifications and exceptions for the procedures and contracts below the EU-thresholds.[2] The PPL contains *inter alia* provisions on the award and selection criteria, on procedural aspects of evaluating the best tender, on rejection of tenders and the admissible corrections and modifications of their content, and on abnormally low prices. The PPL delegates authority to regulate some specific and technical issues to the Prime Minister and several Ministers.[3] Among these regulations there are two which pertain directly to award and selection criteria: the Regulation of the Prime Minister of 10th May 2011 on non-price mandatory tender evaluation criteria with respect to certain types of public contracts[4] and the Regulation of the Prime Minister of 19th February 2013 on types of documents that may be

1. The last uniform version of the Act was published in Journal of Laws 2010, no. 113, item 759, later amended.
2. For further information see P. Szwedo, M. Spyra in R. Caranta, D. Dragos (2012).
3. The English translations of the PPL and of the regulations are available at www.uzp.gov.pl
4. Journal of Laws No.96, item 559.

requested by the contracting authority from the economic operator and forms in which these documents may be submitted.[5]

The Polish legal system does not recognise any binding value of precedent. Neither the National Appeal Chamber (*Krajowa Izba Odwoławcza* hereinafter the NAC), a non-judicial body competent to decide at the first stage of disputes regarding public procurement, nor district courts (*sądy okręgowe*), which decide appeals against the NAC decisions, are bound by the views and opinions expressed in their previous decisions. Arbitrarily different decisions on similar cases would be, however, irreconcilable with the constitutional principle of equality. It is therefore not a surprise that the NAC and courts often refer to their earlier decisions. There are over 2,800 cases decided yearly by the NAC[6] and over 100 appeals decided yearly by district courts.[7] It is therefore impossible to understand thoroughly the Polish procurement law without analyses of the caselaw. Interpretative releases and explanations published by the Public Procurement Office (*Urząd Zamówień Publicznych* hereinafter PPO) are also an important source of insight into the system of Polish public procurement regime. The PPO has published *inter alia* explanations on the duty to apply the environmental award criteria with respect to public contracts to purchase vehicles, on the possibility of real estate transfer as a remuneration for the supplies or services rendered by the economic operator, on abnormally low prices, on the correcting of tenders etc.[8]

2. Selection and award criteria

Under PPL, the selection of economic operators and the contract award are practically simultaneous actions. Nevertheless, formally the selection and the award are perceived as two strictly separate procedural stages. There is also a clear distinction between the selection and the award criteria. According to the Art. 91 (3), PPL tender evaluation criteria shall not pertain to the characteristics of the economic operator and in particular to its economic, technical or financial credibility, unless services of a non-priority nature are the object

5. Journal of Laws item 231.
6. The NAC decided 2,820 cases in the year 2011 and 2,823 in the year 2010.
7. District courts decided 148 cases in the year 2011 and 225 cases in the year 2010. The number of appeals against the NAC decisions systematically decreases probably due to the judicial review.
8. The interpretative releases and explanations of the PPO are available in Polish at www.uzp.gov.pl

of the contract. The criteria related to personal characteristics of the economic operator may, however, decide its eligibility. Awarding authority may set down eligibility conditions related to 1) licenses and authorisations to perform specific activities or actions if such authorisations are required by the law, 2) knowledge and experience, 3) appropriate technical potential and personnel capable of performing a contract, 4) economic and financial standing and 5) the employment of disabled persons (Art. 22 (1-2) PPL).[9] The selection criteria must be proportionate and related to the contract (Art. 22 (4) PPL). The NAC has ordered in several decisions to change the contract notices due to the application of disproportionate or discriminatory selection criteria. The NAC found *inter alia* disproportionate to require a proof of the necessary experience in the construction industry by means of the evidence of a proper performance of a single contract of a certain value. The NAC considered that the necessary experience could been gained by the operator by performing several contracts of a smaller value.[10] The requirement of at least 30 similar contracts performed by the operator as an evidence of necessary experience was found arbitrary and disproportionate as well.[11]

The strict distinction between the selection and the award criteria has been strictly recognised in the NAC and PPO Panel of Arbitrators' jurisprudence.[12] The analysis of jurisprudence allows to point out the typical irregularities pertaining to the use of operator's personal characteristics as award criteria. PPO Arbitrators' Panels and the NAC set aside awards due to the application of the following inadmissible criteria: 1) an experience in the field related to the contract,[13] 2) possession of ISO certificate,[14] 3) a number of employees engaged to perform a contract,[15] 4) the length of the operator's activity on the

9. The requirement of the employment of disabled people was applied in 2011 in 0.19 % of procurement procedures and in 2010 in 0.34 % procurement procedures. On the prerequisite related to employment of disabled persons refer to M. Spyra in R. Caranta, S. Treumer eds. (2010).
10. See the NAC decision of 4th June 2009, KIO/UZP 653/09.
11. See the NAC decision of 23rd June 2008, KIO/UZP 561/08.
12. Until 12th Oct. 2007 the PPO Panels of Arbitrators had been competent to decide in the first instance remedies in the field of the public procurement. Afterwards they were replaced by NAC.
13. See e.g. decisions of the PPO Arbitrators' Panel, of 16th November 2005, UZP/ZO/0-3329/05, of 13th July 2005, UZP/ZO/0-1688/05, 19th July 2006, UZP/ZO/0-2069/06, 12th September 2005, UZP/ZO/0-2491/05, 20th February 2007, UZP/ZO/0-157/07.
14. See decision of the PPO Arbitrators' Panel, 4th August 2005, UZP/ZO/0-1969/05 and decisions of the NAC, 5th December 2008, KIO/UZP 1362/08, 17th March 2008, KIO/UZP 180/08; KIO/UZP 185/08; KIO/UZP 186/08; KIO/UZP 187/08.
15. See decision of the PPO Arbitrators' Panel, 21st June 2007, UZP/ZO/0-703/07.

market,[16] 5) quality of labour conditions,[17] and 6) distance between operator's premises and the place of contract performance.[18]

The deadline of payment (maturity) was one of the most controversial award criteria. The controversy was linked to the fact that such a criterion could indicate the economic operator's good or bad financial standing. It would allegedly violate the prohibition of awarding the contract on subjective grounds, as expressed in art. 91(3) of the PPL. Nevertheless, the Polish Supreme Court in one of its decisions interpreted the maturity as an objective criterion and allowed its application in public procurement.[19] The deadline exceeding 30 days would lead to an obligation of payment of additional statutory interests.[20]

3. Lowest price

The Polish legislation does not provide for criteria other than the "lowest price" and the "best tender", which should be understood as the equivalent of the "most economically advantageous tender" (MEAT), as award criteria. According to the Article 91(1) and (2) (PPL) the contracting authority shall select the best tender on the basis of tender evaluation criteria laid down in the specification of essential terms of the contract. As the arbitrators of PPO have put it: "Price is the easiest measurable criterion. Applicability of other criteria may face difficulties, which, however, does not mean that their determination is unfeasible."[21]

3.1. The best tender based not only on the lowest price criterion

Polish rules on the application of the lowest price criterion and other award criteria are generally in line with the European law. In general, the contracting authority is free to choose either the lowest price criterion as a single award criterion or the price criterion with other relevant criteria (Art. 91(2) PPL). In some cases, Polish law precludes application of the lowest price as a single award criterion. Those cases are: 1) supplies of road transport vehicles

16. See decision of the PPO Arbitrators' Panel, 27th, March 2006, UZP/ZO/0-824/06.
17. See decision of the PPO Arbitrators' Panel, 19th July 2004, UZP/ZO/0-1077/04.
18. See decision of the PPO Arbitrators' Panel,24th March 2006, UZP/ZO/0-816/06.
19. Decision of the Supreme Court of the 18th September 2002, III CZP 52/02.
20. See arts 5, 6, 7 of the Act on payment dates in commercial transactions of 12th June 2003, Journal of Laws 2003, no. 139, item 1323.
21. See decision of the PPO Arbitrators Panel, 20th February 2006, UZP/ZO/0-433/06.

procurement of services, 2) competitive dialogue procedure and 3) supplies or works involving creative or research activities.

The two first cases result directly from the European law. The first case is a consequence of the implementation of the Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles.[22] In 2011, the Prime Minister issued the Regulation on other than the price mandatory tender evaluation criteria in respect of certain types of public contract.[23] The Regulation is applicable to entities when purchasing road transport vehicles. The tender criteria should also include: energy consumption, emissions of CO_2 and emissions of NOx, NMHC and particulate matter (§ 3).

The second case follows from the definition of the competitive dialogue procedure established in the European Directives and implemented into the Polish law. According to the Art. 60b PPL, a contract may be awarded as a result of competitive dialogue if two conditions are met conjunctively: 1) the contract is of a complex nature, and in particular when it is not possible to describe the object of the contract in accordance with the relevant rules of a contract description (Art. 30 and 31 PPL) or to objectively define the legal or financial conditions of contract performance, it is not possible to award contract by the open tendering procedure or restricted tendering procedure and 2) the price is not the only criterion of the selection of the best tender. In fact, the second premise is a pure consequence of selecting the competitive dialogue as a form awarding the tender. The procedure of the competitive dialogue is restricted to tenders of a complex nature when an objective description of object is impossible as a result of the lack of normative regulations or economic standards (Art. 60a PPL). Such an impossibility should not be due to subjective factors laying on the side of contracting authority, like the lack of a sufficiently qualified staff.[24]

The third case does not follow directly from the European law. The award decision based only on the criterion of the lowest price is prohibited, if contract involves creative or research activities and "the object of the contract cannot be established in advance in an unequivocal and comprehensive way". In such a case, "the best tender shall mean the tender providing the most advantageous balance of price and other criteria relating to the object of the contract" (Article 2 (5) PPL, second sentence). The "creative and research ac-

22. Directive 2009/33/EC of the European Parliament and of The Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles, OJ L 120/6, 15.5.2009.
23. Journal of Laws, 2011, no. 96, item 559.
24. M. Stachowiak, in: M. Stachowiak et.al. (2010), p. 320.

tivities" include also works as objects of copyrights. Nevertheless, if the contracting authority can describe the object of the contract in an unequivocal and comprehensive way, it may evaluate tenders using only the lowest price criterion. If due to the nature of the contract its object cannot be described in a precise way the price cannot be a truly indicative criterion of the award as the object of the submitted offers may be not comparable. It is therefore reasonable to demand also the application of other criteria.

It addition, it should be pointed out that the application of the lowest price criterion precludes the admissibility of variant tenders (Art. 83 PPL). A variant tender shall mean a tender providing for a method of the performance of the contract other than that specified by the contracting authority (Article 2(7) PPL). Variants are permitted when price is not the only award criterion. In such a situation, the specification of the essential terms of the contract shall also include the description of the method for submitting variants and the minimum requirements to be met by them (Article 36(2)(4) of the PPL). Such minimum requirements may be of a technical nature or may relate to the environmental protection or to the effect or function which is to be achieved as a result of the contract.

3.2. The use of the "lowest price" in the practice of public procurement

According to data provided by the Polish PPO, about 87-91 % of the tenders are based on the sole price criterion (the accurate figure depends on particular year, 2007-2011). The percentage depends on the object of the tender. In case of contracts for works, it amounts to 95 %, whereas in the case of services it is relatively lower and amounts to 87 %.

Nevertheless, the average number of tenders criteria oscillates around 3 (2,31-3,72). In the case of services, in 2011 it was 3,95, and in the case of works – 2,40. Those data relate to procurements below the EU-thresholds.

3.3. Calculation of the lowest price

In the Polish law, the "price" has been defined in the Art. 3(1) pt. 1 of the Act on Prices.[25] It is "the value expressed in monetary units, which a buyer is obliged to pay the trader for goods or services". It includes the tax on goods and services and the excise duty, if applicable.

The PPL does not impose any criteria on how the price should be calculated. The specification of the essential terms of the contract shall include a description of the method of the price calculation. Polish public procurement

25. Act of 5th July 2001 on prices, Journal of Laws 2001, no. 97, item 1050, later amended.

law does not determine the currency in which tenders should be expressed. According to the Article 358 § 1 of the Polish Civil Code (hereinafter CC), as amended in 2008,[26] the obligation expressed in a foreign currency may be fulfilled in Polish Zlotys. *A fortiori*, a tender which is not yet an obligation, may be expressed in other currencies. The contracting authority shall indicate in the technical specification the currency of tenders as an element of the "description of the method of the price calculation" (Art. 36(1) pt. 12 PPL). If tenders in more than one currency are allowed, the contracting authority should indicate the method of their comparison. The lack of information about the currencies means that tenders may be expressed in every currency.[27] The possible consequence may be their incomparability. The only helpful regulation would be an application *per analogiam* of the art. 358 § 2 CC[28] which makes reference to the average currency rates announced by the National Bank of Poland.[29]

The prices which relate to the same object of tender, even if calculated by using different methods, are economically and mathematically comparable. The price may take a form of **a lump sum**. In such a case, the economic operator shall not require its increase, even if he/she was unable to preview the amount and costs of works at the moment of the contract conclusion. This can be done only by the court due to the supervening extraordinary events. Generally, the risk of random events is to be borne by the economic operator. Therefore, the lump-sum price shall include the relevant economic risks. If the performance of the contract becomes excessively onerous or detrimental to a debtor because of an extraordinary change of circumstances which could not be foreseen at the time of the formation of the contract, the court may, taking into consideration the interests of all the parties modify or set aside the contract (Art. 357^1 CC). If the performance of the contract becomes excessively onerous or detrimental due to the significant change of a currency value the court may only modify the contract (Art. 385^1 § 3 CC). The judicial adaptation of a pecuniary obligation due to the change of the currency value may not be claimed by a business entity in relation to its commercial contracts (Article 385^1 § 4 CC). Price may also be based on **cost estimation**. In such a case, the economic operator calculates the price based on cost estima-

26. Act of 23rd October 2008, amending the Civil Code and the law of currencies, Journal of Laws 2008, no. 228, item 1506.
27. W. Dzierżanowski, in: M. Stachowiak et.al. (2010), p. 414, M. Płużański (2009), p. 489-490,
28. Journal of Laws 1964, no. 16, item 93 later amended.
29. W. Dzierżanowski, in: M. Stachowiak et.al. (2010), p. 416.

tion provided by the contracting authority. The cost estimations are supplemented with a design documentation which defines the scope of expenditures. In the case of calculations based on cost estimation, price is based on components. The prices of components shall not be changed unless the contracting authority allows their valorisation based on inflation rate. In contrast to lump-sum calculation, the risk of underestimating the value of relevant components is mainly borne by the awarding authority. **Mixed lump-sum/cost estimation methods** are allowed as well.

The method of calculation shall be provided in the specification of the essential terms of the contract, similarly as the grounds of its estimation: project documentation and technical specification (art. 36 (1) pt. 12 PPL). The enigmatic description of the methods of price calculation is one of the important factors resulting in submission of tenders "with abnormally low price". The Article 29 of the PPL requires that "[t]he object of the contract should be described in an unequivocal and exhaustive manner by means of sufficiently precise and comprehensive wording, taking into consideration all requirements and circumstances which could influence the preparation of a tender." The description of the method of price calculation is strictly linked with the description of the object of contract.

3.4. Equal tenders

The rules of contract award in the case of the equality of tenders have been regulated by the Art. 91(4)-(6) PPL. If the best tender cannot be selected as two or more tenders represent the same balance of price and other tender evaluation criteria, the contracting authority shall select from among these tenders the one with a lower price (art. 91(4) PPL). This rule is related with the principle of cost-effective expenditure of public funds. If the price is the only award criterion in a contract award procedure and it is impossible to select the best tender as tenders with the same price have been submitted, the contracting authority shall call upon the economic operators to submit additional tenders within a specified period (art. 91(5) PPL). The PPL does not specify the length of the "specified period". Once the additional tenders have been submitted, only they compete in the procurement procedure. The additional tenders should only contain a modification of the price and the other criteria shall remain unchanged. According to Art. 91(6) PPL, the additional tenders shall not contain higher prices than those previously submitted. The conclusion of the tender requires that at least one additional tender to be submitted. This procedure may only take place once. If additional tenders are again equal, the contracting authority shall cancel the procedure (art. 93 (1) pt. 5 PPL). The contracting authority is obliged to verify whether additional

tenders meet formal requirements and to clear possible doubts regarding irregularities of the prices (art. 91 (1) PPL). The solution of the parity problem applied by the Polish law is therefore definitely not the cheapest one. Preparation of additional tenders by economic operators and their assessment by the contracting authority involve higher transaction costs than other possible solutions (e.g. choosing by lot). It is nevertheless possible to conceive several reasons which justify the additional tenders requirement. The additional transaction costs incurred by the contracting authority may be set off by possible advantages resulting from the price decrease. The choice based on decision of economic operators reflects principle of parties autonomy and is supposedly exposed to the risk of moral hazard to the lesser extent than the procedure of drawing lots.

3.5. Procedures based on the price criterion only

In the case of request-for-quotations and electronic bidding procedures, price is the only admissible criterion of the award (Arts 69 and 76 (2) PPL). Both procedures are applicable in the case of the procurement under the EU-thresholds. Request-for-quotations means contract award procedure in which the contracting authority sends a request-for-quotations to economic operators of its choice and invites them to submit tenders (Art. 70 PPL). It is the most simple tendering procedure. The request-for-quotations may be executed in a written form but also by means of fax or e-mail (Art. 27 PPL). The contracting authority may award a contract under the request-for-quotations procedure if the objects of the contract are generally available supplies or services of fixed quality standards, where the contract value is less than the amounts specified in the EU-thresholds (Art. 70 PPL).

Electronic bidding means contract award procedures in which using a form available on the website allowing to enter the necessary data on-line, economic operators shall submit successive more advantageous tenders (bid increments), subject to an automatic classification (art. 74 (1) PPL). Electronic bidding is a specific procedure regulated under the PPL which requires application of on-line instruments and allows economic operators to submit more than one bid. The economic operator with the lowest price must maintain his/her tender (art. 76 (2) PPL). Tenders submitted by economic operators shall be subject to automatic classification based on price. The economic

operator must maintain his/her tender submitted in the course of a bidding until another economic operator submits a better tender (art. 78(2) pt. 3 PPL).[30]

4. Most economically advantageous tender (MEAT)

As it was announced in Section 3 *supra,* the PPL is based on the criterion of the "best tender". The PPL defines the "best (most advantageous) tender" in Article 2 (5), as "either the tender providing the most advantageous balance of price and other criteria relating to the object of the contract or the tender with the lowest price". The notion of the "best tender" is a general one and covers both the awards based on the lowest price and on the MEAT. In general, the contracting authority may choose whether to apply only the lowest price criterion or to combine it with other criteria. There are some cases when the choice of a certain award procedure or other circumstances makes it compulsory to base a call for tenders on the combination of price and other criteria or on a criterion of the price solely. The specification of the essential terms of the contract shall include the description of the criteria which the contracting authority will apply in selecting a tender, specifying also the importance of particular criteria and method of evaluation of tenders (art. 36(1)(13)). Those criteria form the unique mechanism of awarding the contract, therefore they should be formulated in a precise and understandable manner. The contracting authority is obliged not to base the award of the contract on other criteria than those enumerated in the specification. The criteria should also be announced in the notice on public procurement and they should be in a full conformity with the specification of the essential terms of the contract.

4.1. Selection of the award criteria

Apart from price, Article 91(2) of the PPL enumerates the following award criteria: "quality, functionality, technical parameters, the use of best available technologies with regard to the impact on the environment, exploitation costs, aftersales service and the period of a contract performance". The only criterion which appears in Article 53 of the 2004/18 Directive[31] and which is not

30. For a more detailed description of these procedures see P. Szwedo, M. Spyra in R. Caranta, D. Dragos, EPLS vol. IV (2012).
31. Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134/114.

reproduced in the PPL is the one of "aesthetic merits". Nevertheless, the list has the character of an exemplification and the introduction of others is possible if they are justified by the object of the tender and needs of the contracting authority.[32] The amendment of the 2006 of the PPL[33] has derogated from the example list the criterion of "the influence of the method of performing the contract on the local labour market". This, however, does not eliminate its applicability.

The PPL does not provide any requirements on how to select the criteria. They should relate to the essential characteristics of the object of contract and the methods of its performance and should be treated as basic terms of the future contract.[34] If the object of the contract is describable in an objective and unequivocal and exhaustive manner, the price may remain as the sole criterion of awarding the contract. In such a case, the statement of selecting the price criterion is sufficient as its description, weight percentage and the tender evaluation method.[35] The contracting authority should beware of the non-discriminatory way of formulating it.[36] The award criteria should neither be detached from the object of the contract nor with the methods of its performance. They should neither relate to the secondary features of the bid or non-essential contractual obligations, and reduce the most important features of the object nor violate the principles of public finances[37] such as purpose limitation, efficiency, means-ends rationality, punctuality etc.[38]

Among the criteria other than the lowest price, one of the most widely used is the timing of the contract performance. It is one of the most easily quantifiable criteria. The contracting authority shall not forget the general principle of the civil law which declares that a contract for an impossible performance shall be void.[39] In consequence, the tender shall be rejected (see art. 89 (1) pt. 8 PPL). The performance would be impossible if the time limit of the construction works is contrary to technological requirements of e.g. soil stabilization or road building.[40]

32. See J.E. Nowicki, (2007), M. Adamczak, (2010).
33. Ustawa z dnia 7 kwietnia 2006 r. o zmianie ustawy – Prawo zamówień publicznych oraz ustawy o odpowiedzialności za naruszenie dyscypliny finansów publicznych, Dz. U. 2006, no 79, poz. 551.
34. W. Dzierżanowski, in: M. Stachowiak et.al. (2010), p.
35. *Ibid*., para. 3.
36. *Ibid*, p.
37. See art. 44(3) of the Act on public finances, fn 44.
38. P. Karkoszka, (2013), no. 129634, para. 3.
39. Art. 387 of the Civil Code, fn. 28.
40. P. Karkoszka, (2013), para. 4.

Another criterion which may be important for the contracting authority could be the time limit of warranty/guarantee. The impossibility clause is also applicable in such cases. Therefore, time limits which are disproportionately long to the previous period of economic operator's activity should be carefully analyzed. In practice, tenders with warranty/guarantee exceeding ten years should not be taken into account.[41] In the case of high-technology equipment which is the subject of constant dynamic innovatory changes (like computers, software), the rationality of demanding warranties/guarantees exceeding three years should be questioned.[42]

The contracting authority may formulate minimum criteria related to the validity of the warranty. It may also require an unconditional warranty. Nevertheless, the warranty will never extend to an improper use of the object. Also the methods and availability of warranty service may be transposed into quantifiable criteria, such as: availability of service, method of communication with service, time limit of service performance, warranted time of the most difficult repair, availability of replacement equipment during the time of a repair, cost of spare parts, warranty maintenance costs, costs of service after warranty period etc.

If the contracting authority is going to exploit the object of the contract for a long period of time and its costs constitute an important part of its budget, the application of the "exploitation costs" is suggested.[43] Moreover, in such a case omission of this important criterion may result in questioning the procurement on the grounds of the lack of rationality of public spending.[44] The examples of exploitation costs are: energy, water, sewage, waste, conservation etc.

The description of the object of tender may include technical or technological parameters. They may be formulated as indispensable features for the future exploitation. Formulation and subsequent evaluation of such criteria should be entrusted to specialists.[45]

Utility values may also be one of the evaluation criteria. They include: ease of assembling and disassembling, transportability, aesthetics (colour, form, functionality, ergonomics, size) etc. The object shall be described accu-

41. P. Karkoszka (2013) para. 4, W. Dzierżanowski, in: M. Stachowiak et.al. (2010), p. 414.
42. P. Karkoszka (2013) para. 4.
43. *Ibid.*
44. *Ibid*, see Art. 44(3) of the Act on Public Finances of 27 August 2009, Journal of Laws 2009, no. 157, item 1240.
45. P. Karkoszka (2013) para. 4, W. Dzierżanowski, in: M. Stachowiak et.al. (2010), p. 414, M. Płużański, (2009), p. 491.

rately in order to minimize the discretionary factor and clearly communicate which features are the most important for the contracting authority.[46]

As the number of personnel required for the exploitation of the object of the award generates indirect costs to be borne by the contracting authority, this may also be included as one of the relevant quantifiable criteria. Similarly, the indirect costs will be generated if the object of the tender generates environmental pollution. Such a negative effect should be quantifiable and may be taken into account as one of the criteria. Additionally, the contracting authority may formulate criteria related to staffing the unemployed and the disabled. It should provide minimum requirements and methods of evaluating the tenders.

The choice of criteria, methods of their translation into mathematical matrix in order to create a ranking of tenders and their final selection is a crucial activity of the contracting authority in public procurement. Whenever it is possible contracting authorities are bound to apply mathematical matrices which enable objective and verifiable application of the chosen criteria. The NAC acknowledges, however, the admissibility of criteria which are not quantifiable and *de facto* not verifiable.[47] The NAC recognises, however, the freedom of contracting authorities to choose any mathematical matrix as long as it is congruent and unequivocal.[48]

4.2. Weighting of criteria

Art. 36 (1) pt. 13 PPL requires that "[t]he specification of the essential terms of the contract shall include [...] the description of the criteria which the contracting authority will apply in selecting a tender, specifying also the importance of particular criteria and the method of evaluation of tenders." The "importance of criteria" means that the contracting authority should assign weight to each of them.[49] During the process of evaluation the contracting authority is obliged to apply only the criteria enumerated in the specification. They shall be quantifiable in order to be able to create a ranking of tenders expressed in points resulting from their multiplication by an assigned weight.[50] For example, if the weight of the price is 85 %, the contracting au-

46. P. Karkoszka (2013) para. 4.
47. In the decision of 22nd December 2011, KIO 2637/11 the NAC took the position that rather enigmatic criterion of "conception of the service performance" is admissible and that its application does not require any specified mathematical matrix.
48. Decision of the PPO Arbitrators' Panel, 3rd August 2006, UZP/ZO/0-2187/06.
49. M. Stachowiak in: M. Stachowiak et al., (2010), p. 201.
50. Decision of the PPO Arbitrators Panel, 1st December 2000, UZP/ZO/0-1397/00.

thority should divide the lowest price by the price from the tender in case and multiply it by the weight.[51]

The NAC in its jurisprudence has provided guidance for criteria description and their weighting. In some circumstances, it is not sufficient only to name a criterion. It shall be described in details. A method of assigning points for the fulfilment of the given criteria should be communicated to the economic operators. The evaluation should be able to be expressed by a mathematical matrix and it should be gradable by assigning points. The economic operator should not only know what the weight of a particular criterion is but also more concretely what the points are awarded for.[52]

According to Article 91(2) PPL, price or price in combination with other criteria should appear as a yardstick of awarding the contract. Therefore, the price is an always appearing criterion, sometimes associated with other standards.[53] The PPL does not require that the price criterion should be given the highest weight. The weight of the price is to be determined by the contracting authority which should however bear in mind the principle of rationality of public spending.[54] Assigning a symbolic weight to a price criterion is permissible in order to emphasize the importance of other criteria, e.g. technical parameters,[55] quality or time limit.[56] Fixing the weight of the price at a relatively low level has to be economically justified, for example by demonstrating that purchasing more expensive products or services results in their higher quality, durability or other characteristics, which in consequence results in a higher rationality of public spending.

Criteria may be of an objective and subjective nature. The first category may be quantified. Its natural advantage consists in its transparency in the process of evaluation. Examples of quantifiable criteria is the time of performing the contract. Nevertheless, not every criterion can be quantified and in some cases application of subjective criteria is inevitable.[57] However, even in such cases, the perception of the contracting authority should be subjected to the evaluation rigor based on principles of a fair competition and equal

51. Example taken from R. Bartkowski, (2013), para. 4.
52. Decision of the NAC, 24th February 2012, KIO 291/12.
53. W. Dzierżanowski, (2012), p. 306
54. W. Dzierżanowski, in: M. Stachowiak et al., (2010), p., para. 3.
55. Decision of the NAC, 12th October 2010, KIO/UZP 2093/10; KIO/UZP 2094/10; KIO/UZP 2095/10.
56. M. Adamczak, (2010) p. 58.
57. R. Bartkowski, (2013), para. 3.

treatment of economic operators (art. 7(1) of the PPL)[58] and should determine which tender would be granted the highest and the lowest score.[59] A description leading to an unjustified discretion of the contracting authority may lead to an appeal before the NAC. Each criterion should be awarded a weight percent, sum of which should amount to 100 %.[60] In practice, application of weight percentage results in a score which should be expressed in points.[61] The final ranking of tenders serves as ground for the selection of the economic operator.

Criteria which are relatively difficult to be weighted are aesthetics, functionality and quality. Therefore, the contracting authority should pay particular attention to the technical specification. According to the decision of the Warsaw District Court,[62] "the criteria of tender evaluation should be clearly indicated in the technical specification in order to allow the future verification of the tender evaluation and the choice of the most advantageous tender." In the same decision, the Court identified also the necessity of specifying the criteria by the tender committee as an unjustified change of criteria, which is impermissible. The evaluation may be based on attached specimen or documents. In the latter case, the contracting authority shall indicate the nature of required documents, the choice of which should not discriminate the economic operators.

Parameters like technical specification, exploitation costs, service, guarantee are relatively easily quantifiable.[63] In the tender evaluation procedure, they may be formulated in two different ways. The contracting authority may formulate a given feature as of *sine qua non* nature in the specification procedure. Consequently, its non-fulfilment would result in its incompatibility with the description of the object of the contract. The second option is to grant points for the fulfilment of the given criterion. In the case of exploitation costs, the contracting authority should indicate whether all the costs should be included in the calculation and determine the exploitation period to be taken into account.

58. E. Boryczko, (2012), p. 26.
59. P. Karkoszka, (2013), para. 3.
60. Decision of the NAC, 13th May 2011, KIO 918/11.
61. R. Bartkowski, (2013), para. 5.
62. Decision of Warsaw District Court of 18th March 2004, V Ca 264/04.
63. W. Dzierżanowski in M. Stachowiak et al. (2010), p. 415.

4.3. Change of criteria, sub-criteria and models

While awarding a contract, the contracting authority shall base its choice only on the criteria previously announced in the technical specification. The specification constitutes a detailed form of what was previously announced in the publication or in the invitation to tender. According to Art. 38 (4) PPL, in justified cases, the contracting authority may, prior to the expiry of the time limit for the submission of tenders, modify the content of the specification of the essential terms of the contract. This modification shall be immediately provided to all the economic operators who have received the specification of the essential terms of the contract and it shall be posted on the website of the contracting authority if the specification is available on this website. If the modification of specification of essential terms of contract in the contract award procedure under open tendering leads to modification of the contract notice, the contracting authority shall publish a relevant notice in the Official Journal of the European Union or respectively in the Public Procurement Bulletin in the case of the contracts being below the EU-thresholds (Art. 38 (4a) PPL). If the modification requires publishing of the contract notice, the contracting authority shall extend the time limit for submission of requests to participate in the contract award procedure or the time limit for submission of tenders to the additional time indispensable to make changes in requests or tenders, if necessary (Art. 12a (1) PPL). If the modification is essential, in particular if it concerns the description of the subject-matter, size and range of contract, contract award criteria, conditions for participation in the contract award procedure or method used for the evaluation of fulfilment of those conditions, the awarding entity shall extend the time limit for submission of requests to participate in the contract award procedure or time limit for submission of tenders to additional time indispensable to make changes in requests or tenders. Art. 12a (2) PPL provides for the minimum extension periods in the case of procurement procedures covered by the scope of the EU-Directives.[64] The duty to extend time limits enables economic operators to reassess their decision to submit or not to submit the tender. Until the end of the submission period, it is possible to withdraw a tender or to submit a new one.

It is not allowed to alter the award criteria after the expiry of the deadline for the submission of tenders. However, even after the deadline, it is possible to rephrase the description of the criteria, provided the change of the description has purely editorial character.[65] Simple and precise drafting of award cri-

64. A. Kurowska, (2011) para 1.
65. *Ibid.*, para. 2.

teria is not only a matter of elegant style. According to the decision of the Warsaw District Court, an imprecise description of criteria resulting in the need of their later specification by the tender committee is equal to the change of criteria during tender proceedings, which is unacceptable.[66] However, an elimination of a criterion conflicting with the PPL, without changing the weight of the remaining criteria, does not constitute a violation of the public procurement proceedings.

5. Procedure for evaluating MEAT (best tender), juries, transparency and judicial review

5.1. Tender committees (juries)

Regardless of the procedure applied in the case of a specific contract, the contracting authority may be obliged to appoint a tender committee which will award contracts. Such a duty arises in the case of procurement above the EU thresholds. In the cases of contracts below the EU thresholds, the appointment of the committee is facultative (art. 19 (1) PPL). In the latter case, when the head of the contracting authority decides to make an appointment, he/she will be obliged to follow any rules related to the tender committee stemming out from the PPL.

The tender committee is an auxiliary team of the head of the contracting authority appointed to evaluate the fulfilment of the conditions for participation by economic operators in a contract award procedure and to examine and evaluate tenders (Art. 20 (1) PPL). It is composed of at least 3 persons (Art. 21 (2) PPL). The permanent or *ad hoc* nature of tender committees (Art. 19 (3) PPL) does not influence its duties. Its main task is to evaluate the fulfilment of the conditions for participation by economic operators in a contract award procedure and to examine and evaluate tenders. The tender committee is an auxiliary team of the head of the contracting authority (Art. 20 PPL). In consequence, the tender committee submits proposals of decisions on the exclusion of the economic operator, rejection of tender, choice of the best tender or revocation of proceedings. The head of the contracting authority is free to follow or not follow these suggestions. The committee may formulate subjective opinions, but always within the limits of the contract specification,[67] which limits the discretion of the tender committee.[68]

66. Decision of the Warsaw District Court, fn 62, referred in the decision of the PPO Arbitrators Panel, 5th June 2006, UZP/ZO/0-1593/06.
67. Decisions of the NAC of 7th April 2011, KIO 660/11.

The PPL provides two exceptions to Art. 19. In the case of utilities contracts, regardless the contract value, the tender committee is always facultative (art. 138b (1) PPL). However, if a tender committee is not appointed, the head of the contracting authority shall specify a manner of conducting the procedure that ensures efficient awarding of contracts, individual responsibility for the performed tasks and transparency of work (art. 138b (2) PPL). Similarly, Art. 67 (4) PPL provides that in the case of single-source procurement, the contracting authority is not obliged to appoint a tender committee, *inter alia* when the contract object is supply of water, gas or heat. When the head of the contracting authority does not appoint the committee, he/she is always obliged to conduct the government procurement procedures in an impartial and objective manner.[69]

5.2. MEAT (best tender) in Electronic Auctions.

Before the PPL amendment of 2010,[70] an electronic auction was applicable only if price was expressed in a form of a lump sum. The amendment introduced a possibility to express the price in a form of cost estimation. In such a case, the economic operator has to demonstrate which position in the cost estimation has to be lowered in order to reduce the final price.

According to art. 91a (3) PPL, the price does not have to be one of the criteria selected for tender evaluation at the stage of an electronic auction. The contracting authority is obliged to apply all or selected criteria chosen at the first-stage proceedings. However, each of them has to be automatically evaluable and expressed in points. Discretionary aspects requiring a human interference are not allowed. Therefore criteria which may appear in electronic auctions are time limits of performance, payment, guarantee, number or scope of economic operator's activity. Quality, functionality or aesthetic aspects may not be verified at this stage.[71]

An electronic auction procedure should not be confused with an electronic bidding procedure. In the latter the price is the only criterion of evaluation of tenders (art. 76 (2)-78 (2) PPL). Similarly, as in the case of request-for-quota-

68. Decision of the PPO Arbitrators Panel, 27th August 2004, UZP/ZO/0-1373/04.
69. Jerzy Baehr Jerzy Baehr, Tomasz Czajkowski, Włodzimierz Dzierżanowski, Tomasz Kwieciński, Waldemar Łysakowski, *Prawo zamówień publicznych*, available at http://ftp.uzp.gov.pl/publikacje/komentarz/wydanie3/Komentarz_PZP_III_wydanie_str001_682.zip, 405.
70. Act of 2nd December 2009, amending the PPL, Journal of Laws 2009, no. 223, item 1778.
71. W. Dzierżanowski, in: M. Stachowiak et al., (2010) p. 414.

tions procedure, the measured "advantage" of tender is limited to one dimension only.

The contracting authority shall invite by electronic means all the economic operators who have submitted non-rejectable tenders to participate in an electronic auction (art. 91b(1)). From that moment, all communication between the economic operators and the contracting authority shall be in an electronic form (art. 91c(5) and art. 77). In the invitation, the contracting authority shall inform the economic operators about the manner of evaluation of tenders in an electronic auction (art. 91b(2)(5)). At this stage, the award entity shall select criteria from those previously indicated in the technical specification. The tender evaluation method in an electronic auction should include the recalculation of the bid increments into tender evaluation scores taking into account the score received prior to the opening of the electronic auction (art. 91b(4)). The method of their expression in points shall be indicated and the score previously obtained should also be included. Therefore, the contracting authority shall provide a mathematical matrix explaining how different criteria expressed in points at both stages of the procedure would result in a final score. If price is the only criterion, the information shall also indicate how the more advantageous bid increments should be expressed, e.g. in amount of percents. The contracting authority may also indicate a minimum amount of increments (art. 91b(2)(2)) and that increments would constitute a multiplication of minimum increments.[72] The increments shall be "more advantageous" (art. 91c(1)). If an increment is not more advantageous, i.e. is less advantageous or of the same value as the previous tender, it is unlawful. In consequence, awarding a contract to the economic operator would be void.

5.3. Limits of discretion in selection of the MEAT (best tender)

The evaluation of tenders should not make reference to subjective sentiments of tender committee members. Therefore, the evaluable criteria shall be assessed by a mathematical matrix. Their fundamental function is to limit the discretion of the members.[73] Criteria which are the most difficult to be transformed into a mathematical formula are aesthetics, functionality and quality. That is why, the contracting authority is under its best effort obligation to precisely describe the object of the future contract. The tenders should be evaluated with reference to the mentioned criteria and not any in other way,

72. *Ibid.* p. 354.
73. P. Karkoszka, (2013) par. 3.

e.g. by their mutual comparison.[74] The subjective element, which is sometimes inevitable, should be minimized.[75] Nevertheless, according to the interpretation of the NAC, the PPL does not require that all criteria should be quantified. The criterion of "concept of service performance" in not *per se* in contradiction with the PPL, if the contracting authority has provided minimum requirements in the technical specification, divided the criterion into several sub-criteria and assigned it the weight of 30 %, where the quantifiable criterion of price was assigned the weight of 70 %.[76] When the contracting authority combines criteria of ergonomics (20 %), aesthetics (15 %) and spatial organization (15 %), their applicability is allowed only if they are very precisely described in the technical specification. The lack of such a description leads to the demand of repetition of tender proceedings.[77] The subjective criteria are allowed as far as they do not lead to unfair competition and an unequal treatment of economic operators.[78]

5.4. Transparency safeguards in the selection of the MEAT (best tender)

Transparency is one of the principles of spending public money mentioned in Article 3 (3) PPL. This principle is also mentioned in Article 21, guiding the work of tender committees. Transparency is guaranteed by several instruments. One of them is the non-exposure of tenders. The contracting authority is obliged to provide information in the technical specification about the date and place of the submission and of the opening of tenders (Art. 36 (1) pt. 11 PPL). It should also indicate the "description of the manner of the tender preparation" (art. 36(1)(10)), including the method of closing the tender. The tender shall be closed in such a manner that it allows to avoid any doubts that the tender was stored intact and no one had access to it. The instruction may also indicate the form of tender and how it should be submitted.[79]

The premature opening of tender(s) or its omission in opening or later opening will result in the violation of the PPL, especially of the principles of equal treatment and/or principle of publicity. However, such a violation would not serve as ground for nullification of the procedure which is allowed only in

74. This rule does not follow explicitly from the PPL. It has been arbitrarily adopted by the NAC. See, Decision of the NAC, 6th January 2010, KIO/UZP 1804/09.
75. *Ibid.*
76. Decision of the NAC, 28th June 2010, KIO/UZP 1168/10.
77. Decision of the NAC, 15th June 2010, KIO/UZP 1327/10.
78. Decision of the NAC, 23rd October 2010, KIO/UZP 1680/10.
79. R. Groński (2012).

enumerated cases under Article 93(1) of the PPL. Nevertheless, the economic operator who due to such practice suffers damages, may seek redress. Also penal responsibility for certain practices is possible. The economic operator who claims to lose a possibility of a contract conclusion may seek nullification of the contract concluded with another economic operator. Such a possibility is provided by the general rule of civil procedure: "[t]he plaintiff may request the court to determine the existence or non-existence of a legal relationship or law if he has legal interest therein".[80] According to the general principle of civil law: "a juridical act that is contrary to statute or whose purpose is to bypass statute shall be invalid".[81]

The obligation to store the tenders intact exists also in relation to electronic tenders. It means that the contracting authority is obliged to secure an electronic auctions procedure against any illegal interference. Lack of such technological barriers constitutes an obstacle to receiving tenders in electronic form.

The opening of tenders is public (art. 86 (2) PPL). It means that everyone, without showing his/her legal interest may take part in it. The observers do not have to justify reason or even present their identity. Therefore, the opening should take place in a relatively freely accessible environment. The opening "shall take place directly following the expiry of the time limit for the submission of tenders" (art. 86 (2) PPL), which means on the same date as the final date of their submission. It does not mean that any break between opening and submission is not allowed. However, in the meantime any action related to tenders is not allowed and the two actions of submission and opening should be directly subsequent.[82]

Directly prior to the opening of tenders, the contracting authority shall state the amount they intend to allocate to finance the contract. The amount is minimal and may be increased. It depends from the financial situation of the contracting authority. The stated amount is binding if it is higher than the one expressed in the best tender. However, if the price of the best tender or a tender with the lowest price exceeds the amount which the contracting authority can allocate to finance the contract, unless the contracting authority is able to increase that amount up to the price of the best tender, the contracting authority shall cancel a contract award procedure (Art. 93 (1) pt. 4 PPL). If price is not the only awarding criterion, a comparison of the amount with a tender with the lowest price, which is not the best tender, is purposeless. Ac-

80. Code of the Civil Procedure, Journal of Laws 1964, no. 43, item 296, later amended.
81. Art. 58 of the, Civil Code, fn. 39.
82. W. Dzierżanowski, in: M. Stachowiak et al., (2010) p. 380.

cording to Art. 91(1) PPL, only the best tender may be selected for awarding the contract.

While opening tenders, the contracting authority provides information about the names (company names) and addresses of economic operators as well as information included in the tenders concerning the price, time limit for the completion of the contract, period of guarantee and terms of payment (art. 86 (4) PPL). The information may be provided directly after the opening of each tender or after opening all tenders. They shall also be dispatched to the economic operators who were absent while opening tenders upon their request.

The principles of publicity and transparency are safeguarded by the duty of preparing the "written record of the contract award procedure" (art. 96 (1) PPL). The record together with annexes attached thereto shall be open to the public (art. 96 (3) PPL). Therefore, in order to have an access to the record, demonstration of legal or factual interest is not required. The principle of publicity is additionally reinforced by the Access to Public Records Act of 2001 of 6th September 2001.[83] The regulations of the PPL constitute *lex specialis* to the Act on Public Information which would remain applicable in all aspects non-regulated by the PPL.

The record shall be drafted independently from the kind of the contract award procedure or value of the contract. It shall be prepared in a written form. It means than in electronic auctions, the record shall be prepared by electronic means with a secure electronic signature verified by a valid qualified certificate.[84] Written record may also be published on the Internet. It shall be prepared "in the course of the conduct", i.e. after the commencement of the procedure. The Art. 96 (1) PPL provides the minimum content of the record which shall contain at least: description of the object of the contract, information about the contract award procedure, information on economic operators, price and other essential elements of the tender indication of the selected tender or tenders. The content is further specified in the Regulation of the Prime Minister of 26th October 2010 on written record of the contract award procedure.[85] The record shall also indicate the persons responsible for

83. Journal of Laws 2001, no. 112, item 1198.
84. W. Dzierżanowski in: M. Stachowiak et al., (2010) p. 414.
85. Journal of Laws 2010, no. 223, item 1458; commented in: Marta Mikulska-Nowacka, *Nowy protokół postępowania o udzielenie zamówienia,* Lex, ABC nr 123816, Paulina Suszyńska-Purtak, *Dokumentacja postępowania o udzielenie zamówienia publicznego*, Lex, ABC nr 72940, Paweł Wójcik, *Protokół postępowania o udzielenie zamówienia publicznego*, Lex, ABC nr 92336.

the preparation of relevant data therein. The Regulation does not differentiate the scope of required information depending on the value of the contract. Nevertheless, if the contract is below the EU-thresholds and the contracting authority, for example, chooses not to appoint tender committee, the relevant fields of the record's form would remain unfilled.

5.5. Review of award procedures and adjustment of award criteria

In the case of the procurement contracts above the EU-thresholds, both the choice and the way of application of the award criteria are amenable to review. The choice of discriminating criteria or of the criteria which are not adequately related to the subject matter of the contract is a common objection raised in appeals against specifications of essential terms of the contract.[86] E.g. the NAC in its decision of 25th January 2012 demanded to delete certain criteria in a technical specification because they were evaluated as creating a preference for one of the economic operators.[87] The NAC may also demand to change the weight of particular criteria. In its decision of 12th July 2012, it demanded to lower the weight of the technical assessment to 10 % and raise the weight of the price criterion to 90 %.[88] In this decision, the NAC stated *inter alia,* that the competition is limited when the economic operator is able to present a tender which corresponds to criteria enumerated in the technical specification but which, according to provided method of their evaluation, would be unable to compete seriously with tenders of other economic operators.[89] In the case of objective award criteria, the NAC and courts usually review also the way of their application. In the case of criteria with elements of subjective evaluation, the scope of the review is limited. The NAC and the courts verify the choice of the criteria but in practice they do not question the way in which the subjective criteria have been applied.

In the case of contracts below the EU thresholds, the appeal is solely admissible against four measures enumerated in the Article 180 (2) PPL. These measures are: 1) a choice of the negotiated procedure without publication, single-source procurement or request for quotations; 2) description of the method used for the evaluation of the fulfilment of conditions for participation in the contract award procedure; 3) exclusion of the appellant from the contract award procedure; 4) rejection of the appellant's tender. Thus in the

86. See decisions of the NAC of 2nd January 2012, KIO 2703/11; 17 September 2012, KIO 1891/12;
87. Decision of the NAC, 25th January 2012, KIO 91/12.
88. Decision of the NAC, 12th July 2012, KIO 1360/12.
89. *Ibid, para. 2 of the Decision's operative part.*

case of the contracts below the EU-thresholds, it is possible to challenge the choice of the operators' selection criteria and the application thereof may be reviewed by the NAC and courts (Art. 180 (2) pt. 2 PPL). However, any objections pertaining to award criteria in procedures not covered by the scope of the EU-Procurement Directives may not be ground for appeal. The narrow scope of the review below the EU-thresholds does not mean that in this area there are no instruments of the enforcement of the legal rules pertaining to award criteria. They are, however, of the public nature. The legality of procurement contracts may be controlled by the President of PPO (Article 161 PPL), by the Supreme Chamber of Control, the organ of state audit directly subordinated to the lower chamber of Parliament, and by Regional Chambers of Audit, which are governmental agencies of financial supervision established to control local government authorities.

6. Reservation and rejection of non-compliant bids

The noncompliance with law or with the specification of the essential terms of the contract and computational errors in the calculation of prices belong to the grounds of the rejection of a tender (Art. 89 (1) pts 1,2 and 6 PPL). **A breach of statutory provisions** is grounds for rejecting a tender no matter whether the tender is non-compliant with substantive or formal requirements. The contracting authority may reject e.g. tenders submitted in a foreign language (Art. 9 (2) PPL).[90] If a tender has been submitted **past the deadline**, the contracting authority returns it to the economic operator (Art. 84 (2) PPL). The delay may not be excused.[91] Tenders submitted in the wrong place are treated as tenders submitted past the deadline.[92] The difference between rejecting and returning a tender is important in the context of contracts below the EU-thresholds as in these cases the decision to return a tender may not be reviewed by the NAC whereas the rejection of a tender falls within the scope

90. Decision of the PPO Arbitrators' Panel of 5th September 2005, UZP/ZO/0-2414/05 Nevertheless, it should be stressed that according to the Art. 9 (3) PPL in particularly justified cases the awarding entity may agree to the submission of a request to participate in contract award procedures, statements, tenders and other documents also in a language commonly used in international trade or in a language of the country in which the contract is awarded.
91. M. Płużański, (2009), p. 464.
92. Decision of PPO Arbitrators' Panel, 22nd July 2005, UZP/ZO/0-1808/05. Any ambiguities, discrepancies or errors in contracts notice pertaining to the place of tender's submission should be interpreted in favor of economic operator.

of the review. According to the Art. 89 (1) pt 2 PPL, the contracting authority rejects a tender if the **content of the tender is inconsistent with the content of the specification** of the essential terms of the contract. *A contrario,* any formal inconsistencies do not constitute grounds for rejection.[93]

Several PPL provisions temper the formalism of the tender verification procedure. During examination and evaluation of tenders, the contracting authority may require **explanations** regarding the content of the submitted tenders (Art. 87 sec. 1 PPL). During examination and evaluation of tenders, the contracting authority and the economic operator may communicate only to clear up ambiguities in the tender. PPL prohibits any form of negotiation on the content of the tender (Art. 87 sec. 1 PPL *in fine*). The explanations may not change or supplement the submitted tender. Even if a contracting authority finds a submitted bid ambiguous, it is not always mandatory to ask for explanations. A contracting authority may interpret submitted documents on its own, provided its experience and circumstances of the case allow to construe properly the intention of the economic operator. Refraining from asking for explanations accelerates the awarding procedure. It may be a tempting solution for the contracting authority. However, it is not always the safest one. In some cases, the PPO Arbitrators' Panels and the NAC found it negligent that the contracting authority had not required explanations. In these cases, the PPO Arbitrators' Panels and the NAC assumed that the awarding authority should have realised that it was not able to interpret properly submitted documents on its own.[94]

In some cases, an contracting authority is obliged to **correct submitted tenders**. According to the Art. 87 (2) PPL, a contracting authority is obliged to correct obvious misprints, obvious computational errors considering the calculation consequences of the conducted modifications and other errors which bring about inconsistencies between the submitted tender and the spec-

93. Decision of PPO Arbitrators' Panel, 15th July 2004, UZP/ZO/0-1058/04. In this case the economic operator failed to initial several pages of annexes to the tender. The PPO Arbitrators' Panel held that lack of all required initials is a formal inconsistency with specification whereas only an inconsistency with the content of specification may be a ground of rejection of a tender. See also W. Dzierżanowski in M. Stachowiak et al. (2012), p. 399, M. Lemch- Rejowska in M. Lemch Rejowska, Ł. Laszczyński (2012), p. 241.

94. See the decision of the PPO Arbitrators' Panel, 4th July 2003, UZP/Z0/0-936/03, and the decision of the District Court in Nowy Sącz, 2nd February 2006, I Ca 727/05. See also W. Dzierżanowski in M. Stachowiak et al. (2010), p. 388, M. Płużański (2009), p. 472, M. Lamch-Rejowska in M. Lamch-Rejowska, Ł. Laszczyński (2012), p. 252 and A. Elżanowska (2006) p. 32.

ification of the essential terms of the contract but do not cause essential modifications of the tender. The economic operator should be immediately notified about corrections. Within 3 days from the notification, the economic operator may object to corrections not related to obvious misprints or obvious computational errors. If it does so, the contracting authority rejects the submitted tender (Art. 89 (1) pt 7 PPL. It is not hard to guess that in practice the distinction between obvious and not obvious mistakes and an essential and not essential modification is not very clear and that therefore there is a significant number of disputes related to the interpretation of Art. 87 (2) PPL. Unfortunately, it is difficult to point out a consistent line of case law in this field. There are several cases related to inconsistency between offered materials and the materials described in the specification. In the decision of 23rd April 2009 (XII Ga 317/09), the District Court in Kraków held that the awarding authority should have corrected the tender. The court ruled that a correction is not of an essential character if the change of the offered materials does not affect the offered price. Referring to similar facts, the same court in the decision of 29th January 2010 (XII Ga 429/09) held that the awarding authority had no right to correct the tender even if such a correction hadn't affected the price, as the duty to correct errors does not apply to deliberate divergences between an offer and technical specifications. The District Court in Rzeszów in the decision of 12th July 2012 (VI Ga 114/12) held, in line with the Kraków decision of 2009, that the contracting authority is obliged to correct a tender if in the light of explanations submitted by the economic operator it is obvious that the operator has formulated the tender negligently. In this decision, the court took position that the correction of characteristics of a commodity (bus engine capacity) is not an essential modification of the tender if the commodity with characteristics described originally by the operator actually does not exist and the modification does not affect the price. The majority of academic analyses of Art. 87 (2) PPL stress that the correction of a tender is admissible only if the data to be corrected have not been submitted by the operator deliberately.[95] In many situations, the contracting authority is not likely to have adequate evidence to judge whether disputed data have been submitted accidentally or deliberately.

These examples show clearly that correction of tenders is not an efficient instrument. The correction of submitted tenders may also raise to some more general doubts. One may wonder whether such an interference in the content

95. W. Dzierżanowski in M. Stachowiak et al. (2010), p. 394, M. Płużański (2009), p. 478, J. Pieróg (2009), p. 300.

of tender is congruent with basic values and concepts of the European procurement law. There may be several reasons to remove these doubts. It seems that it is mainly the wording of Art. 87 sec. 2 PPL which is misleading. It should be pointed out that, at least in theory, the contracting authority may correct a tender only in the case of obvious misprints and obvious computational errors as well as in the case of other not deliberate errors resulting in inconsistencies between the submitted tender and the specification of the essential terms of the contract. The goal of the Art. 87 sec. 2 PPL is to ascertain the true intent of the economic operator. Thus the PPL rejects purely "literal" concepts of interpretation. The act of "correction" is only a formal manifestation of the interpretation adopted by the contracting authority. The duty to communicate the correction and the presumed consent of the economic operator facilitate the awarding procedure in comparison to explanations procedure which has been designed to solve more complicated problems pertaining to the interpretation of tenders. The possibility to raise an objection to the correction respects the principle of the autonomy of the economic operator. It is therefore difficult to show any glaring inconsistency between Art. 87 sec. 2 PPL and the European law.

The duty to correct obvious **computational errors** affects the rules on the rejection of a tender. According to Art. 89 (1) pt 2 PPL, a tender should be rejected if it contains computational errors in the calculation of prices. Nevertheless, if such an error is obvious, it should be corrected by the contracting authority (Art. 87 (2) pt 2 PPL). A computational error in price calculation may consist in omitting certain categories mentioned in the cost estimation,[96] application of a simplified instead of detailed cost calculation model,[97] application of a non-existing or improper VAT rate[98] or an inappropriate indication of required hours of experts' labour.[99] It is a common problem how to deal with tenders when an economic operator omits one or several elements required by the contracting authority to estimate the price. Previously, the NAC considered every element of the price calculation essential to the content of the tender and therefore regarded any omission of this kind as a cause of tender rejection.[100] In recent decisions, the NAC took an opposite position. An omission of one of price estimation elements was characterised as an obvious computational er-

96. Decision of the NAC, 13th January 2012, KIO 3/2012.
97. Decision of the NAC, 7th February 2012, KIO 197/12.
98. Decision of the NAC, 4th October 2012, KIO 2012/12 and the Supreme Court Decision, 20th October 2011, III CZP 53/11, OSNC 2012/4/45.
99. Decision of the NAC, 4th October 2012, KIO 2012/12.
100. Decision of the NAC, 12th November 2009, KIO/UZP 1396/09.

ror. The NAC concluded that the contracting authority should have corrected it assuming that the omitted element amounted to zero.[101]

7. Abnormally low prices

According to the PPL, the best tender in not necessarily the one offering the lowest price. However, in practice of the Polish awarding entities, it dominates as the sole criterion. The contracting authority shall evaluate whether the offered price is not "abnormally low" (Art. 90 (1) PPL). The scope of this duty is not limited to the contracts above the EU thresholds. It covers all procurement procedures regulated by the PPL.[102] The contracting authority is obliged to reject tenders containing an abnormally low price in relation to the subject-matter of the contract (Art. 89 (1) pt 4 PPL).[103] An infringement of the duty to reject a tender with an abnormally low price belongs to common grounds for appeals before the NAC.[104] The rejection of a tender due to an abnormally low price is admissible only after the contracting authority has requested the economic operator to provide, within a fixed time limit, explanations concerning elements of the tender which have an impact on the price level (Art. 90 (1) PPL). The contracting authority is not obliged to give reasons for the allegation that the offered price is abnormally low. The burden of proof is entirely placed on the economic operator. All evidence must be provided by the operator within a fixed time limit specified by the contracting authority. Neither the NAC nor a court may admit additional evidence which

101. Decisions of the NAC, 16th October 2012, KIO 2094/12, 28th January 2013, KIO 13/13.
102. About the equivalent instruments in the procedures not covered by the scope of PPL see P. Szwedo, M. Spyra in R. Caranta, D. Dragos, eds. (2012).
103. It may be debatable whether the duty to reject tenders containing an abnormally low price follows from EU-law. The answer to this question should be rather affirmative. In is unlikely to assume that a contracting authority may reject a tender due to the abnormally low price at its discretion. The abnormally low offer is a serious distortion of competition. If it isn't rejected it influences significantly the outcome of the awarding procedure. The individual interests of the contracting authority may be a weak incentive to reject an abnormally low offer. It may be tempting to reduce expenses even despite higher degree of default risk. The duty to reject an abnormally low offer is a reasonable solution to protect the fair competition and to avoid gambling behaviour of the contracting authority.
104. See e.g. some recent decisions of the NAC, 6th December 2012, KIO 2595/12, 16th November 2012, KIO 2394/12; KIO 2395/12; KIO 2415/12, 14th November 2012, KIO 2352/12, 13th November 2012, KIO 2413/12.

has not been presented timely to the contracting authority.[105] The rules on the burden of proof are different in proceedings initiated by an unsuccessful participant to the awarding procedure who challenges the award due to the alleged violation of the abnormally low price verification procedure. In these cases, it is up to the appellant to demonstrate convincing evidence that there were reasonable doubts about the price level and that the contracting authority was obliged to commence the price verification.[106]

There are no statutory provisions on the circumstances under which the duty to require explanations arises. The PPL outlines only a general duty to require explanations whenever there is a reasonable suspicion that the offered price is abnormally low. In the decision of 28th July 2010 (KIO/UZP 1505/10), the NAC considered that there was no duty to ask for explanations if the differences between the offered prices did not exceed 10 %. The NAC stressed, however, that there was no threshold of differences between the prices which could be applied in every case to determine whether the duty to require explanations arises.[107]

The term "abnormally low price" is not easily definable on the grounds of a pure legal text. It has to be assessed with the inclusion of such factors as: detachment of the price from the realities of the market or the lack of a possibility to effectuate the contract with profit.[108] According to the predominant opinion, a mere difference between prices may does not suffice to characterise the offered price as abnormally low.[109] Low prices of some of the elements which are compensated by the price of other elements shall not be an

105. Decision of the NAC, 18th December 2012, KIO 2659/12.
106. Decision of the NAC, 22nd December 2009 KIO/UZP 1697/09.
107. Some researchers suggest that such a threshold should be introduced. It is suggested that the difference of the 20 % between the lowest price and the estimated value of contract or the difference of the 10 % between the lowest price and the mean price in the proceeding should oblige the awarding entity to demand explanations. W. Dzierżanowski (2012/5), p. 23.
108. Decisions of the District Court of Krakow of 23rd April 2009, XII Ga 88/09, the District Court of Katowice of 28th April 2008, XII Ga 128/08, the District Court of Katowice of 30th January 2007, XII Ga 3/07. See also. E. Nowicki (2007), M. Olszewska, (2009).
109. Decision of the NAC, 14th November 2012, KIO 2352/12. The NAC held the difference of the 41,51 % between the lowest price and the estimated value of the contract and the difference of the 27 % between the lowest price and the weighted mean price in the proceeding is not a decisive factor in the decision whether the lowest price is abnormally low. The NAC stated that the lowest price was not abnormally low as the operator proved that the deal was still profitable for him.

object of rejection.[110] However, the evaluation of price should concern the whole object of the contract. The abnormally low price of a part of the object or one of the positions of the tender list does not justify its rejection.[111] There are, however, some decisions that are not in line with the predominant way of the interpretation of Art. 90 PPL. The District Court in Poznań in the decision of 4th June 2008 (X Ga 127/08) took the position that in the absence of the precise statutory criteria, the decision whether the offered price is abnormally low is to a certain extent subjective. The Court in Poznan stated also that the significant difference between the prices offered by operators may determine the rejection of the lowest offer as abnormally low even if the economic operator proves that the offered deal is profitable for him/her.

Until the completion of this research (February 2013), there had been approx. 130 PPO published decisions of Arbitrators' Panels and of the NAC which referred somehow to the influence of public aid on prices.[112] In most of them, economic operators referred to the public aid they were going to obtain in order to justify the offered price. The NAC usually holds it necessary that the economic operator proves that the grant of public aid is certain and that the public aid is legal. To justify the low price, it is not only necessary to prove that public aid has been actually granted to the economic operator but also to demonstrate precisely how the public aid influences economic parameters of the tender. In the decision of 29th September 2012 (KIO 1935/12), the NAC held that the documents which proved that the operator had obtained the grant from one of the governmental agencies to buy construction machinery were not an adequate evidence of the fact that the price offered by the operator was not abnormally low. The NAC required evidence that could precisely demonstrate how the subsidised buy of construction machinery affected the price and profitability of the deal. The analysis of the case-law shows that in numerous cases, although the public aid was legally obtained and although it seems that the public aid was reasonably linked with the factors which influenced the offered price, the tender was rejected as the economic operator had not presented sufficient evidence within the time limit set down by the contracting authority.

110. Decision of the NAC of 1st August 2008, KIO/UZP 756/08, District Court of Poznan of 17th January 2006, II Ca 2194/05.
111. P. Karkoszka, (2013), para. 3.
112. Data according to the Lex database.

8. Specific issues disputed at national level

One of the highly controversial questions discussed at national level is the problem of "zero price". Obviously, it does not pertain to the lump sum prices but to the elements of prices based on costs estimation or to the contracts which cover several services (esp. banking contracts).[113] There are two contradictory views on the permissibility of the "zero price" which are represented in two lines of the NAC caselaw. According to one of them, the "zero" price is not permissible. The NAC in the decision of 30th November 2010 (KIO/KD 93/10) stressed that the price is a value expressed in monetary units. According to the NAC reasoning in this case, the definition of price implies its positive value. From the legal point of view, the price may be defined as a monetary obligation in consideration for goods or services. The notions of the obligation and the "zero price" are contradictory. Hence, it is not possible to regard "zero zł" as a price. Whenever the price of certain cost estimation elements or some services covered by the description of the subject matter of the contract is compulsory, a tender with the "zero price" indicated as the element of price calculation should be rejected as inconsistent with the specification of essential terms of the contract (Art. 89 (1) pt 2 PPL).[114]

In the other line of decisions, PPO Arbitrators' Panel and the NAC took the opposite view. In the decision of 11th October 2005 (UZP/ZO/0-2829/05), a PPO Arbitrators' Panel didn't exclude the possibility that some of the cost components equal to zero or that some elements of the service covered by the subject matter of the contract are to be rendered free of charge. In the opinion of the Panel, the price should be understood as a remuneration for overall activities covered by the subject matter of the contract. The price may be calculated on the basis of different methods and, according to the Panel, it shouldn't be excluded that some elements of this calculation equal zero. This line of reasoning was repeated by the NAC in several decisions.[115] The NAC pointed out that it is impossible to apply a uniform approach to the "zero

113. See e.g. the NAC decisions 22nd December 2009, KIO/UZP 1697/09, 30th November 2010, KIO/KD 93/10, 3rd January 2012, KIO 2725/11.
114. See also the NAC decisions, 23rd December 2008, KIO/UZP 1434/08, KIO/UZP 1451/08, 26th November 2009, KIO/UZP 1622/09; KIO/UZP 1647/09.
115. Decisions of the NAC, 2nd April 2008, KIO/UZP 237/08, 5th October 2009, KIO/UZP 1324/09, 18th August 2010, KIO/UZP 1642/10, 28th October 2010, KIO 2246/10, 12th April 2011, KIO 676/11, 19th April 2011, KIO 739/11, 1st December 2011, KIO 2492/11, KIO 2495/11, 8th December 2011, KIO 2542/11, 3rd January 2012, KIO 2725/11, 27th November 2012, KIO 2499/12.

price" in every contract. First, it is necessary to consider the market practice. Rendering some components of the service free of charge is due to the significant competition a common practice e.g. in the banking sector. In some contracts, remuneration is not the only benefit available to the economic operator. Banks may render free of charge some services related to bank accounts as they take advantage of the possibility to invest deposits.[116] Although the controversy is far from being over, it seems that in the recent caselaw, the liberal approach to the "zero price" prevails.

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116. Decision of the NAC, 3rd January 2012, KIO 2725/11.

7 The Theory and Practice of Award Criteria in the Romanian Procurement Law

D. Dragos, B. Neamtu R. Suciu

1. Introduction: Main features of the national system

The development of the current Public procurement (PP) legal framework has taken place in the context of Romania's accession to the EU and of the legislative harmonization. Through Emergency Government Ordinance no. 34/2006 (hereafter EGO no. 34/2006), Romania has transposed the EU Directives on public procurement using almost the same wording, however, without going beyond the main provisions of the Directives. Therefore, certain areas of PP (abnormally low tenders for example) have been tackled via guidelines/recommendations by the national monitoring authority and the doctrine. The almost full transposition of the PP Directives into the national legislation has led to the expanding of its realm to all contracts above the direct procurement threshold, and thus beyond the thresholds established in the Directives (over-compliance leading sometimes to excessive requirements for low value contracts).

With regard to the drafting of the award documentation, including award criteria, there are two elements that have impacted the legislative reforms, the practice, and the doctrine in the field of PP. The first element refers to the lack of expertise of all the relevant actors involved in PP – contracting authorities, economic operators, and review bodies. Based on the case law available, one can notice a common trend with regard to the most often made mistakes by the contracting authorities with regard to the award criteria: confusion between selection/qualification and award criteria; use of subjective factors for the evaluation of tenders; procedural errors infringing transparency and equal treatment of tenderers during the evaluation of the tenders. Economic operators, on the other hand, suffering from the same lack of expertise, react tardily with respect to the faulty award documentation – very often the

award documentation gets challenged once the economic operators are dissatisfied with the result of the evaluation. With regard to review bodies, it took them several years to develop a case law where complaints are solved not by reference to narrow and sometimes unclear legal provisions but also to the case law of the Court of Justice of the European Union and the more general principles that apply to the national PP field. The second element refers to corruption and the opportunity contracting authorities have to breach the principles of PP by misusing award criteria. The main practice by the contracting authorities is to draft award criteria that 'match' the exact description of a certain tenderer, thus eliminating competition. Such corrupt practices have created a general climate of mistrust in public procurement; even when the contracting authorities have no hidden agenda with the use of certain award criteria, mistakes such as subjective evaluation factors are always interpreted by tenderers and the public in light of corrupt practices.

It is worth mentioning that the regulation of the PP field in Romania is influenced by the chosen method of implementation of EU Directives together with the tendency of the executive body to bypass the Parliament in order to avoid lengthy legislative proceedings. As mentioned before, there is a preference for exact transposition of the EU Directives into the national laws. With regard to procurement, this exact transposition was a necessity at first in 2006, before accession to the EU, since the legal framework in place was not in accordance with the EU norms/policy in the field. However, this trend has continued after January 2007 and it continues even today. With regard to certain areas of PP, exact transposition has generated 'the creation' into the national law of novel legal institutions (such as ineffectiveness of a contract, a remedy which does not exist under the same terminology in the Romania legal system). In addition to exact transposition, there is also a tendency to regulate via government acts. Emergency Governmental Ordinances are acts issued by the government, in theory under emergency situations, with the same legal force as a law. Subsequently, these acts need to be approved by the Parliament. What they create is an opportunity for the government to introduce quickly new amendments, based on EU law as well as on nationally driven reforms. This has generated in the last years a lot of instability – provisions concerning the same issue were subsequently modified several times (for example the competence of the review bodies as well as the procedures applicable for contracts of a certain value). In light of these aspects, it can be argued that the award of PP contracts under of the Romanian law resembles very closely the EU Directives' provisions. For certain aspects there is a legal void supplemented by guidelines issued by the monitoring authority. There is a fair amount of case law available, more than with regard to other areas of PP

(remedies for example); though not common only in PP, courts have different opinions on the same issue (divergent opinions are common even within the same court of law).

It is also interesting to sketch the current institutional arrangement by briefly pointing out the role of each institution with regard to the award of PP contracts.

– The National Authority for Regulating and Monitoring Public Procurement (hereafter NARMPP) is, as evident from its title, the institution responsible for monitoring contracting authorities throughout the entire PP process. It's 'power' over contracting authorities is rather large, since it can order them to submit any documents, to suspend/annul any PP procedure pending verifications, to provide any information related to public procurement, etc. Its initial important role was furthermore consolidated in the context of recent critiques coming from the European Commission with regard to errors in the drafting of the award documentation for contracts financed from the structural funds, undetected during the monitoring procedures. The Romanian Government, at the initiative of NARMPP, implemented some important changes (reflected in the amendments from December 2011 of EGO no. 34/2006). Currently, NARMPP performs an *ex-ante* control of all PP procedures of all contracting authorities in Romania. It monitors all participation notices and the award documentation (with the exception of the technical aspects) published by contracting authorities on the national portal for public procurement (ESPP) (from September 2011) in order to validate their legality (conformity with PP legislation). This monitoring takes place for all PP contracts above €15,000 (direct procurement threshold). Following the review/monitoring procedure, NARMPP has to issue the acceptance for initiating the award procedure or to inform the contracting authority with regard to the errors found in the award documentation and the reason why the award documentation is not in conformity with the law. From the analysis of recent case law and the doctrine, it is already visible that some errors are no longer present in the award documentation (they represent an exception rather than the rule).
– The Ministry of Public Finances is the authority who monitors the award procedures through a specialized structure at the central level called the Unit for Coordination and Monitoring of Public Procurement (it does not have the status of legal person). At the sub-state level, the Unit coordinates specialized departments within the Agencies for public finances, called Departments for the Monitoring of Public Procurement. The civil servants who work within these structures are called observers. These entities have

the following competences with regard to the award of PP contracts:[1] to issue a verification decision for each award procedure, before the observing activity takes place, and to communicate it in writing to the contracting authorities within a given timeframe; to state its opinion concerning the conformity of the award procedure with the legislation in place; to draft for each verified award procedure an activity report; to make sure that the observations of the observers during the evaluation process of the tenders are included in the documents drafted by the contracting authority. There is a permanent communication and collaboration between these bodies and the other entities involved in PP (mostly NAPMPP). The report regarding each procedure is sent to NAPMPP and the observers are entitled to ask NARMPP for clarifications concerning legal provisions.

– The National Council for Solving Legal Disputes (first instance review body in PP matters, hereafter the Council). The nature of the Council, considered an administrative (quasi-judicial) body or a special jurisdiction similar to a tribunal in the common law system, has resulted in national debates regarding its competence in relation to the courts of law. Until the beginning of 2011, any aggrieved participant in a PP procedure could choose to submit its complaint either with the Council or with a court of law. Currently, the law was changed and any complaint regarding a PP procedure must be first lodged with the administrative-judicial body and only after this mandatory procedure it can go to a court of law.
– The courts of law.

2. Selection and award criteria

The national law and the case law establish a clear distinction between qualification/selection criteria and award criteria, in line with the Lianakis case. In practice, contracting authorities have used very often selection criteria among the award criteria (relative widespread practice immediately after the adoption of the law in 2006, now less likely to occur).

Governmental Decision no. 925/2006[2] comprising the guidelines for the implementation of EGO no. 34/2005, in article 15(1) clearly prohibits con-

1. EGO no. 52/2011 for the amendment of EGO no. 30/2006 regarding the verification competencies on procedural aspects concerning the award of PP contracts, of public works and services concession contracts, published in the Official Journal of Romania no. 411/10.06.2011.
2. Published in the Official Journal of Romania no. 625/20.7.2006.

tracting authorities from using qualification and selection criteria listed in article 176 from EGO no. 34/2006 as factors for the evaluation of the bids. Article 293(j) from EGO no. 34/2006 states that such a practice by the contracting authority is a misdemeanor sanctioned with a fee of up to 100,000 RON.

Among the selection/qualification criteria most often used also for the evaluation of the tenders are: the past experience of the tenderers with similar contracts, information concerning the personnel and the number of experts used for the implementation of the contract, the technical equipment the tenderers have available. There were cases brought before the courts when the contracting authority not only used qualification criteria for the evaluation of the tenders but the said criteria were not assigned a clear weighing or a points system (no explanation concerning how past experience will count as an advantage in an objective evaluation algorithm).[3] In other cases, a high number of points were assigned to past experience with similar tasks (30 points) while the financial offer was given only 20 points.[4] Interestingly enough, seldom do economic operators challenge the award documentation (specifically the evaluation algorithm) within the legal timeframe; most likely this is invoked when they are dissatisfied with the outcome of the evaluation procedure. This leads to a very disturbing situation, namely to have a qualification/award procedure conducted based on illegal requirements. For example, in one case an economic operator was excluded from tendering following the qualification procedure because it did not comply with a request of the contracting authority (a declaration of all the associates in front of a notary public certifying that they agree with the signing of the contract once this gets awarded). This requirement is illegal, as it is not among the qualification criteria stated by PP law. The court ruled that the decision of the contracting authority based on which the entity was eliminated from the tendering procedure is illegal; thus the act was annulled and the contracting authority was forced to reevaluate the tenders, including the one that had been eliminated earlier.[5] Though the requirement is obviously not legal, the doctrine argues that as long as the economic operators do not challenge the award documentation within the proper timeframe, the requirements, even illegal, become mandatory for all parties to the procedure. The doctrine analyzes the possibil-

3. Bucharest Appellate Court, 8th Division for Administrative and Fiscal Matters, Civil Decision no. 2355/16.11.2009.
4. Galati Appellate Court, Division for Commercial, Administrative and Fiscal Matters, Civil Decision no. 777/8.10.2009 (separate opinion).
5. Bucharest Appellate Court, 8th Division for Administrative and Fiscal Matters, Civil Decision no. 2630/14.12/2009.

ity of invoking in PP maters the theory of inexistence (it applies in administrative law, among other fields of law) when one is confronted with a requirement that is blatantly illegal (exclusion from tendering of non-Romanian entities).[6] This situation is currently partially resolved by the mandatory screening by NARMPP of all participation notices and award documentations before publication (see more below).

Both the Council and the courts have ruled in the vast majority of cases that qualification/selection criteria are not to be used as evaluation factors for the awarding of a PP contract.[7] One interesting situation occurs when contracting authorities annul the award procedure after the opening of the tenders, invoking their own fault in drafting the award documentation. Such a situation may clearly harm the economic operators participating to the tendering procedure – their tenders become public and known by their competitors. In the event that the tendering procedure is re-launched in the future, part of the 'surprise' element of each tender is already known. Most courts have ruled that the economic operators may bring a court action against the contracting authority provided they suspect that the authority had not acted in good faith. However, the potential harm of the interests of the economic operators cannot justify the completion of an award procedure in breach of an imperative legal provision. Other courts offered creative solutions, which are nonetheless harshly criticized by the doctrine.[8] One court[9] ruled that in such a case the award procedure should not be annulled because the error of using qualification criteria also for the evaluation of the tenders does not lead to a breach of the principles stated in art 2/2 (a –f: equal treatment, proportionality, transparency, etc.) from EGO no. 34/2006, and, in the same time, there are

6. D-D Serban, Jurisprudenta comentata in materia achizitiilor publice, vol. II [Annotated case law in the field of public procutement, 2nd volume], Bucharest: Wolters Kluwer, 2010, pp.379-380.
7. Bucharest Appellate Court, 8th Division for Administrative and Fiscal Matters, Civil Decision no. 2355/16.11.2009; Bucharest Appellate Court, 8th Division for Administrative and Fiscal Matters, Civil Decision no. 109/14.01/2010; Cluj Appellate Court, Division for Commercial, Administrative and Fiscal Matters, Civil Decision no. 173/27.01/2010; Galati Appellate Court, Division for Commercial, Administrative and Fiscal Matters, Civil Decision no. 777/8.10.2009 (separate opinion); Bucharest Appellate Court, 8th Division for Administrative and Fiscal Matters, Civil Decision no. 604/13.02/2012.
8. D-D Serban, Jurisprudenta comentata in materia achizitiilor publice, vol. II [Annotated case law in the field of public procurement, 2nd volume], Bucharest: Wolters Kluwer, 2010, pp. 391-395.
9. Bucharest Appellate Court, 8th Division for Administrative and Fiscal Matters, Civil Decision no. 109/14.01/2010.

ways in which this error can be remedied. The solution of the court for remedying the error was to eliminate the factor regarding similar experience from among the evaluation factor (in fact assign to this sub-factor 0 points). The law clearly states that the award criteria cannot be changed throughout the entire duration of the award procedure. The court got around this provision by arguing that the award criterion (MEAT) is in fact preserved, and that only the evaluation factors within MEAT are changed.

Aside from the situations when contracting authorities are using qualification criteria instead of evaluation ones on purpose (corruption, with the intention of awarding the contract to a given entity), there is still a lack of expertise especially at the local level. Though it increases the length of the award procedure, the monitoring by NARMPP of the participation notices and award documentation before the launch of the procedure limits the errors of the contracting authorities. Before the monitoring was introduced for all procedures, irrespective of the value of the contract, errors with regard to the drafting of the award criteria could only be determined by the observers of the Ministry of Finances who check the documents issued during the procedure and participate to the meetings for the analysis of the tenders (all these operations take place after the publication of the participation notice).

3. Lowest price

3.1. Award criteria under the national law

EGO no. 34/2006 explicitly states that it is mandatory for the contracting authority to mention in the participation notice for a public procurement contract which criterion is used in awarding the contract. This decision, once made public through the participation notice and the award documentation, cannot be changed throughout the entire award procedure. Article 198 from EGO no. 34/2006 states that the criterion for awarding a public procurement contract can only be one of the two expressly provided for by the law: either the most economically advantageous tender; or, exclusively, the lowest price. Thus, the law does not leave for the contracting authority an open-ended list of criteria based on which PP contracts are awarded; the possibility for adapting the procurement of goods, services, and works to the contracting authority's needs or policy objectives is related strictly to the use of the most economically advantageous tender criterion.

3.2. Use of the lowest price criterion in practice

NARMPP has no publicly available statistics with regard to the number of PP contracts for which the lowest price criterion is used. Various experts interviewed stated that contracting authorities seem to equally use both criteria for awarding PP contracts. As for the type of contracts for which the lowest price is used as an award criterion, the experts interviewed confirmed our hypothesis (formulated after monitoring for several months various participation notices) that the lowest price criterion is mostly used for goods contracts and for services contracts when the object of the contract are easily quantifiable services such as transportation, security, etc. For works contracts and more complex services contracts (projects, designs, financial services) the most economically advantageous tender (hereafter MEAT) criterion is more frequently used, allowing contracting authorities to meet other objectives related to the subject matter of the contract than the price such as green and social objectives, certain innovative technical solutions, etc. and maintain cost-efficiency at the same time. Given the Romanian context in which PP takes place – suspicions regarding corruption, the use of the lowest price criterion is perceived by the public and media as an indication of correctness and efficient use of public money, as well as being an objective criterion.

3.3. Calculation of the lowest price

The lowest price is generally calculated by reference to the total price of the contract instead of its single components (these single components however need to be summed up, excluding VAT). From the case law it may be inferred that the lowest price can be expressed as a sum of multiple monetary values, without transforming it into MEAT. In one case, the economic operators had to express their offers based on the lowest price by summing up two separate prices (one representing the price of electrical equipment/transformers and the other the value of energy losses associated with each type of equipment). The court ruled with regard to this aspect of the case that there is no legal provision that limits the discretion of the contracting authority to express price as a sum of two monetary values.[10]

Based on this argument, it is relevant to look at legal provisions regarding how the total value of the contract has to be determined by the contracting authorities. The contracting authorities have to consider any options that are still pending when the calculation is made, any possible supplementing or aug-

10. Bucharest Appellate Court, 8th Division for Administrative and Fiscal Matters, Civil Decision no. 632/5.03/2009.

mentation of the contract value. Also, as a mandatory rule, the estimated value of the PP contract must be determined before the award procedure is initiated and the value has to be valid at the moment when the participation notice/invitation is published. In the calculation of the price, elements such as those listed below have to be considered:

- Installation works/operations for goods that require such actions;
- The costs related to purchasing, renting, leasing, or loans for each method of purchasing goods;
- The cumulative value of all lots if the contract is divided into lots;
- The cumulative estimated monthly tariffs for service contracts;
- All foreseeable costs of banking services or other financial services;
- All the costs for designing, planning, engineering and other technical services for works contracts;
- Prizes in design contests are to be included in the value of the PP contract; etc.

3.4. Tenders equal in pricing

There is currently a legal void regarding how to solve cases when two or more tenders are equal. Over the time, NARMPP has stepped in by means of providing guidelines for the contracting authorities. The doctrine is highly critical of these guidelines because their role should be that of interpreting primary and/or secondary legislation instead of creating it. In other words, NARMPP through its guidelines creates norms with regard to how to solve a tie. It is interesting that NARMPP, though it can initiate legislative proposals, has never done this with regard to equal tenders[11] (until recently).

Successive guidelines[12] from NARMPP state the following rules in case of a tie. These rules were also part of the old framework law on public procurement dating back to 2001.[13]

11. In June 2012, at the first reunion of the Consultative National Committee for Public Procurement, the representatives of NARMPP presented several proposals for amending EGO no. 34/2006, including several articles regarding equal tenders. [Online] at http://www.anrmap.ro/sites/default/files/comunicate/comunicat-1496.pdf (in Romanian), accessed March 2nd, 2013.
12. Handbook for awarding public procurement contracts, approved through the Order of the president of NARMPP no. 155/2006, published in the Official Journal of Romania no. 894bis/2.11.206, annulled by the issuer through Order no. 80/2009, published in the Official Journal of Romania no. 296/6.05/2009; then Operational handbook for

a. If the criterion used for awarding the contract is MEAT, and the evaluation commission has given two or more offers the same score, then the contracting authority has the obligation to award the contract to the tenderer whose price was the lowest. If prices are also equal, then the contracting authority can: either ask the tenderers who have offered the lowest price to submit a new financial offer in a closed envelope (the contract will be awarded to the tenderer whose new proposal has the lowest price); or award the contract to the tenderers who have offered the lowest price, based on applying additional criteria, whose nature has to be exclusively technical.
b. If the criterion used for awarding the contract is the lowest price and there are two or more financial offers with the same price, then the contracting authority can: either ask the tenderers who have offered the lowest price to submit a new financial offer in a closed envelope (the contract will be awarded to the tenderer whose new proposal has the lowest price); or award the contract to the tenderers who have offered the lowest price, based on applying additional criteria, whose nature has to be exclusively technical.

If the award procedure is conducted online, through ESPP (with or without the final stage of e-auction), and the evaluation commission finds out that there is a tie, the contracting authority will ask for clarifications through ESPP, so that the economic operators can upload the documents comprising the new price/technical specifications.

EGO no. 34/2006 in article 254 makes reference to a community preference as well as to equivalent tenders. If the tenders presented within the framework of the award of a goods PP contact comprise products that have as origin countries which do not have an agreement with EU concerning the effective access of community economic operators to their markets, then these tenders can be rejected if the proportion of products from these countries is more than 50 % of the total value of the products from the tender. In case of a tie (equal or equivalent tenders), preference will be given to the offer which cannot be rejected based on the community preference mentioned previously. An offer is equivalent if the difference between the prices is less than 3 % (or

the awarding of public procurement contracts, 2nd volume, Bucharest, 2009 (published by NARMPP).

13. GO no. 461/2001 for the approval of the application norms for GEO no. 60/2001 regarding public procurement, published in the Official Journal of Romania no. 268/24.05.2001 (see art. 46).

equal). However, one offer cannot be chosen based on the community preference if this forces the contracting authority to acquire a material with different technical characteristics from the existing material, which would lead to an incompatibility or technical difficulty or unreasonable costs. Thus, one may talk about a community preference but only for goods and not for services and works.

3.5. Procedures for award on the basis of the lowest price

The Romanian law, in accordance with the PP Directives, does not differentiate between the procurement procedures available for contract award on the basis of the lowest price and those based on the most economically advantageous tender. Based on the amount of cases when contracting authorities misuse MEAT, it could be inferred that for them the lowest price criterion, especially when lacking expertise in drafting the award documentation, is safer. However, sometimes contracting authorities insist upon using MEAT even when the subject matter of the contract does not necessarily require it.

The differences in award procedures when using one of the two criteria, following a brief analysis of the law, are minimal. There were identified two instances when the law distinguishes between the two criteria: the possibility to submit alternative offers and the use of competitive procedures. In both instances the law expressly states that the criterion to be used is the most economically advantageous tender. In the case of alternative offers, the contracting authority has the right (not the obligation) to allow tenderers to submit alternative offers only if the award criterion is MEAT. In this case, the participation notice must explicitly mention if alternative offers are permitted or forbidden. If this mention is not made, the contracting authority is not entitled to receive and evaluate alternative offers. In the second situation, article 198 of the law states the mandatory requirement that in the case when the competitive dialogue procedure is used for awarding the PP contract, it is only compatible with the most economically advantageous tender criterion.

3.6. Difficulties with applying the lowest price criterion

In practice, there are several situations when the use of the lowest price criterion for award raised difficulties. For example, contracting authorities have sometimes used electronic auction as the final stage of a competitive procedure based on the lowest price criterion. During this electronic stage, one economic operator offered an abnormally low price which led to a distortion in the perception of the other tenderers regarding the price. The system works by allowing economic operators within a given timeframe to improve their price through successive offers. These successive offers are made in light of

the lowest price offered within that award procedure. When a fictitious price is introduced in the system by an economic operator, the others are left without a frame of reference. There were two solutions offered by courts to this situation: In one case,[14] the court ruled that the procedure does not have to be annulled based on the breach of the fair competition. The other economic operators, despite of the abnormally low tender, were not prevented from improving their offer. In a different case,[15] the court argued that the other economic operators were discouraged from improving their offers, because the abnormally low price was ten times lower than the estimated value of the contract. The court considered that this fictitious price (disqualified by the contracting authority), once it was introduced in the system, distorted competition and led to an inefficient use of the public funds. The contract in reality was awarded to the offer placed second, which had a higher price. In this case the court ordered the annulment of the electronic stage of the award procedure. Basically, the other economic operators did not have a real chance to improve their offers.

4. Most economically advantageous tender (MEAT)

4.1. Award criteria within the MEAT

Article 199(2) from EGO 34/2006 states that in addition to price, the criteria that can be used for the evaluation of a tender include: characteristics regarding the qualitative, technic, or functional level of the tender as well as environmental characteristics; costs regarding functioning/operation; the cost/efficiency ratio, post sales services as well as technical assistance; deadline for the provision of services or execution of works, other elements deemed as important for the evaluations of the bids by the contracting authorities. The list is open, as it can be observed from the text of the law mentioned above. The list is similar to article 53 from 2004/18/EC Directive.

4.2. Relevance of price in MEAT

The law does not contain any provision with regard to the exact weight that needs to be given to price when used as an evaluation factor, among others, in MEAT. The law only states several obligations/principles for the contracting

14. Bucharest Appellate Court, 8th Division for Administrative and Fiscal Matters, Civil Decision no. 1295/21.03.2012.
15. Bucharest Appellate Court, 8th Division for Administrative and Fiscal Matters, Civil Decision no. 507/23.02.2009.

authorities in determining the weight and the relevance assigned to each evaluation factor.

Governmental Decision no. 925/2006 comprising the guidelines for the implementation of EGO no. 34/2005 states in article 15(2) that the contracting authority is prohibited from using factors for the evaluation of tenders which: (a) are not directly related to the nature and the subject matter of the contract; (b) do not reflect a real and obvious advantage to be obtained by the contracting authority provided the said factor is used. Article 15(3) states that for each evaluation criterion used the contracting authority needs to establish a ratio that reflects in a fair way: (a) the importance of the technical/functional characteristic considered to represent a qualitative advantage; (b) the value of the advantages of a financial nature that can be offered by the tenderers by means of assuming additional tasks in comparison with the minimum requirements established in the award documentation. Article 199 from EGO no. 34/2006 together with article 15(2)(b and c) establish that the contracting authority does not only have the obligation to clearly state, in a detailed manner, in the award documentation the evaluation factors and the weighting/mathematical algorithm, as well as the methodology for assessing the advantages resulting from the technical and financial proposals of the tenderers, but also the obligation to not use evaluation factors that do not reflect a real and obvious advantage to be obtained by the contracting authority provided the said factors are used. In addition, according to article 15(4) from Governmental Decision no. 925/2006, when establishing the award criteria, the contracting authority should be able to motivate the way in which the percentage/importance for each factor was established. In doing so, the contracting authority drafts a memo/justificatory note which is attached to the procurement dossier.

In various handbooks and recommendations, NARMPP has been more specific with regard to the exact weight to be attributed to price in comparison with other factors within the MEAT. In the Handbook for the award of PP contracts approved through the order of the president of NARMPP no. 155/2006 (currently abrogated), it was recommended that the contracting authority awarding a works contract, when using MEAT, should not assign more than 30 % to other evaluation criteria than the price, in order not to distort the results of the award procedure.

In practice, contracting authorities, when they intend to award the tender to a specific tenderer (associated with corruption), use the method of assigning a minimum relevance (weight) to price and a maximum relevance to the other criteria. Very often, the Council and the courts have ruled that the contracting authorities, by awarding the contract to a tenderer that had the highest

price but scored very high with regard to the other criteria, have breached the principle of rational/efficient use of public funds. The law in Romania does not limit in any way the discretion of the contracting authorities – they are only bound by the principle of the efficient use of public funds.[16] In some cases, the problem is not only that price is assigned a low weight but also the fact that the other evaluation criteria are not relevant in the context of that specific contract such as execution deadline, delivery deadline, etc.

The weight of various factors used within MEAT need to be considered on a case by case basis. Despite the fact that in many cases the courts have ruled against underestimation of the price criterion in comparison with the other factors, in one case it was considered that it is legal and it brings a real advantage for the contracting authority to assign 30 % to the criterion deadline for payments for services. In this case, the court held that the contracting authority is entitled to make sure that the term is long enough in order to avoid penalties or the termination of service delivery altogether.[17]

4.3. The weighing of evaluation factors within MEAT

Contracting authorities have, generally speaking, discretion with regard to the weighing of the evaluation factors within MEAT. In addition to the aspects discussed under 4.2, the most problematic aspect seems to be the breach of the transparency obligation.

After reviewing a significant number of court cases from 2008-2012 (all the appellate courts were included), it was observed that similar problems with applying MEAT are recurring in many of these cases. The main finding from the analysis of the cases seems to be the lack of expertise of the contracting authorities in applying MEAT to their PP procedures. Various PP procedures conducted by different contracting authorities have been challenged before the courts for similar reasons referring to the lack of a clear methodology for assessing the factors that are part of MEAT. The main criticism of the courts referred to the use of subjective evaluation factors such as: the plan for quality control; the technical solution/technology proposed; the

16. Suceava Appellate Court, Division for Commercial, Administrative and Fiscal Matters, Civil Decision no. 599/26.03.2009; Galati Appellate Court, Division for Commercial, Administrative and Fiscal Matters, Decision no. 2176/7.06/2011; Oradea Appellate Court, Commercial, Administrative and Fiscal Division, Decision no. 249/CA/28.08.2008; Iaşi Appellate Court, Fiscal and Administrative Law Division, Decision no. 20/14.01.2008.
17. Bucharest Appellate Court, 8th Division for Commercial, Administrative and Fiscal Matters, Civil Decision no. 1412/23.06.2011.

methodology for implementing the contract/activities of the contract. The fact that contracting authorities use these criteria without understanding how to adapt them to the subject matter of their contracts (there are standard formats for award documentation drafted by NARMPP as well as unofficial websites/forums where such model documents exist) proves the lack of expertise of the authorities in PP matters. The solution of the courts in these cases was to annul the procedure, because evaluation factors cannot be changed during the award procedure. This has generated in many cases delays/additional costs for economic operators and contracting authorities and ultimately determined NARMPP to propose a change in legislation – currently all participation notices and award documentation are scrutinized before publication by NARMPP. The positive impact of this measure is visible in practice – a somewhat reduced number of procedures where wrong evaluation factors (faulty award documentation) are used. Despite this positive effect with regard to the elimination of errors from the award documentation at an early stage, the NARMPP is criticized because the monitoring of all procedures leads to delays even for the contracting authorities, which over the time have gained enough experience with the drafting of the award documentation.

Below are presented several instances when the evaluation factors used by the contracting authorities were considered by the review bodies as subjective/non-measurable. One of the most used evaluation factors within MEAT refers to the proposed technical solution. The proposed algorithms included criteria such as: the conformity of the technical proposal with the technical specification;[18] detailed description of the proposed technology for the solutions from the award documentation[19] (15 points for the most detailed description, 0 points for incomplete descriptions); a scale measuring the compliance of the technical solution (the interval ranges from the most complying offer = 20 points to the least complying offer = 0 points, no other reference included);[20] only the maximum points that can be given for each sub-factor are stated without mentioning if intermediary or minimum number of points can be assigned[21] or determining a hierarchy regarding the degree of detailing

18. Bucharest Appellate Court, 8th Division for Commercial, Administrative and Fiscal Matters, Civil Decision no. 2593/7.11.2011.
19. Bacau Appellate Court, Division for Commercial, Administrative and Fiscal Matters, Civil Decision no. 452/30.04.2009.
20. Oradea Appellate Court, Division for Commercial, Administrative and Fiscal Matters, Decision no. 588/CA/2011-R/7.04/2011.
21. Bacau Appellate Court, Division for Commercial, Administrative and Fiscal Matters, Civil Decision no.1209/3.12.2009.

required and the points awarded for various degrees of detailing;[22] no uniform criteria in the award documentation, the tenderers were requested to offer themselves technical solutions.[23] In conclusion, the evaluation algorithms proposed the measuring of the evaluation factors using criteria such as degree of detailing, complexity in the description of the solution/plan, number of measured proposed. In the doctrine, it is argued that such algorithms are basically rewarding the 'creativity' of the tenderers and their capacity to write numerous pages/lengthy proposals.[24]

Another major problem with using MEAT occurs when the factors used and the proposed methodology are correct but the courts ruled that they are illegal since their use does not bring a real advantage for the contracting authority. For instance, in the context of a contract for e-government services, one of the evaluation factors was the identification, description, and insurance of risks that can affect the execution of the contract and recommendations for reducing the identified risks;[25] in another case, the contracting authority used as an evaluation factor the way in which the contract is executed, giving less points for an association or subcontracting.[26]

The principle of transparency is often invoked by review bodies when dealing with subjective factors within MEAT. For example, in one case where economic operators asked for clarifications concerning subjective evaluation factors, the authority answered in an even more ambiguous manner, increasing the uncertainty by specifying that evaluation will be made based on internal evaluation matrix which is not present in the award documentation. The contracting authority is in the opinion of the court breaching the principle of transparency as the role of the clarifications is to make evaluation criteria as clear and objective as possible.[27] In a different case, the con-

22. Oradea Appellate Court, Division for Commercial, Administrative and Fiscal Matters, Decision no. 615/CA/2011-R/7.04/2011.
23. Alba Iulia Appellate Court, Division for Administrative and Fiscal Matters, Decision no. 1129/CA/2.06.2010.
24. D-D Serban, Jurisprudenta comentata in materia achizitiilor publice, vol. II [Annotated case law in the field of public procurement, 2nd volume], Bucharest: Wolters Kluwer, 2010, p. 788.
25. Brasov Appellate Court, Division for Administrative and Fiscal Matters, Decision no. 3483/25.07.2012; Targu Mures Appellate Court, Division for Commercial, Administrative and Fiscal Matters, Decision no. 142/R/3.02.2011.
26. Constanta Appellate Court, Division for Commercial, Administrative and Fiscal Matters, Civil Decision no. 591/CA/26.09.2009.
27. Bucharest Appellate Court, 8th Division for Commercial, Administrative and Fiscal Matters, Civil Decision no. 604/13.02.2012.s.

tracting authority argued that the lack of a clear evaluation methodology (subjective factors) could be compensated by a declaration of impartiality signed by each member of the evaluation commission or by the willingness of the contracting authority to appoint external experts.[28]

4.4. Cases when weighting is not possible

The cases discussed in the previous section are all related to the inability of the contracting authorities to properly develop an objective evaluation methodology/algorithm and to motivate it. However, in none of the reviewed cases did the contracting authority argue that weighting was not possible due to the nature of the contract. Article 199(1) from EGO no. 34/2006 states that when weighting is not possible, the contracting authorities required to at least indicated the descending order based on the importance of each factor with the evaluation.

4.5. Change of the award criteria

Under the Romanian law, economic operators can challenge the award documentation (including award criteria and sub-criteria) within a given timeframe (5 or 10 days depending on the value of the contract). If following such a challenge, errors are identified, the contracting authority can remedy the documentation. Once this deadline expires, it is considered that the award documentation is accepted by all parties interested in the award procedure. In practice, economic operators seldom challenge the documentation itself; what they challenge is the outcome of the evaluation procedure after the opening of the tenders. The law clearly states that the award criteria cannot be changed throughout the entire award procedure, the only available remedy being the annulment of the procedure. In practice, debates exist with regard to the situation in which review bodies identify in the award documentation the illegal use of certain evaluation factors. The general approach of the courts is that the award criteria or the weighing of the evaluation factors cannot be changed or dropped in order to remedy the illegality. There were even cases when the contracting authorities agreed to remedy the errors identified and challenged by economic operators, however, such a solution was deemed illegal by the courts and the procedure was thus annulled.[29] Of course, as described in other

28. Craiova Appellate Court, Division for Administrative and Fiscal Matters, Decision no. 2532/26.09.2011.
29. Oradea Appelate court, Division for Commercial, Administrative and Fiscal Matters, Decision no. 777/CA/2011-R/2.05.2011; same court Decision no. 1353/CA/2011-R/19.08.2011.

sections of the paper, there were also courts who ruled creatively on this issue in order to salvage the award procedure; however, this is not the mainstream approach.

4.6. Communication of the evaluation methodology/algorithm to the tenderers prior to the submission of tenders

The law states the obligation of the contracting authority to include in the award documentation a clear and objective evaluation methodology/algorithm and to communicate it to the interested tenders. Since the courts have ruled that by using subjective evaluation factors the contracting authorities are breaching the principle of transparency, it can be inferred that no communication would be an even greater infringement.

4.7. Adjustment/replacement of the methodology

As discussed in the previous sub-sections no changes can be made to the award documentation (including the methodology/matrix/algorithm for evaluation) once the contestation deadline available to economic operators has expired. Of course, the remedy ordered by courts, in line with the legal provisions, namely the annulment of the procedure, is causing in real life tremendous economic implications. At the national level, there is a widespread debate regarding the inability to carry out projects financed through structural funds due to delays caused by successive annulment of award procedures and also lengthy court proceedings in PP matters. The courts have not addressed in their judgments the implications caused by annulment, stating just that this is the legal remedy possible. The doctrine discusses this issue; however, authors are treading carefully because the opposite solution – to allow changes to the award documentation during the tender procedures, including evaluation (once the tenders are received and opened) opens the door for corruption and abuses on the behalf of contracting authority. The only solution working thus far is the monitoring of the award documentation by NARMPP.

5. Procedure for evaluation MEAT: Juries, transparency and judicial review

5.1. Composition of the evaluation commission

According to EGO no. 34/2006, each contracting authority has to establish an internal unit whose task is to deal with public procurement activities. According to the law (Governmental Decision no. 925/2006, article 3(3)), contracting authorities are authorized to use external consultants for drafting of the

award documentation or for carrying out the award procedure. Any costs incurred with such activities cannot be recouped from the tenderers.

In practice, we were told by contracting authorities that very seldom, if ever, external consultants are used. This happens mostly when contracting authorities deal with public procurement contracts whose value is above the EU thresholds or in case of highly visible domestic public contracts.

Another relevant provision in this sense is article 73 from Governmental Decision no. 925/2006. It states that the contracting authority has the right to decide, with the goal of facilitating the evaluation activities (during the evaluation of tenders), to appoint external specialists. They can be appointed at the beginning of the evaluation process or during this process. The decision through which they are appointed needs to include their attributions together with a motivation of why their expertise is needed. Their attributions can concern only: the verification and evaluation of technical proposals; the analysis of the financial situation of the tenderers or the financial analysis of the effects generated by certain elements of the tender or contractual clauses proposed by the tenderer; the analysis of the legal effects generated by certain elements of the tender or contractual clauses proposed by the tenderer. It is worth mentioning that only the members of the evaluation commission can vote. The experts have the obligation to draft a report detailing the situation for which their expertise was needed. The report then becomes part of the dossier of that public procurement. In practice, the president of the evaluation commission, the one who decides that the appointment of experts is needed, can later on decide to renounce the specialized report of the experts. The role of the report is only to facilitate the decision of the members of the evaluation commission and its drafting cannot be considered as being mandatory but rather optional. If the complainant only challenges the fact that the expert report is missing, without showing specific critiques regarding how the evaluation of the tenders was made, then the decision of the contracting authority concerning the evaluation of the tenders should not be annulled.[30]

In practice, the courts have been faced with numerous complaints lodged by economic operators contesting the composition of the evaluation commission, more precisely the proportion of specialists out of the total members of the commission. Article 71 from Governmental Decision no. 925/2006 states that the head of the contracting authority appoints the members of the evaluation commission for each investment project. He/she needs to carefully con-

30. Pitesti Appellate Court, Division for Commercial, Administrative and Fiscal Matters, Civil Decision no. 597/27.05.2009

sider the nature of the investment objective. Thus, the appointed specialists are experts in the field of the subject matter of the contract, working either within the internal compartment of the contracting authority which is specialized in that particular field or within other compartments within the structure of the contracting authority. According to article 72 from Governmental Decision no. 925/2006, one of the main attributions of the evaluation commission is to verify the technical proposals of the tenderers in order to determine if they comply with the minimum requirements from the award documentation. This task can be accomplished only by experts.

For example, for awarding a contract for the architectural design of a courthouse, the contracting authority has appointed as members in the evaluation commission two economists, one architect, one engineer, and one judge. The dissatisfied tenderer argued that only the architect has had an informed opinion concerning his proposal. In this specific case, the court has ruled that given the complexity of the investment, a correct ratio between specialists in economics and specialists in architecture/technical matters was achieved.[31] In a similar case the court has ruled differently – for the award of a procurement contract whose subject matter referred to the acquisition of informatics software all the members should have at least training in this field; in addition one member should be an IT expert.[32]

In the Romanian context, corruption is a big threat to the legal conclusion of public procurement contracts. With regard to the evaluation of the tenders, many cases presented in the media, and sometimes also brought to court, regard the lack of impartiality of the members of the evaluation commission (conflict of interests as well). In one case, the complainant claimed that there is a potential conflict of interests with regard to one of the members of the evaluation commission who had previously collaborated with the managing partner of the wining tenderer and thus knew the technical quality of the offer. In addition, he personally uses the software program proposed by the winning tenderer since he uses it at his private practice. It is important to note that from the correspondence between the member of the evaluation commission and the winning tenderer prior to the evaluation of the tenders, it is not possible to distinguish the concrete element of an interest of financial nature. However, the court acknowledged that the suspicion cannot be overpassed in

31. Cluj Appellate Court, Division for Commercial, Administrative and Fiscal Matters, Civil Decision no. 497/25.02.2010.
32. Brasov Appellate Court, Division for Administrative and Fiscal Matters, Decision no. 868/R/18.12.2008.

other way than through the annulment of the acts issued by the commission with the participation of that member.[33]

In the doctrine, a distinction is made between real and apparent conflicts of interest; a perceived conflict of interest or suspicions can be as harmful as a real conflict because it undermines the public's trust in the integrity of the institution involved and of its employees.[34] Financial interests can involve a real or potential gain which can be obtained with the help of a public servant, governmental official or an elected official, or members of their families, who have properties or shares or hold a certain position in an entity which participate to a public procurement procedure, who accept gifts or bribes or receive an income from a second job.[35]

5.2. Use of MEAT in e-auctions

According to the law, it is possible to use MEAT in e-auctions. According to the Romanian law, e-auctions can be used: as a final stage of the open or restricted procedure, of a negotiated procedure with the publication of a participation notice, or in the case of requests for quotations, before the awarding of the public procurement contract, and only if the technical specifications were clearly stated in the award documentation. If the contracting authority intends to use an e-auction, it must include in the award documentation instructions: the elements of the tender which will represent the object of the repetitive auctioning process, provided that those elements are quantifiable and can be stated in numbers and percentages; the limits up to which the elements of the tender mentioned previously can be improved.

Before launching an e-auction procedure, the contracting authority has the obligation to carry out an initial but complete evaluation of the tenders, according to the award criterion stated in the award documentation. The contracting authority has the obligation to invite all tenderers who had submitted admissible tenders to submit new prices or new MEATs. If the contract will be awarded based on MEAT, the invitation mentioned previously has to comprise also information regarding: the results of the first evaluation of the

33. Bucharest Appellate Court, 8th Division for Administrative and Fiscal Matters, Civil Decision no. 360/9.02.2009.
34. D-D Serban, Consideratii pe marginea conflictului de interese in domeniul achizitiilor publice (Comments on the conflict of interest in public procurement), Revista de Drept Comunitar (*Community Law Review*), no. 3/2008, pp. 36-50.
35. Operational handbook for the awarding of public procurement contracts, 2nd volume, Bucharest, 2009 (published by NARMPP).

offer submitted by the respective tenderer; the mathematical algorithm which will be used for the automatic ranking of tenders, including the weighting.

5.3. Discretion and the avoidance of abuses

In the law, there are not too many provisions which directly limit the discretion of contracting authorities when using MEAT. In numerous occasions, NARMPP has stated that when there is no express legal provision, the discretion of the contracting authorities is only limited by the general principles governing PP (transparency, proportionality, non-discrimination, efficient use of public funds, etc.). Some of the recommendations by NARMPP (for example the optimal ratio of price compared to the other factors in MEAT) have to be understood in the context of these principles which cover the lack of legal provisions. In theory, contracting authorities are not prohibited to favor certain evaluation factors over the others provided that they can prove/motivate a real advantage derived from it.

5.4. Transparency requirements

There are clear provisions regarding the order in which the envelopes are to be opened: the qualification documents, the technical offer and finally the financial offer. In practice, very often they start by opening the price. There are numerous mistakes on the behalf of the contracting authorities regarding the opening of the tenders, some unintentional while other are linked to corrupt practices.

NARMPP through the Order of its president[36] issued in 2011 a new standard format for the minute of the meeting for the opening of the tenders. There is mandatory information that needs to be included in the minute:

- Details about the PP contract/framework agreement to be tendered;
- The award procedure applicable in this case;
- The composition of the evaluation commission;
- The name of the economic operators which submitted a tender;
- A list with all the documents submitted by each economic operator;
- The name of the economic operators whose offers were rejected.

In addition to the already mentioned elements, the Order from 2011 introduces new mandatory requirements compared with the ones from the Operational handbook for the awarding of public procurement contracts. These include:

36. Published in the Official Journal of Romania no. 415/14.06.2011.

- The estimated value of the PP contract;
- The reference to the complaints made against the award documentation/clarifications required/the reply of the contracting authorities to requests for clarifications, the name of the contesters, the reasons invoked as well as the decision made by the contracting authority;
- The opinion of observers from the ministry of Finance and its territorial units expressed as a result of the verification of the procedural aspects of the award procedure.

Often the contracting authorities do not draft the minute. Economic operators need this minute if they want to lodge a complaint with the Council or the courts.

In practice, one interesting situation occurs when procedural norms regarding how the report of the evaluation commission is drafted (some elements are missing or lack of a proper motivation of how the evaluation was made), how the relevant elements of the tenders are presented during the public meeting for the opening of the tenders (because of time constrains the tenderers received in writing, through email, this information) are breached or errors (wrong data/numbers included in the evaluation report) occur. The question addressed by the review bodies is whether or not annulment is the proper sanction for the breach of these norms that safeguard transparency. There were two solutions/motivations offered by courts. First, the award procedure was annulled since the courts found that the legitimate interests of the tenderers were harmed by not having adequate information in order to be able to challenge the decision of the evaluation commission. The contracting authorities have often invoked as an excuse for breaching procedural norms the fact that they did not have enough time and were looking to obtain a speedy procedure. The courts in response have stated that safeguarding the public interest, meaning a speedy procedure, cannot be opposed to the principle of transparency.[37] Other courts have argued the opposite, opting for a flexible solution, favoring both the contracting authorities and the tenderers. The courts have ruled that the annulment of the award procedure is an extreme measure, to be ordered only if procedural breaches cannot be remedied. In-

37. Cluj Appellate Court, Division for Commercial, Administrative and Fiscal Matters, Civil Decision no. 3974/17.05.2012.

complete reports can be filled out at a later stage.[38] The same opinion was expressed in the doctrine.[39]

5.5. Review of the award decision by the Council and the courts

Because of corruption suspicions that exist in the field of PP in Romania there is a rather harsh scrutiny of award decisions by the review bodies. The main problems occur when MEAT is used as an award criterion. As discussed in section 4, based on the analysis of the existing case law, there are two scenarios possible. First, when the courts identify that contracting authorities use inadequate methodologies/algorithms for the evaluation of tenders, their ruling usually leads to the annulment of the award procedure due to the use by the contracting authorities of subjective factors which represent a breach of the transparency principle. In these cases, the courts do not scrutinize in-depth the award procedure or the evaluation factors. Second, there are cases when the proposed algorithm is in line with the legal provisions but the tenders submitted were scrutinized because of their unrealistic character. In these cases, the courts went deeper into scrutinizing the evaluation process – in one case, the court had to determine whether an intervention for road repairs could be done in less than 5 minutes. The court in this case analyzed all the assumptions made by the tenderers in order to prove that this intervention time is not based on realistic aspects.[40]

6. Reservations and rejection of non-compliant tenders

Due to subsequent changes and errors in the drafting of legal norms regulating PP, there is currently an interesting debate with regard to the situations when a tender shall be rejected as non-compliant (as well as inadmissible). Article 36(2) from Governmental Decision no. 925/2006 states the reasons for which the tender shall be rejected, however the said articles applies to competitive procedures. In the case of the negotiated procedures, the said ar-

38. Bucharest Appellate Court, 8th Division for Commercial, Administrative and Fiscal Matters, Civil Decision no. 1637/5.09.2011; Timisoara Appellate Court, Division for Administrative and Fiscal Matters, Civil Decisions no. 213 and no. 214/15.02.2010
39. D-D Serban, Jurisprudenta comentata in materia achizitiilor publice, vol. III [Annotated case law in the field of public procutement, 3rd volume], Bucharest: Wolters Kluwer, 2012 p. 12
40. Craiova Appellate Court, Division for Administrative and Fiscal Matters, Decision no. 5119/14.06.2012.

ticle does not apply – this results from the way in which the text is structured (there is no separate section regarding the analysis of the offers) and not due to the intention of the legislator to exclude these procedures. Moreover, the evaluation commission has to consider for award only valid/admissible tenders. This mistake as well as others could be remedied if the entire text of these laws would be reorganized or rewritten.

The following instances justify the rejection of a tender as non-compliant (the contracting authority shall reject the tender):

- It does not comply with the requirements from the award documentation;
- It comprises proposals for the modification of the contractual clauses established by the contracting authority in the award documentation, which are disadvantageous for the contracting authority, and the tenderer, though informed with regard to these clauses, does not accept to drop them;
- The prices from the financial proposal are not the result of free competition and cannot be justified;
- If the contract is split into lots, and the tender is made without taking into consideration the lots, thus making it impossible for the contracting authority to apply the award criteria for each lot individually.

In practice, the most often invoked reason for rejecting an offer as non-compliant is because it fails to fulfill the requirements from the award documenttation.[41]

The law does not make a distinction regarding non-compliant offers between lack of compliance with substantive conditions and formal conditions. It was left to the review bodies to establish whether or not the breach of formal requirements included in the award documentation represents a ground for rejection. In practice, there are numerous cases when contracting authorities have rejected tenders based on the breach of formal requirements and the courts subsequently upheld this decision. In one case, the tenderer expressed the time of intervention in minutes as opposed to hours (the requirement from the award documentation). The contracting authority rejected the offer as non-compliant and this led to awarding the contract to a tender with a higher price. The economic operator argued that the time expressed in minutes (9 minutes) could have easily been converted into hours (0.15). The court disagreed and argued

41. M E Dobrota, Verdict: Oferta neconforma! (Verdict: Non-compliant tender!), *Revista de achizitii publice* (Public Procurement Review), April 2012, [Online] at http://www.avocat-achizitii.com/verdict-oferta-neconforma/, accessed March 1st, 2013.

that by changing the metrics for expressing time, the offer is non-compliant.[42] There are however also court decisions when the courts clearly ruled that tenders should not be examined formally or giving prevalence to irrelevant aspects. Partial analysis concentrated on purely formal elements leads in practice to the elimination of the tender with the lowest price.[43]

With regard to access to clarifications, the most problematic aspect from the practice is the distinction between the request for clarifications as a right or as an obligation of the contracting authority. First, the ambiguity is supported by the existence of multiple legal provisions both from EGO no. 34/2006 and Governmental Decision no. 925/2006 concerning the request of clarifications. Article 201 from EGO no. 34/2006 states the right of the contracting authority to request clarifications and, if necessary, the completion of the submitted documents by tenderers in order to prove compliance with the requirements of the award documentation. However, by asking for clarifications, the contracting authority is prohibited from creating an obvious economic advantage for a specific tenderer. Article 78 from Governmental Decision no. 925/2006 states among the attributions of the evaluation commission the obligation to determine the clarifications and the completions (concerning formal elements) or confirmation of elements from the offer which are necessary for the evaluation of each tender as well as the applicable deadlines. The courts have ruled after corroborating all the legal provisions that the request for clarifications can be an obligation only when there are unclear or ambiguous elements to the offer and not when there are missing documents or elements.[44] In some of the mentioned cases, requests should have been asked because the tender rejected as non-compliant, without asking for clarifications, offered the lowest price.[45]

With reference to the ban on negotiations, there is no debate in the doctrine. Only one case was identified and discussed in a different section of the paper (see section 7.1). The only applicable legal provision is that by asking clarifications you cannot create a competitive advantage for one of the tenderers.

42. Pitesti Appellate Court, Division for Commercial, Administrative and Fiscal Matters, Decision no. 1758/8.08.2012.
43. Bucharest Appellate Court, 8th Division for Commercial, Administrative and Fiscal Matters, Civil Decision no. 1314/22.03.2012.
44. Oradea Appellate Court, Division for Commercial, Administrative and Fiscal Matters, Decision no. 2653/CA/2011-R/7.12.2011; Alba iulia Appellate Court, Division for Administrative and Fiscal Matters, Decision no. 891/22.02.2012.
45. Bucharest Appellate Court, 8th Division for Commercial, Administrative and Fiscal Matters, Civil Decision no. 279/1.02.2010.

7. Abnormally low tenders

7.1. No mandatory requirement for dismissal

The contracting authority does not have to automatically dismiss abnormally low tenders. EGO no. 34/2006, in article 202(1) states that the contracting authority has the obligation to request the tenderer, in writing and before making a decision concerning the tender, to provide all the information deemed significant with regard to the tender and to verify the justifications provided by the tenderer for proposing an abnormally low price. The imperative nature of this provision has sometimes been misinterpreted by both the Council and the courts. In cases[46] where abnormally low tenders where submitted, if the offer already included detailed information with regard to price, the contracting authorities considered their obligation to request clarifications waived. However, the doctrine is critical of such interpretations since the law clearly states an obligation for the contracting authorities.[47]

In practice, based on the case law from the Council, it can be observed that contracting authorities do not put a lot of effort into investigating the justifications provided by tenderers. In one case,[48] the contracting authority formally fulfilled the legal obligation of requesting clarifications concerning the price from the economic operator; however, the contracting authority, upon receiving the clarifications, has rejected the offer as unacceptable without considering the arguments of the economic operator with regard to price formation. Moreover, the contracting authority offered no motivation for its decision. While some contracting authorities do not check at all the clarifications received, other contracting authorities have done more than what is required by law – when confronted with an abnormally low price, the contracting authority has asked for a second clarification from the tenderer.[49] The court has ruled that a second request for clarifications from an economic operator can lead to the breach of the principle of equal treatment and non-dis-

46. Constanta Appellate Court, Division for Commercial, Administrative and Fiscal Matters, Civil Decision no. 230/CA/30.06.2010.
47. D-D Serban, Jurisprudenta comentata in materia achizitiilor publice, vol. II [Adnotated case law in the field of public procutement, 2nd volume], Bucharest: Wolters Kluwer, 2010, p. 556.
48. Alba Iulia Appellate Court, Division for Administrative and Fiscal Matters, Decision no. 2753/24.10.2011; Craiova Appellate Court, Division for Administrative and Fiscal Matters, Decision no. 1614/20.04.2011.
49. Constanta Appellate Court, Division for Commercial, Administrative and Fiscal Matters, Civil Decision no. 268/CA/31.05/2012.

crimination. In conclusion, there is a thin line between thorough scrutiny and the preferential treatment for one tenderer over the others.

One interesting situation concerning abnormally low tenders occurs when economic operators, given the economic crisis, offer generous discounts or even free services as part of their offers. In one case,[50] the tenderer requested a symbolic sum (1 RON) for drafting several reports for the evaluation of large buildings. It has to be mentioned that the drafting activity represented only a small and non-significant part of the object of the contract and the economic operator is in fact a licensed individual, for whom there are fewer fiscal restrictions than in the case of regular economic operators. The court ruled that in this case the explanation of the tenderer can be accepted as a justification for the abnormally low price. Part of the doctrine is still critical of this solution, arguing that the principle of loyal competition is breached. There were also instances when the economic operators tried to submit abnormally low tenders, impossible to be accomplished legally, invoking 'creative' justifications: price formed without the inclusion of any profit;[51] salaries below the legal hourly tariff or calculated without the inclusion of mandatory social contributions to the public budget.[52] In these cases, where there is a clear indication of a breach of competition and of the labor laws in place, the courts have ruled that such offers are unacceptable. The doctrine considers that when there is an obvious breach of labor laws in place, even if the award documentation does not specifically mention them, the offer must be rejected as unacceptable. If such offers are not rejected this leads to a discrimination of the other economic operators who comply with the law.[53]

7.2. Elements scrutinized for abnormally low values

In the Romanian public procurement law, tenders are solely being scrutinized regarding their prices irrespective of the other award criteria applied. In practice, however there are situations when review bodies have scrutinized other factors/criteria than price such as the excessive length of the warranty period

50. Iasi Appellate Court, Division for Administrative and Fiscal Matters, Decision no. 521/CA/12.10.2009.
51. Craiova Appellate Court, Division for Administrative and Fiscal Matters, Decision no. 2356/11.05.2009.
52. Ploiesti Appellate Court, Division for Commercial, Administrative and Fiscal Matters, Civil Decision no. 736/29.04.2010; Pitesti Appellate Court, Division for Commercial, Administrative and Fiscal Matters, Civil Decision no. 421/18.02.2011.
53. D-D Serban, Jurisprudenta comentata in materia achizitiilor publice, vol. II [Adnotated case law in the field of public procutement, 3rd volume], Bucharest: Wolters Kluwer, 2012, p. 421.

for buildings (50 or 60 years) or unrealistic intervention deadlines in case of maintenance/repairs during the warranty period (5 minute). In the first case,[54] the warranty was assessed as unrealistic, because it exceeds the normal life span of the building itself. Both the Council and the courts have ruled that this criterion, which is secondary to the main offer, may favor an economically non-advantageous tender. Therefore, it has to be reviewed objectively (it does not represent a formal element of the offer) even if it does not refer strictly to price. In the second case, the court argued that the intervention time is at least at a first glance extremely reduced – the fact that the economic operator has the headquarter in the proximity of the road, it does not mean that it can cover in 5 minutes the entire length of the road, since it is not possible to determine in advance where the repair is needed and the nature of the intervention.[55] The review bodies have stressed the importance of a thorough verification by the contracting authorities of the justifications offered by the economic operators for unusually advantageous elements of the offer.

In other cases, the courts have ruled, upon examining the arguments of the economic operators, that an offer, though apparently unrealistic with regard to one element, was acceptable. In one case,[56] the contracting authority used MEAT with the following evaluation factors: price of the offer (60 %), deadline for delivery (20 %), estimated cost of maintenance during the warranty period (20 %). One tenderer submitted an offer without specifying any costs for maintenance. Upon the request of the contracting authority, the tenderer clarified that the maintenance cost is free of charge, being included in the price of the offer. The Council considered this tender to be non-compliant with the award documentation. The court ruled, however, that the tender was acceptable and not in breach of the PP law. In this case, the scrutiny referred also to a cost, distinct from the price, used as an evaluation factor within MEAT. Of course there is a connection between the price of the offer and the maintenance cost – the maintenance cost can be either included in the price or offered for free (there were other cases discussed in the paper where economic operators, due to the economic crisis, were offering this kind of discounted or free services). The only issue, as highlighted in other cases as well, is

54. Craiova Appellate Court, Division for Administrative and Fiscal Matters, Decision no. 2450/13.09.2011.
55. Craiova Appellate Court, Division for Administrative and Fiscal Matters, Decision no. 5119/14.06.2012.
56. Constanta Appellate Court, Division for Commercial, Administrative and Fiscal Matters, Civil Decision no. 341/CA/11.10.2010.

whether or not the principle of free competition and equal treatment of economic operators is breached.

7.3. Methodology for determining abnormally low prices

Starting with 2010, there is a clear methodology in EGO no. 34/2006 for identifying abnormally low tenders. An offer is considered to be abnormally low when the proposed price, without VAT, represents less than 85 % from the estimated value of the contract, or, when there are at least 5 valid bids, when the price represents less than 85 % from the arithmetic mean of the tenders (the highest and the lowest bid are however excluded). The contracting authorities upon requesting clarifications need to consider the following: the economic justification of the price; technical solutions or any favorable conditions regarding the object of the contract; the originality of the offer with regard to its conformity with the requirements from the award documentation; work safety requirements and working conditions; legal state aid (article 202(2)).

Despite clear rules/methodology for identifying what represents an abnormally low price, there were situations when contracting authorities decided to disqualify a final offer provided its value is more than 5 % lower than the estimated value of the contract. Such a solution is illegal and the review bodies argued that this is not a legal way to deal with abnormally low prices.

7.4. Abnormally low tenders due to illegal state aid or other subsidies

Article 203 from EGO no. 34/2006 refers to the situation when a tender has an abnormally low price due to state aid. In this situation, the contracting authority can reject the offer only if the tenderer fails to prove that the state aid is legal. The contracting authority establishes, in the notice through which it requires clarifications from the tenderer, the proper interval during which the proof of the legality of the state aid needs to be submitted by the tenderer.

According to the case law there is one recurring situation with regard to state aid. It only refers to services contracts (security services for example), whose price is abnormally low due to various subsidies given by the government to economic operators provided that they create and maintain for at least 12 months jobs for people previously unemployed (measure meant to limit the effects of the economic crisis[57]). In several cases, the Council had to analyze if an abnormally low price for the provision of a service can be justified

57. GO no. 13/2010 on measures meant to stimulate the creation of new work places and to reduce unemployment in 2010 and Law no. 76/2002 on the system of unemployment aid and the stimulation of employment.

by the fact that the economic operator will employ previously unemployed individuals for whom the company will receive deductions from the government. The Council had ruled that if the company, at the date when the offer is registered, has on the payroll employees for whom subventions are received, the abnormally low price might be justified. However, when the company could only prove the intention to hire such persons (some steps had been taken – contacts with the county Labor Force Agency), the tender should be declared in non-conformity with the requirements specified in the award documentation (not necessarily because of state aid but because the formation of the price is based on future elements whose certainty is questionable).[58]

8. Conclusions

The award of PP contracts, as opposed to other areas of PP (remedies, secondary considerations, etc.), has generated since 2006 a significant body of case law and some interest in the doctrine. As a solution to the main problems occurring in practice with respect to award (faulty award documentation, including award criteria and evaluation methodology, breaches of transparency, competition, equal treatment, and efficient use of public money principles, etc.), a strong *ex-ante* control by NARMPP was established for all PP award procedures, irrespective of the value of the contract. Although this is criticized by some of the actors involved in PP as excessive, causing delays, and centralizing, in light of the case law analysed, this seems a reasonable solution. This solution will most likely have to be maintained regardless of associated inconveniences until contracting authorities develop the necessary expertise to deal in a more professional way with their award procedures. The development of the expertise by the contracting authorities is linked to how fast economic operators educate themselves in matters regarding PP in general and remedies available to them in particular. A recent development, which could also be interpreted in light of the professionalization of PP actors, refers to how review bodies motivate their rulings. While until recently the only fundament for their decisions was the national law (sometimes incomplete and contradictory), it is more and more noticeable the interest of the review bodies in European law and case law as well as in the application of general principles to specific situations/matters.

58. Decision of the Council, no. 2813/274C4/3236 from 09.06.2010.

Biography

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8 Award Criteria and Award-Related Challenges under Spanish Public Procurement Law

Dr Albert Sanchez Graells

1. Introduction: Main features of the national system

The award of public sector contracts (*ie* both 'pure' public contracts and private contracts awarded by contracting authorities and entities, CAE) in Spain is regulated by the Spanish Law on Public Sector Contracts (LPSC) and its implementing regulations.[1] The LPSC sets the rules applicable to all public

1. The consolidated text of the LPSC was approved by Royal Legislative Decree 3/2011 of 14 November 2011, and is partially developed by its implementing regulation in Royal Decree 817/2009 of 8 May 2009. The implementing regulation in Royal Decree 1098/2001 of 12 October 2001 is still in force, despite having been adopted in relation to a prior version of the Spanish public contracts legislation – which has been criticised due to the regulatory confusion this generates; see JM Moreno Molina, 'Consideraciones críticas sobre el Real Decreto 817/2009, de 8 de mayo, de desarrollo parcial de la Ley de Contratos del Sector Publico' (2009) 88 *Contratación Administrativa Práctica* 35. These three legislative instruments contain most of the Spanish public contracts law. However, there is a rather large number of procurement-related provisions in a wide array of other laws and regulations (such as financial and budgetary regulations). These additional regulatory sources will only be mentioned to the extent that they are relevant to the discussion in this paper.
   For a general description of the rules on contractor selection and contract award under the LPSC and implementing regulations, see JM Carbonero Gallardo, *La adjudicación de los contratos públicos. Procedimientos para la adjudicación de los contratos administrativos y otros contratos del sector público* (Madrid, La Ley, 2010) Chapter 4. The work is also available as the prior PhD Dissertation submitted to the Faculty of Law of the University of Granada in January 2010, as 'La adjudicación de los contratos administrativos: Origen, evolución y sistema actual', Chapter 4, 510-586, available at http://digibug.ugr.es/bitstream/10481/4867/1/18654538.pdf accessed 3 August 2012. See also JF Mestre Delgado, 'El Derecho de la contratación pública en España' in M Sanchez Morón (ed) *El derecho de los contratos públicos en la*

procurement activities conducted in Spain, both at national and regional level, although some regions have further developed their own procurement regulations on top of the national regime.[2] Given the difficulty in trying to offer a complete, simultaneous review of national and regional rules, this contribution is limited to the rules contained in the LPSC and its implementing regulations – which, in my opinion, generates no significant loss of information, as the system is substantially the same regarding contract award rules and award-related challenges (with the only exception of some 'regional preference schemes' in case of ties of offers, which are generally discussed below § 3.3).

All public sector contracts must be awarded in compliance with the rules of the LPSC, regardless of their being subject to harmonised regulation or not (*ie* regardless of their value exceeding the EU thresholds or not),[3] and regardless of the specific procedure chosen (open, restricted, negotiated, competitive dialogue, project design or electronic auctions).[4] Therefore, the rules on selection and award criteria are uniformly laid out in the LPSC and its implementing regulations, and apply to all contracts not susceptible of being awarded directly due to their limited value (the so-called 'minor contracts' – *ie* works contracts for an amount lower than Euro 50,000, and any other contracts for an amount lower than Euro 18,000 and duration of up to one year). Therefore, the analysis presented in this contribution is a description of gen-

Unión Europea y sus Estados miembros (Madrid, Lex Nova, 2011) 309-319; G Doménech Pascual, 'La valoración de las ofertas en el derecho de los contratos públicos' (2012) *Revista General de Derecho Administrativo* 30: 1-59; and JM Carbonero Gallardo, 'Los criterios de valoración de las ofertas en la selección del adjudicatario en el procedimiento abierto y restringido. La delimitación de la materia objeto de negociación en el procedimiento negociado', presented at Seminario de Contratación Publica, Zaragoza, 7-8 October 2010, available at http://www.dpz.es/diputacion/areas/presidencia/asistencia-municipios/encuentros/2010/contratacion_publica/documentacion/Los_criterios_de_valoración_(Carbonero_Gallardo_JM).pdf accessed 3 August 2012.

2. For instance, see the Law of the Autonomous Community of Aragon 3/2011 of 24 February 2011, by virtue of which some simplification measures are adopted and a full-fledged review procedure is established.
3. On this, see A Sanchez Graells, 'Public Procurement below Thresholds in Spain' in Caranta & Dragos (eds) *Outside the EU Procurement Directives – Inside the Treaty?*, European Procurement Law Series 4 (Copenhagen, DJØF, 2012) 259-281.
4. Equally, see Doménech Pascual, 'La valoración de las ofertas en el derecho de los contratos públicos', above n 1, 50; LA Ballesteros Moffa, *La adjudicación de contratos en el sector publico* (Madrid, Civitas, 2010) 181.

eral, mandatory rules to be applied throughout the Spanish public sector when conducting procurement activities.[5]

However, challenges against award decisions are not subject to a single, unified review system. The LPSC and its implementing regulations restrict access to the special review procedures and nullity challenges to contracts above EU thresholds (with the only exception of list B services whose total value is equal to or higher than Euros 193,000, which also have access to this type of review). Therefore, only such contracts benefit from the transposition of the Remedies Directive and the specialization of the Spanish Central Administrative Tribunal of Contractual Appeals (Tribunal Administrativo Central de Recursos Contractuales, hereinafter 'SCATCA')[6] or its regional equivalent (if any). On the other hand, the rest of public sector contracts (notably, the largest in number) are left to the general mechanisms of judicial review before Spanish administrative courts – which is an important shortcoming of the current Spanish remedies system,[7] since it leaves all procurement below EU thresholds substantially lacking of any effective review mechanism and remedies (particularly in view of the reluctance of the courts to provide

5. It is worth noting that there is a separate regulation for contracts in the 'excluded' or utilities sector, and in the defence and security field. However, rules on contract award criteria are substantially the same. Therefore, potential (minor) peculiarities of awarding rules or practice in those sectors will not be explored in this paper.
6. SCATCA is a tribunal under the Ministry for the Economy and Competitiveness and, therefore, is not a part of the judiciary. Its decisions can be appealed before the Administrative Chamber of the National Court (Sala de lo Contencioso Administrativo de la Audiencia Nacional), and further challenged before the Supreme Court.
7. The criticism is unanimous: JA Moreno Molina, 'La Ley 34/2010 y la adaptación en España del Derecho de la Unión Europea en materia de recursos en los procedimientos de adjudicación de contratos públicos' (2010) 25 *Revista general de derecho administrativo* 1 27-8; JM Baño León, 'El contencioso precontractual: las insuficiencias de la tutela jurisdiccional' in Gómez Ferrer (ed), *Comentarios a la Ley de contratos de las administraciones públicas* (Civitas 2004) 329, 348 and ff; J Tornos Mas, 'Novedades en la regulación de los recursos en materia de contratos de las Administraciones Públicas' (2006) 59 *Contratación administrativa práctica: revista de la contratación administrativa y de los contratistas* 45, 51; M López-Contreras González, 'El control de la adjudicación de los contratos públicos. En particular, el recurso especial y las medidas cautelares' in JA Moreno Molina (ed), *La Ley de contratos del sector público y su aplicación por las entidades locales* (CEMCI – Diputación de Granada 2008) 289, 305, and B Noguera de la Muela, 'El recurso especial en materia de contratación y las medidas cautelares en la Ley 30/2007, de 30 de octubre, de contratos del sector público, a la vista de la Directiva 2007/66/CE, por la que se modifica la Directiva 89/665/CEE' (2008) *Revista Aragonesa de Administración Pública* [monográfico: El derecho de los contratos del sector público] 295, 329.

both interim measures and compensation for damages to disappointed bidders). Nonetheless, the decisions of the SCATCA have already acquired a clear preponderance in the Spanish review system, and courts tend to follow the criteria set in SCATCA's resolutions. Therefore, this contribution will be limited to the analysis of the SCATCA's administrative doctrine (and, mainly, that of 2012 because it consolidates the initial findings in 2010 and 2011) – which, in my opinion, represents the most current developments on award criteria and award-related challenges under Spanish Public Procurement Law.

This paper will cover the rules on selection and award criteria contained in the LPSC (2), and it will analyse in detail the use of the lowest price (3) and the most economically advantageous tender (MEAT) as award criteria, as well as the peculiarities of procurement for innovation (4). It will then explore the rules concerning evaluation procedures and their review (5), with special attention to the use of reservations and rejection of non-compliant bids (6), as well as the treatment of abnormally low tenders (7). Some brief conclusions will follow (8).

2. Selection and Award Criteria

The LPSC establishes a clear-cut distinction between selection and award criteria, along the lines set by the Judgment of the ECJ in the *Lianakis* case (C-532/06).[8] Selection criteria are regulated in Articles 74 to 82 LPSC and the

8. Nevertheless, practice shows how CAE sometimes improperly (or strategically) use award criteria that should have been considered at selection stage, or the other way around. For a critical appraisal, see AD Berning Prieto, 'Criterios de solvencia y de adjudicación en la contratación pública: un reto aun por superar', 21 September 2011, available at http://www.legaltoday.com/practica-juridica/publico/d_administrativo/criterios-de-solvencia-y-de-adjudicacion-en-la-contratacion-publica-un-reto-aun-por-superar accessed 21 August 2012. See also Doménech Pascual, 'La valoración de las ofertas en el derecho de los contratos públicos', above n 1, 30-37, where a large number of examples is provided, and the changing case law of the Spanish Supreme Court is critically appraised. For an empirical study, see A Andreu, 'Análisis de los criterios de valoración utilizados en concursos públicos por las Administraciones. Cumplimiento de las Directivas Comunitarias', in JM Gimeno Feliu (ed) *Contratación de las Administraciones Públicas: análisis práctico de la nueva normativa sobre contratación pública* (Barcelona, Atelier, 2004) 225-226. For an overview of the situation concerning EU law and a comparative approach to the practice in other Member States, see S Treumer (ed.), 'Special Issue on the Application and Implications of the ECJ's Decision in Lianakis on the Separation of Selection and Award Criteria in EC Procurement Law' (2009) 3 *Public Procurement Law Review* 103-164.

control of those requirements is conducted separately from the evaluation of the tenders according to the award criteria specified in the contract documents (which are regulated in Article 150 LPSC).

Conceptually, meeting selection criteria is a prerequisite for the tender to be evaluated, and both phases remain watertight. Therefore, the standard interpretation of the LPSC is that the setting of selection and award criteria remain independent and play a function at different (consecutive) steps of the procurement process, without any feedback or cross-influence. Indeed, in a case concerned with the evaluation of the quality of the staff offered to be involved in the project, the SCATCA stressed this separation between selection and award criteria by indicating that

[...] no provision of the [LPSC] or its implementing regulation suggests that the inclusion of an award criterion which assesses the quality of staff assigned to perform the contract determines the establishment of an implicit requirement of technical ability. On the contrary, in such cases, the lack of quality required in the personnel involved in the execution of the contract would result in a low evaluation of that same item with the effects indicated in the tender documents, but without deriving any further consequences not expressly provided for.[9]

As a seemingly natural consequence of this separation between selection and award phases and to avoid repetition, the standard interpretation of the LPSC is that selection criteria (*ie* those that refer to subjective characteristics of the tenderer as an undertaking, such as its economic or technical capabilities, or its experience) cannot be used as award criteria (which must be *directly* linked to the object of the contract).[10] This has been consistently declared by the Spanish Consultive Board on Administrative Procurement (Junta Consultiva de Contratación Administrativa, CBAP),[11] – and this approach has been

9. SCATCA Resolution No. 127/2012 of 30 May 2012 in case *Kantar Media* v *Undersecretary of the Ministry of the Presidency* (Consultancy and technical assistance for monitoring of information in media and filing system), at para. 7 (original in Spanish).
10. See Doménech Pascual, 'La valoración de las ofertas en el derecho de los contratos públicos', above n 1, 27, who considers that this even goes beyond the current drafting of the EU Directives, which do not include the adverb 'directly'. For discussion, see M Fueyo Bros & B Rodriguez Prieto, 'Criterios objetivos de adjudicación de contratos en la Administración Pública' (2003) 23 *Contratación Administrativa Práctica* 45-58.
11. The Consultive Board on Administrative Procurement (CBAP) is the specific advisory body to the Central Government, its autonomous bodies, public agencies and other public entities. It is under the Ministry for the Economy and Competitiveness and has acquired significant reputation both in the interpretation of Spanish public procurement rules and the issuance of reports and recommendations to improve the system.

endorsed by the Spanish Supreme Court.[12] It has also been recently stressed by SCATCA.[13] Therefore, for the purposes of this paper, we will only focus on the treatment of 'pure' award criteria in Spanish legislation and case law, bearing in mind that those criteria cannot include elements already taken (or that should have been taken) into consideration at selection stage.[14]

However, to be clear, there will always be hard to draw a red line concerning certain criteria, as is the case of experience (to what extent it is a general feature of the undertaking, or relevant to the specific work team offered for the project?), or the amount of material and human means offered to use in the project when they exceed the thresholds set for selection purposes – which, according to CBAP, can be taken into consideration as award criteria.[15] However, in my view, it is still necessary to stick to the basic position that under the LPSC, award criteria are completely separate from selection criteria (below § 4.1).

In that regard, it is interesting to stress that Article 150 LPSC sets the award criteria that CAE can take into account in order to choose the tenderer to which the contract will be awarded. Following the rules of the EU Directives, the LPSC allows CAE to choose only between the 'lowest priced tender' or the 'most economically advantageous tender' (MEAT) – and, in the list of orientative criteria to be used in case of MEAT, the LPSC does not incorporate any criterion extraneous to those of the EU rules. The following sections explore each of them in turn.

Its views on the interpretation of the Spanish public procurement rules are usually followed by administrative courts when dealing with procurement law cases. Therefore, its reports are an important source of legal analysis. On the specific issue of the separation between selection and award criteria, see Reports such as 45/02 of 28 February 2003, or 44/04 of 12 November 2004.

12. Amongst others, in its Judgments of 15 March 2004 (rec. 10627/1998), 24 May 2004 (rec. 7759/1999), 27 October 2004 (rec. 2029/2000), and 11 July 2006 (rec. 410/2004).
13. Resolution No. 102/2012 of 9 May 2012 in case *Langa Industrial, S.A.* v *Civil Guard* (Supply of equipment for an air force base).
14. Even if this has not always been the situation, most judicial rulings and opinions of consultative bodies have emphasised this separation in more recent cases. Therefore, no reference is made to prior case law of the Spanish Supreme Court (dating back to 1999) or to some CBAP Reports where some instances of selection criteria disguised as award criteria were upheld. In my view, those judgments and opinions have been overruled by the *Lianakis*-compliant cases indicated in the main text.
15. Reports 59/04 of 12 November 2004 and 41/05 of 26 October 2005. A position strongly criticised by Doménech Pascual, 'La valoración de las ofertas en el derecho de los contratos públicos', above n 1, 35.

3. Lowest Price

3.1. 'Lowest price' criterion as the only acceptable price-related criterion

Article 150.1 LPSC does not expressly mention 'lowest price' as an alternative to the 'most economically advantageous tender' (MEAT), but it includes the price offered among the criteria that CAE may take into account to determine the MEAT. However, Article 150.1.II LPSC mandates that '[w]*hen only an award criterion is used, it must necessarily be the lowest price*'. And, moreover, Article 151 LPSC *in fine* expressly indicates that '[w]*hen the only criterion to consider is the price, it is understood that the most economically advantageous tender is the one with the lowest price*'.[16]

Therefore, there is an actual option for contracting authorities to award contracts exclusively with regard to a price criterion but in such cases it must be to the 'lowest priced' tender. This comes to exclude the possibility of setting different award criteria solely based on price, such as 'second-best' price (to award the contract either to the lowest tenderer but at that second-lowest price, or directly to the tenderer that submitted the second lowest tender) or other possible (not lowest) price combinations, such as the price closest to the average price (which, moreover, was expressly rejected by the Spanish Su-

16. Indeed, there has been some terminological controversy due to the fact that article 150 LPSC only mentions the 'most economically advantageous tender' criterion. This derives from the following considerations in the preamble to the original text of the LPSC: '*The legal concept of 'most economically advantageous tender' is* [...] *broader than the one handled in Directive 2004/18, since in its strict notion the concept encompasses both the one present in the community standard -which assumes the use of multiple valuation parameters- and the criterion of the lowest price, which the Directive formally distinguishes from the former; this Law groups both concepts under one heading to avoid straining the usual linguistic value of the expressions used (it would not be understandable that, when the only criterion to evaluate is the price, the cheapest offer was not considered as the most economically advantageous), and to facilitate its use as a guideline to highlight the need to address efficiency criteria in awarding public sector contracts*' (original in Spanish). These rather convoluted considerations in the preamble of the LPSC triggered concerns regarding the proper transposition of Directive 2004/18. However, in my view, there is no material divergence between the Spanish regulation of award criteria and the content of the EU Directives, despite any potential conceptual discrepancies between the legislators in Madrid and Brussels. For discussion, see Carbonero Gallardo, *La adjudicación de los contratos públicos*, above n 1, 536-537; Mestre Delgado, 'El Derecho de la contratación pública en España', above n 1, 309; Doménech Pascual, 'La valoración de las ofertas en el derecho de los contratos públicos', above n 1, 2-3.

preme Court[17] and, more recently, again by the CBAP: '*the evaluation method* [concerning the price of the contract] *cannot result in any situation where a lower priced offer obtains a lower score than a more expensive one and, consequently, that any offer obtains a higher mark than any other lower offers; or, in other words, the lowest priced offer must be given the highest score as regards the price criterion*'[18]).

3.2. Limited freedom to choose the 'lowest price' criterion over MEAT

A related, and possibly less clear issue, is how free the option between both award criteria is. As we shall see in further detail (below § 4.3), Article 150.3 LPSC sets a list of cases where multiple award criteria (*ie* MEAT rather than lowest price) shall be used. According to the drafting of the list, the lowest price criterion is only deemed appropriate by the Spanish legislator in cases where price is the sole determinant of the award, such as:

a. Supply contracts where the standardized products to be acquired are perfectly defined and it is not possible to vary delivery times or to make changes of any kind in the contract; and
b. Service contracts where the services to be rendered are perfectly defined from a technical perspective and it is not possible to vary delivery times or to make any changes to the contract.

The list in Article 150.3 LPSC is not exhaustive but, in cases other than these two, there is a clear legal indication (if not a properly binding legal mandate) to use multiple award criteria and, consequently, use the MEAT (below § 4.3). Therefore, recourse to 'lowest price' must be seen as a relatively residual option for CAE, which will only be able to avail themselves of this simplified award criterion when they acquire standard goods or perfectly defined services in clearly pre-set, non-modifiable and non-negotiable conditions. This may be seen as an unnecessary limitation of CAE's discretion, since recourse to 'lowest price' could be desirable in a wider set of cases, as long as the tender documents and technical specifications were precise enough to restrict the tenderers' ability to compete on pricing only. However, from a practical perspective, it seems difficult to find other cases where CAE can define the contractual object and conditions so precisely as to exclude all

17. Judgment of 9 June 2004 (rec. 324/2000). See Doménech Pascual, 'La valoración de las ofertas en el derecho de los contratos públicos', above n 1, 47 and, in further detail, Ballesteros Moffa, *La adjudicación de contratos en el sector publico*, above n 4, 210 ff.
18. Report 4/11 of 28 October 2011 (original in Spanish).

types of non-pricing competition between tenderers. In any case, given that the award procedure is exactly the same, regardless of the use of the 'lowest price' or the MEAT criteria (other than the potential complexity derived from the application of the more sophisticated evaluation methods required to properly apply MEAT), this relatively restrictive approach to the use of the 'lowest price' criterion seems to be of no material disadvantage for CAE.

3.3. Ties in case of use of 'lowest price' criterion

In general terms, in case of a price tie when the 'lowest price' award criterion is used, Article 87.2 *in fine* of implementing regulation in RD 1098/2001 requires the contracting authority to award the contract through a raffle between the tenderers that had submitted identically priced offers.

However, the 4th Additional Provision of the LPSC on 'contracting with companies that have staff with disabilities or at risk of social exclusion, and with non-profit entities' contains several criteria that CAE can include in the tender documents to sort out price ties in a different manner. In particular, CAE could set a preference for undertakings that meet certain social characteristics,[19] such as being an employer of more than 2 % of disabled staff, being considered a sheltered workshop, being a non-profit organisation active in the fields of social care, or being a 'fair trade' organisation when products to be acquired are susceptible of qualifying as 'fair trade products'.[20]

19. On the broader issue of socially responsible public procurement, but with specific reference to rules on 'social' preferences in case of a tie, see MA Bernal Blay, 'Hacia una contratación pública socialmente responsable: las oportunidades de la Ley 30/2007, de 30 de octubre, de contratos del sector público' (2008) 10 *Revista Aragonesa de Administración Pública* 211-252; and LA Ballesteros Moffa, 'La selección del contratista en el sector público: criterios reglados y discrecionales en la valoración de las ofertas' (2009) 180 *Revista de Administración Pública* 21-57.
20. Given the restrictive approach adopted by the Court of Justice of the EU in case C-368/10 *Commission* v *Netherlands* ECR [2012] nyr 90 – which restricts the possibility of taking into consideration 'fair trade' and analogous considerations beyond their use as strict award criteria and only in so far as they are closely linked to the object of the contract – the compatibility of this latter criterion with EU law can be doubted. However, given that it is exclusively a rule for the breaking up of ties (rather than a raffle) and consequently, not an award criterion as such; its acceptability cannot be safely excluded at this point. In my view, this criterion should be excluded because it goes beyond the contractual object. Nonetheless, given the rarity of ties, the practical relevance of this provision is prone to be non-existent. See A Sanchez Graells, 'Comercio Justo, Productos Ecológicos, Responsabilidad Social Corporativa y Contratación Pública: Buena STJUE en el Caso C-368/10 Comisión contra Holanda', 31 May 2012,

Moreover, Articles 34 and 35 of the Organic Law 3/2007, of 22 March, for the Effective Equality of Women and Men establish preferences for public contracts and public grants under certain circumstances. Regarding public contracts, article 34 establishes that:

1. *Annually, the Council of Ministers, in view of the evolution and impact of equality policies in the labour market, will determine the contracts of Central Government and its agencies which necessarily will have to include amongst their conditions compliance clauses designed to promote equality between women and men in the labour market, in accordance with the legislation of public sector contracts.*
   In the resolution referred to in the preceding paragraph, where appropriate, specification may be made on the characteristics of the conditions to be included in the specifications, based on the nature of the contracts and to industries affected.
2. *Contracting authorities may provide, in the technical specifications and contractual documents, for a preference in the award of contracts for the proposals submitted by companies that, at the time of proving their technical or professional capacity, comply with the guidelines of the previous paragraph, provided however that these proposals at least equate the most advantageous offer on the basis of the objective award criteria chosen [...]*

Therefore, this could be a further rule to sort out price ties, although it seems difficult to see it being applied in practice, either because a CAE with strong social or environmental concerns will tend to award the contract according to MEAT to include equality or other social dimensions (with the difficulties indicated below § 4.6), or simply because price ties are extremely rare.[21]

Finally, even if this contribution is generally limited to Spanish State (*ie* national) law, it is worth to mention that some regions have developed additional rules to break potential ties by reference to the social or regional elements of the tenders. As mere examples, it is interesting to have a look at the situation in the Basque Country and Valencia, which have been relatively active in this area.

1) Basque Country. This region has a general enabling clause in its regional 'Equality Law' (Basque Country Regional Law 4/2005, of 18 February, for the Equality of Women and Men), but it has not been developed

http://howtocrackanut.blogspot.co.uk/2012/05/comercio-justo-productos-ecologicos.html accessed 7 May 2013.

21. As a side note, it is worth stressing that price ties may be an indication of collusion between tenderers and that the 23rd Additional Provision of the LPSC obliges CAE to report any potential violations of competition law – which could add to the difficulty of seeing these rules applied in practice.

through implementing regulations and, consequently, lacks effectiveness. The text of the provision is the following:

Article 20 – 'Measures to eradicate inequalities and to promote equality'

(2) Without prejudice to other measures considered appropriate, the public bodies in the Basque administration will include in the regulations governing grants and, where permitted by the law of contracts, among the criteria for their award one criterion based on the assessment of the integration of the gender in the bid and/or the aid project or financed activity. In the same cases, and amongst the criteria for assessing the technical capacity of candidates or tenderers and, where appropriate, amongst the requirements to be met by the recipients of grants, their track record in promoting equality between women and men will be assessed.

Also, in accordance with public contract law and the provisions below, consideration will be given to the obligation of the contractor to undertake, as a condition of the contract, measures to promote equality of men and women.

This general provision has been further developed through Regional Resolution 6/2008 of 2 June, where the criteria for the application of 'equality-promoting' selection criteria, technical capacity requirements or contractual clauses are still left open and in very unspecific terms that retain a requirement of 'linked to the object of the contract' that, to the best of my knowledge, leave them ineffective [the relevant provisions are in the following articles of the Resolution III.2, V.2 (apts. 3 y 4), VI.4 (apt. 1), VII.1 (apt. 3), IX.3]. Actually, in the 2010 V Plan for the furthering of the equality between women and men presented to the Basque Parliament, there was an express call for effective application of these rules, which were reported as remaining substantially unapplied.

2) Valencia. The Regional Government passed the IV Plan for the promotion of effective equality that provides for a preference to 'equality-promoting' bidders only in case of tied offers. So the regime is exclusively an application of the nation-wide provisions already discussed.

Therefore, as a general rule, it can be considered that regional rules are either basically a repetition of the State regime or, where they try to go further, face significant difficulties due to the fact that they can only be applied in cases of ties that, as already mentioned, are extremely rare.

4. Most Economically Advantageous Tender (MEAT)

4.1. Criteria to be taken into consideration when using MEAT and their weighting

Article 150.1 LPSC establishes that the evaluation of the tenders received and the decision to award a public sector contract according to the most economically advantageous tender (MEAT) shall be made on the basis of various criteria *directly*[22] linked to the subject-matter of the contract in question. In its open (*ie* non-exhaustive) list of usable award criteria,[23] Article 150.1 LPSC differs from the list included in Article 53 of Directive 2004/18, since it includes some additional criteria (marked in italics): quality, price, *the formula used to adjust the remuneration linked to the effective use of works or the level of services actually rendered*, delivery date and delivery period or period of completion, running costs, environmental characteristics *or elements related to the satisfaction of the social requirements linked to the needs defined in the contractual specifications and belonging to the categories of particularly disadvantaged population to which the users or beneficiaries of the contract belong*, *profitability*,[24] technical merit, aesthetic and functional characteristics, *availability and cost of spare parts*, after-sales service and technical assistance, *or other similar criteria*.

Case law and the administrative doctrine of the CBAP have consolidated some additional guidelines regarding the acceptability or unlawfulness of certain award criteria. For instance, contracting authorities cannot set as an award criterion a waiver of maximum payment delays (*ie* additional "commercial" credit facilities provided by the contractor) or a waiver on the charging of interest for late payments to the contractor, since this would reinforce an illegal conduct by the CAE (which is bound by EU and domestic rules on maximum payment delays and mandatory interest rates).[25] Similarly, criteria that set a disguised regional preference (for instance, by assessing the volume of contracts executed in a given region, or for a given municipality) have also

22. See above n 10.
23. The Spanish Supreme Court has defined the award criteria as those '*indications, parameters, or guidelines according to which the Administration will evaluate and select the offer that overall generates the largest advantages in the execution of the contract*' [Judgment of 18 February 2002 (RJ 2002\3562), original in Spanish]. See Carbonero Gallardo, *La adjudicación de los contratos públicos*, above n 1, 537.
24. Instead of cost-effectiveness, which is the criterion included in the Directive.
25. CBAP Report 5/05 of 11 March 2005; Doménech Pascual, 'La valoración de las ofertas en el derecho de los contratos públicos', above n 1, 20.

been considered unlawful by the Spanish Supreme Court due to their discriminatory features.[26] The CBAP has also rejected the validity of criteria such as knowledge of the region where the contract was to be executed.[27] A reduction in the delivery date and delivery period or period of completion initially set by the CAE is clearly an acceptable criterion in general, but not when there is no immediate or clear public interest in the early completion of the contract.[28] The taking into consideration of improvements on the technical specifications applicable to the contract is equally inadmissible unless it is done according to the rules on variants.[29] Other unacceptable criteria include several aspects closely related to the distinction between selection and award criteria (above § 2), such as the use of the stability of employment of members of staff;[30] the index of labour related accidents[31] or those concerning with their prevention through health and safety policies;[32] the percentage of female members of staff,[33] or general quality or environmental certificates.[34]

According to Article 150.4 LPSC, when taking into consideration more than one criterion (*ie* when using the MEAT[35]), CAE must not only expressly indicate the criteria to be used, but it also has to specify the relative weighting given to each of them, which can be expressed by providing for a range with an appropriate maximum spread. Where weighting is not possible, due to

26. See, amongst other, Judgments of 28 April 2005 (rec. 418/2003), 5 July 2005 (rec. 852/2003), and 24 September 2008 (rec. 4793/2006); Doménech Pascual, 'La valoración de las ofertas en el derecho de los contratos públicos', above n 1, 21-22.
27. Report 9/09 of 31 March 2009.
28. CBAP Report 29/98 of 11 November 1998.
29. SCATCA Resolutions No. 5/2012 of 5 January 2012 in case *Grupo Focus Servicios Auxiliares S.L.* v *Hispano-American Studies Centre and CIC Isla de la Cartuja de Sevilla* (Porter services), and No. 318/2011 of 14 December 2011 in case *Vallicam, S.L.* v *Spanish National Research Council* (Cleaning services).
30. CBAP Reports 44/98 of 16 December 1998, 5/02 of 13 June 2002, and 44/04 of 12 November 2004.
31. CBAP Report 11/99 of 30 June 1999.
32. CBAP Report 42/06 of 30 October 2006.
33. CBAP Report 44/04 of 12 November 2004.
34. CBAP Report 73/04 of 11 March 2005; Doménech Pascual, 'La valoración de las ofertas en el derecho de los contratos públicos', above n 1, 31; Carbonero Gallardo, 'Los criterios de valoración de las ofertas en la selección del adjudicatario en el procedimiento abierto y restringido', above n 1, 8.
35. It must be stressed that MEAT requires the use of more than one criterion since, in case only one criterion is used, it must refer to the price of the offer (Article 150.1.II LPSC, above § 3.1), which was the position traditionally held by the Spanish Supreme Court [see *eg* Judgment of 11 May 1999 (RJ 1999\544)]. Carbonero Gallardo, *La adjudicación de los contratos públicos*, above n 1, 544.

properly justified reasons, CAE shall list the criteria in descending order of importance (below § 4.4). In the event that the procurement procedure is articulated in several phases, CAE will also indicate in which of the phases the different criteria will by applied, as well as the minimum score required for the tenderer to progress to the following phases in the selection process.[36] It is possible that the application of a single set of award criteria generate different results in each of the lots in which a tender is divided (particularly when the criteria used are of a relative nature and depend on the content of the offers submitted by tenderers), and it has been held by SCATCA that this does not create an issue of inconsistency or discrimination.[37]

Given the open nature of the list of criteria included in Article 150.1 LPSC,[38] CAE retains a substantial degree of discretion to choose those that better allow for the identification of the MEAT, as long as they are objective, pre-defined in the contract documents, and properly weighted or, at least, listed in decreasing order or relevance.[39]

However, Article 150.2 LPSC sets some additional requirements that CAE must follow when choosing the specific criteria to be used in a tender – which must be publicised in the advertising of the tender (if mandatory, art 150.5 LPSC), and included in the tender documents. Award criteria tend to be structured in three tiers: criteria to be subjectively evaluated, criteria to be automatically evaluated through formulae and (within the latter) economic criteria.[40] In this regard, it is worth noting that according to Article 150.2 LPSC, in choosing the applicable award criteria, prominence will be given to those criteria that refer to characteristics of the object of the contract that can be assessed by numbers or percentages obtained by the mere application of the

36. Failure to reach such minimum score must imply the rejection of the tender and prevent its further progression in the evaluation procedure. SCATCA Resolution No. 300/2011 of 7 December 2011 in case *ARAVINC, S.L.* v *Spanish Public Broadcasting Service (RTVE)* (Urgent parcel services by motorbike) at para. 5.
37. SCATCA Resolution No. 71/2011 of 21 March 2011 in case *Centre Medic Diagnostic Alomar, S.L.* v *Director General of ASEPEYO, Mutuality of Work Accidents and Occupational Diseases of the Social Security* (Medical diagnostic services) at para. 7.
38. As expressly indicated by the Spanish Supreme Court in its Judgment of 25 January 2000 (rec. 6382/1993).
39. CBAP, Report 28/95 of 24 October 1995; Carbonero Gallardo, *La adjudicación de los contratos públicos*, above n 1, 545-550.
40. It is worth noting that the classification of a given criterion under either of those headings is irrelevant for the purposes of challenging award decisions, since review bodies will be able to 'reclassify' them as appropriate, depending on the actual way a given criterion is evaluated. See SCATCA Resolution No. 88/2012 of 11 April 2012 in case *UTE Monforte, S.A.* v *Army* (Road transport of off-duty troops) at para. 6.

formulae set out in the contract documents (including its price[41]). When this is not the case (*ie* if the award of the contract is primarily dependent on subjective evaluation, which aggregate weighting exceeds 50 % of the total points), additional safeguards are mandated by the LPSC (see below § 4.4 and § 5).

Once made public in the tender documents, all these decisions will be binding on CAE throughout the procedure, since *any (material) deviation or ulterior modification would imply an abuse of its administrative discretion.*[42] Therefore, as a matter of principle, once set, award criteria cannot be changed or adjusted prior to the bidding – other than by means of a publication of a corrigendum of the original tender documents, which could raise important issues of potential discrimination of those potentially interested bidders that dismissed the opportunity to participate in view of the originally published criteria[43] (particularly because the corrigendum would not extend the time limits applicable to the tender).

41. For the sake of simplicity, price will not be distinguished from the rest of criteria susceptible of automatic evaluation through formulae. However, tender evaluation actually follows a three-stepped evaluation. First, technical criteria which evaluation depends of subjective considerations. Second, technical criteria to be automatically evaluated through formulae. And, finally, evaluation of the economic offer. However, in my opinion, this is the result of administrative inertia and there is no good reason to keep this artificial separation between price and the rest of 'purely' objective criteria, since they could all be evaluated simultaneously without loss of procedural guarantees. Given the safeguards implemented when subjective evaluation accumulates more than 50 % of the weighting (below § 4.4 and § 5), there is no need to maintain this separation between technical and economic evaluation. Therefore, the process of bid evaluation is presented in this simplified manner in this contribution, but the reader is asked to bear in mind the (sub)division of the process of automatic evaluation of 'purely' objective criteria in technical and economic evaluation of the bids. This approach is supported by SCATCA Resolution No. 59/2012 of 22 February 2012 in case *Rigual, S.A. and Diseños y Proyectos Técnicos, S.A (DITECSA)* v *Logistic Support Command of the Air Force* (Supply of mixing equipment) at para. 5, where it is clearly indicated that the current version of the LPSC does not mandate a specific order in the presentation and opening of (technical and financial) documentation, other than mandating a separation of information concerning award criteria to be assessed according to value judgements (below § 5).
42. Spanish Supreme Court, Judgment of 11 July 2006 (rec. 410/2004).
43. The acceptability of such corrigenda as legal amendments of the pre-published award criteria is at least debatable, since they fall short from solving the problem linked to the *de facto* existence of a change/adjustment of the award criteria initially published. In my view, the risk of discrimination (particularly against potential tenderers that dismissed the possibility to participate and do not follow up on the corrigendum, or

However, departing from this general rule, the Spanish Supreme Court has (in my view) shown excessive deference towards the possibility of decomposing and specifying the way in which award criteria are to be applied (or even the possibility to include new award criteria or sub-criteria) after having published the tender documents (or even after the offers were submitted), if this: i) was indicated in the documentation, ii) was communicated to all tenderers in a transparent and non-discriminatory way, iii) could have been reasonably anticipated by tenderers, or iv) was (implicitly) accepted by tenderers (*eg*, by submitting an offer in a tender were it was clearly stated that CAE would freely choose the awardee of the contract).[44] In my opinion, this runs contrary to EU case law and, consequently, this string of jurisprudence of the Spanish Supreme Court is no longer good law.[45]

In contrast with that, the Supreme Court has ruled that in the conduct of the evaluation of tenders, the CAE is not able to omit any of the criteria already included in the tender documents (even if its use is subsequently considered illegal due to, for instance, the inclusion of a 'pure' selection criterion as an award criterion).[46] Resorting back to the general rule, in cases where the CAE wants to make any changes to the published award criteria or their weightings, it has to cancel the tender and start the process all over (as already mandated by the case law of the ECJ and the GC).

that are negatively affected due to a loss of time when they identify the change) is too high and corrigenda should not be accepted – at least where they generate a material change from the criteria initially published (since merely formal corrigenda would not alter the competition and would rarely, if ever, actually exclude potentially interested tenderers). Regardless of the possibility for disadvantaged or excluded tenderers to notify such a procedural defect or anomaly to the contracting authority and, eventually, raise this issue in a special challenge against the award decision [art 40(3) LPSC, if the contract is above EU thresholds or otherwise has access to this remedy], the solution should be one of cancellation and retendering. For a fuller discussion of this topic, with references to practice in other Member States, see S Arrowsmith & S Treumer (eds), *Competitive Dialogue in EU Procurement* (Cambridge University Press, 2012) 88-94.

44. See Spanish Supreme Court, Judgments of 5 March 2002 (rec. 99/1998), 28 June 2004 (rec. 7106/2000), 29 March 2005 (rec. 3073/2001), 11 July 2006 (rec. 410/2004), and 26 December 2007 (rec. 634/2002); Doménech Pascual, 'La valoración de las ofertas en el derecho de los contratos públicos', above n 1, 33.
45. Equally, see Doménech Pascual, 'La valoración de las ofertas en el derecho de los contratos públicos', above n 1, 9-10, who clearly considers that this line of (old) Spanish Supreme Court case law runs contrary to, amongst others, the ECJ Judgment in *Lianakis* (C-532/06).
46. Spanish Supreme Court, Judgment of 24 May 2004 (rec. 7759/1999).

4.2. Practical impossibility of excluding price considerations in the award of public contracts

A connected issue is whether price considerations can be completely excluded from the set of criteria used to award the contract under MEAT. General practice tends to give price a relatively high relevance, but there is no mandatory minimum weight to be given to this criterion. In some relatively old reports, CBAP accepted that price considerations could be minimised (but not completely excluded) in tender procedures, but that this should be seen as an exceptional circumstance that requires full, proper justification by CAE.[47] Along these lines, without excluding the possibility to minimise the relevance of price, in the case of works contracts, the CBAP admitted that '*it is hard to imagine that, in this type of contracts, price is irrelevant to the extent of completely excluding from the criteria taken into consideration to award them*'.[48] Indeed, it is very hard to see how price considerations would not be relevant to the award of the contract[49] (unless the contract was for a set, fixed price and all tenderers bid on the assumption that the price was a given[50]), particularly in an environment of economic crisis.

Therefore, this may never have had significant practical relevance (since the vast majority of tenders do include price considerations) and, in any case, it seems to be further restricted by the Judgment of the General Court in the *Evropaiki Dynamiki* v *BEI* case (T-461/08, 194), where it found that '[s]*ave in exceptional circumstances* [...] *in order to ensure that the best 'value for money' or 'price-quality' ratio is achieved at the conclusion of the overall evaluation of the criteria chosen for the purpose of identifying the economically most advantageous tender, the weighting applied to the financial criterion must not result in the neutralisation of that criterion*'. My reading of this case is that EU law requires the price criterion to always be taken into account to an extent (*ie* with a weighting) that gives it sufficient relevance as not to neutralise it in the formation of the award decision, unless the CAE can justify that exceptional circumstances concur. However, if no price competition can be gained from a tender process, we will probably be in a situation where a direct award trough a negotiated procedure could be justified (due to

47. Reports 28/95 of 24 October 1995, 29/98 of 11 November 1998, and 48/01 of 30 January 2002.
48. Report 28/98 of 11 November 1998.
49. Carbonero Gallardo, *La adjudicación de los contratos públicos*, above n 1, 550-552.
50. Doménech Pascual, 'La valoración de las ofertas en el derecho de los contratos públicos', above n 1, 46.

exclusive rights or a *de facto* monopoly) and, in those cases, it may not even be necessary to hold the tender, or specify any award criteria.

4.3. Cases where the use of MEAT is compulsory

As already mentioned (above § 3.2), Article 150.3 LPSC lists a relatively broad set of cases where the use of MEAT shall be deemed appropriate (and, consequently, makes its use compulsory for CAE,[51] at least unless they can provide a sufficient justification that, in the case at hand, recourse to 'lowest price' better serves their purposes – which, in any case, would be open to challenge and judicial review).[52] According to Article 150.3 LPSC, the evaluation of more than one criterion shall, in particular, be used in the award of the following contracts:

a. Those whose projects and budgets have not been previously established by CAE and must be offered by the tenderers.
b. When CAE considers that the definition of the contractual object is likely to be enhanced by the variant technical solutions proposed by the tenderers, or by means of reductions in execution time.
c. Those for which implementation CAE facilitates materials or auxiliary means which good use requires special guarantees by contractors.
d. Those that require the use of advanced technology or which performance is particularly complex.
e. Contracts for the management of public services.
f. Supply contracts, unless the standardized products to be acquired are perfectly defined and it is not possible to vary delivery times or to make changes of any kind in the contract, therefore the price being the sole determinant of award decisions.
g. Service contracts, unless the services to be rendered are perfectly defined from a technical perspective and it is not possible to vary delivery times or to make any changes to the contract, therefore the price being the sole determinant of award decisions.
h. Contracts that may have a significant impact on the environment, in which award measurable environmental conditions shall be considered, such as lowest environmental impact, savings and efficient use of water, energy and materials, the environmental cost throughout the life-cycle, procedures and methods of organic production, the gen-

51. Doménech Pascual, 'La valoración de las ofertas en el derecho de los contratos públicos', above n 1, 5-6. *Cfr*. Carbonero Gallardo, *La adjudicación de los contratos públicos*, above n 1, 541-544.
52. Spanish courts tend to take the excessive use of 'lowest price' seriously and to consider it an illegal behaviour. Remarkably, the Judgment of the Judgment of the Spanish Constitutional Court of 29 June 2009 (RTC 2009\162) quashed a regional law that imposed the use of lowest price as the general criterion – to the exclusion of MEAT. In general, courts will assess whether the contracting authority has abused its discretion when opting for lowest price where MEAT was more appropriate (and, particularly, if one of the presumption in art 150.3 LPSC applied).

eration and management of waste, or the use of reused or recycled materials, or of green materials.

In all such cases, CAE will have to choose the relevant criteria to find the MEAT, and it seems that they should at least include those more closely connected to the circumstance that triggered the use of MEAT (*eg* environmental criteria in the last case, which seems an obvious implication[53]).

4.4. Weighting of criteria and evaluation models used to determine the MEAT

As already briefly mentioned (above § 4.1), according to Article 150.4 LPSC, when taking into consideration more than one criterion, CAE must specify the relative weighting given to each of them, which can be expressed by providing for a range with an appropriate maximum spread. Where weighting is not possible, due to properly justified reasons, CAE shall list the criteria in descending order of importance.[54] It is interesting to stress that, under certain circumstances (such as the impossibility to establish weightings), the Spanish Supreme Court has considered it unlawful to grant the same relevance to all award criteria (*ie* actually forces the CAE to at least make the effort to prioritise the criteria, even in abstract terms).[55] However, this position has been criticised by commentators, who see no reason to prohibit such equal split of

53. Nonetheless, such a possibility remains limited and subject to full administrative discretion, since SCATCA has seen no restriction of competition or discriminatory behaviour in the fact that a CAE rejected the supply of reused or refurbished products under a supply agreement; see SCATCA Resolution No. 60/2012 of 30 March 2012 in case *Caro Informática, S.A.* v *FREMAP* (Supply of IT consumables) at para. 5. In my view, this is an undesirable incipient line of case law, particularly due to the disregard of functional equivalence implied in the admissibility of reused or refurbished materials. See A Sanchez Graells, 'The Spanish Central Administrative Tribunal of Contractual Appeals grants public buyers wide discretion to exclude supplies of reused or refurbished goods (FREMAP)', 30 March 2012, *e-Competitions*, N°49043.
54. The wording of Article 150.4 LPSC ('properly justified' reasons) differs from that of Article 53.2 *in fine* of Directive 2004/18 (which requires that reasons are 'demonstrable'). However, in my opinion, no significant divergence in legal consequences seems to derive from that difference in the drafting of these provisions, as both Article 150.4 LPSC and Article 53.2 *in fine* of Directive 2004/18 place the burden of proof of the impossibility to weigh the chosen award criteria on the CAE. Doménech Pascual, 'La valoración de las ofertas en el derecho de los contratos públicos', above n 1, 19-20 considers that this burden should be seen as particularly high, in view of the risks of arbitrariness in CAE's behaviour lacking weightings.
55. Judgment of 24 June 2003 (rec. 3979/2000).

weightings between all chosen criteria.[56] In my reading of Article 150.4 LPSC, if weightings can be allocated equally, CAE must expressly do so. It will not suffice to list a number of criteria and exclude any prioritisation since that would run against both alternative requirements (to either specify the weighting or, alternatively, at least prioritise the criteria), although, in such a case, a default rule to allocate equal weightings could reduce litigation.

As also mentioned earlier (above § 4.1), the LPSC strongly pushes for the adoption of automatic evaluation methods based on (mathematic) formulae,[57] which should at least be given 50 % or more of the total weighting in order to avoid the (partial, subjective) evaluation of tenders by independent committees or specialized agencies (below § 5). There is no general model to conduct the automatic evaluation of tenders. Therefore, in order to increase tenderers' awareness and to try to ensure transparency and equality of opportunity, the CBAP has recommended that the specific formula or mathematical matrixes to be used in a given tender procedure should be described in detail in the contract documentation and be made available to tenderers prior to submission of their offers.[58]

Nonetheless, SCATCA has considered that there is certain room for CAE to apply specific criteria not fully spelled out in the tender documents – as, for instance, in a case where the price for several lots had to be evaluated according to the average price, SCATCA found no fault in the fact that CAE used a weighted average by the volume of the several lots rather than a straightforward arithmetical average of all prices, despite not having mentioned the specific use of a weighted average in the initial tender documents.[59] Along similar lines, and surprisingly, the Spanish Supreme Court has in the past not seen any illegality in the fact that certain criteria for the award of public contracts remain unknown to tenderers prior to submission of their offers, or even throughout the tender procedure [in that instance, the

56. Doménech Pascual, 'La valoración de las ofertas en el derecho de los contratos públicos', above n 1, 12-13.
57. An option criticised by Doménech Pascual, 'La valoración de las ofertas en el derecho de los contratos públicos', above n 1, 13 and, in more detail, in ibid. 'Principios jurídicos, proporcionalidad y análisis económico' in Ortega & De La Sierra (eds) *Ponderación y Derecho administrativo* (Madrid, Marcial Pons, 2009) 173 and ff.
58. Report 35/08 of 25 April 2008; Carbonero Gallardo, *La adjudicación de los contratos públicos*, above n 1, 550.
59. SCATCA Resolution No. 38/2012 of 3 February 2012 in case *Redyser Transportes S.L.* v *Director General of ASEPEYO, Mutuality of Work Accidents and Occupational Diseases of the Social Security* (Urgent parcel services) at paras. 6 & 7.

case concerned certain internal general guidelines issued by top ministerial departments that had to be followed by all CAE of a lower rank[60]].

The above is seen by several commentators as running against the case law of the ECJ and, consequently, the consensus is that evaluation methods should be disclosed in full and prior to the submission of tenders, in order to allow tenderers to be fully acquainted while preparing their offers of which elements will be taken into consideration and how.[61] In my view, this issue is still affected by some shadow areas regarding the extent to which evaluation rules must be made explicit in the tender documents and CAEs retain some discretion to partially not disclose the exact models to be used (although an implicit limit on the impossibility to set them after having seen the content of the tenders should be construed from a systematic analysis of the rules on opening and evaluation of the bids, which include important restrictions on the procedures to follow, as discussed below § 5.1).

4.5. Ties in case of use of MEAT

In cases where MEAT is used, it is very hard to envisage a case of an exact tie in the evaluation of the offers. This will be particularly unlikely as the number of criteria taken into consideration grows, and as evaluation formulae become more complicated or sophisticated. However, the Spanish legislator has extended to these cases the same rules already seen regarding ties when the 'lowest price' criterion is used (above § 3.3). Therefore, the criteria specified in the 4th Additional Provision of the LPSC for undertakings that meet certain social characteristics, or for non-profit or fair trade entities can be used when MEAT applies, as long the CAE has clearly indicated this in the tender documents. The preferences in Article 34 of the Organic Law 3/2007, of 22 March, for the Effective Equality of Women and Men will also be available, under the same conditions.

60. Judgment of 3 December 2004 (rec. 2779/2001).
61. *Eg* Doménech Pascual, 'La valoración de las ofertas en el derecho de los contratos públicos', above n 1, 17, who strongly criticises this ruling of the Supreme Court, although he points towards its relatively limited importance in view of the fact that this finding was made *obiter dicta*.

5. Procedure for Evaluating MEAT, Juries, Transparency and Judicial Review

5.1. Procedure for evaluating MEAT, Juries and Transparency

As already mentioned in passing (above § 4.1), the evaluation system of the LPSC tries to minimise the influence of subjective evaluations in the award of public sector contracts and, consequently, the scope for favouritism or corruption.[62] This is primarily done by mandating that, in choosing the applicable award criteria, prominence will be given to those criteria that refer to characteristics of the object of the contract that can be assessed by numbers or percentages obtained by the mere application of the formulae set out in the contract documents (including its price[63]). As a strengthening of such measure in favour of objective tender evaluation and contract award, Article 150.2 LPSC establishes some additional procedural safeguards.

Indeed, in open or restricted procedures, if those criteria evaluated automatically by applying formulae are given a lower weighting than criteria which quantification depends on a value judgment (*ie* if the award of the contract is primarily dependent on subjective evaluation, which aggregate weighting exceeds 50 % of the total points): a) the evaluation of bids under the latter criteria shall be conducted by an *ad hoc* appointed committee, with a minimum of three members, comprising experts with appropriate qualifications and independent from CAE;[64] or b) such assessment shall be entrusted to a specialized technical agency, duly identified in the contract documents.[65]

62. Doménech Pascual, 'La valoración de las ofertas en el derecho de los contratos públicos', above n 1, 53-54.
63. See above n 41.
64. However, they may belong to the same ministerial department or public body. This has generated criticism, due to perceived limitations in the actual independence of the members of the expert committee. See Ballesteros Moffa, *La adjudicación de contratos en el sector publico*, above n 4, 217. In any case, it is worth stressing that members of evaluating teams and independent expert committees are subject to the rules on the prevention of conflicts of interest contained in Articles 28 and 29 of Law 30/1992 on General Administrative Procedure, which contravention would determine the invalidity of the award decision [Spanish Supreme Court, Judgment of 4 June 2002 (rec. 3309/1997)]. See also Doménech Pascual, 'La valoración de las ofertas en el derecho de los contratos públicos', above n 1, 58-59.
65. Articles 25 to 30 of Royal Decree 817/2009 of 8 May 2009 develop the regulation of the expert committee entrusted with performing the subjective bit of the evaluation process, but do not offer any significant additional indications regarding committee membership, appointment system, criteria to select specialized technical agencies, or regulation of potential conflicts of interest. The only relevant additional safeguard

Moreover, in order to prevent any undue influence in the subjective evaluation process, Article 150.2 LPSC mandates that it be conducted first, so that the automatic evaluation of the bid under the criteria measurable by the simple application of formulae will only be made after the CAE, or the independent committee or the specialized technical agency (as appropriate, depending on the relative weightings) have concluded their evaluations and issued a report that offers sufficient documentary proof to that effect. As a strengthening of these measures, Article 26 of the implementing regulation in Royal Decree 817/2009 of 8 May 2009 requires the documentation concerned with the criteria which quantification depends on a value judgment to be submitted in a separate envelope, so that the rest of the tender documentation can be kept sealed and reserved until the subjective evaluation is concluded.[66] This first envelope will be opened in a public act and, if necessary, its content will be handed over to the committee or specialized agency (art 27.3 RD 817/2009). Otherwise, the CAE will conduct its assessment separately, and will not proceed to open the rest of the documentation until this first assessment is completed and documented (*ie* minuted). Unless the tender documents include provisions to the contrary (and a proper justification, it should be expected), the result of the subjective evaluation (be it conducted by the CAE, or by the independent committee or the specialized technical agency) must be disclosed in a second public act where the rest of the bid documentation will be opened (art 30.3 RD 817/2009). Only then will the automatic evaluation of the bid under the criteria measurable by the simple application of formulae take place.

In order to conduct the evaluation of the bids, the CAE can request as many technical reports as it deems fit (Article 151.1 LPSC). Such reports will be of a 'purely' technical nature and are aimed at complementing the knowledge and expertise available to the CAE. Even if they could be seen as purely discretionary (*ie* CAE remains free to ask for them or not), the Spanish Supreme Court has made them almost mandatory ('unavoidable') when it is clear that the CAE lacks the required knowledge or expertise to properly

concerns transparency, as Article 29.3 RD 817/2009 requires publication in the web portal of the relevant CAE of the composition of the committee or the selection of an (independent) specialized technical agency.

66. Failure to provide this information separately must result in the disqualification of the non-compliant tender. SCATCA Resolution No. 47/2012 of 3 February 2012 in case *AFC Ingenieros, S.A. and Adasa Sistemas, S.A.U.* v *National Meteorological Agency (AEMET)* (Environmental pollution control services) at para. 6. See also below § 6 on the treatment of non-compliant tenders.

evaluate the tenders.[67] In such cases, it will not only suffice that the CAE request those technical reports, but they will have to follow the technical opinion – since departure would constitute an unjustified abuse of administrative discretion. As clearly indicated by the Spanish Supreme Court, the CAE cannot disregard the fact that the technical reports support the award of the contract to a given tenderer and substitute such technical opinion with subjective considerations that are not actually based on the award criteria set in the tender documents.[68] On the other hand, if the CAE seeks for those technical reports and follow them, their award decisions will usually be harder to challenge on technical grounds (as long as the content of the technical report is justified and expresses a reasonable technical opinion) and any potential allegations of arbitrariness will be significantly reduced, if not completely excluded[69] (on the review of award decisions based on arbitrariness, below § 5.2.3).

According to Article 151.1 LPSC, once the CAE has completed the evaluation of the tenders (with or without the intervention of the independent expert committee or specialized technical agency, and with or without requesting additional technical reports), it must rank in descendent order the (valid) tenders received according to the results of the evaluation process and will award the contract to the (compliant) tender that has obtained the highest score [after having checked, if appropriate, that there are no disqualifying shortcomings (below § 6) and that it is not an abnormally low tender (below § 7)]. It is worth stressing that, under Article 151.3.II LPSC, the CAE has a positive obligation to award the contract even if there is only one tender that meets the criteria set in the tender specifications (*ie* as long as it reaches any minimum score set in the relevant tender documents).[70] In conducting this evaluation and raking, and as already mentioned (above § 4.4), CAE, experts committees and technical agencies should stick to the criteria, sub-criteria and weightings published in the tender documents – although current case law still provide them with some leeway to alter or specify them to a certain extent, always provided that this i) was indicated in the documentation, ii) was communicated to all tenderers in a transparent and non-discriminatory way, iii) could have been reasonably anticipated by tenderers, or iv) was (implicit-

67. Judgment of 7 May 2004 (rec. 651/2000).
68. Judgs. of 24 June 2004 (rec. 8816/1999), 11 July 2006 (rec. 410/2004) and 21 March 2007 (rec. 6098/2000).
69. Spanish Supreme Court, Judgments of 21 July 2000 (rec. 1768/1996), and of 10 May 2006 (rec. 7885/2003).
70. Carbonero Gallardo, *La adjudicación de los contratos públicos*, above n 1, 573.

ly) accepted by tenderers (*eg*, by submitting an offer in a tender were it was clearly stated that the CAE would freely choose the awardee of the contract). However, as already said, this seems to run contrary to EU law and this possibility should be accepted no longer (in order to make the award decision as straightforward and predictable as possible, subject to the checks and balances discussed below in § 6 and § 7).

5.2. Administrative Appeals and Judicial Review

Even if contracts above EU thresholds have access to a specialised administrative tribunal (SCATCA), while other contracts are left to ordinary administrative judicial review, the criteria and approach towards the review of award decisions are significantly the same in both cases (as they are built upon the case law of the Spanish Supreme Court). Therefore, they will be analysed jointly for the purposes of this paper (above § 1).

In its relatively short life, the SCATCA has had a very significant number of opportunities to clarify the scope and extension of the review of award decisions. It is clear that both administrative appeals and judicial reviews of award decisions in public procurement matters are restricted to three specific grounds: i) procedural or formal irregularity, ii) manifest error or iii) arbitrariness in the assessment of tenders and award proposal.[71] The Spanish Supreme Court has traditionally taken the initial position that decisions involved in awarding public sector contracts are complex and, consequently, CAE retain a certain margin of discretion;[72] but that it does not completely exclude judicial review.[73] In that regard, courts (but not administrative tribunals) can review the decisions adopted and, in case they have sufficient information to determine which was the MEAT, they can re-award the contract to that tenderer.[74] Nonetheless, in practice, it is very rare that the courts consider that they have sufficient information and usually simply annul the award and mandate the CAE to make a new award following the rules in the tender documents and the information in the tenders submitted by participating bidders

71. Doménech Pascual, 'La valoración de las ofertas en el derecho de los contratos públicos', above n 1, 50-58.
72. Judgment of 29 June 1999 (rec. 9405/1995).
73. Judgement of 11 May 1999 (rec. 4071/1993).
74. See Spanish Supreme Court Judgements of 11 June 1991 (rec. 409/1986), 11 May 1999 (rec. 4071/1993), 25 January 2000 (rec. 6382/1993), 4 June 2002 (rec. 3309/1997), 14 July 2004 (rec. 1933/2002), 15 November 2004 (rec. 6812/2001) and 9 December 2004 (rec. 5769/2001); Doménech Pascual, 'La valoración de las ofertas en el derecho de los contratos públicos', above n 1, 52.

(which is precisely what administrative tribunals, such as SCATCA, are empowered to do[75]). Therefore, in most instances, challenges do not result in a fresh award decision adopted by the courts, but in a referral of the case back to the CAE by either the courts or the administrative tribunal, for it to re-run the evaluation process and reach a new award decision. The scope of the judicial and administrative review has been clearly delineated by SCATCA in the following terms:

> [...] *the Supreme Court's case law regarding the so-called technical discretion of the Administration is fully applicable to the value judgments implied in bid evaluation and contract award. This means that in the case of issues that are evaluated strictly applying technical criteria, the Tribunal cannot correct them by applying legal criteria. This does not mean, however, that the outcome of those assessments cannot be analyzed by this Tribunal, but this analysis should be limited exclusively to the formal aspects of the assessment, such as rules on competence or procedure, to the appraisal of whether the criteria were applied in an arbitrary or discriminatory fashion or, ultimately, to check that there was no material error in the evaluation. Beyond these issues, the Tribunal must respect the results of those assessments.*[76]

Therefore, it can be considered that, in general terms, review of award decisions is relatively limited, and no full judicial review is available, since the courts (and administrative appeal bodies, such as the SCATCA or its regional equivalents) will almost never substitute the discretion of the CAE with their own. This can be seen in some recent and leading cases concerned with the abovementioned limited grounds for challenge of award decisions, which are briefly discussed in what follows.

75. SCATCA Resolution No. 117 /2012 of 23 May 2012 in case *Pegamo Equipamiento Ferroviario, S.L. & GOMYL, S.A.U.* v *Valladolid Alta Velocidad 2003* (Supply of machinery for a new high speed train installation) at para. 4. See also SCATCA Resolution No. 74/2012 of 28 March 2012 in case *Mantenimientos Cascales, S.L.* v *Mancomunidad de los Canales del Taibilla* (Cleaning services) at para. 4.
76. SCATCA Resolution No. 33/2012 of 26 January 2012 in case *DIR Mensajería y Transporte* v *Director General of ASEPEYO, Mutuality of Work Accidents and Occupational Diseases of the Social Security* (Courier services) at para. 5 (original in Spanish). See also SCATCA Resolution No. 93/2012 of 18 April 2012 in case *Indra Sistemas* v *Spanish Maritime Safety Agency* (Supply of Electronic Equipment for the Renewal of the Centre for Maritime Rescue Coordination in Vigo) at para. 7; and SCATCA Resolution No. 119/2012 of 23 May 2012 in case *ORONA, S. Coop.* v *AENA Aeropuertos S.A.* (Services for the maintenance of mechanical transport elements for Alicante airport) at para. 6.

5.2.1. Procedural or formal irregularity (lack of notification or proper motivation of award decision)

According to settled case law of the Spanish Supreme Court, there are some procedural or formal requirements of award decisions which failure to comply with result in the invalidity of the award. In this regard, the CAE i) must reach an award decision on the basis of the award criteria set in the contract documents;[77] ii) must motivate it properly and provide clear reasons for the award decision (as a general requirement under Article 151.4 LPSC and Article 54 of Law 30/1992 on General Administrative Procedure);[78] and, finally, iii) must notify it to tenderers (both the awardee and the rest) in a manner that allows them to have sufficient information to protect their rights in the tender (*ie* to bring a sufficiently motivated challenge) – as specified in Article 151.4 LPSC, and subject to the confidentiality exception in Article 153 LPSC (which are substantially identical to Article 41 of Directive 2004/18).[79]

Challenges against award decisions are usually based on defects in their notification, particularly as regards the insufficiency of the motivation and reasons given by the contracting authority, or the insufficient detail provided regarding the result of the evaluations,[80] since this would be a ground for nul-

77. This is due to the fact that, once the CAE has exercised its administrative discretion in the selection and weighting of the award criteria, they set the limits for the exercise of such discretion throughout the procedure, as clearly set by the Spanish Supreme Court in its Judgments of 14 October 1999 (rec. 8714/1994), 4 June 2002 (rec. 3309/1997), 24 June 2004 (rec. 8816/1999), 14 July 2004 (rec. 1933/2002), and 15 November 2004 (rec. 6812/2001).
78. Doménech Pascual, 'La valoración de las ofertas en el derecho de los contratos públicos', above n 1, 56-58.
79. On the issue of the treatment of confidential information for debriefing purposes, see A Sanchez Graells, 'The Spanish Central Administrative Tribunal of Contractual Appeals issues its first decision on treatment of confidential information in procurement debriefing', 29 February 2012, *e-Competitions*, N°47987.
80. It is worth stressing that a CAE that simply notified the aggregate results of the evaluation process, but failed to disclose the breakdown of the scores by award criteria, would fail to meet the threshold of providing '*sufficient information for the bidder to bring a sufficiently founded challenge*' and, consequently, would see its award decision under a significant risk of annulment. See SCATCA Resolutions No. 305/2011 of 7 December 2011 in case *Adasa Sistemas, S.A.U. & Computer Sciences España, S.A.* v *General Directorate for State Assets* (Development of certain information systems) at para. 4; No. 103/2012 of 9 May 2012 in case *Brassica Group, S.A., Wrist Ship Supply & UTE (Revilla S.A., Sediasa Alimentación S.A. y El Pozo S.A.)* v *Contracting Unit of the Directorate for Supplies and Transport, Headquarters of the Navy* (Supply of preserved foods) at para. 3; and No. 109/2012 of 9 May 2012 in case

lity due to its negative effect on the ability of tenderers to protect their rights in the procurement procedure – and due process is a constitutional guarantee with rank of fundamental right (Article 24.1 Spanish Constitution) that, consequently, offers relatively wide space for litigation (due to the strong mandate that all courts have to uphold such guarantee). In that regard, SCATCA has developed a clear practice of trying to protect tenderers' rights by subjecting award notices to a relatively hard and detailed scrutiny, in order to ensure procedural fairness and to prevent defencelessness. As indicated by SCATCA:

> [...] *it is settled doctrine of this Tribunal that the award decision will be deemed sufficiently motivated if it at least contains sufficient information for the bidder to bring a sufficiently founded challenge. Otherwise, it would be deprived of the elements necessary to configure an effective and useful challenge, producing defencelessness and triggering challenges improperly.*[81]
>
> [...] *the objective for the notice to be reasoned is to provide rejected or excluded tenderers enough information on the decisive reasons for their exclusion or rejection, so that they may contradict the given reasons by filing the appropriate challenge (SSTS 27 and 31 January, 2 February, 12 April and 21 June 2000, and 29 May 2001).*[82]

Therefore, one of the first grounds for revision of award decisions relates to the consistency, accuracy and sufficiency of the reasons given to tenderers when the CAE communicates them. However, except in extreme cases where the information given clearly leaves the (disappointed) tenderer unaware of the reasons behind the award decision, SCATCA tends to maintain the validi-

Coremain S.L.U. v *General Directorate for State Assets* (Development of certain information systems) at para. 6.

81. SCATCA Resolution No. 93/2012 of 18 April 2012 in case *Indra Sistemas* v *Spanish Maritime Safety Agency* (Supply of Electronic Equipment for the Renewal of the Centre for Maritime Rescue Coordination in Vigo) at para. 6 (original in Spanish). See also SCATCA Resolution No. 33/2012 of 26 January 2012 in case *DIR Mensajería y Transporte* v *Director General of ASEPEYO, Mutuality of Work Accidents and Occupational Diseases of the Social Security* (Courier services) at para. 6.
82. SCATCA Resolution No. 33/2012 of 26 January 2012 in case *DIR Mensajería y Transporte* v *Director General of ASEPEYO, Mutuality of Work Accidents and Occupational Diseases of the Social Security* (Courier services) at para. 3 (original in Spanish). SCATCA Resolution No. 103/2012 of 9 May 2012 in case *Brassica Group, S.A., Wrist Ship Supply & UTE (Revilla S.A., Sediasa Alimentación S.A. y El Pozo S.A.)* v *Contracting Unit of the Directorate for Supplies and Transport, Headquarters of the Navy* (Supply of preserved foods) at para. 3.

ty of award decisions by applying an antiformalistic and pragmatic approach.[83]

A second important area of scrutiny is that of compliance with the award criteria and evaluation rules included in the tender documents. In that regard, any (material) deviation by the CAE can result in the annulment of the award decision. This analysis is still rather formal, but the level of detail of the scrutiny has increased since the creation of SCATCA, which specialization allows for relatively complex analysis of the proper application or deviation from the rules in the tender documents by CAE. Nevertheless, when the conflict does not refer to the ommission of an existing award criteria or rule (or the inclusion of a rule not foreseen in the contract documents[84]), but rather focuses on the manner in which the CAE has applied them, then the analysis becomes significantly more restricted, as the review will only check for a manifest error in the tender evaluation process.

5.2.2. Manifest error in the assessment and award decision

The Spanish Supreme Court has clearly indicated that courts (and administrative tribunals) can examine whether the award decision reached by the CAE is consistent with a proper and accurate appraisal of the facts on the file.[85] However, such review is limited. As summarised by SCATCA,

> [...] *to appraise the possible existence of error in the assessment it is not required to "conduct a thorough analysis of the technical arguments put forward by the parties, but more accurately and as case law has shown, to assess whether in the application of award criteria there has been a material or patent error of fact that can be appreciated without the need for complex reasoning".*[86]

83. SCATCA Resolution No. 141/2012 of 28 June 2012 in case *France Telecom* v *Spanish Port Authority* (Telecommunications services) at para. 7.
84. SCATCA Resolution No. 69/2012 of 21 March 2012 in case *Vaughan Systems S.L.U.* v *Chancelor of the Menéndez Pelayo International University* (English language training services) at para. 5.
85. Judgment of 11 May 1999 (rec. 4071/1993).
86. SCATCA Resolution No. 127/2012 of 30 May 2012 in case *Kantar Media* v *Undersecretary of the Ministry of the Presidency* (Consultancy and technical assistance for monitoring of information in media and filing system), at para. 11 (original in Spanish). In the same terms, SCATCA Resolution No. 93/2012 of 18 April 2012 in case *Indra Sistemas* v *Spanish Maritime Safety Agency* (Supply of Electronic Equipment for the Renewal of the Centre for Maritime Rescue Coordination in Vigo) at para. 8; and SCATCA Resolution No. 119/2012 of 23 May 2012 in case *ORONA, S. Coop. v*

Therefore, it can be seen that the review in such cases follows a light touch approach that, in the absence of grave or manifest errors of appreciation by the CAE, is very unlikely to succeed.

5.2.3. Arbitrariness in the assessment and award decision

Finally, courts and administrative tribunals can review award decisions to exclude that they have been adopted in an arbitrary manner – which, in the case of public bodies, derives from the constitutional mandate for them to abide by the law and free from arbitrariness (*ie* in an objective manner, Article 9.3 Spanish Constitution). There are some cases where an award decision has been effectively challenged due to arbitrariness, such as an instance where the CAE chose the most expensive amongst two tenders that had received the exact same technical evaluation, without giving any valid reasons to do so.[87] However, other than in such flagrant cases, the review on the basis of alleged arbitrariness also follows a light touch approach since, as recently stressed by SCATCA,

> [...] *to appreciate the existence of arbitrariness, resort cannot be had to arguments of a technical content, but rather to simple arguments based on legal criteria or common sense.*[88]
>
> [...] *alleged arbitrariness must be verifiable by the Tribunal through legal analysis, not by assessing technical aspects that [...] cannot fall within the legal field under its control.*[89]

Therefore, once again, the scope and intensity of the review of award decisions seems to fall short from full judicial review, due to the deferential approach towards the CAE's technical discretion.

AENA Aeropuertos S.A. (Services for the maintenance of mechanical transport elements for Alicante airport) at para. 6.

87. Spanish Supreme Court, Judgment of 11 June 1991 (rec. 409/1986).
88. SCATCA Resolution No. 127/2012 of 30 May 2012 in case *Kantar Media* v *Undersecretary of the Ministry of the Presidency* (Consultancy and technical assistance for monitoring of information in media and filing system), at para. 11 (original in Spanish). See also SCATCA Resolution No. 119/2012 of 23 May 2012 in case *ORONA, S. Coop.* v *AENA Aeropuertos S.A.* (Services for the maintenance of mechanical transport elements for Alicante airport) at para. 6.
89. SCATCA Resolution No. 93/2012 of 18 April 2012 in case *Indra Sistemas* v *Spanish Maritime Safety Agency* (Supply of Electronic Equipment for the Renewal of the Centre for Maritime Rescue Coordination in Vigo) at para. 8 (original in Spanish).

6. Reservations and Rejection of Non-Compliant Bids

As mentioned in passing, the award decision adopted by the CAE (with or without the intervention of the independent expert committee or specialized technical agency, and with or without requesting additional technical reports) not only needs to be made to the tender that ranks higher in view of the applicable award criteria, their weightings and mathematical formulae used (above § 5.1), but must also ensure that it behoves to a valid and compliant offer (both in substantive and formal terms). In that regard, the CAE needs to respect certain rules on the rejection of non-compliant bids and, more specifically, needs to adhere strictly to the terms of the tender documents. As recently emphasised by SCATCA, it is the constant jurisprudence of the Spanish Supreme Court that

contract award [should be] based on [...] *the tender documents which, it should not be forgotten, are the law of the contract and bind* [...] *both the contracting authority or entity and the tenders. As for the contracting authority or entity, such bindingness means that it cannot unilaterally alter the terms contained in the tender documents to the detriment of tenderers. Regarding the latter, they are supposed to meet the conditions established in the tender documents, and failure to do so implies that they may be excluded from the tender.*[90]

Lack of compliance with the tender documentation, which may result in the exclusion of the tenderer or the rejection of its tender, can affect both the applicable substantive and formal requirements. The criteria and standards applicable to substantive requirements are very strict and require the exclusion in view of any deviation (without subjecting it to any balancing exercise or analysis of its substantiality). On its part, the criteria and standards applicable to formal requirements are more flexible and further regulated in an implementing regulation, which clearly sets a duty to reject in principle, but provides the contracting authority with additional room to balance the (lack of) relevance/substantiality of the defect with the consequences of the rejection.

Indeed, regarding *substantive requirements* (*ie* the object of the contract proper, such as the goods, services or works and their technical characteris-

90. SCATCA Resolution No. 141/2012 of 28 June 2012 in case *France Telecom* v *Spanish Port Authority* (Telecommunications services) at para. 5 (original in Spanish). Despite the wording of the Spanish case law being seemingly more lenient than the approach adopted by the Court of Justice of the EU (Judgment in case C-243/89, *Commission* v *Denmark (Storebaelt)* [1993] ECR I-03353) as we shall see, in practice, there is a duty to reject non-compliant bids in principle (and only a possibility to reject them when the unfulfilled condition was not substantial/fundamental).

tics; or essential contractual conditions), and subject to the rules on variants, any deviation from the specifications of the tender documentation would make the award invalid on grounds of discrimination against compliant tenderers (as well as, potentially, of arbitrariness on the basis of deviation and abuse of power; see above § 5.2.3).[91]

On their part, *formal requirements* specified in the tender documentation (*ie* format of the bid, date, language requirements, number of copies) deserve more careful analysis. A distinction can be made between, on the one hand, the requisite to submit the tender in accordance with certain formats or models (*ie* a congruity requirement) or to respect certain limits or restrictions; and, on the other hand, the requisite to provide clear, comprehensible and consistent information throughout the tender, particularly concerning values or prices. Both sets of requirements are jointly dealt with by Article 84 of Royal Decree 1098/2001, which determines that:

If some tender is inconsistent with the documentation reviewed and accepted, exceeds the basic tender budget, varies substantially from the established model or contains a manifest error in the amount of the offer, or if there is any recognition by the bidder of internal inconsistencies or of any error that vitiates the offer so as make it unworkable or non-viable, [such an offer] *shall be dismissed by the* [CAE] *by means of a reasoned decision. By contrast, the change or omission of some words included in the models, provided that that does not alter their meaning, will not be sufficient to cause the rejection of the proposal.*

Therefore, while the first group of (major) formal shortcomings should result in the exclusion of the tender (due to incongruity of the offer), the second type of errors is subject to a potential request for clarifications by the contracting authority. Indeed, the treatment of formally non-compliant tenders is generally very strict. For instance, a waiver of the penalty of disqualification otherwise triggered by the excessive length of some tender documents submitted by two tenderers was considered sufficient to declare the award procedure formally flawed and to annul the award of the contract – since the allowance for additional length and the ensuing extra information disadvan-

91. SCATCA Resolution No. 183/2011 in case *SEATRA* v *State Secretary for Education and Vocational Training* (Consultancy services for the redesign of vocational training curricula) at para. 4; and SCATCA Resolution No. 200/2011 of 7 September 2011 in case *MOLNLYCKE HEALTH CARE v MUPRESPA* (Supply of hospital consumables) at paras. 5 and 6. See also SCATCA Resolution No. 151/2012 of 19 July 2012 in case *COTELSA* v *Centralized State Procurement System* (Supply of security scanners) at para. 9. Furthermore, in many instances, the tender documents themselves expressly indicate that failing to meet any of their requirements will result in exclusion or rejection.

taged the bidders that respected the limits set in the contract documents.[92] On the other hand, the exclusion of offers due to unclear or potentially inconsistent information is treated in a more cautious manner and subject to a proportionality test. As recently stressed by SCATCA:

> It cannot be ignored that, as reflected in the Supreme Court decision of *21* September 2004, *which* in turn quotes Judgment 141/93 of the Constitutional Court of 22 April, the relevant case law (cases of *5* June 1971, *22* June 1972, *27* November 1984, *28* September 1995 and *6* July 2004, among others), and the doctrine of the Consultive Board on Administrative Procurement (CBAP) (reports 26/97 of 14 July, 13/92 of *7* May, and 1/94 of 3 February), *lean* increasingly towards applying *anti*formalist and restrictive criteria in examining the causes for the exclusion of tenders, *asserting* that "a literalist interpretation leading to the dismissal of the propositions by mere formal defects, *which could be* easily corrected, is contrary to the principle of competition," without forgetting the principles of discrimination and proportionality.[93]

Therefore, the rules on the possibility to request clarifications and the restrictions applicable to such clarifications in order to prevent forbidden changes to the submitted tenders become highly relevant. In this regard, it is worth to stress that the the CAE and the evaluation teams within them are under a 'good administration' duty to seek clarifications from tenderers (rather than dismissing their bids automatically) in case they experience difficulties understanding the content of their offers, but always provided they do not require or receive information not originally included in the tenders.[94]

In this regard, SCATCA has held that:

92. SCATCA Resolution No. 122/2012 of 23 May 2012 in case *Estudio MRA* v *General Treasury of the Social Security* (Contract for the design of a rehabilitation project for an office building in Burgos) at para. 8. However, in the specific case, SCATCA decided not to annul the award that had been made to an offer that actually complied with the bid extension limitations, while the other two non-compliant bids were disqualified.
93. SCATCA Resolution No. 141/2012 of 28 June 2012 in case *France Telecom* v *Spanish Port Authority* (Telecommunications services) at para. 10 (original in Spanish). Similarly, see SCATCA Resolution No. 14/2012 of 26 November 2012 in case *UTE El Corte Ingles y Fábrica Española de Confecciones* v *Directorate General for Prisons, Homeland Ministry* (Supply of uniforms) *in totum*.
94. SCATCA Resolution No. 64/2012 of 7 March 2012 in case *Autocares Vista Alegre, S.L. and other* v *Land Transport Directorate of the Ministry of Public Works and Infrastructures* (Public transport services in Vizcaya) at para. 6 (where express reference is made to the GC Judgment in T-195/08, *Antwerpse Bouwwerken NV* v *European Commission* ECR [2009] II-04439 at para. 56).

the requirements of the principle of proportionality [...] *applied to a procedure for the award of public contracts* [... oblige] *the contracting authority* [...] *when faced with an ambiguous offer, and as long as a request for clarification on the contents of the offer could ensure legal certainty in the same way as an immediate rejection of the offer in question, to seek clarification from the tenderer concerned rather than opt for outright rejection of this offer. In any other case, the contracting authority would incur in a manifest error of assessment.*[95]

However, the limits and balances implied in the proportionality principle are hard to define in a clear-cut manner. As also clearly indicated by SCATCA:

accepting corrections that go beyond defects affecting errors or omissions of fact would be implicitly accepting the possibility that the proposals could be substantially modified after their submission, and this possibility is radically contrary to the more intimate philosophy of procedures for the award of public contracts, since it frontally clashes with the principles of non-discrimination, equal treatment and transparency.[96]

This is in line with the applicable requirements under EU law, which have been directly adopted by SCATCA (without further interpretation) and which prevent the submission of information that would imply a modification of the offer or a renegotiation of its content between the CAE and the tenderer since:

once the [...] tenders have been submitted, in principle those tenders can no longer be amended either at the request of the contracting authority or at the request of the tenderers. The principle of equal treatment of tenderers and the obligation of transparency resulting therefrom preclude [...] any negotiation between the contracting authority and one or other of the tenderers. To enable the contracting authority to require a tenderer whose tender it regards as imprecise or as failing to meet the technical requirements of the tender specifications to provide clarification in that regard would be to run the risk of making the contracting authority appear to have negotiated with the tenderer on a confidential basis, in the event that that tenderer was finally successful, to the detriment of the other tenderers and in breach of the principle of equal treatment. In any event, it does not follow from Article 2 or from any other provision of Directive 2004/18, or from the principle of equal treatment or the obligation of transparency, that, in such a situation, the contracting authority is obliged

95. SCATCA Resolution No. 64/2012 of 7 March 2012 in case *Autocares Vista Alegre, S.L. and other* v *Land Transport Directorate of the Ministry of Public Works and Infrastructures* (Public transport services in Vizcaya) at para. 6 (original in Spanish).
96. SCATCA Resolution No. 151/2012 of 19 July 2012 in case *COTELSA* v *Centralized State Procurement System* (Supply of security scanners) at para. 9 (original in Spanish). See also SCATCA Resolution No. 156/2012 of 19 July 2012 in case *TRADESEGUR* v *Centralized State Procurement System* (Supply of security scanners) at para. 8.

to contact the tenderers concerned. Those tenderers cannot, moreover, complain that there is no such obligation on the contracting authority since the lack of clarity of their tender is attributable solely to their failure to exercise due diligence in the drafting of their tender, to which they, like other tenderers, are subject.[97]

Therefore, it seems that the CAE should not be excessively formal in the assessment of the tenders received and that they should effectively exercise their discretion to try to obtain reasonable and limited clarifications from the tenderers where the errors are obvious or a clarification may be provided using exclusively the information already submitted in the original tender. However, they are not under an absolute obligation to do so and, should there be any risk of (perceived) renegotiation or discrimination, they should refrain from requesting such clarifications. In the end, then, the balance seems to tilt towards the exclusion of incomplete, inconsistent or unclear offers, in order to avoid challenges against the award decision – which seems to perpetuate a rather formalistic (box-ticking) approach to evaluation and award decisions.

7. Abnormally Low Offers

Finally, it is interesting to take into consideration that the 'standard' award decision under the procedure discussed (above § 5.1 and § 6) may be altered if CAE identifies any signs of abnormality in the winning tender. Indeed, Article 152 LPSC regulates the treatment of apparently low or disproportionate offers by setting different rules when the contract has to be awarded according to the 'lowest price' or to MEAT, coupled with some common procedural guarantees.[98] These are examined in turn in this section.

7.1. Screening of abnormally low offers when 'lowest price' is used

Regarding the treatment of apparently abnormally low tenders when the 'lowest price' criterion is used, Article 152.1 LPSC establishes that they may be assessed in light of the parameters set in the corresponding implementing regulations, which can determine the relative evaluation of the apparently abnormally low offer against the rest of the offers submitted in the tender. In

97. SCATCA Resolution No. 88/2012 of 11 April 2012 in case *UTE Monforte, S.A.* v *Army* (Road transport of off-duty troops) at para 7 (where express reference is made to the CJEU Judgment in case C-599/10, *SAG ELV Slovensko a.s. and Others* ECR [2012] nyr at para. 36; which wording is used here to avoid dual translation).
98. Generally, see Carbonero Gallardo, *La adjudicación de los contratos públicos*, above n 1, 552-559.

this regard, it is worth highlighting that the relatively old rule in Article 85 of the implementing regulation in Royal Decree 1098/2001 of 12 October 2001 is still in force. According to this provision:

[...] *an offer will, in principle, be considered abnormally low or disproportionate in the following cases:*

1. *If there is only one tenderer, if its offer is lower than the base budget by more than 25 %.*
2. *If there are two tenderers, if one offer is lower than the other by more than 20 %.*
3. *When there are three bidders, those which are lower than the arithmetic average of the bids submitted by more than 10 %. However, such average will be computed with the exclusion of the highest bid when the latter exceeds the global average by more than 10 %. In any case, any offer lower than the base budget by more than 25 % will be considered abnormally or disproportionately low.*
4. *Where there are four or more bidders, those which are lower than the arithmetic average of the bids submitted by more than 10 %. However, such average will be computed with the exclusion of all bids that exceed the global average by more than 10 %. In any case, if the number of remaining bids is less than three, the new average will be calculated on the basis of the lower three bids.*
5. *Exceptionally, and considering the subject-matter of the contract and prevailing market circumstances, the contracting authority may reduce by a third the percentage rates determined in the preceding paragraphs, offering a sufficient motivation in the tender documents.*
6. *In order to assess the bids as disproportionate, the contracting authority may consider the relationship between the solvency of the tenderer and the offer submitted.*

Therefore, the screening of apparently abnormally low or disproportionate offers when 'lowest price' is used follows a relatively straightforward mathematical criterion that is in compliance with the requirements of EU case law,[99] and which is already relatively aligned with the proposal for the revision of the current EU procurement Directives of December 2011, but with lower abnormality thresholds (see Article 69 of the proposal for a Directive replacing 2004/18, which basically doubles the thresholds foreseen in the current Spanish rule). Once identified under these screening rules, the apparently

99. It is important to stress that the Court of Justice has not prohibited the use of mathematical formulae for the screening of apparently abnormally low tenders, but only prohibited that such formulae are used for the automatic rejection of the seemingly abnormally low tenders. See Judgments in case 76/81, *SA Transporoute et travaux* v *Minister of Public Works* ECR [1982] 417 17, and in joined cases C-285/99 and C-286/99, *Lombardini and Mantovani* v *ANAS* ECR [2001] I-9233 43 and ff.

abnormally low offer will be subjected to the *inter partes* procedure mandated by EU law, as discussed below (§ 7.3).

7.2. Screening of abnormally low offers when MEAT is used

On its part, Article 152.2 LPSC determines that, when MEAT is used, in order to screen for apparently abnormally or disproportionately low offers, CAE must establish in the tender documents the objective parameters, if any, that will be used to determine that a proposition cannot be fulfilled due to the inclusion of abnormal or disproportionate low values. If the price offered is one of the objective criteria to be used as a basis for the award, the tender documents can indicate the limits, if any, that will be used to determine that a proposition cannot be fulfilled due to the inclusion of abnormal or disproportionate low price. This gives the CAE more discretion than in the case of tenders awarded under 'lowest price', as the mathematical criteria set in Article 85 of the implementing regulation in Royal Decree 1098/2001 will not be mandatory (and cannot be used unless the tender documents incorporate them, at least, by reference[100]). In this regard, CBAP stresses that Article 152.2 LPSC requires that the objective criteria that will be used to assess the abnormality of offers when the MEAT criterion is used are specifically described in the tender documents.[101] Moreover, it is understood that the specific formula or method to be used to screen for abnormality in any of the criteria used for evaluation purposes must also be indicated in the tender documents.[102]

7.3. Common provisions applicable to a finding of an apparently abnormally low tender

In very close terms to those of Article 55 of Directive 2004/18, Article 152.3 LPSC establishes that when a proposition that would be considered disproportionate or abnormal is identified, the CAE should give audience to the tenderer and offer the opportunity to justify the evaluation of the offer and its specific conditions, in particular regarding the savings that can be obtained from its particular method to execute the contract; the technical solutions chosen and/or any exceptionally favourable conditions available to the tenderer for the execution of the contract; the originality of the tender; compli-

100. SCATCA Resolution No. 113/2012 of 16 May 2012 in case *Toscatrade, S.A.* v *Empresa de Transformación Agraria, S.A. (TRAGSA)* (Supply and installation of equipment for a cooking school in Gambia) at para. 3.
101. Report 58/07 of 31 March 2007.
102. Carbonero Gallardo, *La adjudicación de los contratos públicos*, above n 1, 556.

ance with the provisions relating to employment protection and working conditions in force at the place where the contract is to be performed; or the possibility of the tenderer obtaining State aid. Technical advice from the relevant service must be sought in this procedure.

If the tender is abnormally low because the tenderer has obtained State aid, the tender can be rejected on that ground alone only where the tenderer is unable to prove that such aid was granted without infringing Community rules on State aid. Where the contracting authority rejects a tender in these circumstances, it shall inform the Commission, but only if it concerns a procurement procedure subjected to harmonized regulation [*ie* above EU thresholds].

On its part, Article 152.4 LSPC determines that if the contracting authority, considering the justification made by the tenderer and the technical reports mentioned in the previous section, deemed that the offer cannot be fulfilled due to the inclusion of abnormal or disproportionate values, can exclude it from the classification of evaluated tenders and award the contract in favour of the most economically advantageous tender in accordance with the order in which they are classified under Article 151.1 LSPC (above § 5.1). Therefore, there is no positive obligation to automatically reject abnormally low or disproportionate tenders, but the CAE is under serious pressure to make sure that the contract can be satisfactorily executed in the terms of the offer. Indeed, as the SCATCA has clearly indicated,

> *Article 152 SPCA states that contract documents can specify limits below which it can be inferred that a tender cannot be fulfilled due to the inclusion of abnormally low or disproportionate values, if any. Overcoming these limits cannot automatically determine the exclusion of the tender, but an opportunity must be given to the tenderer so that it can justify that, whichever the values included in its proposition, it can perform the contract. Thus, once the limits set out in the contract documents are overcome, a presumption of recklessness in the tender is created, which must be destroyed by the tenderer; providing a sufficient justification is only incumbent upon the tenderer, so that its silence implies rejection.*[103]

Further than that, SCATCA considers that the CAE does not have unlimited discretion to decide whether to react or not on the basis of a presumption of abnormality or disproportion according to the tender documents (since they are implicitly bound by the presumption set under their own rules). Conse-

103. SCATCA Resolution No. 121/2012 of 23 May 2012 in case *MDL Distribución Logística* v *Undersecretary of the Ministry of Education, Culture and Sports* (Removal services) at para. 7.

quently, there is a procedural flaw that implies the nullity of the award if the tender documents establish criteria and thresholds that create a presumption of abnormality and the CAE fails to react; either by properly and expressly explaining why, regardless of that presumption, it considers that the contract can be performed in the terms of the apparently abnormally low or disproportionate offer to which it intends to award the contract; or by requiring the tenderer to offer a full justification of the feasibility of the contract in those apparently abnormally low or disproportionate terms. In that regard, according to SCATCA, failing to deactivate the presumption *motu propio* or, alternatively, to request the tenderer to provide a proper justification that it can perform the contract in the terms of its offer, the CAE cannot accept the apparently abnormally low tender (since this would affect the procedural rights of other tenderers wishing to rely on the presumption of abnormality under the conditions set in the tender documents).[104]

On the other hand, in those cases where the CAE does request and the tenderer does provide reasons and justifies the content of its offer, then the CAE is in its turn under a positive duty to contradict them in a sufficient and well-motivated manner if it wants to exclude the offer and award the contract to the (next best evaluated, or first compliant) most economically advantageous tender.[105] Otherwise, the rejection of the apparently abnormally low tender that the tender has properly justified will be deemed unlawful.[106] On the contrary, the CAE is under no such duty and faces no such risk of award nullity when the reasons and justifications provided by the tenderer upon the CAE's request are excessively vague, generic or, simply, insufficient to rebut the presumption.[107] Evidence presented when challenging the award decision

104. SCATCA Resolution No. 119/2012 of 23 May 2012 in case *ORONA, S. Coop.* v *AENA Aeropuertos S.A.* (Services for the maintenance of mechanical transport elements for Alicante airport) at para. 7.
105. SCATCA Resolution No. 92/2012 of 18 April 2012 in case *ELQUIS XXI S.A.* v *National Meteorological Agency (AEMET)* (Maintenance services) at para. 7.
106. SCATCA Resolution No. 121/2012 of 23 May 2012 in case *MDL Distribución Logística* v *Undersecretary of the Ministry of Education, Culture and Sports* (Removal services) at para. 7.
107. SCATCA Resolution No. 74/2012 of 28 March 2012 in case *Mantenimientos Cascales, S.L.* v *Mancomunidad de los Canales del Taibilla* (Cleaning services) at para. 5.

will not be taken into consideration, since the tenderer had the peremptory obligation to submit it to the CAE when given audience.[108]

8. Conclusions

This chapter has succinctly outlined the rules controlling the selection, weighting and application of award criteria under Spanish public contracts legislation. It has particularly focused on the application of the MEAT criterion and the formalities that surround the evaluation procedure and the formation of the award decision. It has also described the administrative and judicial challenges against award decisions, as well as the specific rules applicable to non-compliant and abnormally low offers, which are usually the object of such challenges.

Overall, it can be concluded that the Spanish rules and case law on award criteria and award-related challenges is relatively well developed and consolidated, and substantially in line with EU law requirements. It seems to be gradually moving away from a purely formalistic approach and towards some increased procedural flexibility and pragmatism. However, there are still some grey areas regarding difficult points such as: transparency/disclosure of (sub-)award criteria and their weightings, or the ensuing evaluation formulae (or mathematical matrices); or concerning the degree to which CAEs can or must require clarifications without infringing the ban on negotiations. All these matters will probably be cleared out as case law continues to develop, particularly under the jurisdiction of the SCATCA, and the influence of the EU and of other solutions in EU jurisdictions that use the EU Directives as the blueprint for their domestic rules will also prove influential.

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9 Awarding of public contracts in the United Kingdom

Dr. Pedro Telles[1]

1. Introduction: Main features of the national system

Public procurement regulation in the UK is geographically divided into two different systems. In England, Wales and Northern Ireland, public procurement is currently regulated through the Public Contracts Regulations 2006.[2] Public procurement is a devolved power in Scotland[3] and is regulated there by the Public Contracts (Scotland) Regulation 2012.[4] In addition to statute legislation, in the UK, one should bear in mind the small yet growing amount of case law applicable to public procurement, particularly to award criteria.[5]

The regulation of public procurement in the UK has followed a minimalist approach. In general, procurement regulations in the UK are little more than a

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2. This law has been amended by the Public Contracts (Amendment) Regulations 2009 and by the Public Procurement (Miscellaneous Amendments) Regulations 2011. The Directive 2009/81/EC on defence and sensitive security procurement was transposed through the Defence and Security Public Contracts Regulations 2011. On the Public Contracts Regulations in general, S Arrowsmith, *The law of public and utilities procurement* (Sweet & Maxwell, 2005), S Arrowsmith, 'Implementation of the new EC procurement directives and the Alcatel ruling in England and Wales and Northern Ireland: a review of the new legislation and guidance' (2006) 15 *Public Procurement Law Review* 86.
3. On these Regulations please see P Henderson, 'The impact of Devolution on public Procurement in the United Kingdom' (2003) 12 *Public Procurement Law Review* 175-175, C Boch, 'The Implementation of the Public Procurement Directives in the U.K.: Devolution and Divergence' (2007) 16 *Public Procurement Law Review* 410.
4. References hereunder will be made generally to the regulatory system in England, Wales and Northern Ireland with the specificities of Scotland mentioned where appropriate.
5. See sections 7 and 8 here under on the case law related to award criteria.

direct transposition of what already can be found on the Directives with some adaptations. Each home nation can follow its own practice and plenty of freedom is left for contracting authorities to devise their own. For example, in contracts under the EU thresholds in Wales and Scotland, there are no specific mandatory obligations of transparency or a standardised approach to tender such contracts. In England, however, central purchasing public bodies have to tender and advertise all contracts over circa €12,500 since 2011.[6] English local councils or schools are not under a similar obligation however.

The wide scope for variation from home nation to home nation and from contracting authority to contracting authority can be puzzling for contractors which need to assess each procurement exercise thoroughly to check the requirements and approach required.[7] Even on harmonised contracts, there is some scope for different practices, particularly, in what concerns the adoption of horizontal policies, generally described as "community benefits". These have been pushed forward at the political level in Scotland[8] and Wales[9] but not in England, for example. It would not be surprising, if in the coming years, the devolved administrations continued moving on a diverging path from the central UK Government in what concerns public procurement regulation.

In addition to both sets of Regulations and case law specific for public procurement, the Public Services (Social Value) Act 2012 has introduced a statutory requirement for economic, social and environmental issues to be considered by contracting authorities and will be discussed in further detail in section 5.1. Tenderers information requests about the procedure are governed

6. Cabinet Office, *Transparency – Publication of Tender Documentation Guidance Note* (2011), Cabinet Office, *Transparency – Publication of New Central Government Contracts Guidance Note* (2012) L Wisdom, 'Implementing "lean" procurement in the United Kingdom: recent Cabinet Office guidance' (2012) 18 *Public Procurement Law Review,* K Creelman, 'The UK Cabinet Office's initiative on small and medium enterprises' (2012) 18 *Public Procurement Law Review* NA293. At the time of writing a new Procurement Reform Bill was being drafted in Scotland with the aim of updating its procurement legislative framework.
7. On this topic, please see L Butler, Below Threshold and Annex II B Service Contracts In The United Kingdom: A Common Law Approach. In *European Procurement Law Series: Outside the EU procurement directives – inside the treaty?* (2012), p. 283.
8. Welsh Government, *Community Benefits in Public Procurement (2008) and Welsh Government, Community Benefits in Public Procurement* (2008). The Public Reform Bill in Scotland is expected to be particularly focused on the expansion of the use of social and environmental considerations in Scottish procurement and the streamlining of procurement procedures.
9. *Community Benefits: Delivering Maximum Value for the Welsh Pound* (2010).

by the Freedom of information Act 2000[10] and the Environmental Information Regulations 2004.

Enforcement is ensured through recourse to the judicial courts.[11] In addition to the traditional enforcement mechanism, non-litigious "escape valves" have been implemented in recent years in the UK (Mystery Shopper service) and in Scotland (Single Point of Enquiry). The Mystery Shopper service was introduced in 2011 and has opened 300 cases after complaints by suppliers.[12] Its original mandate was to look into the practice of contracting authorities and suggest improvements. However, it has been expanded to include supply chain issues as well. The Single Point of Enquiry provides impartial and confidential advice to suppliers bidding in contracts tendered by Scottish contracting authorities. Neither the Mystery Shopper nor the Single Point of Enquiry have real enforcement powers and depend on the collaboration of the authorities involved. Furthermore, they do not redress the grievances a tenderer might have.

2. Selection and award criteria

As a general rule, the Public Contracts Regulations 2006 follows the Directive 2004/18 albeit with a modified structure. For example, whereas the Directive regulates selection and award criteria across 9 different articles, only 7 can be found on UK legislation. In consequence, the rules on selection and award criteria are presented differently. This does not mean they differ from the Directive in general. However, the Public Contracts Regulation 2006 introduces specific rules in some specific points such as the case of consortia on Regulation 28.

On the Public Contracts Regulation 2006, selection and award criteria are separated into different parts of the law. Selection rules can be found on Part IV, in regulations 23 through 29, whereas the rules applicable to the award criteria are made available on Part V, in Regulation 30 only.

10. On this topic, please see *Veolia ES Nottinghamshire Ltd* v *Nottinghamshire County Council* [2010] EWCA Civ 1214 where the principle of confidentiality was held on the grounds that otherwise competition might be distorted.
11. In case the contract being tendered has a value under the EU thresholds, the only remedy available is the judicial review based on domestic law procedures, *Sidey Ltd* v *Clackmannanshire Council* [2009] CSOH 166, 2010 SLT 481
12. Cabinet Office, *Mystery Shopper Service Progress Report: Trends from the first 18 months* (2012)

a. Selection

The rules on the selection of tenderers can be found on regulations 23 through 29A of the Public Contracts Regulations 2006.[13] These can be divided into exclusions due to the personal situation of the tenderer,[14] economic and financial standing,[15] technical and professional ability,[16] and legal structure.[17] Sections 15(11)(12), 16 (7)(8), 17(9)(10) and 18(10)(11), each about one of the procurement procedures, cross-refer to sections 23 through 26 in what concerns how the selections shall be carried out. Furthermore, the economical financial, technical or professional requirements set forth in the tender notice will have to be proportionate to the contract at hand.[18] However, it has been detected by the author in practice that for low value contracts, i.e. contracts well under the EU thresholds, a practice by contracting authorities of imposing insurance requirements for professional or employer liability in excess of €2.5 million or even €6 million.

Most of the requirements are similar to the ones set forth by the Directive, but Regulations 28 and 29, which are concerned with consortia[19] and corporations, are not based on the Directive.[20] The first limits the contracting authority discretion to exclude suppliers when they present themselves as consortia, that is the fact that a legal entity has not been formed cannot be used as grounds for exclusion. Interestingly, Regulation 28(3) is not applicable to the selection but to the award stage. It states that the suppliers that did not establish a legal entity at the selection stage *may* be requested by the contracting authority to create one before the contract is awarded. In face of the draft, it seems the contracting authority is free to decide whether to demand the creation of the legal entity and not bound to require it.

Regulation 29 restricts the possibility of a supplier being excluded due to its legal status if on its home Member State it could perform the same contract. However, in the case of public services, works or supply contracts

13. Regulation 29A was introduced in the 2009 amendments and mandates the need to notify candidates excluded during the selection stage of the reasons.
14. Regulation 23 as amended by the Public Procurement (Miscellaneous Amendments) 2009, similar to article 45 of the Directive. On this topic see, S Williams, 'The Mandatory Contractor Exclusions for Serious Criminal Offences in UK Public Procurement' (2009) 15 *European public law,* p. 429.
15. Regulation 24, similar to article 47 of the Directive.
16. Regulation 25, similar to article 46 of the Directive.
17. Regulations 28 and 29.
18. Regulation 15(12), 16(12), 17(14) and 18(15).
19. Regulation 28.
20. Regulation 29.

which include services or siting installation operations, the contracting authority may demand the information regarding the professional qualifications of the staff that will be allocated to the contract at the tender stage.

Furthermore, it should be noted though that the UK has a particular appetite for the use of the restricted procedure in contracts over the EU thresholds. The average yearly use of the restricted procedure in contracts between 2008 and 2012 is 6,164, whereas the open procedure has been used in average 3,624 times per year. However, it must be noticed the usage trend for the restricted procedure is on the wane, with only 4,747 procedures launched in 2012 comparing with the 7,674 for 2008.[21] The open procedure numbers have been edging upwards but on a much more limited basis. One of the reasons for this change is the recent policy change by the UK Government in insisting the open procedure should be the default procedure for public procurement and that pre-qualification questionnaires should be avoided.[22] In another example of differing practice among the home nations, Northern Ireland uses almost exclusively the open procedure in detriment of the restricted procedure. It should be noted though that Scotland and Wales devolved administrations have not adopted similar policies.

The selection stage on the restricted procedure tends to be very long and detailed due to the use of pre-qualification questionnaires. The consequence of such detailed evaluation is that considerable amounts of effort and time need to be put by candidates to make the cut before even submitting the final tenders.[23] Where on an open procedure, the pass/fail nature of the selection test ensures a reasonable playing field for tenderers, the creation of a shortlist on the restricted procedure may be seen as a "starting grid" for the tenderers invited to submit tenders. The real impact of this "tenderer quality" shortlist on the tender analysis is not entirely clear. As such, even when the award criteria comply at face value with the requirements of the *Lianakis* decision, it is possible contracting authorities will oversee limitations on the tenders from "better" suppliers and award them higher marks. In addition, it is also possi-

21. In fact, the UK has traditionally been the Member State where the restricted procedure is more used as a percentage of total procurement procedures, representing 44 % of the total procedure use, European Commission, *Public Procurement in Europe – Cost and Effectiveness*, p. 30 (2011),
22. Cabinet Office, *Procurement Policy Note – further measures to promote Small Business procurement Information Note 05/11* (2011).
23. This explains efforts undertaken by the Welsh Government to standardise the pre-qualification questionnaires through the SQUID database.

ble suppliers with lower scores at the selection stage will consider themselves to have less chances of winning the bid.

There has been some research carried out in Wales[24] between 2011 and 2013 on the tendering practice of contracting authorities, where one of the data points analysed was the use of experience elements at the tender stage. At the time of writing, around 50 tender documents had been analysed, 70 % of which had included experience elements in the award criteria and not only the selection stage as it should be expected. It should be noted that this sample is not necessarily representative of the UK public sector as a whole has it bears 90/10 split in favour of Welsh contracting authorities. One should not argue that the experience of small Welsh contracting authorities will be similar to the practice of larger contracting authorities. However, this research provides an interesting empirical data point that warrants further research with a more representative sample of British contracting authorities as to assess if the *Lianakis* requirements are being followed up in practice in this Member State.

b. Award criteria

The rules on award criteria[25] can be found on Regulation 30. In addition, sections 15(11)(12), 16 (7)(8), 17(9)(10) and 18(10)(11), each about one specific procurement procedure, cross-refer to section 30 in what concerns the contract award rules. Regulation 30 allows for the use of both the most economically advantageous and lowest price award criteria. No other award criteria may be used in public procurement covered by the Public Contracts Regulation 2006.

There is no preference set in the legislation over the types of award criteria. Contracting authorities have the discretion to choose which one they prefer based on their own requirements. In consequence, a specific contract for supplies may be awarded by a contracting authority through the lowest price criteria, whereas another authority procuring the same supplies may prefer to do so by using the most economically advantageous tender. This does not mean, however, that in practice the usage numbers are that similar, as we shall see on section 3 under.

Even though the legislation does not create a specific preference in favour of one or other award criteria type, Scotland has a specific policy in favour of

24. Winning in Tendering project, results unpublished at time of writing.
25. On award criteria in the UK in general please see, S Arrowsmith, *The law of public and utilities procurement* (Sweet & Maxwell, 2005).

the most economically advantageous tender.[26] Furthermore, local guidance[27] states that the choice between either type of award criteria cannot be decided by the procurer himself but must be agreed by the User Intelligence Group. This is a cross-functional team composed by key stakeholders from the contracting authority, such as the end users or beneficiaries of the product and service being procured. The purpose of involving a wider group of stakeholders on the decision-making process appears to be to make sure the award criteria reflect the needs of the end user instead of the day-to-day practice of the procurer undertaking the procedure.

In Wales, contracting authorities are "encouraged" to use the most economically advantageous tender criteria but there is no specific requirement by Welsh contracting authorities to do so.[28] As such, contracting authorities are free to choose their preferred method. This idea is further compounded by the limited enforcement powers the Welsh Government has over Welsh contracting authorities.[29]

Regulation 30 makes clear the need for the award criteria to be linked to the subject matter of the contract. In consequence, it seems clear that social objectives will have to comply with this requirement. In addition to this connection requirement, the award criteria will also have to be clear and understandable by the tenderers.[30]

Regulation 30 provides no indication on whether there are any limitations to the possibility of the contracting authority setting as award criteria information from the tenderer that should have been assessed at the selection stage. However, there is at least one case[31] where financial stability information was found to have been used at the tender stage. In *Varney & Sons,*

26. Scottish Procurement Toolkit, http://www.scotland.gov.uk/Publications/2006/11/16102303/tenderingprocess#a8, accessed January 25th 2013. This policy has been restated in 2009 with the Scottish Sustainable Procurement Action Plan, http://www.scotland.gov.uk/Publications/2009/10/sspap, accessed January 25th 2013.
27. Available at: http://www.scotland.gov.uk/Topics/Government/Procurement/buyer-information/spdlowlevel/routetwotoolkit/developdocumentsroutetwo/selectionandawardcriteria, accessed January 25th 2013.
28. *Guidance Note for the Public Sector in Wales – Selection, Short-listing and Contract Award Criteria*, p. 8.
29. Which has been recommended for change recently on the Maximising the impact of Welsh Procurement Policy Report, recommendation 26. It is not known at the time of drafting when and if such recommendation will be implemented.
30. *Clinton (t/a Oriel Training Services)* v *Department for Employment and Learning* [2012] NICA 48.
31. *Varney & Sons* v *Hertfordshire County Council* [2010] EWHC 1404 (QB) at [131].

Judge Flaux J. held that in theory such information can be used to assess tenders, with the nuance that the tender documents need to disclose such fact. It would seem, however, that this position is in contradiction with *Lianakis* and it remains to be seen if this precedent will be followed.

In *Lancashire CC* v *Environmental Waste Controls Ltd*,[32] financial information was not used at the tender stage but the assessing officer raised concerns over the financial capacity of the tenderer. In this case, it was found that the officer disregarded the financial information of the company while assessing the tenders and as such had not considered irrelevant information. In other words, it seems that if he had indeed considered the financial information then the decision might have been found in favour of the claimant.

3. Lowest price

As referred to in the previous section, UK procurers can use the lowest price award criteria for any contract they may deem fit, with the caveats mentioned for Scottish contracting authorities.

Regulation 30 is not prescriptive on how the evaluation of a tender should be carried out. In addition, there are also no rules on how the price itself is to be assessed. When the lowest price award criterion is being used, this leaves unresolved issues such as price calculation, that is if it is done by reference to the overall cost or its components or how to award the contract in case two bidders submit the exact same price. It should be noted though these remarks are valid for the most economically advantageous tender award criteria as well.

In the last few years, the percentage of lowest price used as an award criteria has been limited to say the least. For example, on the Tenders Electronic Daily, a search carried out on the contract notices published between September 2010 and September 2012 by UK based contracting authorities yielded only 92 results for contracts covered by the Directive 2004/18. The same search for most economically advantageous tender yields 1,114 results. These data points clearly indicate that for contracts above the EU thresholds and covered by the Directive 2004/18 there is only a limited take up of the lowest price criteria.

The lack of use of the lowest price award criteria is corroborated by data from contracts live at the time of writing (February 2013) on Contracts Finder, where the ratio is also close to 1:10. Analysing the data from Contracts

32. *Lancashire CC* v *Environmental Waste Controls Ltd* [2010] EWCA Civ 1381

Finder provides with another interesting insight as it includes all contracts tendered by Central Government over circa €12,500. It appears thus that even for lower value contracts, contracting authorities also prefer to use the most economically advantageous tender award criteria. Furthermore, restricting the search to contracts between €12,500 and €125,000 provides a similar ratio of 1:9, further compounding the findings above. However, the data here provided likely does not cover low value tenders from Scotland, Wales or Northern Ireland contracting authorities.

4. Most economically advantageous tender

Regulation 30 of the Public Contracts Regulation 2006 states that the most economically advantageous tender award criteria can be used freely as long as each criterion is connected with the subject matter of the contract.[33] The Regulation provides a list of what may be considered as the link to the subject matter of the contract but this list does not appear to be exclusive.[34]

In practice there is no limitation on the split between quality and pricing elements in the UK. There is no limitation neither in stature or in case law regarding the split between quality and price. Contracting authorities are free to allocate marks as they see fit. For example, they can divide the marks 10 % for price and 90 % for quality and vice versa. If that makes for good procurement in either case is a different matter. In any tender where quality assumes a very high proportion of the scoring, it will be difficult for the contracting authority to price what it is getting. Defining the specific cost for each extra point of quality becomes impossible. In other words, the tender becomes a black box when it comes down to pricing.[35] The opposite is also true: on a tender where the price element is disproportionately high, a company with low quality but a very low price would win the tender as long as it does not trigger an abnormally low value tender investigation. Both cases of

33. Regulation 30(2).
34. On the subject of the necessity to check the subject matter of the contract see, C McCrudden, *Buying Social Justice: Equality, Government Procurement & Legal Change* (Oxford University Press, USA, 2007) and C McCrudden, 'Social policy issues in public procurement: A legal overview' [1998] *Public Procurement: Global Revolution. Kluwer Law International, Dordrecht, The Netherlands* 219-239.
35. In *Henry Bros (Magherafelt) Ltd* v *Department of Education for Northern Ireland* [2011] NICA 59 the Court of Appeal did not give a general view if a price element must be included in each award criterion.

extreme split in quality and price have been observed in practice by the author. It is not known, however, if there is a typical split between price and quality related criteria.

The list of Regulation 30(2) is identical to the one found on Article 53 (1)(a) of the Directive. There is one difference, however, worth noting. Whereas the Directive's list starts with "for example", the UK text refers to "including". This appears to be just a choice of wording that does not alter the indicative nature of the list. As such, the list of what may be considered as elements linked to the contract subject matter should be interpreted as being an open list. In consequence, it is possible for contracting authorities to, in theory, conceive new award criterion as long as it passes the contract subject matter linking test. The view that the list is not exhaustive or closed has been held in the *Henry Bros* case.[36]

In line with the Directive 2004/18 Article 53(2), the contracting authority has to disclose the weightings given to each award criterion in advance but may provide a minimum and maximum range instead of an absolute figure. The Public Contracts Regulations 2006 depart slightly from the Directive in what concerns the possibility of not disclosing the weightings. The Directive states in Article 53(2) that if it is not possible to provide the weightings for "demonstrable reasons", then at least they should be listed in descending order of importance.

Regulation 30(5) has changed the wording slightly from "demonstrable reasons" to "on objective grounds". This may appear to be just a simple adaptation of the textn but in the view of the authorn it renders the situation more complex than on the Directive. The reason is that on Article 53(2) "demonstrable reasons" is preceded earlier on the same phrase by the sentence "in the opinion of the contracting authority". When both are read together, it appears that the Directive requires the decision maker within the contracting authority to be *subjectively* convinced and the decision reason to be explained. The Regulations include the exact same "in the opinion of the contracting authority" which is hard to reconcile with the "objective grounds" required. How can one reconcile a subjective condition of opinion with objective conditions? For the grounds to be objective, they need to be acceptable by a reasonable third party, not necessarily on the same conditions as the real contracting authority that made the choice.

36. *Henry Bros (Magherafelt) Ltd and others* v *Department of Education for Northern Ireland* (No.2) [2008] NIQB 105.

For the author, the UK draft in comparison with Article 53(2) of the Directive appears to be less clear and imposes a more difficult test for contracting authorities to overcome. In a sense, Regulation 30(5) includes a transparency test on the weighting matrix. It has, however, the benefit of perhaps signalling contracting authorities they need to have a "bullet proof" case to argue before a court if their decision is challenged.

5. Procedure for evaluating MEAT, juries, transparency and judicial review

The evaluation of tenders is traditionally carried out by the contracting authority's own staff, particularly procurers. In some cases, as mentioned above regarding Scotland, groups of stakeholders may be involved in the decision-making process of marking tenders.

Under UK legislation there is no legal obligation to have experts or independent members on the jury or decision panel, apart from design contests. (Regulation 33(15)) Regulation 33(15)(a) and (b) sets for these contracts that the jury needs to be independent from the economic operators tendering and that if a qualification is required, a third of its members should have the same or an equivalent qualification. This is similar to the requirements set forth in Article 73 of the Directive 2004/18.

The decision is mapped out to a mixture of criteria and sub-criteria. There is, however, a perspective by some procurers that only the minimum information possible should be given out to tenderers and this includes also information related with criteria and sub-criteria. No specific rules exist in UK legislation regarding how minutes should be kept and what information should be recorded on the procedure meetings. Bearing in mind the lack of tradition of public procurement litigation in the country,[37] it would not be surprising if contracting authorities are not used to keep detailed records of their decision-making processes as is normal in other Member States. For example, the evaluation panel was found in *Resource (NI) Ltd*[38] not to have kept appropriate evidence and justification for the scoring matrix it chose. In

37. D Pachnou, 'Bidders use of mechanisms to enforce EC procurement law' (2005) 11 *Public Procurement Law Review*
38. *Resource (NI) Ltd* v *Northern Ireland Courts and Tribunals Service* [2011] NIQB 121 (QBD (NI). On this case, P McGovern, 'Northern Ireland: rules on award criteria and the remedy of set aside: the case of Resource (NI) Limited v Northern Ireland Courts and Tribunal Service' (2012) 18 *Public Procurement Law Review*.

other words, the panel did not keep minutes or a log of the decision making process to help it justify its decision when asked for by the court.

Under national law, there are no restrictions on what methodologies can be used to score tenders or the discretion of the contracting authority limited in any way. As such, in theory, they can either be very simple such as a 1-10 scale for each question, criteria or sub-criteria or may involve more complex mathematical matrixes. The author's experience is that at least in low value contracts the first approach is more common, but it does not mean that for complex procurement projects more advance scoring mechanisms are not being used. In fact, the use of flawed mathematical models appears to have been at the centre of the controversy surrounding the West Coast Mainline railway franchise concession in 2012. After a challenge by the unsuccessful bidder, the Government decided to scrap the process citing a flawed financial model and will be re-tendering the contract from scratch.

It should be noted as well that some issues surrounding mathematical matrixes have been discussed in relation to electronic auctions.[39] However, bearing in mind the remarks regarding the urgent need to develop procurers skills both in Scotland[40] and Wales[41] on the reviews conducted by McClelland, perhaps the evaluation practice will be more focused on more simple marking schemes and not mathematical matrixes.

There have been a number of cases in the UK courts on award criteria issues, but these have been focused on the obligation of disclosing award sub-criteria[42] or how to assess abnormally low tenders.[43] More recently, in *Shetland Line (1984) vs Scottish Ministers*,[44] it was held that on a competitive dialogue procedure there was some scope for variation on the specifications (and by necessity the award criteria) due to the complex nature of the underlying contract and that such variation does not imply neither a manifest error nor

39. A Eyo, 'Electronic Auctions in EU Procurement: Reflections on the auction rules from the United Kingdom' (2012) 18 *Public Procurement Law Review p.12*.
40. J McClelland, *Review of Public Procurement in Scotland* (2006), Section 8.
41. J McClelland, *Maximising the Impact of Welsh Procurement Policy* (2012), Recommendation 6.
42. Such as on R. *(on the application of the Law Society)* v *Legal Services Commission*, [2007] EWHC 1848 (Admin)
43. *Morrison Facilities Services Ltd* v *Norwich City Council* [2010] EWHC 487 (Ch) (Ch D) and *Varney & Sons* v *Hertfordshire County Council* [2010] EWHC 1404 (QB) at [131].
44. *Shetland Line (1984) vs Scottish Ministers* [2012] ScotCS CSOH 99.

misuse of powers.[45] It appears from this decision that some variations is admissible on the competitive dialogue procedure, which makes sense bearing in mind the purposes behind this procedure, that is the award of particularly complex contracts.[46] The same may not hold true for procedures such as the open or restricted procedures where the principles of transparency and stability have to be followed more closely.

It was held on *Resource (NI) Ltd* that contracting authorities may only assess tenders by reference to the *disclosed* award criteria and that evaluating panels are obliged to disregard all aspects of a tender not covered by such award criteria. That is, only the award criteria disclosed in time to influence the bidders may be applied in the decision-making process. In addition, if the tenderer decides to include extraneous information like a variant proposal, such information must be considered irrelevant and cannot be taken into equation at when the bids are being marked.

6. Reservations and rejection of non-compliant bids

The Public Contracts Regulations 2006 makes no reference to non-compliant bids and what should be done with those, other than allowing for exclusion in a case of abnormally low tenders.[47] As such, there is no statute regulating the issue of formal and substantive non-compliant bids.

There is, however, some developing case law on the extent of contracting authorities' duty to seek clarification from bidders. In *Clinton (t/a Oriel Training Services)* v *Department for Employment and Learning,*[48] judge McCloskey held that the contracting authority was under the obligation to request clarifications from the one of the bidders as it was done so from other participants. It was deemed that not requiring the extra information on a situation where the specifications were unclear breached the principles of equal treatment and proportionality and put the contracting authority in a situation

45. As defined by Lord Hodge in *Healthcare at Home Ltd* v *The Common Services Agency*, [2012] CSOH 75 and Mr. Justice Morgan in *Lion Apparel Systems Limited* v *Firebuy Limited*, [2007] EWHC 2179.
46. This issue is discussed in detail in S Arrowsmith and S Treumer, Competitive dialogue in EU law: a critical review. In Competitive Dialogue in EU Procurement, Cambridge University Press, 2012, p.88 to 94. The authors have dissenting views on the topic.
47. Please see section 7 hereunder.
48. *Clinton (t/a Oriel Training Services)* v *Department for Employment and Learning* [2012] NIQB 2.

of manifest error. It is not certain, however, that in a case where the specifications were clear and easy to understand that the same logic would apply.

The uncertainty on the grounds for request of clarifications was seen in the appeal to the *Clinton (t/a Oriel Training Services)* v *Department for Employment and Learning.*[49] The appeal was heard after *Slovensko*[50] and the Court of Appeal were divided in the consequences of the lack of clarification and held on majority that there is no obligation for the contracting authority to require extra information from tenderers. Furthermore, in this particular case, the principle of equal treatment was not breached as the other tenderers were asked to correct obvious and minor defects, whereas the respondent would have had to undertake major corrections to its bid.

From the above, it can be said that minor or formal corrections to tenders may be made but that tenders demanding significant corrections – even when the award criteria may not be entirely clear – amount to the submission of new tenders and as such should not happen.

There is also case law surrounding the issue of bids submitted after the tender submission deadline. In *JB Leadbitter & Co Limited* v *Devon County Council,*[51] it was held that late tenders could be accepted if the reason for the delay was outside the tenderer's control (such as if a tenderer suffers a power cut near the deadline) and equal treatment was ensured, that is if all tenderers could benefit from the extension. In the remaining situations, where the tenderer is at fault, the contracting authority was deemed to have the discretion to accept late tenders as long as the decision was proportionate and equal treatment was observed.

The perspective of allowing tenderers to submit their bids out of time in case they have "special circumstances" appears to be fair and proportionate, as it is not due to their own fault they have not complied with the deadline. As long as equal treatment is observed, the principle of competition appears to be better served by allowing all tenderers to submit their bids slightly later than originally conceived. This decision is proportionate as long as it is a short extension to the original deadline. On the other hand, it could be argued that this leniency fosters the recklessness of tenderers to leave submissions

49. *Clinton (t/a Oriel Training Services)* v *Department for Employment and Learning* [2012] NICA 48.
50. *SAG ELV Slovensko a.s., and others* v *Irad pre verejne obstaravanie* Case C-599/10. On this case please see, D McGowan, 'An obligation to investigate abnormally low bids? SAG ELV Slovensko a.s. (C-599/10)' (2012) 18 *Public Procurement Law Review*.
51. *J B Leadbitter & Co Limited* v *Devon County Council* [2009] EWHC 930 (Ch)

for very close to the deadline. The increased risk of legal challenges could be argued as well as another reason for the contracting authority to bind itself to not accept any bid out of time. As could be seen in the *JB Leadbitter & Co Limited* v *Devon County Council,* the fact that a supplier had its bid accepted out of time and others did not was the key reason that led to the challenge. The same argument can be put forward in situations where the margin of discretion by the contracting authority is exercised to accept a late tender from a tenderer at fault. Erring on the side of precaution, it would probably be safer for a contracting authority to clearly state on the tender documents that it will not accept a late tender under no circumstances thus binding itself to that statement and reducing its own margin of discretion.

7. Abnormally low tenders

Regulation 30(6) defines how abnormally low tenders are to be treated by contracting authorities. The UK laws[52] are broadly in line with Article 55 of the Directive 2004/18. According to Article 55(1), it appears that the contracting authority has no scope not to investigate an abnormally low tender, an interpretation confirmed by the *Slovensko* ECJ decision. UK legislation states that the contracting authority "may reject the offer" after certain verification steps are taken. These steps are similar to the Directive requirements, and include requesting extra information from the tenderer, taking into account the evidence provided and verifying the abnormally low elements with the tenderer.[53]

There is no indication on what constitutes an abnormally low bid on the legislation. In addition, there is no provision in the UK legislation regarding the possibility of automatic formulae being used for the assessment of abnormally low tenders, as suggested in *Impresa Lombardini SpA*[54] and *SECAP SpA*.[55] In consequence, contracting authorities are left to decide on what may constitute to them an "abnormally low bid". This leads to legal uncertainty on how to make that judgment call.

There are some potential suggestions that can be made though. The contracting authority may, for example, define in private a budget for the contract and have suspicions on a tender that comes under such value. If it does not have a clear command of the contract subject matter, its internal budget

52. As the same argument is valid for the Public Contracts (Scotland) Regulation 2012.
53. Regulation 30(6)(a)(b) and (c).
54. *Impresa Lombardini SpA* v *ANAS*, Case T-285/99.
55. *SECAP SpA* v *Comune di Torino*, Case T-147/06.

may be unrealistic, either by being too expensive or to cheap. If it is too cheap, then an offer that would be abnormally low (that is, deemed unsustainable) will not be flagged as such. Another alternative might be to use the mean or the average of tenders received to define a reasonable value and suspect from a tender if it deviates too much from the middle of the field. Again, this suggestion may lead into problems as it leaves the contracting authority at the mercy of the actual bids it receives. On a scenario where only two bidders present themselves, it will be impossible to find if the lowest is an abnormally low one, or in a cartel situation, the low bid may actually be an honest one whereas the others are "abnormally high". Another possibility is to consider a tender as abnormally low if it increases the risk for the contracting authority for non-performance or post-tender variations. For example, if the price appears to be so low that the contracting authority has reasonable doubts on the feasibility of the project for the offered price, it would appear that it could argue that such is an abnormally low bid.

The issue of abnormally low tenders in the UK has been raised in conflicting terms in three recent cases: *Morrison Facilities Services Ltd,*[56] *J Varney & Sons Waste Management* and *Amey AG Limited* v *The Scottish Ministers*.[57]

It was held on *Morrison Facilities Services Ltd* that the contracting authority has a duty for all tenderers to investigate prices as to assess if there is an abnormally low tender. There is a mandatory obligation to do so or else the Regulation would be meaningless. It seems that, according to the court, contracting authorities should follow the wording of the Directive, which appears to mandate the test and not the Regulations where it appears to be optional in nature. However, this sentence was given on an injunction and the final decision is yet to be produced. On *Amey AG Limited*, the judge held on no uncertain terms that the contracting authority is under a duty to assess tenders for abnormally low values. The justification offered is based on the interpretation made in the ECJ cases of *Fratelli Constanzo*,[58] *Impresa Lombardini SpA* and *SECAP SpA* that bids must be genuine, serious and viable.

On *J Varney & Sons Waste Management*, however, the judge appears to have held that contracting authorities *may* reject a tender on the grounds it is abnormally low but that it is not mandatory to carry out an investigation or to

56. *Morrison Facilities Services Ltd* v *Norwich City Council* [2010] EWHC 487 (Ch) (Ch D). On this case, P Henty, 'Award of injunctions, abnormally low tenders and duty to disclose award criteria: the case of Morrison Facilities Service' (2010) 16 *Public Procurement Law Review*.
57. *Amey AG Limited* v *The Scottish Ministers* [2012] CSOH 181
58. *Fratelli ConstanzoComune di Milano*, Case 103/88.

disqualify the tender. Out of the three cases, this is the one that appears to be in conflict with the command from the Directive. In the author's view, however, the Regulation 30(6) should be interpreted in accordance with the Directive, thus implying that the correct interpretation would be the one found in the *Morrison Facilities* and *Amey* cases, as otherwise the the usefulness of Article 55(1) would be questionable at best.

It is not entirely clear what should happen if the bid is deemed as not genuine, serious or viable after the test is conducted.[59] Although, both the Directive and the Regulations in the UK mention that the test must be conducted before the tender "may" be excluded, it does not appear to be logical that a tender might fail the abnormally low assessment and not be automatically excluded. If the logic of the abnormally low tender provisions is to protect the market (and the contracting authority) from unrealistic bids it makes no sense to leave any discretion in case the test is failed. An aggrieved bidder would be entitled to challenge an award decision in case the contracting authority itself had found the winning tender to be abnormally low and not acted in accordance to the finding. The decision to keep a tender in a procedure would be unjustified and not proportionate if it had been found to be abnormally low. That is, in case of failure on any of these checks would appear, a bid needs to be assessed through this test, and in case of failure will have to be disqualified. Admitting the opposite would have the effect of rendering the test almost useless as through its discretion, the contracting authority could comply with the letter of the law (conducting the check) but not with its spirit (excluding the abnormally low tender). Admitting the opposite would make Slovensko useless. In any case, in face of the difficulties of determining what is indeed an abnormally low tender, the contracting authority might just conduct the checks and just declare the tender not to be abnormally low just to avoid any future grounds for appeal on its award decision.

8. Specific issues disputed at national level

a. Disclosure of sub-criteria

Although the Public Contract Regulations do not regulate specifically the disclosure of sub-criteria, there have been a number of decisions by UK courts on the issue. Of particular interest are *Letting International,*[60] *McLaughlin*

59. This topic is analysed in detail in Chapter 1.
60. *Letting International LtdNewham LBC* [2008] EWHC 1583 (QB).

and Harvey Ltd,[61] *J Varney & Sons Waste Management,*[62] *Mears Ltd* v *Leeds City Council,*[63] *Healthcare at Home Ltd vs Common Services Agency*[64] and *ALSTOM Transport* v *Eurostar International Ltd*.[65]

In *Letting International*, the judge, referring to *Lianakis,* held that any "principle, standard or test by which a thing is judged, assessed or identified" has to be considered an award criteria and as such disclosed to tenderers in advance, particularly if it may have an effect on how they prepare their bids. The judge held that any that passes the mentioned test has to be considered for all due effects as a criterion, irrespectively of the name adopted in the documents as "sub-criteria" or "method statement. That is, if it is important for the decision then it has to be disclosed, unless, as required by law there is are "objective grounds" not to do so.

In *McLaughlin and Harvey Ltd,* it was held that the weightings of criteria need to be disclosed if they can affect the preparation of a tender by a supplier. Not doing so amounts to a violation of the principle of transparency. As such, if the weightings cannot influence the preparation of the tender, for example because all have the same weighting or are evenly matched, then there is no need to provide them in advance. Further to this case, in *Morrison Facilities*, the judge held that certain award criteria had probably not been disclosed in advance.

Both in *Letting International* and *McLaughlin and Harvey Ltd,* it appears that sub-sub criteria, particularly when these have an *evidence* nature and not an *economical* one, do not have to be disclosed in advance. By evidence, the author means information related to the quality of the tenderer, for example, the experience of the staff that will be allocated to the contract. The compatibility of such view with *Lianakis* and the obligation of providing all the information relevant for the preparation of tenders remains to be seen, particularly if one reads *evidence information* as information that perhaps should have been requested at the selection stage.

61. *McLaughlin and Harvey LtdDepartment of Finance and Personnel (No.2)* [2008] NIQB 91. On this case, P McGovern, 'Northern Ireland: disclosure of award criteria and setting aside of framework agreements: the case of McLaughlin and Harvey Ltd v Department of Finance and Personnel' (2012) 18 *Public Procurement Law Review*.
62. *J Varney & Sons Waste Management LtdHertfordshire CC* [2010] EWHC 1404 (QB). On this case, L Osepciu, 'J Varney & Sons Waste Management Limited v Hertfordshire County Council' (2010) 16 *Public Procurement Law Review*.
63. *Mears LtdLeeds City Council* [2011] EWHC 1031 (TCC).
64. *Healthcare at Home Ltd* v *Common Services Agency* [2012] CSOH 75 (OH).
65. *ALSTOM Transport* v *Eurostar International Ltd* [2010] (Ch).

On *Mears* v *Leeds City Council*, Judge Ramsay laid down a number of principles regarding the disclosure of criteria and sub-criteria. Under the general rule that award criteria, subcriteria and rules regarding weightings should be disclosed, some exceptions are allowed. For example, if the weightings do not alter the disclosed criteria, could not have affected the preparation of the tenders nor discriminate against one of the tenderers, then such weightings need not be disclosed. The judge held as well that below criteria, sub-criteria and weightings the assessment level by the contracting authority will not have to be disclosed. This is applicable as long as on a reasonable view this assessment does not introduce different or new criteria, sub-criteria or weightings as well as not affecting the tenders. In other words, this assessment is focused on the ability of the tenderer to perform the contract. This appears to contradict *Lianakis,* as the ability of the tenderer to perform the contract should already have been discussed at the selection stage. In addition, the crucial point to look on in this case is: if a piece of information is not necessary to make a decision on the best tender why should it be asked on the first place?

On the recent *J Varney & Sons Waste Management*, it was held by the judge that the "Return Schedules" deemed by the contracting authority as sub-criteria did not have to be disclosed in advance as each contained the same marks and all were evenly weighted. In consequence, it was held that withholding this information did not have an impact on the way tenderers presented their bids. Contrary to *Letting International*, on *J Varney & Sons Waste Management*, not disclosing this sub-criteria was not seen to violate the principles of transparency and equal treatment. This decision was upheld on appeal.

On *ALSTOM Transport* v *Eurostar International Ltd,* it was held that it was at least arguable the criteria should be disclosed as it had an effect on the preparation of the bids. However, this was an injunction case and not a final decision. It was considered in the case that it was unlikely the faults identified with the criteria disclosure would have impacted the final outcome.

When taken together, the UK case law leads to the conclusion that, in general, sub-criteria need to be disclosed to suppliers in time for them to prepare their bids as long as they impact their evaluation and the decision-making process. In case they do not have any impact on the evaluation then the interpretation of the court has been slightly more accommodating to the views of contracting authorities. That begets the question that if said criterion does not have an impact on the decision is it actually an award criterion? Probably this "relevance" test can only be carried out after the tender stage closure. It can be argued that it if its not relevant for the decision then it is not actually part of the decision-making process. A question should also be raised if this separation be-

tween relevant and non-relevant criteria, with only the first having to be disclosed, actually makes the system clearer or harder to understand. It can be said that it raises uncertainty and possibly creates fertile ground for challenges.

b. Procurement of innovation

Specifically for the procurement of innovation, the UK has piloted the creation of a new pre-commercial procurement process called forward commitment procurement.[66] This process has been used a few times in the country. For example, it was used in 2007 for the procurement of new mattresses for prisons or the development of a new ultra efficient lighting solution for a ward at the Rotherham Hospital. The forward commitment procurement procedure implies a market engagement stage before actually launching of a competitive dialogue procedure to help define what the contracting authority really needs and how the market may achieve it. Regarding the use of award criteria, it has been argued that Regulations 30(2) do not close the possibility of having innovation requirements as award criteria as the list is open.[67]

In some situations known to the author, contracting authorities have left some scope on award criteria for the inclusion of innovation by the contractor. That is, the supplier is left with some scope to draw on its ideas and put on the table something that the contracting authority has not conceived at the start. In other words, it could be said that the contracting authority is accepting at least partial variants to the specifications and pointing those towards "innovation". In consequence, it may well be the contracting authority will be surprised by what the contractor provides or just left with minor changes to the original specifications. In either case, however, the contracting authority is left at the mercy of suppliers as unexpected deviations from the specifications may be difficult to measure. If the innovations are indeed entirely new, then the contracting authority may simply not know how to gauge and measure them. Even if the innovations are relatively simple, they may lead to a situation where the tenders become so different that they may not be comparable. Furthermore, if the specific price of the "innovation" is not discriminated in the overall cost of the tender, the contracting authority will have no idea of what that extra bit is costing it.

66. A description of the procedure can be found at, Department for Business Innovation and Skills, *Forward Commitment Procurement – Practical Pathways to Buying Innovative Solutions* (2011).
67. *Forward Commitment Procurement – Practical Pathways to Buying Innovative Solutions*, p. 26.

Conclusion

In this chapter we have seen that the United Kingdom has adopted a transposition of the Directive 2004/18 with few changes to the original text in what relates to award criteria. In addition, it became apparent that different policies are being followed in the different home nations, particularly in what concerns social clauses. In what concerns the split between most economically advantageous tender and lowest price award criteria, it seems British contracting authorities are overwhelmingly favouring the first.

Limited evidence has been found that contracting authorities in the United Kingdom use experience at the tender stage. Although there is at least one court decision on the topic, it is not known, however, if such practice is widespread and across what types of contracts or contracting authorities. In any case, this may point towards an inconsistent take on the obligations deriving from *Lianakis*.

Conflicting case law has been identified in what concerns both abnormally low tenders. In *Morrison Facilities Services Ltd* and *Amey AG Limited* v *The Scottish Ministers,* it was held that the contracting authority is under the obligation of investigating abnormally low tenders, whereas in *J Varney & Sons Waste Management,* the opposite decision was taken.

The consistency of case law is also questionable in the issue surrounding the need to disclosure sub-criteria. It appears to the British courts that as long as the sub-criteria does not have an impact on the award decision, then the contracting authority is free not to disclose such criteria at all.

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10 Rejection of abnormally low and non-compliant tenders in EU public procurement: A comparative view on selected jurisdictions

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1. Introduction

This paper attempts a concise comparison of the rules applicable to the rejection of abnormally low (§ 2) and non-compliant tenders (§ 3) in a number of EU jurisdictions.[1] In order to set the common ground for the analysis of such domestic rules, which are solely applicable to non-negotiated procedures,[2] the paper first offers a description of the rules in the EU public procurement Di-

* This research has been carried out in the framework of the Research Project "Contratación pública y transparencia: alcance y límites de los principios de publicidad y libre competencia", sponsored by the Ministry for the Economy and Competitiveness. Government of Spain (Ref: DER2012-39003-C02-02).

1. Namely, Denmark, France, Germany, Italy, Poland, Romania, Spain and the United Kingdom. The analysis relies on the national reports prepared for this book by my esteemed co-authors. Nonetheless, I am solely responsible for my interpretation of those reports and for the comparisons made in this chapter.
2. In negotiated procedures, none of these rules are applicable or relevant, since the contracting authority retains significant discretion to check and alter the conditions of the initial offers submitted by the undertakings invited to negotiate. Therefore, the discussion in this paper is basically relevant solely in connection with open and restricted procedures (although it could be of some relevance for design contests and competitive dialogues, depending on their specific rules).

rectives[3] and the case law of the European Courts (*ie* GC and CJEU), and then proceeds to compare them against this benchmark and amongst themselves. Where possible, the paper highlights innovative or different solutions, as well as potential deviations from EU law.

2. Treatment of Abnormally Low Tenders

2.1. EU Rules and Case Law

2.1.1. General Criteria

Needless to say, the treatment of abnormally low tenders[4] is an important issue related to the application of award criteria and the treatment of non-fully compliant bids (discussed below § 3). Under the relevant EU rules, the analysis of seemingly abnormally low tenders is configured as a mechanism that allows contracting authorities to depart from the *automatic* or 'acritical' application of award criteria in cases where, for a given contract, certain tenders appear to be abnormally low in relation to the goods, works or services concerned [see art 55(1) *ab initio* dir 2004/18]. In these cases, contracting authorities are entitled to reject tenders that appear to be abnormally low in relation to any of the relevant parameters and award criteria (*ie* not only price, at least where the award criterion is that of the most economically advantageous offer).[5]

To do so and before rejecting those tenders, contracting authorities shall request in writing[6] details of the constituent elements of the tenders which are considered relevant for the appraisal or verification of their apparent anoma-

3. For the purposes of this paper, references will only be made to Directive 2004/18, although the findings are equally applicable to utilities, defence and institutional procurement under the relevant rules.
4. Generally, see S Arrowsmith, *The Law of Public and Utilities Procurement*, 2nd edn (London, Sweet and Maxwell, 2005) 531-539; P Trepte, *Public Procurement in the EU: A Practitioner's Guide*, 2nd edn (Oxford, Oxford University Press, 2007) 59-60 and 474-7; and GS Ølykke, *Abnormally Low Tenders – with an Emphasis on Public Tenderers* (Copenhagen, DJØF Publishing, 2010). More specifically, see also GS Ølykke, 'Submission of Low Price Tenders by Public Tenderers – Exemplified by Public Procurement of Railway Services in Denmark' in UB Neergaard et al (eds), *Integrating Welfare Functions into EU Law – From Rome to Lisbon* (Copenhagen, DJØF Publishing, 2009) 253.
5. Case T-495/04 *Belfass* [2008] ECR II-781 100.
6. Indeed, the requirement to provide for a written procedure has been stressed by the CJEU; Case C-292/07 *CommissionBelgium* [2009] I-59 161 and Case C-599/10 *SAG ELV Slovensko* [2012] nyr 33.

ly, such as:[7] the economics of the products, processes and methods used; technical solutions chosen and/or exceptionally favourable conditions available to the tenderer; originality of the work; compliance with applicable labour and risk prevention legislation; and the possibility of the tenderer obtaining State aid (see below, § 2.1.3) [art 55(1) dir 2004/18]. In view of the evidence supplied by the tenderer upon such consultation, the contracting authority shall verify the constituent elements of the apparently abnormally low tender and reach a final decision on whether to reject it or not [art 55(2) dir 2004/18]. In the case of rejection of the abnormally low tender, the contracting authority is under a special duty to provide reasons for that decision [art 43(d) dir 2004/18].

In this regard, it has been stressed by the EU case law that this is '*a fundamental requirement in the field of public procurement, which obliges a contracting authority to verify, after due hearing of the parties and having regard to its constituent elements, every tender appearing to be abnormally low before rejecting it*'.[8] Indeed, as the CJEU has clearly emphasised, this is a positive and unavoidable requirement, and '*Article 55 of Directive 2004/18 does preclude* [...] *a contracting authority from claiming* [...] *that it is not obliged to request a tenderer to clarify an abnormally low price*'.[9] To be sure, contracting authorities are not expressly obliged to reject abnormally low tenders – rather, their duty is just to identify suspect tenders and scrutinize them following the *inter partes* procedure established in the directive, whereby '*the contracting authority must set out clearly the request sent to the tenderers concerned so that they are in a position fully and effectively to show that their tenders are genuine*'.[10] In this regard, the CJEU has been clear in stressing that the contracting authority is

> under a duty, first, to identify suspect tenders, secondly to allow the undertakings concerned to demonstrate their genuineness by asking them to provide the details which it considers appropriate, thirdly to assess the merits of the explanations provided by the per-

7. This list "*is not exhaustive, [but] it is also not purely indicative, and therefore does not leave contracting authorities free to determine which are the relevant factors to be taken into consideration before rejecting a tender which appears to be abnormally low*". See Case C-292/07 *Commission v Belgium* [2009] I-59 159; and Case C-599/10 *SAG ELV Slovensko* [2012] nyr 30.
8. Case T-495/04 *Belfass* [2008] ECR II-781 98. Similarly, Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233 51.
9. Case C-599/10 *SAG ELV Slovensko* [2012] nyr 34.
10. Case C-599/10 *SAG ELV Slovensko* [2012] nyr 31.

sons concerned, and, fourthly, to take a decision as to whether to admit or reject those tenders.[11]

Hence, the rules of the directive exclusively impose procedural guarantees to be complied with by contracting authorities prior to rejecting apparently abnormally low tenders;[12] and, consequently, seem to be mainly oriented towards providing affected tenderers the opportunity to demonstrate that their tenders are genuine[13] – *ie* are *primarily* a mechanism to prevent discretionary (or arbitrary) decisions by contracting authorities.[14] In this regard, contracting authorities are obliged to take into account the explanations and proof provided by the affected tenderers and, consequently, cannot apply automatic or simple mathematic rules to *reject* apparently abnormal tenders[15] – although the use of such rules to *identify* suspicious tenders should not be ruled out. As stressed by the case law, the directives do not provide a definition of 'abnormally low tenders', or a method to calculate an 'anomaly threshold' – which are issues consequently left to Member States' domestic regulation[16] (below § 2.2.1), and should be determined for each contract according to the specific purpose it is intended to fulfil (*ie* it must be tender-specific).[17] Therefore, the rules of the directives seem to be adequately conceived as a check or balance to the general power of contracting authorities to reject abnormally low tenders – which is an instance of exercise of their broad discretion with regard to the factors to be taken into account for the purpose of deciding to award a contract, or not to award it to a given tenderer.

11. Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233 55.
12. Case 76/81 *Transporoute* [1982] ECR 417 18; Case 103/88 *Costanzo* [1989] ECR 1839 16-21; Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233 33-45.
13. Case 103/88 *Costanzo* [1989] ECR 1839 18; Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233 47; Case T-495/04 *Belfass* [2008] ECR II-781 97.
14. Case 103/88 *Costanzo* [1989] ECR 1839 20 and 26; and Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233 48-9 and 57. See also Case C-599/10 *SAG ELV Slovensko* [2012] nyr 29.
15. Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233 72; Case T-495/04 *Belfass* [2008] ECR II-781 102-103.
16. Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233 67; and Case T-495/04 *Belfass* [2008] ECR II-781 94.
17. Opinion of AG Ruiz-Jarabo Colomer in joined cases C-285/99 and C-286/99 *Lombardini and Mantovani* 32 and 35; and Case T-495/04 *Belfass* [2008] ECR II-781 94.

The justification for this empowerment of contracting authorities to reject abnormally low tenders seems to be that they should not be forced to award the contract under circumstances where there is a reasonable *risk of non-performance* of the contract or of financial instability or disequilibrium,[18] or a risk of breach of applicable legislation by the contractor during the execution of the contract under the tendered conditions (particularly as regards labour and risk prevention legislation); since such an award would hardly satisfy the needs of the contracting authorities and/or would force them to assume certain risks that they might not be willing to accept. The appraisal of such risks shall be undertaken by contracting authorities from a neutral or objective perspective and be sufficiently motivated [by analogy with art 55(2) dir 2004/18]. To be sure, contracting authorities cannot exercise unlimited discretion in the assessment and eventual rejection of abnormally low tenders and their decisions should be guided by and be compliant with the general principles of the procurement directives and the TFEU – notably, non-discrimination and competition. In this regard, it should be remembered that the treatment of abnormally low tenders by contracting authorities might generate competition distortions and/or have a negative impact on innovation[19] and, consequently, its analysis also merits further consideration.

2.1.2. Circumstances in Which There Is an Obligation to Reject Abnormally Low Tenders

In my view,[20] and as already mentioned, the rules contained in the directives do not expressly impose upon contracting authorities the duty to reject abnormally low tenders in all cases.[21] Nonetheless, it is submitted that such an

18. See Arrowsmith, *The Law of Public and Utilities Procurement* (2005) 532-534; P Trepte, *Regulating Procurement. Understanding the Ends and Means of Public Procurement Regulation* (Oxford, Oxford University Press, 2004) 165-166 and 197; and ibid, *Public Procurement in the EU* (2007) 474. From an economic perspective, this seems the clearest justification; AR Engel et al, 'Managing Risky Bids' in N Dimitri et al (eds), *Handbook of Procurement* (Cambridge, Cambridge University Press, 2006) 322, 326.
19. L Carpineti et al, 'The Variety of Procurement Practice: Evidence from Public Procurement' in N Dimitri et al (eds), *Handbook of Procurement* (Cambridge, Cambridge University Press, 2006) 14, 36.
20. A Sanchez Graells, *Public Procurement and the EU Competition Rules* (Oxford, Hart Publishing, 2011) 325.
21. *But see* C Bovis, *EC Public Procurement: Case Law and Regulation* (Oxford, Oxford University Press, 2006) 154-155; and ibid, *EU Public Procurement Law* (Cheltenham, Edgar Elgar, 2007) 68, who considers that '*the European rules provide for an* ***automatic*** (sic) *disqualification of an "abnormally low offer"*' (emphasis added). In my

obligation exists, at least when certain circumstances concur. In this regard, once a contracting authority – in view of the evidence supplied by the affected tenderer upon consultation, and adopting a neutral approach – has reached the conclusion that a tender is abnormally low and, consequently, that the tender is not genuine and/or entails a certain risk of non-performance, financial instability or disequilibrium, or a risk of breach by the tenderer of particularly relevant legislation, it seems to be a logical requirement of the *principle of diligent administration* that the contracting authority should reject the tender *unless* it can sufficiently motivate a decision not to do so on the basis of overriding legitimate reasons – that is, unless the specific tender provides the contracting authority with advantages that compensate for or exceed the potential risks. Admittedly, a similar reasoning might not be applicable in the event of a potential breach of the relevant legislation by the tenderer, in which case the discretion of the contracting authority to accept the abnormally low tender might even be completely excluded – since, in general, contracting authorities seem to have significant difficulties in accepting illegal tenders.

Other than the general restrictions that domestic or special legislation may impose on contracting authorities preventing them from reaching such a decision of non-rejection of an abnormally low tender (below § 2.2.2), the principles of non-discrimination and competition seem to limit even more the possibilities for the contracting authority to do so. In this regard, it should be stressed that contracting authorities cannot exercise unrestricted freedom of choice amongst tenderers and, in my view, granting them discretion to accept tenders found to be abnormally low might result in discriminatory outcomes – since the anomaly of the tender will probably, and by itself, materially affect its ability to satisfy the needs of the contracting authority and, consequently, should be rejected as an unsuitable bid (not merely non-fully compliant; see below § 3.1). Moreover, even in the absence of discriminatory features, the principle of competition can still impose additional restrictions on the ability of the contracting authority to accept abnormally low tenders, preventing it from doing so if accepting the abnormally low tender generates or reinforces a distortion of competition in the market concerned.[22] In this re-

opinion, and in the light of the arguments developed in the text (particularly the CJEU case law), that position is incorrect under the new directives. Indeed, Bovis himself presents the system as discretionary for contracting authorities [(2006) 264] – therefore blurring the automaticity of his initial position.

22. Along the same lines, emphasising the existence of a possible obligation to reject in order to protect 'healthy competition', see the contributions of Treumer to this book (who supports them in his reading of *Slovensko*). Also in this line of thought, Telles

gard, contracting authorities should at least be prevented from accepting abnormally low tenders submitted by a dominant undertaking if they can be considered *predatory*, as well as abnormally low tenders that could be proven to result from *collusive agreements* amongst tenderers aimed at sharing the market (*ie* as an instance of bid rotation, boycott of other tenderers, etc.). In these instances, the involvement or cooperation of competition authorities in the assessment of apparently abnormally low tenders seems desirable.[23]

2.1.3. The Particular Case of Abnormally Low Tenders Tainted by State Aid

As a particular instance of, or an exception to, the general rule regarding the taking into consideration of general competition concerns in the analysis of abnormally low tenders, article 55(3) of Directive 2004/18 sets special rules regarding abnormally low tenders tainted by State aid.[24] As anticipated (above § 2.1.1), one of the constituent elements of tenders on which contracting authorities can request tenderers to provide additional information is '*the possibility of the tenderer obtaining State aid*' [art 55(1)(a) dir 2004/18]. In this regard, the special rules contained in the directive as regards abnormally low tenders tainted by State aid determine that

> where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender can be rejected *on that ground alone* only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority, *that the aid in question was granted legally* [art 55(3) dir 2004/18, emphasis added].

In this regard, it seems clear that the test applicable by contracting authorities in these cases – where they intend to reject the apparently abnormally low tender *exclusively* on the basis that the tenderer has obtained State aid – is limited to the verification of whether the State aid was granted legally to the tenderer submitting an abnormally low tender – *ie* to request proof that the aid received complies with the requirements for a general exemption (in a block exemption regulation, or otherwise) or has been the object of a positive clearance decision by the Commission (*ex* arts 107 and 108 TFEU). Failure to prove the legality of the granting of the State aid by the tenderer concerned will entitle the contracting authority to reject the tender as being abnormally

also stresses in his contribution that '*If the logic of the abnormally low tender provisions is to protect the market (and the contracting authority) from unrealistic bids it makes no sense to leave any discretion in case the test is failed.*'

23. Sanchez Graells, *Public Procurement and the EU Competition Rules* (2011) 385-389.
24. On the inclusion of this special rule in Directive 2004/18, see Trepte (n 4) 474.

low on that ground alone. In such cases, the contracting authority should inform the Commission of this fact [art 55(3) dir 2004/18].

Doubt could be cast on whether contracting authorities can go further and (based on the general criterion of 'severability' of authorization and use of State aids)[25] analyse whether the *use* of legally granted State aid to submit the abnormally low tender is illegal in itself – *ie* whether it constitutes a case of *misuse* of aid[26] (as an instance of *predatory pricing*,[27] or otherwise), in which case it could also be considered a valid reason for the rejection of abnormally low tenders on that ground alone. Such an approach would probably allow for a common treatment of all unlawful uses of State aid – whether illegal by reason of its award, its incompatibility with the internal market, or its misuse – and, consequently, might seem desirable as a way to reinforce the State aid prohibition through public procurement rules. However, the exclusive competence of the European Commission to apply articles 107 and 108 TFEU (and the special nature and more limited powers in cases of misuse of State aid),[28] prevent con-

25. An issue raised by Trepte (n 4) 60 – who, however, also points out that '*there is a danger that decisions on this issue by the purchaser could lead to little more than political revenge*' – and, implicitly, seems to regard this option unfavourably. As developed in the text, there are additional reasons that point in the same direction and that should exclude the possibility for contracting authorities to conduct an analysis of the (mis)use of legally granted State aid.
26. See Ølykke, Submission of Low Price Tenders by Public Tenderers (2009) 263, who considers that '*the receipt of legal state aid could ... be an objective justification for an apparently abnormally low tender, as long as this use does not amount to* ***misuse*** *of the aid*' (emphasis added).
27. In this regard, it is interesting to read the Commission's Decision of 7 July 2004 on the aid measures implemented by France for Alstom (OJ 2005 L 150/24), where France undertook to monitor the inexistence of predatory pricing in Alstom's tenders for public contracts in the transport sector. As indicated by the Commission, the measure was '*intended to ensure that the aid will not be used by Alstom in the Transport sector to finance predatory pricing policies [...] to the detriment of competitors*'. In such specific case, where refraining from predation is made an explicit condition in the granting of the aid, rejection of the tenders that proved to be predatory ought to be easier than in the general cases – where, as discussed in the text, contracting authorities and review bodies/courts face a significant obstacle due to the exclusive competence of the European Commission to declare the (il)legality of the use of the State aid received.
28. See Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (Regulation 659/1999) [1999] OJ L83/1, particularly recital (1). Along these lines, it is important to stress that according to EU case law (see Case 74/76 *Iannelli* [1977] ECR 557 16) even '*national courts are not competent to judge the compatibility of State aids with Community*

tracting authorities from having direct recourse to such a possibility and, consequently, the test that contracting authorities can apply to apparently abnormally low tenders tainted by State aid seems to be limited to the legality of its being granted, not of its use.[29] In this regard, it seems relevant to stress that unlike 'unlawful aid' [*ie* aid that was granted without prior notification to the Commission or in disregard of the standstill obligation of art 108(3) TFEU], 'aid which has possibly been misused' is aid which has been previously approved by the Commission [see recital (15) reg 659/1999] or that benefits from a general (block) exemption and, consequently, is vested with an appearance of legality (*fumus boni iuris*). Such an appearance of legality requires careful analysis – and this justifies, for instance, the absence of recovery injunction mechanisms that are generally available in cases of unlawful aid.

This rather formal approach – that largely limits contracting authorities' ability to take the (anti-)competitive effects generated by State aid into consideration in public procurement processes – seems to be consistent with the relevant case law, where the CJEU has clearly held that

> the mere fact that a contracting authority allows bodies receiving subsidies of any kind, whether from that contracting authority or from other authorities, which enable them to submit tenders at prices appreciably lower than those of the other, unsubsidised, tenderers, to take part in a procedure for the award of a public service contract does not constitute either covert discrimination [or a restriction on freedom to provide services].[30]

In this regard, given the special nature of State aid, the EU judicature seems to have opted for a restriction of the analysis of its effects on competition to the narrow limits of the procedures for the control of State aid, consequently strengthening the exclusive competence of the European Commission in this

law'; JM Fernández Martín and O Stehmann, 'Product Market Integration versus Regional Cohesion in the Community' (1990) 15 *European Law Review* 216, 231.

29. This situation is clearly different from that of arts 101 and 102 TFEU, which must be applied by all authorities of Member States; see J Temple Lang, 'National Measures Restricting Competition and National Authorities under Article 10 EC' (2004) 29 *European Law Review* 397, 399-404. Therefore, a restriction of the effectiveness of the principle of competition in this particular regard, such as that operated by the special rule in art 55(3) of Directive 2004/18 seems compatible with the general system of competition rules in the TFEU. In this respect, a 'de-monopolisation' or decentralization of the enforcement of State aid rules could be desirable, but reaching such a conclusion requires analyses that goes well beyond the limits of this paper.
30. Case C-94/99 *ARGE* [2000] ECR I-11037 32 and 38. *cf* Ølykke, Low Price Tenders (n 4) 263 fn 48. The issue was touched upon, diagonally, in case C-305/08 *CoNISMa* [2009] ECR I-12129.

area. Along the same lines, in very clear terms, it was stressed that '*aid that has been notified and declared compatible with the common market cannot affect the decision of the contracting authority to admit a tenderer* ***or the assessment of its tender****'*.[31] It is submitted that the same reasoning applies to State aid exempted on other grounds. Therefore, the denial of contracting authorities' power to reject abnormally low tenders apparently tainted by the misuse of State aid on that ground alone [*ex* art 55(3) dir 2004/18] seems to accord to this *ring-fencing* of State aid analysis.[32]

2.1.4. Preliminary Conclusion on the Requirements Imposed by EU Public Procurement Rules

To sum up, in my view, contracting authorities are under a duty to reject abnormally low tenders – after complying with the *inter partes* procedure regulated by article 55 of Directive 2004/18 – unless they can sufficiently justify a decision not to do so on the basis of overriding legitimate reasons and only as long as there are no discriminatory or competition distorting effects derived from the acceptance of the abnormally low tender. In the particular case of abnormally low tenders tainted by State aid, the directive sets specific rules whereby contracting authorities can reject abnormally low tenders *exclusively* on the basis of the reception of State aid if, and only if, it is not proven that the aid was *granted* legally.[33] These are the standards against which domestic rules will be assessed.

2.2. Applicable Rules in the Selected Jurisdictions

This subsection explores the three main areas that EU rules and case law leave for Member States to regulate, or where their practice deserves particular scrutiny: namely, the definition of an 'abnormally low tender', the potential creation of a rule of mandatory rejection of abnormally low tenders, and the control of abnormally low tenders tainted by illegal State aid.

2.2.1. Definition and Screening of 'Abnormally Low Tenders'

As we have seen, EU rules and case law do not provide a definition of abnormally low tenders and, consequently, this is left to Member States' do-

31. Opinion of AG Léger in case C-94/99 *ARGE* 105, emphasis added.
32. For a critical appraisal of this situation, see Sanchez Graells (n 23) 328-329.
33. For an extended discussion, see A Sanchez Graells, 'Enforcement of State Aid Rules for Services of General Economic Interest Before Public Procurement Review Bodies and Courts', *CLaSF Working Paper*, June 2013, available at http://ssrn.com/abstract=2271674.

mestic rules. However, maybe not surprisingly, most jurisdictions do not expressly define them, but rather follow a case by case approach (where relatively open-ended criteria are taken into consideration, such as a disproportion between the tendered prices and market conditions, or a perceived risk of default on the part of the tenderer). Given the difficulty of coining a clear and satisfactory definition of abnormally low tenders, this situation is understandable, although it can result in significant legal uncertainty.

For instance, *Danish* law has not established criteria or a general methodology to be used to identify an apparently abnormally low tender, nor does it require the contracting authority to outline the criteria or method for assessment of whether a tender is abnormally low in the tender conditions. The burden of proof of abnormality rests with the contracting authority and there are few cases where it has been successfully discharged. Neither does the *United Kingdom*, in which legislation there is no indication on what constitutes an abnormally low bid. In addition, there is no provision in the UK legislation regarding the possibility of automatic formulae being used for the assessment of abnormally low tenders and, consequently, contracting authorities are left to decide on what maybe constitutes to them an abnormally low tender – which leads to legal uncertainty on how to make that judgment (particularly in view of the contradictions in the existing case law).[34] Similarly, *France* does not have a definition of abnormally low tenders, nor a methodology to screen them.[35] Also along these lines, *Germany* does not have a definition of an abnormally low tender or a scrutinizing methodology (and indications in the case law offer such big variations as setting the relevant thresholds between 10 % and 50 % price differences). *Poland* does not offer a definition or a screening methodology either; there are no statutory provisions on the circumstances under which the duty to require explanations arises (and the case law has so far not been very specific, since it has been considered that there is no duty to ask for explanations if the differences between the offered prices does not exceed 10 %, while stressing that there is no threshold of price differences which could be applied in every case).

Other jurisdictions, however, have adopted a screening methodology and, implicitly, a definition of an apparently abnormally low tender. This is the case of *Romania*, where an offer is *prima facie* considered abnormally low

34. For suggestions as to how to proceed, see Telles' contribution.
35. For a general overview of some of the criteria used in the French case law, see Institut Des Routes, des Rues et des Infrastructures pour la Mobilité, *L'Offre Anormalement Basse*, July 2012, available at http://www.idrrim.com/ressources/documents/2/1226,5_Offre-anormalement-basse_v2.pdf

when the proposed price, without VAT, represents less than 85 % of the estimated value of the contract, or, when there are at least five valid tenders, when the price represents less than 85 % from their arithmetic mean (excluding the highest and the lowest tenders).[36] There is also anecdotal evidence of screening for 'unreasonable' values for criteria other than price if the contract is not awarded solely on the basis of the lowest offer (which, however, only seem to catch rather extreme circumstances of unreasonable, illogical or gratis offers).

Adopting a similar approach, when the lowest price is the relevant award criterion, *Spanish* law sets a rebuttable presumption of abnormality by reference to certain value thresholds referred to either the tender budget or a given average of the tenders received (which is calculated in different manner depending on the number of valid offers received). More specifically, an offer will, in principle, be considered abnormally low or disproportionate if it is lower than the base budget by more than 25 %, in case it is lower than the rest of the offers by more than 20 % (when there are two tenderers), or by more than 10 % (where there are three or more bidders, with some corrections).[37] On top of that, exceptionally, and considering the subject-matter of the contract and prevailing market circumstances, the contracting authority may reduce by a third these percentage rates, offering a sufficient motivation in the tender documents. And, in any case, in order to assess the bids as disproportionate, the contracting authority may consider the relationship between the solvency of the tenderer and the offer submitted. As we see, this legislation offers a staggered approach to the screening of abnormally low tenders that is not without difficulty. In the case of awards based on the most economically advantageous tender (MEAT), in order to screen for apparently abnormally or disproportionately low offers, contracting authorities must establish in the tender documents the objective parameters, if any, that will be used to determine that a proposition cannot be fulfilled due to the inclusion of abnormal or disproportionate low values. If the price offered is one of the objective criteria to be used as a basis for the award, the tender documents can indicate the limits, if any, that will be used to determine that a proposition cannot be fulfilled due to the inclusion of abnormal or disproportionate low price. This

36. However, as indicated in the contribution by Dragos, Neamtu and Suciu, these rules seem to be circumvented sometimes and contracting authorities may reject tenders that are 5 % lower than the estimated budget, which is a clearly illegal practice, as the authors rightly point out.
37. For further details, see my other contribution to this book.

gives contracting authorities more discretion than in the case of tenders awarded under the lowest price criterion.

Finally, and along the same lines, *Italian* law gives broad flexibility to contracting authorities to investigate potentially abnormally low tenders, but also sets two specific screening rules. On the one hand, when contracts should be awarded according to the lowest price, and as long as more than 5 tenders are received, the screening is based on the average discount offered by the tenderers, tempered by excluding the highest and lowest. On its part, when MEAT is used, screening is due of all tenders whose price quotation and the marks gotten for the criteria different from price both exceed 4/5 of the maximum marks possible. As a complement, the costs relating to the workforce and to the security on the workplace are estimated beforehand by the contracting authority; and no tenderer can submit a lower quotation concerning the costs of workplace security.

2.2.2. The Existence of a Duty to Reject Abnormally Low Tenders

A second issue that is open for domestic legislations to regulate is whether, once the authority has found an offer to be abnormally low after completing the required written *inter partes* procedure,[38] there is an obligation to reject it or, on the contrary, if the contracting authority can accept it on the basis of any other overriding considerations. In this regard, some jurisdictions leave this to the discretion of the contracting authority (with or without imposing general criteria to be taken into consideration), while others expressly mandate the rejection of abnormally low tenders. Indeed, a first group of jurisdictions expressly requires the rejection of abnormally low tenders. Under *German* law, there is a legal prohibition of taking into account tenders that have been officially ascertained to be abnormally low. Equally, under *Polish* law, contracting entities are obliged to reject tenders containing an abnormally low price in relation to the subject-matter of the contract, and an infringement of this duty to reject abnormally low tenders is a specific ground for appeal. Finally, the situation in *Italy* is a hybrid because the applicable rules are not explicit on whether contracting authorities must or may dismiss abnormally low tenders and, on its part, the case law has interpreted that there is a duty to reject in case of award to the lowest price, and simply a power to do so in case of award to the MEAT.

38. It is worth mentioning that, on paper, all jurisdictions have properly adopted a procedure that meets the requirements of EU rules and case law. However, practice may be different, as the *Romanian* example shows.

In a second group of jurisdictions, contracting authorities retain the discretion to reject or accept an abnormally low tender (although they can be subjected to some general criteria in its exercise). This is the case in *Romania*, where contracting authorities do not have to automatically dismiss abnormally low tenders (although, in practice, they seem to generally opt for rejection). Almost identically, in the *United Kingdom*, it is not entirely clear what should happen if the bid is deemed as not genuine, serious or viable after the test is conducted, given that the Regulations in the UK adopt the same wording of the directive and mention that the test must be conducted before the tender 'may' be excluded (which does not impose an obligation to reject, despite it being the most logical consequence of a finding of abnormality). Similarly, according to *Danish* law, there is no mandatory requirement to reject abnormally low tenders and contracting authorities in principle enjoy wide discretion in this respect (unless, as a consequence of the abnormally low price, there is a risk that it will be necessary to correct the price subsequently – which would be contrary to the applicable rules). In practice, most Danish contracting authorities consider it irrelevant to reject what appears to be an abnormally low tender and, as a consequence, rejections on this basis are relatively rare. Likewise, under *Spanish* law, there is no positive obligation to automatically reject abnormally low or disproportionate tenders, but contracting authorities are under serious pressure to make sure that the contract can be satisfactorily executed in the terms of the offer if they opt not to reject it. Finally, under *French* law, there is no mandatory requirement to dismiss abnormally low tenders. However, rejection can be mandatory if the abnormally low tender was submitted by an undertaking in a dominant position (impliedly, to prevent instances of predatory pricing) and, increasingly, decisions not to reject abnormally low tenders are scrutinized in search for manifest errors of assessment, thereby imposing significant pressure on contracting authorities willing to retain them.

As we see, even in the jurisdictions where rejection is not mandated, there is a clear trend towards rejection of abnormally low tenders, and this may support the future consolidation, as a matter of EU law, of a positive obligation to reject abnormally low tenders unless sufficient overriding reasons can be provided by the authority (subject always to a proportionality analysis).

2.2.3. (In)Existence of Special Rules for Abnormally Low Tenders Tainted with State Aid

Even if there are other potentially interesting aspects for a comparative analysis, the last bit of the domestic rules that we will scrutinize refers to the rules applicable to abnormally low tenders tainted by State aid. It must be stressed that, despite the relevance given to this issue in the EU directives, there are

jurisdictions where this is clearly an underdeveloped area of public procurement and competition law.[39] The very limited experiences in *Italy*, *France*, *Spain*, *Germany* or *Denmark* show how unimportant this issue is in practice, or that these matters are much more likely to be challenged at the EU level than in domestic jurisdictions (probably in view of the restrictions analysed above § 2.1.3). *Poland* seems to accumulate a larger number of cases, but they seem to have been decided on the grounds of procedural issues (expiry of time limits to provide evidence of the legality of the aid) rather than on their merits. The case law is also more specific in *Romania*, particularly as regards State aid for social policy goals, where tenderers have been able to successfully justify the viability of their offers on the grounds that they were receiving legal State aid. My impression is that the mere reproduction of the rules in the EU Directive in domestic legislation and the limited powers of contracting authorities and domestic courts in the area of State aid have significantly restricted this area of intersection between public procurement and competition law that, in my view, deserves more attention in the future.

3. Treatment of Non-Compliant Bids

3.1. EU Rules and Case Law

During the tender evaluation process, and as a result of applying the pertinent evaluation rules, contracting authorities can determine that, without being abnormally low (above § 2), a given tender is not fully compliant with the technical specifications or other requirements regulating the tender. This deviation from the tender requirements should be determined in accordance with a general mandate to accept functional and performance equivalents and, consequently, cannot be justified on purely formal terms or by relation to a given standard – at least if alternative standards are available and if the tenderer has proven the equivalence of the proposed solution under the latter [art 23(4) and 23(5) dir 2004/18]. In any case, deviations from the requirements set by the contracting authority in the tender documents can still take place under the test of functional or performance equivalence, and a determination that a bid is not fully compliant with the tender requirements can clearly take place under the regime regulating technical specifications.

39. See GS Ølykke, 'The Legal Basis Which Will (Probably) Never Be Used: Enforcement of State Aid Law in a Public Procurement Context' (2011) 2 *European State Aid Law Quarterly* 457.

In that situation, however, there is room for significant variation as regards the degree of non-compliance of bids.[40] At the one extreme, bids can be completely *unsuitable* for the purposes intended by the contracting authority and, at the other extreme, tenders can be merely *non-compliant* with marginal or secondary issues that would not significantly alter the ability of the tender to satisfy the contracting authorities' needs. Any imaginable situation lying in the middle of these two extremes is possible and, consequently, a rigid rule applicable equally to all instances of formal non-compliance seems to offer relatively limited results. The difficulty in this area derives from the silence of the directive, which does not provide a rule applicable to non-compliant tenders.

In this regard, it should be stressed that contracting authorities might be willing to accept relatively minor deviations from the tender requirements provided that, overall, the tender is beneficial to their interests.[41] Therefore, interpreting the silence in the directive as imposing an automatic and non-waivable requirement to reject all non-fully compliant bids could limit unnecessarily the alternatives of the contracting authority and may defeat the purpose of the procurement procedure by imposing the contracting of overall second-best solutions. Generally, it is worth recalling that the directive acknowledges that contracting authorities might consider it appropriate to expressly confer on tenderers the possibility to submit alternative solutions that do not fully comply with all the tender requirements, or even that substantially depart from the tender requirements in certain aspects, as long as they can still satisfy the needs intended to be covered by the contract – *ie variants* that meet the 'standard' or 'core' tender requirements. This alternative is available to contracting authorities as long as they (strictly) comply with certain specific rules laid down in the EU public procurement directives. However, the issue of the treatment of non-compliant bids will arise where variants are not admitted (or, marginally, where variants do not comply with the core manda-

40. Such differentiation between unsuitable and non-fully compliant bids has recently been stressed. See Opinion of AG Poiares Maduro in case C-250/07 *Commission-Greece* 10-13, where it is argued that a tender cannot be rejected as 'unsuitable' only because it does not satisfy *fully* the criteria set out in the call for tenders, and that 'unsuitability' rather arises when the tender cannot cover the needs of the contracting entity – *ie* when there is a *substantial* departure from the criteria set out in the call for tenders. The argument is implicitly echoed by the CJUE in Case C-250/07 *Commission v Greece* [2009] ECR I-4369 43, distinguishing between unsuitability and non-conformity that constitutes a mere inaccuracy or a mere detail.
41. Generally, on the acceptance of tenders non-compliant with substantive requirements or procedural formalities, see Arrowsmith (n 4) 493-499.

tory requirements). Finally, it should also be borne in mind that the treatment granted to non-fully compliant bids can alter the outcome of the tendering process and, more generally, can have an impact on competition[42] and on the outcome of the tender procedure. Therefore, it deserves some detailed analysis.

3.1.1. Restriction of the Criteria available to Determine Compliance

As a preliminary issue, it should be stressed that determinations of compliance or non-compliance of tenders should be conducted solely on the basis of the criteria set out in the call for tenders. In this regard, the EU judicature has consistently stressed that, when reference has been made to certain standards in the setting of the technical specifications applicable to a given tender, offers that comply (or are certified to comply) with those standards cannot be rejected on technical grounds.[43] Also, the principle of equal treatment of tenderers and the ensuing obligation of transparency prohibit contracting authorities from rejecting a tender which satisfies the requirements of the invitation to tender on grounds which are not set out in the tender specifications, but adopted after the submission of the tenders.[44] Therefore, it should be clear that determinations of compliance by contracting authorities are restricted to the criteria set in the contract documentation – primarily as an obligation ensuing from the principle of equal treatment and as a clear rule aimed at preventing contracting authorities from exercising unrestricted freedom of choice amongst tenders.

3.1.2. The Possibility to Ask for Clarifications when a Tender Seems to Be Non-Compliant

A related issue concerns the degree of discretion or the duty under which the contracting authority may find itself when it identifies an imprecise tender or one which does not seem to meet the technical requirements of the relevant tender specifications (*ie* a seemingly non-compliant tender). In contrast to the

42. Similarly, see C Roussel, 'Variantes et libre concurrence' in C Ribot and J-L Autin (eds), *Environnements. Les mots du Droit et les incertitudes de la modernité. Mélanges en l'honneur du Professeur Jean-Philippe Colson* (Grenoble, Presses Universitáires de Grenoble, 2004) 577, 579-582.
43. In particular, as regards medical devices that bear a 'CE' marking, the CJEU clearly holds that contracting authorities are generally precluded '*from being entitled to reject [...] on grounds of technical inadequacy, medical devices which are certified as being in compliance with the essential requirements provided for*' by the relevant directive; see Case C-6/05 *Medipac-Kazantzidis* [2007] ECR I-4557 50-52; and Case C-489/06 *Commission v Greece* [2009] ECR I-1797 43.
44. Case C-6/05 *Medipac-Kazantzidis* [2007] ECR I-4557 54.

situation concerning abnormally low tenders (above § 2.1.1), Directive 2004/18 does not contain any provision which expressly sets out the procedure to be followed in the event that the contracting authority finds that the tender submitted is imprecise or does not meet the technical requirements of the tender specifications.

The CJEU has addressed this issue – although exclusively in connection to restricted procedures (which conclusions can be applied to open procedures) – and has found that

> To enable the contracting authority to require a tenderer whose tender it regards as imprecise or as failing to meet the technical requirements of the tender specifications to provide clarification in that regard would be to *run the risk of making the contracting authority appear to have negotiated with the tenderer on a confidential basis, in the event that that tenderer was finally successful*, to the detriment of the other tenderers and in breach of the principle of equal treatment. [...] it does not follow from Article 2 or from any other provision of Directive 2004/18, or from the principle of equal treatment or the obligation of transparency, that, in such a situation, the contracting authority is obliged to contact the tenderers concerned.[45]

However, despite the inexistence of such a duty to request clarifications, contracting authorities can, if they so wish, engage in a non-discriminatory process whereby they allow for the correction or amplification of details of a tender where appropriate, on an exceptional basis, particularly when it is clear that they require mere clarification, or to correct obvious material errors, provided that such amendment does not in reality lead to the submission of a new tender;[46] [always provided that]

> In the exercise of the discretion thus enjoyed by the contracting authority, that *authority must treat the various tenderers equally and fairly, in such a way that a request for clarification cannot appear unduly to have favoured or disadvantaged the tenderer* or tenderers to which the request was addressed, once the procedure for selection of tenders has been completed and in the light of its outcome.[47]

Therefore, differently to what applies in the case of seemingly abnormally low tenders, contracting authorities are not bound to request clarifications but

45. Case C-599/10 *SAG ELV Slovensko* [2012] nyr 37-38, emphasis added.
46. Case C-599/10 *SAG ELV Slovensko* [2012] nyr 40.
47. Case C-599/10 *SAG ELV Slovensko* [2012] nyr 45, emphasis added. One can wonder whether the *ex post* requirement in the test imposed by the CJEU is not impossible to meet (*probatio diabolica*), and whether it does not set too high a barrier for contracting authorities to effectively engage in clarification exercises.

can nevertheless do so, as long as they are scrupulous in avoiding any (perceived) instance of discrimination[48] – which may create difficulties where it is unclear whether a tender is non-compliant or abnormally low, particularly if non-compliance would depend on the value given to any specific parameter in the offer.

In my view, the argument can be even taken further and there is scope for the adoption of a '*possibilistic' or anti-formalistic approach* – oriented towards maintaining the maximum possible degree of competition by avoiding the rejection of offers on the basis of too formal and/or automatic rejection criteria for non-compliant offers. It is important to underline that the relevant case law has already offered some guidance that points in this direction by stressing that '*the guarantees conferred by the Community legal order in administrative proceedings include, in particular, the principle of good administration, involving the duty of the competent institution to examine* ***carefully*** *and impartially all the relevant aspects of the individual case*'[49] – which, in the case of public procurement, should be interpreted as requiring contracting authorities to *exercise due care* in the evaluation of the bids submitted by tenderers.[50]

To be sure, as indicated by the CJEU, the obligation of contracting authorities to review the bids for possible mistakes and to contact tenderers to seek for *correction* is limited as a mandate of the principle of non-discrimination; but the scope for *clarification* of the tenders and for the establishment of rules allowing for a flexible treatment of formally non-compliant bids, support the adoption of this possibilistic approach in the evaluation of bids (as a specification or particularization of the duty of due care or diligent administration that is required of contracting authorities).

In this regard, as reasoned by the EU case law, the contracting authority is under an obligation to conduct the revision of the bids in accordance with the principle of good administration (art 41 CFREU)[51] and is, consequently, un-

48. For critical comments, see D McGowan, 'An obligation to investigate abnormally low bids? SAG ELV Slovensko a.s. (C-599/10)' (2012) *Public Procurement Law Review* NA 165. See also the remarks by Treumer in the first chapter of this book.
49. Joined Cases T-376/05 and T-383/05 *TEA-CEGOS* [2006] ECR II-205 76, emphasis added.
50. Joined Cases T-376/05 and T-383/05 *TEA-CEGOS* [2006] ECR II-205 83.
51. Article 41 of the Charter of Fundamental Rights of the European Union (OJ 2007 C 303/1). On this general principle of EU administrative law, see T Fortsakis, 'Principles Governing Good Administration' (2005) 11 *European Public Law* 207. Of particular relevance here is one of the manifestations of the general principle of good administration, *ie* the principle of proper functioning of the administration – which

der an obligation to exercise the power to ask for additional information in circumstances where the clarification of a tender is clearly both practically possible and necessary, and as long as the exercise of that duty to seek clarification is in accordance with the principle of equal treatment.[52] This means that the contracting authority is to adopt an anti-formalistic approach that renders the effective appraisal of the tenders possible – regardless of minor deficiencies, ambiguities or apparent mistakes. Indeed, as stressed by the jurisprudence, in cases where the terms of a tender themselves and the surrounding circumstances known to the authority indicate that the ambiguity probably has a simple explanation and can be easily resolved, then, in principle, it is contrary to the requirements of good administration to reject the tender without exercising its power to seek clarification. A decision to reject a tender in such circumstances is, consequently, liable to be vitiated by a manifest error of assessment on the part of the contracting authority,[53] and could result in an unnecessary restriction of competition. Therefore, contracting authorities should ensure that the evaluation of bids leading to the award of the contract is based on the substance of the tenders – by adopting a possibilistic or anti-formalist approach that excludes purely formal decisions that restrict competition unnecessarily; subject, always, to guaranteeing compliance with the principle of equal treatment.

In that vein, it is important to stress that the duty of good administration does not go so far as to require the contracting authority to seek clarification in every case where a tender is ambiguously drafted.[54] Particularly as regards calculations and other possible non-obvious clerical mistakes, the duty of good administration is considerably more restricted and the authority's diligence only requires that clarification be sought in the face of *obvious* errors that should have been detected when assessing the bid.[55] This is so particularly because, as clearly indicated by the CJEU, the presence of non-obvious er-

implies that '*administrations are required to carry out their activities not only in accordance with the relevant legal rules but also in a professional manner and in keeping with the facts of common experience*' (ibid at 209). See also HP Nehl, *Principles of Administrative Procedure in EC Law* (Oxford, Hart Publishing, 1999) 101-165; and J Mendes, 'Good Administration in EU Law and the European Code of Good Administrative Behaviour', *EUI Working Paper Law 2009/09*, available at http://hdl.handle.net/1814/12101, last visited 9 April 2013.

52. See Case T-211/02 *Tideland Signal* [2002] ECR II-3781 37-8, and cited case law. See also Case T-195/08 *Antwerpse Bouwwerken NV* [2009] ECR II-4439.
53. See Case T-211/02 *Tideland Signal* [2002] ECR II-3781 37-38, and cited case law.
54. See Case T-211/02 *Tideland Signal* [2002] ECR II-3781 37 *ab initio*.
55. See Case T-495/04 *Belfass* [2008] ECR II-781 65-71.

rors and their subsequent amendment or correction might result in breaches of the principle of equal treatment.[56] Therefore, as the general criterion, it seems that the relevant case law intends to favour the possibilistic approach hereby advanced, subject to two restrictions: i) that it does not breach the principle of equal treatment (*ie* that it does not jeopardize the neutrality of the evaluation of tenders), and ii) that it does not require the contracting authority to develop special efforts to identify errors or insufficiencies in the tenders that do not arise from a diligent and regular evaluation. In this regard, the additional practical guidance recently offered by the CJEU is valuable:

> a request for clarification of a tender may be made only after the contracting authority has looked at all the tenders [...] Furthermore, that request must be sent in an equivalent manner to all undertakings which are in the same situation, unless there is an objectively verifiable ground capable of justifying different treatment of the tenderers in that regard, in particular where the tender must, in any event, in the light of other factors, be rejected. In addition, that request must relate to all sections of the tender which are imprecise or which do not meet the technical requirements of the tender specifications, without the contracting authority being entitled to reject a tender because of the lack of clarity of a part thereof which was not covered in that request.[57]

In conclusion, and in view of the possibilistic approach adopted by the CJEU itself towards the assessment of imprecise tenders and tenders that seem to be non-compliant, it is submitted that contracting authorities should develop the activities of evaluation of bids and award of the contract on the basis of a neutral and possibilistic approach – which must be aimed at trying not to restrict competition on the basis of considerations that are too formal (*ie* to effectively appraise which is the tender that actually or in substance offers the best conditions, regardless of minor formal defects or non-fulfilment of immaterial requirements) and, at the same time, ensuring compliance with the principle of non-discrimination and the ensuing transparency obligation. In practical terms, this flexibility in the screening of non-compliant offers prior to rejection should alleviate the problem.

3.1.3. Mandatory Rejection of Non-Fully Compliant Tenders

Despite the previous restriction of the grounds for the consideration of non-compliance and the flexibility and possibilistic approach towards excluding

56. Case T-19/95 *Adia Interim* [1996] ECR II-321 43-49. Similarly, Case T-169/00 *Esedra* [2002] ECR II-609 49; and Case T-195/05 *Deloitte Business Advisory* [2007] ECR II-871 102.
57. Case C-599/10 *SAG ELV Slovensko* [2012] nyr 42-44.

non-compliance, it is impossible to totally suppress the existence of cases where contracting authorities will reach the conclusion that a given tender does not fully meet all applicable tender requirements. And, nonetheless, contracting authorities can be convinced that specific tender is the one that better meets their needs. In this regard, it is regrettable that Directive 2004/18 does not contain express rules determining whether contracting authorities are bound to reject non-fully compliant bids in all cases or, on the contrary, whether they can retain a certain degree of discretion to accept them. Nonetheless, this issue has been addressed by the case law of the CJEU, which has determined that '*the principle of equal treatment of tenderers requires that all the tenders comply with the tender conditions so as to ensure an objective comparison of the tenders submitted by the various tenderers*'[58] and that '[t]*hat requirement would not be satisfied if tenderers were allowed to depart from the basic terms of the tender conditions* [...] *except where those terms expressly allow them to do so*'.[59] Therefore,

> it is also essential, in the interests of legal certainty, that the [contracting authority] be able to ascertain precisely what a tender submitted in the course of a procurement procedure means and, *in particular, to determine whether the tender complies with the conditions set out in the contract documents*. Thus, where a tender is ambiguous and the [contracting authority] is not in a position to establish, quickly and efficiently, what it actually means, that institution *has no choice but to reject the tender*.[60]

Consequently – unless contract documents expressly allow for specific departures from the basic requirements (*ie* unless variations were authorised) – there seems to be an absolute obligation to dismiss non-fully compliant bids as a requirement or corollary of the principles of equality of treatment[61] and legal certainty. Therefore, the acceptance or rejection of a non-fully compliant bid is not within the discretion of the contracting authority – which must automatically reject all non-compliant bids in order to guarantee equality of treatment. In my opinion, such interpreting case law is unnecessarily restrictive and leads to excessive limitations of competition based solely on largely formalistic criteria that might also diminish the ability of contracting authori-

58. Case C-243/89 *Storebaelt* [1993] ECR I-3353 37.
59. Case C-243/89 *Storebaelt* [1993] ECR I-3353 40.
60. Case T-195/08 *Antwerpse Bouwwerken NV* [2009] ECR II-4439 58, emphasis added. See also Case T-211/02 *Tideland Signal* [2002] ECR II-3781 34.
61. See P Braun, 'Selection of Bidders and Contract Award Criteria: The Compatibility of Practice in PFI Procurement with European Law' (2001) 10 *Public Procurement Law Review* 1, 12. *Cf* Trepte (n 4) 297.

ties to obtain value for money. However, it must be reckoned that this is the current state of the law at the EU level,[62] which can only possibly be tempered by an application of the principle of proportionality.[63]

3.1.4. Preliminary Conclusion on the Requirements Imposed by EU Public Procurement Rules

As a matter of EU law, then, contracting authorities need to assess tender compliance exclusively on the basis of the requirements included in the tender documents and cannot exclude tenders on the basis of technical defects where functional equivalence or compliance with an existing European standard is proven. Seemingly, as a requirement derived from the principle of good administration, they must adopt a possibilistic and non-formalistic approach in the assessment of tenders and should engage in the clarification of obvious errors whenever they identify an imprecise or seemingly non-compliant tender, always provided that they do it in a non-discriminatory, objective manner. Finally, however, contracting authorities are under an absolute requirement to reject non-compliant tenders as found (as long as it is reasonable and proportionate to do so). Again, these are the standards against which domestic rules will be assessed.

3.2. Applicable Rules in the Selected Jurisdictions

As a matter of their general principles or rules, Member States show a clear convergence around the restrictive approach imposed by the CJEU and tend to uphold rules whereby non-compliance with tender requirements implies tender rejection. However, some Member States have recently implemented regulatory changes and/or their case law has moved in the direction of: i) creating some flexibility by distinguishing between formal and substantial requirements (and, simultaneously, reducing the scope for rejection on the basis of the mere non-compliance of formal requirements), and ii) increasing the duties or powers of clarification by contracting authorities in order to minimise the instances of rejection of non-compliant bids.

62. For criticism and a proposal to introduce some flexibility in this area, Sanchez Graells (n 23) 322-323.
63. In similar terms, in his contribution to this book, Treumer also indicates proportionality as a correction.

3.2.1. Strength of the Principle of Mandatory Rejection of Non-Compliant Tenders

Some EU jurisdictions follow very closely the seemingly absolute requirement for the rejection of non-compliant tenders that can be read in the CJEU leading case of *Storebaelt*. This is particularly the case of France, Romania, Denmark and Poland – and, to a large extent, of Germany, Italy and Spain; whereas the *United Kingdom* seems to allow for a more flexible approach. Notwithstanding such general approach, most of the jurisdictions have started to create some flexibility, particularly concerning formal requirements, as we shall see in more detail below. However, the overall impression is that the general principle of mandatory rejection of non-compliant tenders is still the default rule of thumb.

Indeed, *France* seems to be amongst the most restrictive Member States, since a general principle of automatic rejection of non-compliant tenders is clearly set out and there are very limited exceptions available in the case law – so that tenders cannot be completed, or modified, or simply rectified in case of mistakes. As a matter of principle, contracting authorities must reject non-compliant tenders, whether they are non-compliant on the substance or with formal requirements, and when they deviate from any prescriptions present in the tender documentation, even if they are not material or directly relevant to the object of the contract.

Similarly, *Romania* follows a stringent approach, since contracting authorities are required to reject the tenders if they do not comply with the requirements of the tender documentation (without any legal distinction between formal and substantive requirements), or if they comprise proposals for the disadvantageous modification of the contractual clauses established by the contracting authority (*ie* where tenderers condition their offers to a 'softening' of the contractual requirements).

Denmark also retains a rather restrictive approach and enforces a broad principle whereby acceptance of non-compliant tenders is in general prohibited. Even if a distinction between fundamental and non-fundamental substantive requirements has been developed in the case law, the interpretation of "fundamental" is expansive and, consequently, non-compliance often leads to a duty to reject the tender. The approach is equally restrictive as concerns formal requirements, which has nonetheless triggered criticism by practitioners and scholars, and prompted legal reform in 2011 (below § 3.2.2). However, even under the new rules, contracting authorities are always entitled to reject tenders that do not fully comply with even the minor of formalities and, consequently, the general "pro-rejection principle" remains strong in this jurisdiction.

Poland, on its part, also adopts a rather strict rule of rejection, whereby tenders that fail to comply with any statutory requirement (*ie* those imposed by a law, whether of a substantive or formal nature), or with the specification of the essential terms of the contract, or that contain computational errors in the calculation of prices, must be rejected. The only flexibility introduced in this generally stringent rule seems to be that formal or procedural requirements created by the contracting authority that go beyond the statutorily required are not valid grounds for rejection (but additional substantive requirements are).

Germany enforces a principle of almost mandatory rejection of formally non-compliant bids, whereas it follows a more complex approach concerning substantive requirements (with a more stringent rule of rejection for price-related non-compliance and a seemingly more flexible approach to performance-related deficiencies or variations), which are coupled with a specific rule concerning the ineligibility of tenders where changes or additions have been made to the contractual documents.

In a slightly more flexible approach, *Spain* retains a very stringent approach that mandates rejection of tenders that do not fully comply with the applicable substantive requirements (since any deviation from the specifications of the tender documentation would make the award invalid on grounds of discrimination against compliant tenderers), but has developed a more nuanced approach towards formal non-compliance. While major formal shortcomings should result in the exclusion of the tender (due to incongruity of the offer), a second type of minor errors is subject to a potential request for clarifications by the contracting authority (below § 3.2.3).

Very similar in *Italy*, there is well-established case law mandating rejection of substantially non-compliant tenders, whereby the courts have constantly required rejection of tenders that do not fully meet technical specifications. In contrast, and going beyond the Spanish approach, recent legislative reforms have aimed to reverse the former rule of rejection of all formally non-compliant tenders and to set up a limited number of grounds for rejection (*ie* a *numerus clausus*) concerned with major formal defects that question the integrity or validity of the tender. Indeed, given the excessively formalistic pre-existing case law, in 2011, the Italian legislature passed a modification of the relevant rules whereby only very serious formal deficiencies trigger rejection – simultaneously increasing the duties of contracting authorities to seek clarifications where needed (below § 3.2.3).

In the most flexible position, and in line with its traditional approach to public contracts, the *United Kingdom* seems to be the jurisdiction that gives more flexibility to contracting authorities on the basis of the requirements of the prin-

ciple of proportionality. A 2009 decision by the High Court in England indicates that a contracting authority may, in some circumstances, exercise its discretion to allow bids to stand even if they are technically non-compliant; although it is not a discretion that the contracting authority is required to exercise, particularly where the cause of the non-compliance lies with the bidder and there is a risk of unequal treatment against bidders that submitted compliant tenders.[64] Therefore, contracting authorities are within their rights to use even minor instances of technical non-compliance by bidders to reject otherwise valid tenders, given that the requirement to act proportionally (*ie* the requirement to avoid rejection on the basis of an excessively formalistic approach) cannot override the requirement to treat all bidders equally in a non-discriminatory fashion and to act transparently.[65] In short, the principle of mandatory rejection of non-compliant bids may not be as tight as in other EU jurisdictions but, in practical terms, the effects seem to be largely the same.

3.2.2. Distinction between Substantive and Formal Requirements, and Reduction of (Merely) Formal Disqualification

As briefly mentioned, even in the jurisdictions where there is a stronger adherence to the general rule of mandatory rejection of non-compliant tenders, either case law or recent legislative modifications have attempted to create some flexibility by distinguishing formal and substantive requirements and, in most instances, distinguishing between essential or core requirements (which will justify or require rejection) and secondary or dispensable conditions (which will, at the very least, require a balanced analysis, if they are not excluded as causes for tender rejection). At face value, these developments seem to contradict the very strict approach followed by the CJEU but, in my opinion, can be reconciled on the basis of the principle of proportionality and with a functional re-reading of the seminal cases – where, at the bottom line, the CJEU was (impliedly) requiring that the partial non-compliance did not materially affect the ability of the tender to satisfy the needs of the contract-

64. *J B Leadbitter & Co LtdDevon County Council* [2009] EWHC 930 (Ch) (01 May 2009).
65. Morrison & Foerster (UK) LLP, *UK Public Procurement Law Digest*, January 2010, 29-30, available at http://www.mofo.com/files//Uploads/Images/20090217HKStock Exchange.pdf, last accessed on 11 April 2013.

ing authority and/or that the waiver of some requirements did not grant the tenderer a material advantage over other competing bidders.[66]

3.2.2.1. Substantive Requirements as Grounds for Rejection of Non-Compliant Bids

All the jurisdictions analysed retain a very restrictive approach to any deviations from the substantive requirements included in the tender documents. The principles of non-discrimination and legal certainty are, more or less explicitly, the basis for such a restrictive approach. Indeed, except if in accordance with the rules on the acceptance of variants, substantive non-compliance is generally a non-waivable ground for the automatic rejection of tenders. This is clearly the case in France,[67] Romania, Poland, Italy and Spain.

Germany has developed a more complicated set of rules, where price elements in the offer are subject to strict rejection requirements, whereas other substantive requirements present a state of certain conceptual uncertainty (although there is consensus on the requirement to reject technically non-compliant tenders, unless performance equivalence can be satisfactorily justified which, in the end, is the current EU rule). There is some case law that requires that non-compliance be material and to have the potential to alter the result of the competition – *ie* that sets out that tenders have to be comparable with regard to any aspect of the contractual specifications, but only within the limits of reasonableness (on which basis, some high courts have denied the ineligibility of tenders where the non-compliant items would be insignificant and would not impair competition). However, the legislature restricted this case law in 2009 by limiting the potential for non-compliance to one price element, and there is growing consensus against the creation of carve outs and exceptions to the general rule of mandatory rejection.[68]

In *Denmark*, similarly and as briefly mentioned, the case law has also attempted a more fine-grained approach to substantive requirements by creat-

66. See Arrowsmith (n 4) 662; Sanchez Graells (n 23) 322. In relation with the same situation in the US, see RD Looney, Jr., 'Public Contracts: Competitive Bidding: Material Irrelevance versus Irregularity' (1970) 23 *Oklahoma Law Review* 220, 221; and RJ Prevost, 'Contract Modification vs. New Procurement: An Analysis of General Accounting Office Decisions' (1984-1985) 15 *Public Contract Law Journal* 453.
67. Although, as pointed out by Lichère in his contribution to this book, there seems to be some confusion as to the possibility to accept minor technical deviations even when variants were not expressly admitted as long as they are slight modifications which improve the project.
68. For more information, see the detailed account provided by Burgi in his contribution to this book.

ing a distinction between fundamental and non-fundamental substantive requirements, but the interpretation of "fundamental" is expansive and, consequently, non-compliance often leads to a duty to reject the tender.

Therefore, even in Germany and Denmark, despite the efforts to create a more staggered approach towards substantive non-compliance in the case law, the default position seems to still result in *de facto* mandatory disqualification of substantially non-compliant bids. Not surprisingly, in all jurisdictions, the strictness of the rule on the rejection of non-compliant bids has created pressure for the development of case law on the duty of contracting authorities to seek clarifications and to test the functional equivalence of the apparently substantially non-compliant tenders, which can work as an escape valve and offer some room for flexibility (as we shall see below § 3.2.3).

3.2.2.2. Formal Requirements as Grounds for Rejection of Non-Compliant Bids

It also seems a general feature of all the jurisdictions analysed that they have traditionally held a rule where any formal non-compliance would trigger rejection of the tenders (for reasons such as exceeding the maximum length of the tender, providing improperly paginated documents, failing to sign all pages and annexes, not adhering strictly to the formats and formulaires published by the contracting authority, by using other languages or measurement units, etc). It is also a common feature that commentators have generally criticised such a formalistic approach and, in some jurisdictions, this has prompted the development of case law or legal rules aimed at tempering it. However, some jurisdictions such as France, Romania, Germany and Poland remain very strict regarding formal compliance. In other jurisdictions, such as Denmark, Spain or Italy, some variation is observable as regards the new rules for a more balanced treatment of formal non-compliance as a mandatory ground for tender rejection.

Indeed, a first group of jurisdictions remains very strict in the imposition of formal non-compliance as a mandatory ground for disqualification. This is clearly the case of *France*, where formal deficiencies trigger rejection and where very limited, anecdotal exceptions can be found in the case law (for instance, in cases where there was an obvious calculation error, or where an otherwise publicly available document was missing, or a signature on an annex was absent). *Romania* also enforces a very strict approach, since the case law has interpreted in almost absolute terms the requirement of formal compliance (remarkably, getting to the very formalistic point of denying the equivalence between expressing time in minutes and in fractions of an hour), although minoritarian instances of non-formalistic case law can also be found.

Similarly, in *Germany*, tenders are ineligible if they do not comply with the formal specifications of the contracting entities, such as the written form or signature requirements. The same applies in *Poland*, with the only limited exception of non-statutory formal requirements, which have been interpreted by the case law not to constitute a sufficient ground for tender rejection. In these jurisdictions, the same formalism is generally also predicable regarding the belated submission of tenders, or their submission in the wrong place.

A second group of countries, such as Spain, Denmark and Italy, have adopted rules to try to limit the effects of formal non-compliance or, at least, to offer some flexibility to contracting authorities, to different degrees.

Spain has for a long time had some rules on the treatment of formal aspects of the tenders. According to a 2001 regulation, a distinction is made between, on the one hand, the requisite to submit the tender in accordance with certain formats or models (*ie* a congruity requirement) or to respect certain limits or restrictions; and, on the other hand, the requisite to provide clear, comprehensible and consistent information throughout the tender, particularly concerning values or prices. Based on this distinction, if some tender is inconsistent with the documentation reviewed and accepted, exceeds the basic tender budget, varies substantially from the established model or contains a manifest error in the amount of the offer, or if there is any recognition by the bidder of internal inconsistencies or of any error that vitiates the offer so as to make it unworkable or non-viable, the tender shall be rejected by the contracting authority. By contrast, the change or omission of some words included in the models, provided that that does not alter their meaning, will not be sufficient to cause the rejection of the proposal. In principle, then, while the first group of major formal shortcomings should result in the exclusion of the tender (due to incongruity of the offer), the second type of errors is subject to a potential request for clarifications by the contracting authority. However, overall, the treatment of formally non-compliant tenders is still generally very strict. On the contrary, the exclusion of offers due to unclear or potentially inconsistent information is treated in a more cautious manner and subject to a proportionality test. Therefore, the rules on the possibility to request clarifications and the restrictions applicable to such clarifications in order to prevent forbidden changes to the submitted tenders become highly relevant.

Along the same lines, in *Denmark*, a legislative modification was adopted in 2011 so that contracting authorities that receive tenders that do not fulfil certain formal requirements can reject them, or can chose to: a) neglect the mistake or lacking information, provided that the contracting authority itself is in possession of the required information or documentation; b) collect the information or documentation, provided that it is publicly accessible; or c)

request that the tenderers remedy the mistake or shortcoming within a certain deadline. Implicitly, in case the contracting authority decides not to reject the tender (which still remains an option and, consequently, makes the effects of this legislative change uncertain if contracting authorities opt to adopt a conservative approach), it must do so in a transparent and non-discriminatory manner, offering all non-compliant tenderers the same remedial opportunities.[69] Therefore, the new legislation seems to give significant leeway to each contracting authority to decide on the level of formalism it wants to exercise in the assessment of the tenders received, always subject to the checks and balances imposed by the applicable general principles of public procurement.

Going a step beyond, *Italy* also adopted new legal rules in 2011, whereby it was set that contracting authorities can only reject a tender i) for lack of signature or other essential elements, or ii) if the envelope was broken or badly closed, or in any case if the principle of secrecy of tenders was violated. Any contrary clause in the tender documents is null and devoid of effects and, consequently, the grounds for rejection of formally non-compliant tenders have been subjected to a very limited *numerus clausus*. This regulatory reform followed up on a growing line of case law that criticised the prior very formalistic jurisprudence of the *Consiglio di Stato*, holding that the rejection of bids could not be justified with purely formal reasons but was possible only if the breach of the formal prescriptions in the tender documents was essentially preventing the tender from achieving its aims. Therefore, despite the existence of some academic discussion on the implications of the 2011 reform,[70] *Italy* presents the most restrictive approach to mandatory disqualification on the basis of formal shortcomings, and has expressly coupled this reform with the imposition of an extended duty of contracting authorities to seek clarifications and corrections of tenders in order to prevent any illegal rejection of non-compliant tenders.

As can be seen, in this second group of jurisdictions, the deactivation or flexibilisation of the rules on the automatic disqualification of formally non-compliant tenders goes hand in hand with an expansion of the powers and/or duties of the contracting authorities to seek clarification of imprecise or unclear tenders. This is a development that is shared, to a large extent (with the exception of *France*), with the first group of jurisdictions – although in the

69. As Treumer clearly emphasis, as well as worrying about the prospect that this legal change may not generate a change in administrative practices soon enough.
70. Indeed, the legislative amendment of 2011 has been interpreted variously by administrative case law, so that there are still some shadow zones where formalism is applied, even if the general trend is certainly for substantialism.

latter this seems to have been mainly prompted by pressure derived from the interest not to reject substantially non-fully compliant bids (above § 3.2.2.1).

3.2.3. Expansion of the Powers and/or Duties to Clarify Imprecise Tenders by Contracting Entities

It is very interesting to see how, rather than substituting the formal rule of mandatory rejection of non-compliant bids (particularly due to substantive shortcomings) – which would run frontally against the CJEU case law – the examined jurisdictions (with the exception of *France*, that continues to prevent bids from being completed, modified or simply rectified) have tried to pre-empt the problem by expanding the powers and/or duties of contracting authorities to seek clarifications from tenderers. As we have seen in relation to abnormally low tenders (above § 2.1.2), there is a substantial body of EU guidance on the exercise of the duty of good administration and the prevention of discrimination in the carrying out of such clarifications. The same principles seem to have been picked up in the examined jurisdictions in the development of the rules and case law controlling contracting authorities' enquiries when faced with an imprecise or apparently non-compliant bid.

3.2.3.1. Seeking Clarifications as a Duty or a Power of Contracting Authorities

As a preliminary issue, it is interesting to see that some Member States merely empower contracting authorities to seek for clarifications, whereas others have instituted a proper duty to request them and to investigate the potential imprecision or apparent non-compliance in the tenders. Only *France* seems to completely exclude this possibility by enforcing a very strict rule of 'tender unmodifiability'.

On the one extreme, *Denmark* leaves it up to the specific contracting authority to choose whether to default to the rejection rule or embark in a clarification enquiry (and usually considers tenderers liable for the consequences of the defects of their tenders, unless the lack of clarity or imprecision derives directly from the tender documents, on which case the contracting authority's decision to reject may be open to judicial scrutiny). Again, following a similar approach, the *United Kingdom* gives substantial room and discretion to contracting authorities to seek for clarifications, but enforces strictly the principle of non-discrimination, so that whatever remedial actions contracting authorities decide to offer to tenderers are offered to all of them in an egalitarian

manner.[71] Similarly, *Poland* merely empowers contracting authorities to seek for clarifications (although they can be found negligent if they fail to do so under certain circumstances). The relevant rules make it clear that the authorities can interpret tenders on their own and, even more, forces them to propose corrections to the tenderers in order to correct obvious misprints, obvious computational errors considering the calculation consequences of the conducted modifications, and other errors which bring about inconsistencies between the submitted tender and the specification of the essential terms of the contract but do not cause essential modifications of the tender (and economic operators will see their tenders rejected in case they do not confirm the corrections suggested by the contracting authority). This cannot imply a negotiation and the explanations may not change or supplement the submitted tender (although it seems clear that such an exchange of positions regarding a tender can be prone to litigation,[72] not least on the basis that there are undercover negotiations).

In an intermediate position, and despite the ambiguity in the law, in *Romania,* the relevant courts have ruled that the request for clarifications can be an obligation only when there are unclear or ambiguous elements in the tender, but not when there are missing documents or elements. The courts also seem to have given special relevance to the fact that an apparently non-compliant tender is the lowest-priced and, in those cases, they have tended to strengthen the obligation to seek for clarifications before its rejection. In any case, a general restriction is imposed by stressing that by asking for clarifications, authorities cannot create a competitive advantage for one of the tenderers. In a similarly mild position, the relevant administrative practice in *Spain* is to consider that contracting authorities are under a 'good administration' duty to seek clarifications from tenderers (rather than dismissing their bids automatically) in case they experience difficulties understanding the content of their offers. Contracting authorities should effectively exercise their discretion to try to obtain reasonable and limited clarifications from the tenderers where the errors are obvious or a clarification may be provided using exclusively the information already submitted in the original tender. However, they are not under an absolute obligation to do so and, should there be any risk of

71. See the Judgment of the High Court in Northern Ireland in *Clinton (t/a Oriel Training Services)* v *Department for Employment and Learning & Anor* [2012] NICA 48 (13 November 2012).
72. As is indeed the case. For details on the contradicting line of case law that, so far, has derived from such litigation, see Spyra's contribution to this book.

(perceived) renegotiation or discrimination, they should refrain from requesting such clarifications.

On the opposite extreme, imposing a positive duty of action on contracting authorities, *Italy* mandates an extensive use of the power of the contracting authority to ask for clarifications to the participants in order to prevent any illegal rejections (since, as we have seen, they are particularly limited in terms of formal non-compliance, at least as matter of general trend). Also at this end of the spectrum, *Germany* requires contracting authorities to seek clarification before they can reject an apparently non-compliant tender. However, an express limitation is set to prevent the conduct of undercover negotiations, so that the contracting authorities may only request tenderers to provide information on the tender or their suitability, but no negotiations may be conducted.

3.2.3.2. The Possibility to Request Additional and Extraneous Information

It is also interesting to see that, generally, the powers and duties of contracting authorities are limited to seeking clarification of the information already submitted, so that no new documents or extraneous information can be submitted at this stage. This is particularly clear in *Italian* case law, which has clearly set this boundary: the request of a new document not included in the original bid is not allowed, but the request of clarification of an existing document is (which has some specific effects regarding identity documents not submitted with the tenders since, under Italian law, they affect the validity of the declarations therein contained). Along the same lines, *Spanish* case law also enforces the restriction that contracting authorities can seek for clarifications always provided they do not require or receive information not originally included in the tenders. However, in quite a strong contrast, some jurisdictions, such as *Germany*, allow for a late submission of missing documentation upon request from the contracting authority and within an extended deadline, but this seems to be related to technical specifications and mostly in cases where variants are accepted.

3.2.3.3. Clarifications and Precisions Regarding Price and Price Sub-Elements

Another interesting area is whether clarifications can affect price or price-related elements of the tenders, as it is obvious that such adjustments are likely to have an impact on the outcome of the tender. The stringent case law of the CJEU requires that errors or imprecisions in price are apparent and that they

can only be remedied with information already contained in the tender.[73] And these general guidelines seem to be followed in the examined jurisdictions. As already mentioned, the position is clearly restrictive in *Germany*, where only one price item can be corrected or clarified, and always as long as the overall price can be calculated with the information already present in the tender and in accordance with some predetermined rules (which, however, is already seen as a too lenient test by relevant commentators). In *Denmark*, a similarly restrictive approach was followed by the complaints board, which stressed that clarifications regarding price entail a risk of breach of the principle of equal treatment, and only allowed them in instances where the error or imprecision was obvious.[74] Slightly differently, in *Poland* the rule is that a tender should be rejected if it contains computational errors in the calculation of prices but, if such an error is obvious, it should be corrected by the contracting entity (and, in this regard, it is interesting to stress that the case law is adopting a growingly flexible interpretation of what is an obvious mistake that must be corrected by the contracting authority, which may run against the principles set in the CJEU case law).[75] In the other jurisdictions, it seems clear that contracting authorities need to treat any imprecision regarding price under their discretion to seek clarifications (above § 3.2.3.1).

3.2.3.4. Clarifications Regarding Technical Matters

On their part, when clarifications are concerned with technical issues rather than with price elements, the approach seems to be more lenient across the board in those jurisdictions that have specific rules concerning the clarification of price-related elements; probably as a result of the mandates of technical neutrality and the obligation to assess tenders under a performance-based approach that the EU rules require. In this regard, it is clear that there is more leeway for technical than financial clarification in *Germany*, *Denmark*

73. Case T-19/95 *Adia Interim* [1996] ECR II-321 43-49.
74. Although, as Treumer points out, the concept of "apparent" mistake used by the Danish complaints board seems to be narrower than the one adopted at the EU level.
75. In this regard, for instance, there is a case where the absence of a price was deemed an obvious error and the appeals authority decided that it should have been corrected by assigning it a value of zero. In my view, this goes beyond the limits of the CJEU case law and may unfairly advantage the tenderer in some cases, or force it to deliver goods or render services for free, which does not seem to be in line with general practice. Therefore, it seems an instance of risky legal interpretation that may need some correction in order to adjust it to the requirements of non-discrimination and transparency imposed by the CJEU.

and *Poland*. And the general impression is that the same holds true in the rest of the jurisdictions examined (again, with the only exception of *France*).

4. Conclusions

The analysis of the domestic rules applicable to the treatment of abnormally low and non-compliant tenders has shown that, overall, Member States seem to have domestic rules and practices already aligned with the requirements and recent developments in EU law.

The specific rules show quite some variety of approaches in the areas not harmonised by EU rules and the case law of the CJEU. Despite this variety, however, some trends of convergence seem clear, in terms of trying to escape formalistic assessments and to design rules that take into consideration the effects of rejection decisions on the needs of the contracting authority, the business interests of tenderers and, ultimately, the effects in the market place. In this regard, contracting authorities are increasingly vested with discretion (and the subsequent powers/duties) to assess the likelihood of non-compliant and apparently low tenders being able to meet their needs while not generating significant negative impacts in the competition for the contract (and in the market concerned).

More specifically, comparing both sets of rules, it may be worth stressing that, while the treatment of abnormally low bids is becoming more prescriptive and a rule of mandatory (or strongly encouraged) rejection seems to be the general standard (subject only to limited exceptions based on the implicit requirements of proportionality and neutrality of competitive effects, in some jurisdictions and at the EU level); on its part, the treatment of non-compliant bids seems to be pushing in the opposite direction and to be creating more flexibility for contracting authorities to avoid automatic rejection due to secondary or insignificant tender defects that do not alter the competition and that would exclude the otherwise more advantageous or beneficial tender. Even if these developments are moving in opposite directions, they seem to aim to converge in a common ground where contracting authorities base their decisions whether to reject or not abnormally low and non-compliant tenders on the effects that such decisions can have on competition (for the contract, and in the market concerned) and, in view of those, where contracting authorities can decide whether there are other (proportional and non-discriminatory) reasons that justify non-rejection. This also seems to be in line with the most recent case law of the CJEU and, in particular, with the approach adopted in *Slovensko*.

In parallel, procedural requirements applicable to both cases seem to be growing closer and the *inter partes* procedure foreseen for abnormally low tenders has been more or less extended (with some adaptations) to the request of clarifications concerning imprecise or apparently non-compliant tenders, at least in connection with the existence of obvious or apparent mistakes (although this area is showing less uniformity and some countries may be adopting flexible approaches that exceed the room of manoeuvre granted by the CJEU in its case law). In both areas, then, domestic rules and practice are increasingly echoing the development of 'good administration' duties and, in that regard, mirror the developments at the EU level (which should be welcome, particularly in view of the upgrade of the contents of the EUCFR to Treaty level after Lisbon).

All in all, in my view, the only area that seems to be significantly underdeveloped is that of the treatment of abnormally low bids tainted with State aid, which may call for a revision of the rules at the EU level and, possibly, for the development of more effective enforcement mechanisms at domestic level – with the desirable implication of the national competition authorities.

11 The electronic award of public procurement

Gabriella M. Racca

1. Introduction. E-procurement strategies in Europe: overcoming inertia and fragmentation

The Digital Agenda of the European Commission is one of the seven elements of the *Europe 2020 Strategy* which sets objectives for the growth of the European Union. The Digital Agenda proposes to better exploit the potential of Information and Communication Technologies tools (IT) in order to foster innovation, economic growth and progress.[1] Such tools can also contribute to maximise, in times of crisis, the efficiency of public expenditure and favour new sources of economic growth.

The 2004 Directives on public procurement put electronic and traditional means of communication and information exchange on the same level.[2] New techniques (e-auctions, dynamic purchasing system) and tools (e-Signatures, e-Catalogues, e-Notification, Buyer profiles, Electronic access to documents) were provided to favour the use of electronic communication to improve pro-

1. Commission (EU) 'A Digital Agenda for Europe', COM(2010)245 final, 19 May 2010, where a lack of interoperability is identified and "weaknesses in standard-setting, public procurement and coordination between public authorities prevent digital services and devices used by Europeans from working together as well as they should"... L. Valadares Tavares, *An Essay on the Future of e-Public Procurement in Europe: 2015-2025*, paper presented at *the 1st European Conference on e-Public Procurement*, Barcellona, March 2013, 4.
2. Directive 2004/18/EC, whereas No. 35. See: S. Arrowsmith 'Electronic reverse auctions under the EC public procurement rules: current possibilities and future prospects' (2002) in P.P.L.R., 299-330; R. Bickerstaff 'E-communication Regulation in Public Procurement: the EC and UK perspective' in S. Arrowsmith (eds.) *Reform of the UNCITRAL model law on procurement* (Thomas Reuters/West, Danvers, 2009), 288 et seq.

curement outcomes.[3] Nonetheless, the use of such instruments has been scarce. It is well known that the 2005 predictions on the use of such tools ("by 2010 at least 50 % of public procurement above the EU public procurement threshold will be carried out electronically"[4]) were incorrect.

The Commission[5] recognized that less than 5 % of total procurement budgets in the Member States is awarded through electronic systems.[6] Such percentage is very low if compared to US, Korea and Brazil.[7]

According to the European Commission's data, "*Contracting authorities and Public entities that have already implemented e-Procurement report savings of between 5 % and 20 % of their procurement expenditure. The total size of the EU's procurement market is estimated to be more than 2 trillion*

3. R. Bickerstaff 'The New Directives' Rules on E-communication Mechanisms in Public and Utilities Procurement' (2004) in *P.P.L.R.*, 277; ID., 'Review: Commission Staff Working Document on the Requirements for Conducting Public Procurement Using Electronic Means' (2005) in *P.P.L.R.* NA17.
4. Ministerial Declaration 24 November, 2005, Manchester on the occasion of the Ministerial eGovernment Conference "Transforming Public Services" of the United Kingdom Presidency of the European Council and of the European Commission, Ministers of European Union (EU) Member States, Accession States and Candidate Countries and Ministers of the European Free Trade Area (EFTA) Countries, responsible for eGovernment policy, under the chairmanship of Minister Jim Murphy, representing the UK Presidency and in the presence of European Commissioner for Information Society and Media Mrs Viviane Reding. "By 2010 all public administrations across Europe will have the capability of carrying out 100 % of their procurement electronically and at least 50 % of public procurement above the EU public procurement threshold will be carried out electronically". See G. M. Racca 'The role of IT solutions in the award and execution of public procurement below threshold and list B services: overcoming e-barriers' in D. Dragos – R. Caranta (eds. By) *Outside the EU Procurement Directives – inside the Treaty?,* (Djøf, Copenhagen, 2012),, 375.
5. Commission (EC) 'Evaluation of the 2004 Action Plan for Electronic Public Procurement Accompanying document to the Green Paper on expanding the use of e-Procurement in the EU' SEC (2010) 1214 final October 2010, 9. "The EU average figure is estimated to be less than 5 % of total value, other than in Portugal, where the mandatory approach results in nearly 100 % use of e-Procurement. France and Italy, notwithstanding being first mover countries in e-Procurement, estimate that only 4 % and 2.5 % respectively of their total procurement is conducted electronically.
6. The Portugal Law advanced in this regard as use of e-Procurement tools is mandatory for phases from notification to tender award since November 1, 2009.
7. Commission (EU) 'A strategy for e-procurement' 20 April 2012, COM(2012) 179 final, 1. "A full online procurement market place has already been achieved in Korea, which generated savings of US$ 4.5 billion (about 8 % of total annual procurement expenditure) annually by 2007; in Brazil 80 % of public procurement is carried out electronically".

euro, so each 5 % saved could result in about 100 billion euro of savings per year".[8]

Considering that Electronic tools can assure such saving and are constantly improving in quality and ease of use, the question is why it is so difficult to achieve their application either as means of communications[9] in the submission, or in the evaluation and award phase of public procurement.[10]

E-procurement can simplify the procurement procedures, reducing waste[11] and delivering lower price and better quality, by stimulating transparency and competition across the EU Internal Market.[12] Nonetheless, the main obstacle

8. Commission (EU) 'Delivering savings for Europe: moving to full e-procurement for all public purchases by 2016', IP/12/389, 20 April 2012. See also: Deutsche Bank Research: E-procurement, February 2011. Concerning possible saving in Italy see: F. P. Schiavo 'The role of eProcurement and PEPPOL in Italy' speech at the *7th PEPPOL conference*, Rome, 29 May 2012.
9. Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, Article 1, § 12 e 13, "12. 'Written' or 'in writing' means any expression consisting of words or figures which can be read, reproduced and subsequently communicated. It may include information which is transmitted and stored by electronic means. 13. 'Electronic means' means using electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means".
10. Commission (EU) 'Green Paper on expanding the use of e-Procurement in the EU', COM(2010) 571 final, 18 October 2010, 3. See also OECD 'Discussion paper on public procurement performance measures. OECD Meeting of Leading Practitioners on Public Procurement', 11-12 February 2012, 10, where the adoption of ICT solutions in public procurement ("e-procurement") is justified "on the ground of speeding up processes and enlarging the set of potential participants". R. Bickerstaff 'E-communication Regulation in Public Procurement: the EC and UK perspective' in S. Arrowsmith (edited by) *Reform of the UNCITRAL model law on procurement* cit., 288 et seq., where the author put in evidence the risk of new e-barriers in cross-border trade. See also: K. Vaidya – G. C. Callender – A.S.M. Sajeev 'Facilitators of Public E-Procurement: Lessons Learned from the U.K., U.S., and Australian Initiatives' in Khi V. Thai (eds.) *International Handbook of Public Procurement* (Auerbach Publications Taylor & Francis Group 2009), 475 et seq.
11. Directive 2004/18/EC, whereas No. 38.
12. Directive 2004/18/EC, whereas No. 12. See also: Commission (EU) 'Proposal for a Directive of the European Parliament and of the Council on public procurement' COM(2011) 896 final, December 20, 2011, whereas No. 19 and 23. Commission (EU) 'The European eGovernment Action Plan 2011-2015. Harnessing ICT to promote smart, sustainable & innovative Government' 15 December 2010, COM(2010) 743 final, see also the final compromise text of 12 july 2013. Commission (EU) 'Green Paper on expanding the use of e-Procurement in the EU', cit., 4, where the

remains public officials' *"inertia",* resisting to any change of their ingrained habits. The need of an in-depth and intense retraining of the staff is evident.

The second related obstacle is the widespread "market fragmentation that can emerge from the existence of a wide variety of systems, sometimes technically complex, deployed across the EU (and sometimes within a single Member States) that can lead to increased costs for economic operators/suppliers".[13]

Together with the market fragmentation there is demand-side fragmentation, considering the existence of 250,000 contracting entities[14] in EU, which does not allow the achievement of significant professional skills to tackle the use of IT solutions. Fragmentation of procuring entities is connected with markets fragmentation and the award of a relevant number of small contracts with evident limits to an effective competition throughout the internal market. The ensuing result is that cross-border procurement reaches only 1.6 % of contracts.[15]

E-procurement could provide the reduction of distance barriers and information gaps.[16] Moreover, the use of IT solutions allows collection of data and information on all transactions and connected payments from the contracting

benefits of e-procurement are identified in: 1. increased accessibility and transparency, 2. benefits for individual procedures compared to paper based systems, 3. benefits in terms of more efficient procurement administration, 4. Potential for integration of EU procurement markets. See: S. Croom – A. Brandon Jones 'Key Issues in E-Procurement: Procurement Implementation and Operation in the Public Sector' in Khi V. Thai (eds.) *International Handbook of Public Procurement* cit., 447; A. Deckers – Head of Unit for e-procurement and economic analysis of procurement markets 'New perspectives on e-procurement in Europe' speech at the *7th PEPPOL conference*, Rome, 29 May 2012.

13. Commission (EU) 'A strategy for e-procurement' 20 April 2012, COM(2012) 179 final, 5.
14. Commission (EU) 'Evaluation Report – Impact and Effectiveness of EU Public Procurement Legislation' 27 June 2011, SEC(2011) 853 final, vi.
15. EU Commission, 'Green Paper on the modernisation of EU public procurement policy – Towards a more efficient European Procurement Market', COM(2011) 15.
16. K. Dooley – S. Purchase 'Factors Influencing E-Procurement Usage' in Khi V. Thai (eds.) *International Handbook of Public Procurement*, cit., 461-462. In the same book see also: K. Vaidya – G. C. Callender – A.S.M. Sajeev 'Facilitators of Public E-Procurement: Lessons Learned from the U.K., U.S., and Australian Initiatives', 478-479.

authorities to economic operators involved.[17] Such amount of data leads to a precise map of public spending quality and quantity.[18]

The EU Commission provided some non-legislative initiatives to clarify and encourage the use of e-procurement[19] to overcome administrative and technical barriers to cross-border e-procurement (Pan-European Public Procurement Online – PEPPOL,[20] e-CERTIS[21] and open e-PRIOR[22]).

17. Italian law recently (d.l. 9 February 2012, n. 5, art. 20, c. I, lett. a, converted in Law n. 35 of 2012) implemented the "national database on public contracts" (Banca Dati Nazionale dei contratti pubblici) that will acquire the data of economic operators related to the technical, organizational, economic, financial and general requirements for the qualitative selection of tenderers in the procedures. See the Italian Authority for the Supervision of Public Contracts for works, services and supplies, Atto di Segnalazione n. 1 del 12 gennaio 2012, in http://www.avcp.it/portal/public/classic/AttivitaAutorita/AttiDellAutorita/_Atto?ca=4890. About the relevance of eProcurement in information processing see: M. Essig – M. Amann 'E-procurement and Its Role in Supply Management and supplier Valuation' in C. Harland – G. Nissimbeni – E. Schneller (eds.) *The SAGE Handbook of strategic Supply Management* (SAGE, London, 2013), 425-426.
18. A. Merrill – Procurement & Commercial Director – Scottish Government 'PEPPOL & Public Procurement Reform' speech at the *7th PEPPOL conference*, Rome, 29 May 2012. In this perspective the experience of the 'Scottish Management Information Hub' seems very interesting. The Hub has been in existence since 2006 and is a centrally funded and sophisticated analytical tool provided with the Scottish Procurement Reform Programme. "The Hub allows organisations to: identify how much they are spending on external goods and services from third party suppliers, identify who the key suppliers are, ascertain how many transactions were made with each supplier, highlight commonality across suppliers and spend categories, identify spend with small and medium sized suppliers, highlight spend with local suppliers". See also: Scottish Government, in http://www.scotland.gov.uk/Topics/Government/Procurement/eCommerce/ScottishProcurementInformationHub. Participating organisations are required provide a detailed annual extract from their accounts payable system. The specification and example data extract templates can be downloaded by anyone with a log-in to http://www.spikescavell.net/
19. Commission (EU) 'Action plan for the implementation of the legal framework for electronic public procurement' 29 December 2004, SEC(2004)1639.
20. The Pan-European Public Procurement Online (PEPPOL) project is completed at the end of August 2012. Now the Open PEPPOL association promote European businesses to easily deal electronically with any European public sector buyers in their procurement processes. See http://www.peppol.eu/
21. Commission (EU) 'Proposal for a Directive of the European Parliament and of the Council on public procurement' COM(2011) 896 final, December 20, 2011, whereas No. 33. "Commission provides and manages an electronic system – e-Certis, which is

Progress has been made in the electronic publication and dissemination of information about procurement opportunities. However, the developing of common approaches, standards or templates for the on-line submission and processing of tenders is delayed. It has been underlined that "while solutions have been engineered for individual e-procurement platforms, no attention has been devoted to aligning methods or approaches for submitting tenders electronically".[23] The use of electronic means in public procurement in Europe requires standardisation[24] and interoperability[25] among the systems used in different Member States and in the phases of the awarding procedure.[26] Otherwise, as already pointed out,[27] the risk is to build new electronic barriers.

updated and verified on a voluntary basis by national authorities. The aim of e-Certis is to facilitate the exchange of certificates and other documentary evidence frequently required by contracting authorities. Experience acquired so far indicates that voluntary updating and verification is insufficient to ensure that e-Certis can deliver its full potential for simplifying and facilitating documentary exchanges for the benefit of small and medium-sized enterprises in particular. Maintenance should therefore be rendered obligatory in a first step; recourse to e-Certis will be made mandatory at a later stage", see also the final compromise text of 12 july 2013.

22. F. G. Moran 'Pan-European interoperable electronic public procurement: enabling its implementation within the European Union institutions, agencies and other bodies, and facilitating its adoption across the member States' (2012) *5th International Public Procurement Conference*, in http://www.ippa.org/IPPC5/Proceedings/Part2/PAPER2-4.pdf.
23. Commission (EU) 'Green Paper on expanding the use of e-Procurement in the EU', cit., 17.
24. The standardisation refers to tender and contract documents and also to technical specifications. An exemple it's provided by the Common Procurement Vocabulary (CPV)' that was adopted by Regulation (EC) No 2195/2002, which is a hierarchically structured nomenclature, divided into divisions, groups, classes, categories and subcategories.
25. Commission (EC) 'Requirements for conducting public procurement using electronic means under the new public procurement Directives 2004/18/EC and 2004/17/EC' 8 July 2005, SEC(2005) 959, 8. 'Interoperability' is used here to refer to the capability of ICT systems (and of the business processes they support) to exchange information or services directly and satisfactorily between them and/or their users, so as to operate effectively together.
26. Directive 2004/18/EC, whereas No. 35, where it is stated "As far as possible, the means and technology chosen should be compatible with the technologies used in other Member States".
27. G. M. Racca 'The role of IT solutions in the award and execution of public procurement below threshold and list B services: overcoming e-barriers' in D. Dragos – R.

The recent Green Paper on expanding the use of e-procurement in the EU has highlighted the need to identify solutions to improve and enhance interoperability between local, regional and national e-procurement systems. Member States should participate in a "collaborative process, in which independent systems belonging to unrelated parties interact through the exchange of business information".[28] To achieve such goals, the EU Commission has established an e-Tendering Expert Group (e-TEG) tasked with defining a blueprint for pre-award e-procurement that provides a basis for the development of "best-of-breed" solutions. The objective is to promote solutions that achieve the optimal balance between usability and other attributes, such as security. An essential task for the e-TEG is to define an effective model for e-submission, as this is currently the main bottleneck for the wider implementation of e-procurement. On-going standards work, such as that carried out by the CEN BII workshop, will be leveraged by the e-TEG.[29]

A case-book on the best practices on the implementation of e-procurement platforms that assure accessibility, ease of use and cost-effectiveness has been published recently.[30] The costs of e-procurement facilities require invest-

Caranta (eds. By) *Outside the EU Procurement Directives – inside the Treaty?*, cit., 376 et seq.

28. Commission (EU) 'Green Paper on expanding the use of e-Procurement in the EU', cit., 13.
29. Commission (EU) 'A strategy for e-procurement' 20 April 2012, COM(2012) 179 final, 8. the e-TEG will also present recommendations on actions to be taken by the EU institutions and Member States to ensure the roll-out of eprocurement platforms that guarantee cross-border access and facilitate use by all economic operators in particular SMEs, whilst nonetheless preserving Member State autonomy to design solutions that best fit national requirements and can be integrated with existing platforms. See the recommendations provided by the Expert Group on e-tendering (e-TEG) in the 'High level Report – Part I', in http://ec.europa.eu/internal_market/publicprocurement/docs/eprocurement/conferences/121214_e-tendering-expert-group-draft-report-part1_en.pdf and in the 'Operational Recommendations – Part II', in http://ec.europa.eu/internal_market/publicprocurement/docs/eprocurement/conferences/121214_e-tendering-expert-group-draft-report-part2_en.pdf
30. Pwc, 'Golden Book of e-Procurement good Practice' 5 December 2012, in http://ec.europa.eu/internal_market/publicprocurement/docs/eprocurement/conferences/121214_e-procurement-golden-book_en.pdf. The outcome of this work will be used to promote convergence towards and take-up of such good practices by Member States and public authorities investing in e-procurement infrastructure.

ments that cannot be supported by all contracting authorities.[31] New organizational models are required to overcome fragmentation.

In the recent proposal for a new Directive on public procurement, the electronic means of communications are recommended and a general obligation to use such means will be imposed earlier on central purchasing bodies, after a transition period.[32] The use of electronic procedures by Central Purchasing Bodies (CPBs) can reduce costly procurement back-office functions and reap scale economies in procurement administration.[33] The future EU Directive underline the difference between small procuring entities and wider organizations such as CPBr, which can afford the change of the instruments and the improvement of strategic sourcing skills.

2. Efficiency and transparency through e-procurement solutions.

The principle of transparency is connected to other principles of the Treaty such as the principle of freedom of movement of goods, freedom of establishment and freedom to provide services.[34] Transparency assures impartiality and non-discrimination and favours the participation of economic operators

31. Commission (EU) 'Green Paper on expanding the use of e-Procurement in the EU', cit., 5. The ability to perform procurement electronically requires investment throughout the procurement chain to build the necessary capacity and manage the change-over. Investment costs in national and regional e-Procurement facilities – spanning e-portals to more comprehensive solutions – range from 0.5m€ to 5m€.
32. Commission (EU) 'Proposal for a Directive of the European Parliament and of the Council on public procurement' COM(2011) 896 final, December 20, 2011, whereas No. 25, where it is stated that "electronic means of communication are particularly well suited to support centralised purchasing practices and tools because of the possibility they offer to re-use and automatically process data and to minimise information and transaction costs. The use of such electronic means of communication should therefore, as a first step, be made compulsory for central purchasing bodies, while also facilitating converging practices across the Union", see also the final compromise text of the 12 july 2013.
33. Commission (EU) 'Green Paper on expanding the use of e-Procurement in the EU', cit., 4. For a different perspective see: A. Sánchez Graells 'Public Procurement and EU Competitions Rules' (Hart Publishing, Oxford, 2011).
34. Directive 2004/18/EC, whereas No. 2. See also art. 2 and S. Arrowsmith 'EC Regime on Public Procurement' in Khi V. Thai (eds.) *International Handbook of Public Procurement* (Auerbach Publications Taylor & Francis Group 2009) 267-268.

in the selection for the award of public contracts.[35] Transparency seems also relevant to improve monitoring contracts in all the phases of "procurement cycle", from the definition of needs to the end of the contract performance, avoiding conducts aimed at distorting competition in the relevant market. The advertising of the will to award a contract has the aim to favour competition between the economic operators and to facilitate control of the compliance with the award criteria.[36]

Transparency provides "a system of openness into public purchasing in Member States, so a greater degree of accountability should be established and potential direct discrimination on grounds of nationality should be eliminated".[37] Transparency in public procurement is achieved through communi-

35. Case C-260/04, Commission v. Italy [2007] E.C.R. I-7083; Case C-231/03, Consorzio Aziende Metano (Coname) Comune di Cingia de' Botti (Coname) [2005] E.C.R. I-7316; Case C-275/98, Unitron Scandinavia A/S v. Ministeriet for Fodevarer e Landbrug og Fiskeri, [1999]. Concerning a contract of certain cross-border-interest see: Case C-412/04 Commission v. Italy [2008] E.C.R. I-619, § 66-78. Concerning a below threshold contract see: Case C-220/06 Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administración General del Estado [2007] E.C.R. I-12175. See: A. Brown 'Transparency Obligations Under the EC Treaty in Relation to Public Contracts that Fall Outside the Procurement Directives: A Note on C-231/03, Consorzio Aziende Metano (Coname) v Comune di Cingia de' Botti' in *PPLR* 2005, NA153-NA159. See also: G. Skovgaard Ølykke 'How Should the Relation between Public Procurement Law and Competition Law Be Adressed in the New Directive?' in G. Skovgaard Ølykke – C. Risvig Hansen – C. D. Tvarnø, *EU Public Procurement – Modernisation, Growth and Innovation* (Djof publishing, Copenhagen, 2012), 62-63 and 67.
36. Opinion of AG Stix-Hackel in Case C-247/02, Sintesi S.p.A. v Autorità per la Vigilanza sui Lavori Pubblici [2004] E.C.R. 1-9215, par. 39 where it is stated that "A minimum degree of transparency is required to guarantee competition. To that end, the directives on the award of contracts lay down a number of obligations concerning publicity. The obligation placed on the contracting authority to define the criteria in advance and also to adhere to them thereafter serves competition. On the other hand, in certain cases the need to ensure competition makes it necessary to withhold certain information about an undertaking from other undertakings". L. Valadares Tavares, *Why e-Public Procurement?*, paper presented at *the 1st European Conference on e-Public Procurement*, Barcellona, March 2013, 7.
37. C. H. Bovis 'EU Public Procurement Law' (Cheltenham 2007), 65, where are also examined the effects of the Principle of Transparency. S. Arrowsmith – J. Linarelli – D. Wallance 'Regulating Public Procurement: National and International Perspectives' (Kluw Law International London 2000) 72-73 where the authors suggested that the concept of transparency can in fact be broken down into four distinct aspect: Publicity for contract opportunity, publicity for the rules governing each procedure, a principle that limits the discretion of procuring entities, the possibility for verification

ty-wide publicity and advertisement of public procurement contracts over certain thresholds".[38] The EU case-law on transparency in public procurement, implies an obligation to provide "a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procurement process to be reviewed".[39] All potential tenderers have to be in a position of equality[40] as regards the scope of the information in a contract notice.[41] In the pre-award phase the principle of transparency "implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract".[42] The

of the fact that the rules have been followed. See also: C. Loyola – M. Ortíz 'The experience of information acquisition in chilean public market via bi implementation' (2012) *5th International Public Procurement Conference*, in http://www.ippa.org/IPPC5/Proceedings/Part9/PAPER9-10.pdf

38. C. H. Bovis 'EU Public Procurement Law' cit., 65, where are also examined the effects of the Principle of Transparency.
39. Case C-324/98, Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG, [2000], E.C.R. I-10745 § 61-62. See also: Case C-513/99 Concordia Bus Finland [2002] ECR I-7213, § 81, and Joined Cases C-21/03 and C-34/03 Fabricom [2005] ECR I-1559, § 26. See: Directive 2004/18/EC, art. 42(2), where are provided the rules concerning the general availability and non discrimination in the use of the selected electronic means.
40. Case C-213/07 Michaniki [2008] ECR I-0000, § 44 and 45; Case C-231/03, Consorzio Aziende Metano (Coname) Comune di Cingia de' Botti (Coname) [2005] E.C.R. I-7316, § 17; C-315/01 GAT [2003] ECR I-6351, § 73; Case C-470/99, Case C-448/01 EVN and Wienstrom [2003] ECR I-14527, § 47, Universale-Bau and Others [2002] ECR I-11617, § 93; Case C-19/00 SIAC Construction [2001] ECR I-7725, § 34. R. Caranta 'Transparence et concurrence', in R. Noguellou – U. Stelkens (eds.) *Droit comparé des Contrats Publics* (Bruxelles, Bruylant, 2010), 149.
41. Case C-199/07 Commission v. Greece, [2009] ECR I-10669 § 38; Case C-231/03, Consorzio Aziende Metano (Coname) Comune di Cingia de' Botti (Coname) [2005] E.C.R. I-7316, § 18 and 21. P. Trepte 'Transparency and accountability as tools for promoting integrity and preventing corruption in procurement: possibilities and limitations' Expert Group Meetinig on Integrity in Public Procurement, 20-21 June 2005, Château de la Mouette, Paris.
42. Case C-496/99 EU Commission v. CAS Succhi di Frutta SpA [2004] E.C.R. I-3801, § 111; Case T-437/05 Brink's Security Luxembourg v. Commission [2009] E.C.R. II-3233, 114-115.

electronic instruments can greatly improve the effectiveness of the principle of transparency and efficiency.

The correct use of interoperable IT solutions can improve the accessibility of the call for tenders and thus increase the participation of SMEs, also in cross-border procurement.[43]

It is important to remove barriers that currently discourage newcomers from undertaking onerous registration or authentication procedures required by some platforms – in some cases requiring the use of tools and assets only available in the country concerned.

3. Pre-award electronic advertising: the evolution towards full electronic means for the submission of the requirements and of the offers.

In the procurement process, the electronic means have been, so far, one of the ways provided by EU directives to give economic operators information of an award procedure.[44] The 2004 Directives, in some cases, limited the right of contracting authorities to choose the means of communication and imposed the electronic one.[45] Tender documents can be either made available or sent to economic operators by electronic means.[46] In the case of a Dynamic Pur-

43. Directive 2004/18/EC, whereas No. 35.
44. Directive 2004/18/EC, art. 42, where it is also specified that "the means of communication chosen must be generally available and thus not restrict economic operators' access to the tendering procedure".
45. Commission (EC) 'Requirements for conducting public procurement using electronic means under the new public procurement Directives 2004/18/EC and 2004/17/EC' 8 July 2005, SEC(2005) 959, 6 and 7, Where it is also stated that "Technical problems within the contracting authority's network, service disruptions and system failures may impede access to contract documents, or may disrupt the procurement process at a critical moment (e.g. during the transmission of requests for clarification or the corresponding answers, during receipt of tenders or requests to participate, or during auctions). Problems within the public or open network and problems specific to the device or the platform of the contracting authority should be distinguished: only in the latter case must the contracting authority remedy the failure by, for example extending the deadlines and providing the relevant information to all interested parties. The contracting authority is not responsible for the open network failure and is not obliged to take any remedial actions, even though it may do so where this seems appropriate (respective disclaimers may be included in an appropriate location)".
46. See the national article of this book. See also F. Lichère 'The Regulation of Electronic Reverse Auctions in France' in S. Arrowsmith (edited by) Reform of the UN-

chasing System, it is mandatory to offer unrestricted and full direct electronic access from the date the notice setting up the system is published, until the expiry of the DPS.[47] Where the contracting authority offers unrestricted and full direct access by electronic means to the contract documents and any supplementary documents from the date of publication of the notice, the time limits for receipt the tenders may be reduced by five days.[48] Electronic means can be used to send and receive tenders and requests to participate, as well as plans and projects in design contests.[49]

All types of notices are published by the Publications Office of the EU. Within twelve days (or five days in the case of the accelerated form of restricted or negotiated procedures), the Publications Office publishes the notices in the Supplement to the Official Journal and via the TED (*Tenders Electronic Daily*) database. TED is a single, accepted and well-used system for the publication of above threshold notices across the EU, supported by

CITRAL *model law on procurement*, (Thomas Reuters/West, Danvers, 2009), 459-463 and M. Burgi 'The Policy on Regulating Electronic Communications in Germany' in S. Arrowsmith (edited by) *Reform of the UNCITRAL model law on procurement*, cit., 323-324.

47. Directive 2004/18/EC, art. 33(3)(c) and Directive 2004/17/EC, art. 15(3)(c). See also: Directive 2004/18/EC, art. 42(5)(d) and Directive 2004/17/EC, art. 48(5)(d) where it is provided that the receipt of documents, certificates and declarations that do not exist in electronic format must be organised following the traditional procedures on paper. Directive 2004/18/EC, art. 1(7) second indent and 1(6) "some procuring methods/instruments such as auctions and dynamic purchasing systems may only be conducted by electronic means". Commission (EC) 'Requirements for conducting public procurement using electronic means under the new public procurement Directives 2004/18/EC and 2004/17/EC' 8 July 2005, SEC(2005) 959, 7. When there are reasons to believe that, due to the volume and/or complexity of the data to be submitted, the communication, exchange and storage of it cannot be properly handled by electronic means, and therefore the requirements of Articles 42(3) and 48(3) are not satisfied, they should be handled by traditional means of communication. In such cases data shall be exchanged on physical supports like paper or generally used supports for electronic storage of data such as floppy disks, CD-ROMs or memory sticks.
48. Directive 2004/18/EC, art. 38(6) and Directive 2004/17/EC, art. 45(6). In open procedures it is possible to cumulate the two possibilities of reduction, the one for electronic transmission of the notice and the one for the unrestricted and full direct access to tender documents, leading to a total reduction of the deadline for submitting tenders of twelve days.
49. Directive 2004/18/EC, art. 42(5) and Directive 2004/17/EC, art. 48(5) determine the key rules and refer to Annexes X and XXIV for the specific minimum requirements for the security and confidentiality of electronic reception devices.

compatible infrastructures at national level.[50] Two notices are published: in full in their original language only, and in summary form in the other Community languages. The Publications Office takes responsibility for the translations and summaries.[51] Where notices are drawn up and transmitted by electronic means, the time limits for the receipt of tenders and for the receipt of requests to participate can consequently be shortened by seven days.[52]

The use of a common database ensures the accessibility of information but it lacks the idea of translating all the content of the notices in a common language, as the translation of a summary in all languages seems insufficient to assure a wider participation. As well known, the EU language issue in the field of public procurement risks undermining opportunities of participation and of growth of European economic operators. The use of IT solutions can be simplified by standard forms for the publication of notices, as provided by EU rules.[53]

3.1. The electronic submissions of tenders and of e-signatures.

Most concerns encountered in the submission of tenders relate to the authentication through means such as electronic signatures and recognition of electronic identification. Such issues are not specific to the e-procurement context but arise in any situation where authentication/signatures are required. The EU Commission has adopted measures to allow authorities to identify the origin/certification of partner countries signatures. The PEPPOL project developed solutions to provide on-line tools permitting automatic recognition of electronic signatures from other Member States to be used in a procurement context. Other concerns arise from the requirement for contracting authorities to assess documents submitted by tenderers to prove eligibility for selection. These documents are issued at national/local level in accordance with the relevant conventions, formats and languages. E-procurement was expected to find ways to increase efficiency and to reduce such repeated burden on economic operators. Many solutions developed go some way to fulfilling these

50. Commission (EU) 'Green Paper on expanding the use of e-Procurement in the EU', cit., 8, where it is reported that "in 2009 just over 90 % of forms sent to TED (Tenders Electronic Daily) were received electronically and in a structured format. The electronic publication of notices for below threshold procurement has also advanced at national or regional level".
51. C. H. Bovis 'EU Public Procurement Law' cit., 66.
52. Directive 2004/18/EC, art. 38(5) and Directive 2004/17/EC, art. 45(3).
53. Regulations EU No 842/2011of 19. August 2011 establishing standard forms for the publication of notices in the field of public procurement and repealing Regulation (EC) No 1564/2005. L. Valadares Tavares, *Why e-Public Procurement?* cit., 18.

objectives, without relying on complicated high tech solutions. In some countries, economic operators provide a statement (often a simple electronic document which may or may not be electronically signed) in which they maintain that they are not in breach of any of the set criteria. Only the winning bidders are asked to provide the actual documents and this may be done electronically or on paper.

The Polish legal system provides that in case of lowest price the procedure can be based on a request-of-quotations or an electronic bidding and the price may take the form of a lump sum. In case of request of quotation, such quotation might be submitted with an e-mail. In case of electronic bidding the tender must be submitted through a platform and has to comply with EU and national procurement law allowing the recording of data and timing. It is evident that e-submission of tender (especially if done with an e-mail) might give rise to the possibility of not being received by the procuring entity with the consequent issues of responsibility by either the manager of the platform or the contracting authority. Actually, there is no case law concerning such problem. Italian contracting authorities may turn to a subject for the technical management of IT systems[54] and provide in their procurement documents a specific clause to exempt from any responsibility the contracting authority and the manager of the system.[55]

The 2004 Directives provide that Member States may regulate the level of electronic signature required and restrict the choice of contracting authorities to qualified signatures.[56] "In 2010, 18 countries expressly require the use of electronic signatures in e-procurement procedures, while 13 countries do not explicitly require them. In terms of the type of signature required, 13 out of the 27 Member States have introduced a legal requirement specifying the use of advanced e-signatures. The regulatory choices of Member States in regard to e-signatures may indicate their preferences in relation to security and trust

54. See the Italian Procurement Regulation enforcing the code, d.P.R. 7 October 2012, No. 207, art. 290.
55. For an exemple you can see: Consip S.p.A., *Disciplinare di gara a procedura aperta per la prestazione del servizio di noleggio a lungo termine di autoveicoli senza conducente per le pubbliche amministrazioni ai sensi dell'art. 26 legge n. 488/1999 e s.m.i. e dell'art. 58 legge n. 388/2000, in* http://www.consip.it/on-line/Home/Gare/scheda934.html, par 4.1, 17 et seq.
56. Directive 2004/18/EC, art. 42(5)(b) and Annex X. For utilities sector see Directive 2004/17/EC, art. 48(5)(b) and Annex XXIV. The device for the electronic receipt of tenders and requests to participate must guarantee that the electronic signatures used are in conformity with the national provisions adopted pursuant to Directive 1999/93/EC.

but also need to be considered from a cross-border and inter operability perspective".[57]

The Commission's evaluation of the e-procurement Action Plan reveals concerns that the preference for qualified electronic signatures may constitute an unnecessary entry barrier to e-procurement – particularly for partner country suppliers in the absence to date of operational tools for the recognition of different electronic signatures.[58] Given this assessment, it may be useful to revisit the assumption in favour of qualified electronic signatures t provided for in EU procurement legislation. The Digital Agenda for Europe foresees a review of e-signatures legislation and a stepping up of work in the area of e-identification.[59]

The proposal for a Directive on public procurement provides some simplification concerning administrative burdens deriving from tenderers requirements (the need to produce attestations, certificates or other documents evidencing tenderer's suitability).[60] The production of documentary evidence could have been facilitated by a standardised document, the "European Procurement Passport" which should have provided means of electronic for the absence of grounds for exclusion. [61] Unfortunately, the final compromise text (12 july 2013) deleted the provision of such passport nevertheless,[62] steps towards such direction have already been taken expecially in the UK, particularly in Wales,[63] Scotland[64]and it is foreseen in Italy[65] too.

57. Commission (EC) 'Evaluation of the 2004 Action Plan for Electronic Public Procurement Accompanying document to the Green Paper on expanding the use of e-Procurement in the EU' cit., 35.
58. Commission (EC) 'Action plan for the implementation of the legal framework for electronic public procurement' 13 December 2004.
59. Commission (EU) 'A Digital Agenda for Europe', cit.
60. G. M. Racca 'The role of IT solutions in the award and execution of public procurement below threshold and list B services: overcoming e-barriers' in D. Dragos – R. Caranta (eds. By) *Outside the EU Procurement Directives – inside the Treaty?*, cit., 382-383.
61. Commission (EU) 'Proposal for a Directive of the European Parliament and of the Council on public procurement' cit., Article 59, § 2. For the content of the European Procurement Passport see Annex XIII. This provision was deleted in the final compromise text of 12 july 2013.
62. Commission (EU) 'Proposal for a Directive of the European Parliament and of the Council on public procurement' cit., Article 59, § 3. See also the compromise amendments of 11 December 2012 provided by European Parliament, art. 59.
63. See the article of P. Telles of this book (par. 2), with reference to the 'Supplier Qualification Information Database (SQUID)'.

4. E-procurement solutions for the automatic evaluation of bids and tenders: the lowest electronic price and the most economically advantageous electronic tender

Contracting authorities can choose[66] between the criteria of the lowest price and the most economically advantageous tender according to the characteristics of the subject matter of the contract.[67] The evaluation of bids and tenders could take place through electronic means as well. Such step in the use of electronic tools seems to be one of the most challenging, especially in the case of the criteria of the most economically advantageous tender.

When the lowest price is the award criterion, contracting authorities will not refer to any other qualitative element in the award of the contract. The lowest price is the sole quantitative benchmark that can differentiate the offers submitted by the tenderers.[68]

The criterion of the lowest price is appropriate when the subject matter of the contract is ordinary in relation to the widespread presence of economic operators on the market able to provide the requested product/service/work. The standardization of the product/service makes it easier to define the requirements of the subject matter of the contract. Nonetheless, through an in-

64. See footnote No. 18 in this article, concerning the 'Scottish Management Information Hub'.
65. See the Italian Public Contract Code, art. 6 bis (introduced with d.l. 9 February 2012, n. 5, art. 20, c. I, a), converted in Law 4 April 2012, No. 35), where it is provided the National Database of Public Contracts (NDPC). From 1st. January 2013, contracting autority use NDBC to take information about the quality of tenderers.
66. Commission (EU) 'Proposal for a Directive of the European Parliament and of the Council on public procurement' COM(2011) 896 final, December 20, 2011, whereas No. 37. "Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment. These criteria should guarantee that tenders are assessed in conditions of effective competition, also where contracting authorities require high-quality works, supplies and services that are optimally suited to their needs, for instance where the chosen award criteria include factors linked to the production process. As a result, contracting authorities should be allowed to adopt as award criteria either 'the most economically advantageous tender' or 'the lowest cost', taking into account that in the latter case they are free to set adequate quality standards by using technical specifications or contract performance conditions". About the equivalence of two award criteria see.: Authority for the Supervision of Public Contracts for works, services and supplies, Determinazione, 24 November 2011, n. 7, in http://www.avcp.it/portal /public/classic/AttivitaAutorita/AttiDellAutorita/_Atto?ca=4846
67. Case C-247/02, Sintesi S.p.A. v Autorità per la Vigilanza sui Lavori Pubblici [2004], cit.
68. Directive 2004/18/EC, art. 53(1)(b)

tense and detailed preliminary work it is possible to define the exact quality standard required and consider the possible different options submitted by the tenders irrelevant; in such cases, the precise previous definition of the quality required enables to receive and evaluate on a price basis only offers than assure all such level of quality. Such previous work can open a wider room for the adoption of the criterion of the lower price without sacrificing quality and facilitates the use of electronic evaluation. Obviously, if there are no preferences concerning the different quality variants of the same good, service or work, the economic operators in the relevant market will offer the most cost-effective solution of the contract request. However, contracting authorities can reject a tender if the price is considered abnormally low.

The contracting authority should analyze and define its needs and therefore specify the subject-matter of the contract performance. Significant professional skills are required to properly pinpoint such needs and the quality level required. Otherwise, an improper definition of the needs and of the quality standards required will lead to an unsatisfactory award.

When the contracting authority fails to define the object of the contract performance precisely, the only criterion for the award of the contract is the most economically advantageous tender. Specific concerns arise in the electronic evaluation of such set of criteria, in the attribution of scores and in the sum of them. In such cases, different elements linked to the subject-matter of the contract must be evaluated, e.g. quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion.[69] As well-known, the above-listed criteria are not exhaustive. The technical specifications of the services and goods or works required (quality of the bid)[70] must obviously be distinguished from the criteria for the qualitative selection of participants (quality of bidder) evaluated electronically in the future through databases.

69. Directive 2004/18/EC, art. 53(1) and Directive 2004/17/EC, art. 55(1). Concerning the scoring rules provided from the contracting authority see: F. Dini, R. Pacini, T. Valletti 'Scoring rules', in N. Dimitri – G. Piga – G. Spagnolo (eds.) *Handbook of procurement* (Cambridge University Press, Cambridge, 2006), 294 et seq.
70. Case C-532/06, Emm G. Lianakis AE v. Alexandroupolis, (2008) E.C.R. I-251; On this ECJ case law see: 'Application and Implications of the ECJ's Decision in Lianakis on the Separation of Selection and Award Criteria in EC Procurement Law' (2009) in *P.P.L.R.* (special issue) 103. For a general EU perspective, see S. Treumer 'The Distinction Between Selection and Award Criteria in EC Public Procurement Law: A Rule Without Exception?' (2009) in *P.P.L.R.*, 103.

The contracting authority must specify the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender in the contract notice or in the contract documents. This weighting may be expressed as a range with a minimum and maximum weighting, where the authority considers this appropriate.[71] Those weightings can be expressed by providing a range with an appropriate maximum spread. Whenever the weighting is not possible for demonstrable reasons, the contracting authority must indicate the criteria in descending order of importance in the contract documents. The implementation of such criteria in an electronic system of evaluation requires to define only objectively measurable qualitative element that can receive an automatic score in case of relevant changes or amelioration proposed.

The electronic evaluation of the tender, whichever the award criteria, is provided through the instrument defined as e-auctions to be applied in open or restricted procedures or in different kinds of framework agreements[72] and Dynamic Purchasing System, as already provided by the 2004 Directive on public procurement.

4.1. Electronic auctions as a tool for electronic evaluation of tenders.

The significant step in the use of electronic tools is the electronic evaluation of the tenders that implies an automatic processing of the offers according to the evaluation criterion.[73]

The electronic auction (electronic reverse auction or e-auction)[74] is not an autonomous awarding procedure, in addition to the open, restricted and nego-

71. Directive 2004/18/EC, art. 53(2) and Directive 2004/17/EC, art. 55(2). For example, an authority could perhaps assign in the documents a weighting of 80 % to price and 20 % to quality; or state in the documents that the weighting will be 80-85 % for price and 15-20 % for quality, and later decide on the more precise weighting.
72. L. Folliot-Lalliot 'The French Approach to Regulating Frameworks under the New EC Directives' in S. Arrowsmith (eds.) *Reform of the UNCITRAL model law on procurement*, (Thomas Reuters/West, Danvers, 2009), 198 et seq. on French rules on framework agreements.
73. A. Eyo 'Electronic auctions in EU procurement: reflections on the auction rules from the United Kingdom' (2012) *P.P.L.R.*, 1-17.
74. Directive 2004/18/EC, art. 54(1) and Directive 2004/17/EC, art. 56(1), where it is stated that Member States may regulate and limit the resort to e-auctions. See also Directive 2004/18/EC, art. 54(3) and Directive 2004/17/EC, art. 56(3), where is stated that contracting authorities which decide to hold an electronic auction shall provide information about the electronic equipment used and the arrangements and technical specifications for connection. See also: Commission (EC) 'Evaluation of the 2004 Action Plan for Electronic Public Procurement Accompanying document to the

tiated procedure, but it is a procurement tool that emerged as a result of progress in electronic technology.[75] In this perspective, e-auctions merely allow to carry out the award process electronically in one of the ordinary procedures. Electronic auctions[76] may be used as part of open, restricted or negotiated procedures,[77] and also in case of framework agreements or dynamic purchasing systems.

Electronic auctions[78] imply automatic evaluation, which are possible whenever services and works contracts have not intellectual performances – such as the design of works[79]- as their subject-matter. Some Member States (as France) have already identified further limits on the use of e-auctions.[80]

Green Paper on expanding the use of e-procurement in the EU' cit., 32, where is stated that "in 2004, seven countries reported some experience with e-Auctions, while 23 countries expressed the intention to introduce e-Auctions. In 2010, 26 countries support its use. Among the six countries that have not transposed the e-auctions provisions, only two countries do not intend to do so (DE and LI)". For US experience on eAuctions: C. Yukins 'Use and Regulation of Electronic Reverse Auctions in the United States' in S. Arrowsmith (eds.) *Reform of the UNCITRAL model law on procurement*, (Thomas Reuters/West, Danvers, 2009), 471 et seq.

75. E-auctions constitute a particular step of the awarding stage of the procurement procedure and as such they shall always be preceded by the full evaluation of the tenders received, which will result in a score (notation) that enables the contracting authority to rank the tenders using automatic evaluation methods.
76. Directive 2004/18/EC, art. 54(3) and Directive 2004/17/EC, art. 56(3). Contracting authorities have to announce their intention to hold e-auctions in the contract notice. Once the e-auction has been announced it becomes mandatory to hold it, unless only one valid tender is received.
77. Directive 2004/18/EC, art. 54(2) and Directive 2004/17/EC, art. 56(2). In open, restricted or negotiated procedures in the case referred to in Article 30(1)(a), the contracting authorities may decide that the award of a public contract shall be preceded by an electronic auction when the contract specifications can be established with precision.
78. In open, restricted, negotiated procedures with prior publication of a contract notice justified by the presence of irregular or unacceptable tenders in the case of Article 30(1)(a), on the reopening of competition among the parties of a framework agreement and on the opening of competition under a DPS if it is possible to establish the contract specifications with precision (Art. 54(2) of Directive 2004/18/EC); in open, restricted or negotiated procedures with a prior call for competition and on the opening for competition of contracts to be awarded under a DPS (Article 56(2) of Directive 2004/17/EC).
79. Directive 2004/18/EC, art. 1(7) second indent and Directive 2004/17/EC, art. 1(6). See also whereas No. 14 "provision should be made for such electronic auctions to deal only with contracts for works, supplies or services for which the specifications

Through e-auctions economic operators compete to win contract opportunities, submitting a bid and subsequently proposing a rebate, or revise their tender on an electronic platform.[81] Anyway, the subsequent rebate phase is considered optional.

The e-auction can be based either solely on prices (whether award criteria is the lowest price) or on prices and/or new values for other features that are indicated in the specification (in case of most advantageous tender).[82] As usual, the award criteria is published in the contract notice or tender documents. An equal and transparent treatment towards tenderers is required.[83] Moreover, "in order to guarantee compliance with the principle of transparency, only the elements suitable for automatic evaluation by electronic means, without any intervention and/or appreciation by the contracting authority, may be the object of electronic auctions, that is, only the elements which are quantifiable so that they can be expressed in figures or percentages. On the other hand, those aspects of the tenders which imply an appreciation of non quantifiable elements should not be the object of electronic auctions".[84]

can be determined with precision. Such may in particular be the case for recurring supplies, works and service contracts.

80. F. Lichère 'The Regulation of Electronic Reverse Auctions in France' in S. Arrowsmith (edited by) *Reform of the UNCITRAL model law on procurement*, cit., 459-463. Where is stated that the decree of September 18, 2001 "limited the use of electronic auctions to goods available on the general market". The author take into account the perspective of the code des marchés publics.
81. Directive 2004/18/EC, art. 1(7) and Directive 2004/17/EC, art. 1(6). A. Eyo 'Electronic auctions in EU procurement: reflections on the auction rules from the United Kingdom' (2012) *P.P.L.R.*, 1-17, in 2008 only 38 contract notices published on OJEC used such tool. In other member States the use of e-auctions seems even much lower: Denmark (1); France (1); Hungary (1); Netherlands (3); Poland (8) and Romania (10).
82. S. Arrowsmith, Ch. 8 on "Electronic Procurement" in S. Arrowsmith (ed.), *EU Public Procurement Law: An Introduction* p. 255: "A procuring entity using both price and quality criteria in an auction for motor vehicles will need to establish before the auction the financial value to entity of the different quality aspects of the vehicles offered by different tenderers. The prices offered by tenderers will be subject to revision during the auction, and as the prices are changed the auction software must automatically re-rank the tenders taking into account both the current prices tendered and quality features as evaluated prior to the auction"
83. S. Arrowsmith 'Electronic Reverse Auctions under the EC Public Procurement Rules' (2002) in *P.P.L.R.*, 299.
84. Directive 2004/18/EC, whereas No. 14. See also Directive 2004/18/EC, art. 54(2) and Directive 2004/17/EC, art. 56(2).

A full evaluation of the tenders based on the award criteria and their relative weighting published in the contract notice must precede the auction.[85] At the end of the full initial evaluation, all tenderers who have been submitted as admissible tenders shall be invited[86] simultaneously to submit new prices and/or values,[87] whenever provided.

The award criteria must permit to establish the respective ranking of the tenderers at any stage of the electronic auction.[88] The rules provide only auctions in which suppliers can ascertain their ranking during the auction, and thus can establish at any time whether they have submitted the best tender. This is an important feature of e-auctions under the EU provisions which should motivate suppliers at a later stage to improve their tenders to the level necessary to win the contract, enhancing value for money for the procuring entity. New prices, revised downwards, or the improvement of elements of the tenders other than prices can be submitted electronically.[89]

The procuring entity may also communicate other information concerning other prices or values submitted, provided that that is stated in the specifications. They may also – at any time – announce the number of participants in that phase of the auction. In no case, however, may they disclose the identities of the tenderers during any phase of an electronic auction.[90]

85. Directive 2004/18/EC, art. 54(5) and Directive 2004/17/EC, art. 56(5). When the contract is to be awarded on the basis of the most economically advantageous tender the invitation shall indicate the result of the full initial evaluation by communicating the notation (i.e. the number of points allocated to the individual tenderer). See also: Commission (EC) 'Requirements for conducting public procurement using electronic means under the new public procurement Directives 2004/18/EC and 2004/17/EC' 8 July 2005, SEC(2005) 959, 19, where is stated that there is no obligation to communicate at this stage the precise ranking (i.e. the relative position of the individual tenderer compared to the other participants) so long as this is done when the auction starts.
86. Invitations shall be sent individually by electronic means to each admissible tenderer.
87. Directive 2004/18/EC, art. 54(4) and Directive 2004/17/EC, art. 56(4). A full evaluation of the tenders based on the award criteria published in the notice or in the specification and their relative weighting must precede the auction. At the end of the full initial evaluation, all tenderers who have submitted admissible tenders shall be invited simultaneously to submit new prices and/or values
88. Directive 2004/18/EC, whereas No. 14.
89. S. Arrowsmith, fn. 82 above.
90. Throughout each phase of an electronic auction the contracting authorities shall instantaneously communicate to all tenderers at least sufficient information to enable them to ascertain their relative rankings at any moment. Directive 2004/18/EC, art. 54(6) and Directive 2004/17/EC, art. 56(6). Cfr. S. Arrowsmith – A. Eyo 'Electronic Auctions in the EC Procurement Directives and a perspective from UK Law and

In case of the lowest price, e-auctions enables contracting authorities to ask tenderers to submit new prices, revised downwards.[91] The 2004 Directives define the conditions of integrity and security of the data that the contracting authority has to fulfil by the chosen means of communication during the communication, exchange and storage of information.[92]

In the awarding phase, contracting authorities shall take appropriate steps to give evidence the progress of award procedures conducted by electronic means.[93] This requirement of traceability refers to each stage of the procurement process conducted electronically. "There should be equipment and functionalities in place to maintain the original version of all documents and a true and faithful record of all exchanges with economic operators in order to provide any of the evidence which might be needed in case of litigation".[94]

The effective use of e-auctions is still quite rare in most of the EU Member States, especially in Denmark[95] and Germany.[96] It is considered to undermine the participation of SMEs and affects the quality of goods, works and services acquired. In France, the use of e-auctions is provided only in

Practice' in S. Arrowsmith (edited by) *Reform of the UNCITRAL model law on procurement* (Thomas Reuters/West, Danvers, 2009), 422. This seems to indicate that tenderers need to know where they are ranked overall in the competition, and arguably how many tenderers are participating, and not merely whether or not the tenderer is the highest-ranked. In the empirical study referred to earlier two electronic service providers interviewed expressed concern that providing such detailed information creates greater scope for collusion and considered that a rule allowing for disclosure only of whether the tender is the first ranked bidder would be preferable".

91. Directive 2004/18/EC, whereas No. 14.
92. Directive 2004/18/EC, art. 42(3) and Directive 2004/17/EC, art. 48(3). These are not typically conditions specific to electronic means, because they also apply traditionally to paper-based communication. The Secure channels (https, SSL) and/or encryption may be used to preserve the data integrity and the confidentiality of tenders and requests to participate, although encryption may require higher levels of ICT literacy from economic operators.
93. Directive 2004/18/EC, art. 43, second indent and Directive 2004/17/EC, art. 50(1) last indent.
94. Commission (EC) 'Requirements for conducting public procurement using electronic means under the new public procurement Directives 2004/18/EC and 2004/17/EC' 8 July 2005, SEC(2005) 959, 10.Where it is also stated that "Traceability should make it possible to verify what message/data has been transmitted or made available, by whom, to whom, and when, including the duration of the communication. It should also be possible to reconstitute the sequence of events including any automatic data processing or automated calculations". See also: Directive 2004/18/EC, whereas No. 30.
95. See the article of S. Treumer of this book (par. 5).
96. See the article of M. Burgi of this book (par. 5.2).

case of 'quantifiable criteria'.[97] The Polish Public Procurement Law provide, the preferential use of quantifiable criteria and allows the use of e-auctions as a second-step procedure whenever during the prior award procedure all the tenders have been rejected and the original conditions of the contract are not materially amended.[98] Such second step of competition concerns only the evaluation of qualitative criteria and not of the price. In Romania, the use of e-auctions highlighted the problem of abnormally low tenders that might be discouraged through some forms of sanctions for the tenderes.[99]

The evaluation of tenders in e-auctions requires the use of a mathematical formula in order to sum the scores and define the ranking. This one, stated in the invitation of tenderer, will be used "to determine automatic re-rankings on the basis of the new prices and/or new values submitted".[100] Such formula shall incorporate the weighting of all the criteria fixed to determine the most economically advantageous tender, as indicated in the contract notice or in the specifications. The ranges shall, however, be reduced beforehand to a specified value. Where variants are authorised, a separate formula shall be provided for each variant.[101]

The use of electronic means permits to evaluate only measurable quality and requires a significant effort to define *ex ante* the parameters that are really significant and whose improvement assures a concrete value added to the contracting entity. Such instruments could assure a greater degree of the objectivity of the evaluation, as it reduces the discretionary power of the contracting authority renouncing to the evaluation of non-measurable quality elements. The objectively measurable technical and qualitative criteria, (e.g. the delivery can be measured in days, the distance between the supplier's warehouse and the place of delivery and measured in kilometers, saving energy in Kw/h, etc.) will be the only ones to evaluate, while other non-objectively

97. See the article of F. Lichere of this book (par. 4.3).
98. See the article of M. Spyra and P. Szwedo of this book (par. 5.2).
99. See the article of D. Dragos, B. Neamtu, R. Suciu of this book (par. 3.6), in case of lowest price award criteria.
100. Directive 2004/18/EC, art. 54(5) and Directive 2004/17/EC, art. 56(5). The purpose of the formula is to calculate a single score for each tender submission and will determine the automatic re-ranking of participants on the basis of the new prices and/or new values submitted. In the initial contract specification, some features may be stated as ranges. These will have to be reduced to a single value for use within the formula.
101. Directive 2004/18/EC, art. 54(5) and Directive 2004/17/EC, art. 56(5).

measurable criteria (technical merit, aesthetic characteristics) could not be taken into account.[102]

The discretionary power of technical assessment of the jury, whenever provided, or directly of the contracting authorities in the evaluation of qualitative elements of the tenders, must ensure to be reasonable, consistent and not illogical in order to avoid discriminations.

The electronic evaluation could provide more transparency and predictability of the evaluation but it can also be used in a distorted and discriminatory way.

Some Member States[103] provide for the use of mathematical formula in the traditional award of public procurement as well, to sum up quality evaluation.[104] The contracting authority shall determine a mathematical formula to represent the different criteria and their relative weightings used to determine the most economically advantageous tender.[105] The independent mathematical formulae take into account elements of the each single offer evaluated, while the interdependent formulae in addition to the evaluated tender are taken in account elements of other tender. The use of interdependent mathematical formulae could lead to distortion of competition between economic operators as a collusion between economic operators can drive the result of the evaluation.[106]

102. In addition to these quality characteristics a "non-negotiable" quality has been pointed out. This quality is observable but difficult to evaluate and define *ex ante* and therefore defined as "non-negotiable": G. L. Albano, G. Calzolari, F. Dini, E. Iossa, G. Spagnolo 'Procurement contracting strategies', in N. Dimitri – G. Piga – G. Spagnolo (eds.) *Handbook of procurement*, cit., 101 et seq.
103. The Italian Public Procurement Code: d.lgs. No 163 of 2006, art. 83 § 5, where in the specification of the rules concerning the most economically advantageous tender the use of methodology that allows to identify, with a single numeric parameter end the most advantageous offer is provided for. See also: the Government regulation enforcing the IPPC (d.P.R. 5 October 2010, n. 207), Annex P.
104. F. Dini, R. Pacini, T. Valletti 'Scoring rules', in N. Dimitri – G. Piga – G. Spagnolo (eds.) *Handbook of procurement*, cit., 304 et seq.
105. P. S. Stilger 'Formulas for Choosing the Most Economically Advantageous Tender – a Comparative Study' (2011) in http://igitur-archive.library.uu.nl/student-theses/2012-0327-200536/StilgerPSMA2011Part%20I.pdf. For France see: F. Lichere 'Award of the contracts in EU Procurements' in this book, where state that mathematical matrix reduce the evaluation discretion of "Commission d'appel d'offre". See also the interesting German perspective included in this book by M. Burgi.
106. Cons. Stato, sect. VI, 2 March 2004, No. 926, concerning an awarding procedure carried out by Consip S.p.A. for substitute services to canteen meal vouchers. About this case see also the investigation activity provided by the Italian Competition Authority

The mathematical formulae solely translate the scores given by the evaluation committee (jury) into a ranking. The problem is often not the formula itself but the subjectivity of the scores, which can cover the will to orient the award. In such case, the assessment of the jury continues to have a discretionary content and the mathematical formulae are used only to give a semblance of objectivity to a subjective evaluation.

In many Member States, mathematical formulas define ranking whenever Most Economically Advantageous Tender is provided. According to the Spanish Law on Public Sector, mathematical formulas can be used to allow automatic evaluation of tenders to minimise the influence of subjective evaluation by the Jury.[107] No indication for automatic tender evaluation is provided within the Spanish Law on Public Sector. Yet, "the Spanish Law on Public Sector strongly pushes for the adoption of automatic evaluation methods based on (mathematical) formulas, which should at least be given 50 % or more of the total weight in order to avoid a tender evaluation (partial and/or subjective) by independent committees or special agencies". In England and Wales, no methodological restrictions can be enforced to score tenders. In Scotland and Wales, the evaluation practice seems to be more focused on simpler scoring schemes and mathematical matrixes.[108] In France and Denmark, the use of mathematical methods raises communication issues on tender evaluation methods because the contracting authorities are not obliged to communicate them prior to tender submission and this is in contrast with the EU principles of transparency, equal treatment and competition.[109] Yet, Contracting Authorities might abuse changing the mathematical model used based on submitted tenders.[110] A mandatory provision in the Romanian Procurement Law imposes to the Contracting Authority to include in the procurement documents both the methodology and the mathematical formula

in http://www.agcm.it/component/domino/open/41256297003874BD/934143B3AF9C783AC125705F002CBAF3.html. See also: Authority for the Supervision of Public Contracts for works, services and supplies, Determinazione, 24 November 2011, n. 7, in http://www.avcp.it/portal/public/classic/AttivitaAutorita/AttiDellAutorita/_Atto?ca=4846; F. Dini, R. Pacini, T. Valletti 'Scoring rules', in N. Dimitri – G. Piga – G. Spagnolo (eds.) *Handbook of procurement*, cit., 309-310.

107. See the article of A. S. Graells concerning the Spanish Public Procurement Law (par. 4.1, 4.4 and 5.1) of this book.
108. See the article of P. Telles of this book (par. 6).
109. See the article of S. Treumer of this book (par. 4). In particular we have to underline that the "relative assessment" is an interdependent method and the contents of one tender may influence the evaluation of the others.
110. See the article of F. Lichere of this book (par. 4.6).

applicable in the evaluation. The possible abuse by the contracting authority may persist because the Romanian system provides to change the methodology of evaluation in the event of claims filed by tenderers.[111] The Italian Public Procurement Code provides both the use of mathematical formulas and more complex methodologies that allow to identify the Most Economically Advantageous Tender. A non-mandatory list of methods[112] is provided by the Procurement Regulation enforcing the Code and concerning works,[113] services and supplies[114] providing some simplified arrangements for services and supplies.[115] In Poland, the use of mathematical matrixes to evaluate tenders is thought to be paramount to enforce public spending rationality in the event of an most economically advantageous tender.[116] Based on the German experience, some mathematical formulas are provided, particularly in the IT sector.[117]

5. Conclusions

Electronic means in public procurement can assure a higher degree of transparency and traceability which can guarantee the accountability of public officials involved. The issue of integrity in public contracts could be also tackled through electronic evaluation and its traceability.

Nonetheless, recourse to e-auctions to evaluate tenders received electronically and to define ranking for the award is not yet widespread. All the criticalities related to the objectivity of the public procurement award arise with electronic means too. The advantages of such tools are evident in the award of dynamic purchasing systems[118] and of framework agreements by central

111. See the article of D. Dragos, B. Neamtu, R. Suciu of this book (par. 4.3).
112. Like the analityc hierarchy process (AHP), the evamix method, the technique for order preference by similarity to ideal solution (TOPSIS).
113. See the Italian Procurement Regulation enforcing the code, d.P.R. 7 October 2012, No. 207, annex G (for work).
114. d.P.R. 7 October 2012, No. 207, annex P (for supply and services) and annex M (for services related to architecture and engineering.
115. See the article of R. Caranta and M. Comba of this book (par. 4.3).
116. See the article of M. Spyra and P. Szwedo of this book (par 3.3 and par. 4.1).
117. See the article of M. Burgi of this book (par. 4.3).
118. Framework agreements are arrangements whereby a purchaser and a provider establish the terms on which purchases may or will be made over a period of time. Their basic rationale is to allow the parties to establish the terms of (future) transactions in advance of specific orders, leading to more rapid procedures and reduced costs when

purchasing bodies, whenever technical specifications are well defined and there are accepted standards. Whenever e-evaluations occur through the most advantageous economic tender, it is necessary to stress the relevance of reasonableness and proportionality in the allocation of weights to the elements involved, in order to avoid discrimination in the award. Recourse to e-auctions can contribute to highlight such problems, but not necessarily to solve them. E-auctions seem to assure the advantage of limiting evaluation only to measurable quality, which could assure further ex post control over the evaluation in order to guarantee a higher degree of objectivity. Nonetheless, the other quality elements cannot be evaluated and this may be considered sometimes a limit for contracting entities.

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it comes to actually placing an order. Framework arrangements are often used in practice when contracting authorities have recurring or continuing needs to purchase certain particular products or services – for example stationary, computers or maintenance services – and in particular, where contracting authorities do not know the exact timing or quantity of their requirements.

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12 Evaluation models in public procurement: A comparative law perspective

Paula Bordalo Faustino

1. Introduction

Evaluation models are tools which assist the contracting authorities in measuring the level of performance offered by each tender, in order to facilitate the choice of the tender which best meets the needs targeted by a particular public contract. Those needs are expressed in the contract terms and specifications. This practical tool is made up of several different elements which are identified by a variety of terms (often non-legal jargon).

This chapter explores the different legal approaches by selected jurisdictions to the topic of evaluation models in the field of public procurement. Its goal is to present a comparative view of the rules, case law and practical illustrations (where available) on this topic, as they stem from the national reports collected for this book. Despite not setting out to discover the causes which led to the said different legal approaches, some suggestions are put forward. It should be stressed that this chapter does not aim to identify the alleged best evaluation model, nor to advocate the export of particular national rules or procedures.[1] What motivates this comparative study is the belief that sharing national relevant practices is susceptible of enhancing better practices in other jurisdictions. This chapter does not extensively cover the EU take on the topic, as the first chapter of this book is devoted to the EU perspective on evaluation. Brief mentions to EU law are made where appropriate.

Evaluation models act as a means of structuring the contracting authority's discretion regarding the award decision – more specifically, the choice of the best tender. From the contracting authority's perspective, the parameteriza-

1. In this line of thought, see P Legrand, "The Impossibility of 'Legal Transplants'" (1997) 4 *Maastricht Journal of European and Comparative Law* 111-124.

tion of its discretionary powers through the usage of evaluation models is determined either externally or internally. On the one hand, regulatory rules and case law are likely to impose limits on the set-up and application of evaluation models by contracting authorities. On the other hand, contracting authorities may also decide to use evaluation models as a kind of 'self-instructing' technique, often in keeping with existing soft law such as official guidance. The motivation behind the external and the internal modes of adhering to a set of instructions on how to set up and apply an evaluation model tends to vary from jurisdiction to jurisdiction as noted below.

Section two of this chapter explains the basic components of an evaluation model and submits a working terminology for the purposes of the present chapter. Section three then compares the different national scenarios in terms of the use of evaluation models. It begins by describing the existing legal framework as regards the set-up and application of evaluation models in the several jurisdictions at stake (3.1). After that, it focuses on a related issue which comes hand in hand with the use of an evaluation model: its disclosure (3.2). Indeed, there are different approaches to the transparency requirements on this. Finally, the question of permissible changes to evaluations models is also tackled (3.3). Section four looks at judicial review of evaluation models, namely at the extent of the review to which evaluation models are subject in the different jurisdictions and at the respective grounds for review. Concluding remarks are offered in section five.

2. Descriptive elements of an evaluation model

In this section, it is argued that evaluation models are composed of basic elements regardless of the type of model or its degree of detail.

Criteria

The starting point of any model is the set of *criteria* chosen by the contracting authority as the relevant decision-making factors in a specific procurement procedure. The first terminological remark due at this stage regards the meaning of *criteria*. For the purposes of this chapter, and in line with the Public Sector Directive,[2] *award criteria* refer to the two permitted rationales upon which the award decision is founded: the *lowest price* and the *most economi-*

2. Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, Article 53 and Recital 46.

cally advantageous tender (hereafter, the MEAT); whilst the term *criteria* tout court means the combination of features which preside over the evaluation stage (e.g. price, quality, aesthetics characteristics, delivery period, etc.). Therefore, the use of evaluation models is usually associated with the MEAT. The evaluation based on the *lowest price* criterion, however, might also be translated into a model, namely a mathematical one, but this is no different from the evaluation of price in the context of the MEAT *criteria*. Within the MEAT both price and non-price criteria can be assessed.

Sub-criteria

The *sub-criteria* form the second layer of the evaluation models. They reveal the contracting authority's preferred evaluation aspects within each *criterion*. The quality *criterion*, for example, is often disaggregated into several component parts, depending on the object of the contract and the needs of the contracting authority. Symmetrically, the aspects of the tenders which match the sub-criteria (or the non-disaggregated criteria, for example the price; or the sub-sub-criteria, should they exist) are termed *attributes* (e.g. the proposed price, the proposed delivery period, a specific aesthetics characteristic, a particular quality feature, etc.). The *attributes* of the tenders play a key role in their evaluation: they are the focal point of the allocation of the partial scores (see below) for each tender.

Weightings

Both *criteria* and *sub-criteria* have *weightings* attached to them. They can be expressed in percentages, points, etc. The *weightings* represent an indication of the relative importance of *(sub-) criteria* vis-à-vis each other. A full understanding of the said relative importance, however, is only granted by the scoring method (see below). The relevance of *weightings* is particularly evident when it comes to the commonly used methodology known as weighted sum or weighted factor score[3] (see below), whereby scores are allocated to all attributes of each tender, then those scores are multiplied by the weightings of the respective *(sub-) criteria*, and finally the figures for each tender are added to reveal its weighted sum.

3. See J Telgen and F Schotanus, "The effects of full transparency in supplier selection on subjectivity and bid quality" in *4th International Public Procurement Conference Proceedings* (Seoul, 26-28 August 2010).

Scoring methods

The next layer of the evaluation models set-up is the *scoring method*. This is the core of the models, i.e. the evaluation model sensu stricto. It is apparent from the national reports collected for this book that there is a variety of different terms which are used to convey the same idea, such as "matrix", "mathematical matrix", "point-system", "calculation formulas", "weighting system", "mathematical matrix/point models", "methodology for evaluation", "weighting/mathematical algorithm". Hereafter, all these different terminologies are referred to as *scoring methods*. These methods translate the price-quality ratio which the contracting authority envisages in the context of a specific public procurement procedure. In the English version of the Public Sector Directive, the expression "price-quality ratio" is translated by "value for money". Indeed, the design of a *scoring method* should reflect the preferences of the contracting authority, namely the relative importance of aspects of the contract which are taken into account in the *(sub-) criteria.*[4] Whereas the application of the *scoring method* should enable the allocation of partial scores to each *attribute* of the tenders, thereby making it possible to measure the overall merit of each tender (represented by its total score), which then produces the ranking of all tenders and allows the choice of the best.

There are many methodologies which can be used in order to operationalise the *scoring method*. The underlying objective is to convert *performance units* into scores. *Performance units* refer to the aspects, which are evaluated under each *(sub-) criteria* and mirrored in the *attributes* of the tenders, such as euros (re price), days (re delivery period), centimeters (re dimension of the equipment), or semantic descriptions in the case of non-price qualitative aspects, e.g. an aesthetics characteristic. The said conversion is put in practice via a *scale* (e.g. 0-10, 0-20, 0-100, etc.).

Methodologies used to operationalise *scoring methods* can be detailed in numerous ways which may be expressed by formulas, graphs, matrixes, grids, etc. On the one hand, mathematical formulas are adequate means to measure price as well as non-price quantitative *attributes* (e.g. delivery period, CO2 emissions, guarantee period, etc.). On the other hand, the use of *sets of performance levels* is a suitable technique for assessing non-price qualitative *attributes* (although it can also be used for quantitative aspects too).

4. F Dinni, R Pacini and T Valletti, "Scoring rules" in N Dimitri, G Piga, and G Spagnolo (eds), *Handbook of Procurement*, (Cambridge, Cambridge University Press, 2006) 294.

These sets are also known as "descriptors of plausible impacts"[5] and usually take on the graphical representation of a grid. Each *descriptor* consists of a collection of alternative configurations of each *attribute* organised in order of preference, i.e. the alternative configurations are described and ranked, and scores are distributed to each one of them according to their relative position. In graphical terms, each *performance level* (i.e. each alternative configuration of the *attribute* at stake) corresponds to a row in the respective *descriptor*'s grid, to which a specific score is attached.

Contracting authorities decide how many *performance levels* per *descriptor* there are, bearing in mind they act as reference levels for the allocation of scores during the evaluation stage. So, the larger the amount of levels, the more steered the evaluation task is, which means the more structured the margin of discretion becomes. From the tenderers' perspective, the larger the amount of levels, the better they are able to understand the contracting authority's preferences. This, however, also depends on the content and detail of the said levels. Each performance level can be described by a natural indicator, a proxy or indirect indicator, or a combination of indicators which form a constructed *descriptor*.[6] The material from which a specific tool is made (e.g. stainless steel, which might be preferable to plastic, which in turn might be preferable to glass) is an example of a natural indicator. The experience of the proposed staff to provide the services may be used as a proxy for measuring the means for managing the risk of under-performance of the contract. An illustration of a constructed *descriptor* would be a series of several comfort features regarding office furniture when evaluating the respective ergonomics.

A current classification of the methodologies used to operationalise *scoring methods* distinguishes *absolute or independent* scoring from *relative or interdependent* scoring.[7] The latter relies on the best, worst or average *attributes* of the tenders as reference levels for allocating scores (e.g. lowest price, highest quality, average delivery period, etc.); whilst the former means that the evaluation of each tender depends on its sole merit, which is said to pro-

5. CA Bana e Costa et al., "Facilitating bid evaluation in public call for tenders: a social-technical approach" (2002) 30 *Omega – International Journal of Management Science* 230.
6. Idem, 230-231.
7. See J Telgen (n3) and GL Albano, F Dinni and R Zampino, "Suppliers' behavior in competitive tendering: Evidence from the Italian Ministry of Economy and Finance's acquisitions of its services" in *3rd International Public Procurement Conference Proceedings* (Amsterdam, 28-30 August 2008) 684.

vide an incentive for tenderers to improve their offers,[8] taking into account they are able to determine the *attributes* of their tenders separately from their competitors' behaviour. *Absolute or independent* scoring methodologies are based on *mathematical formulas* and sets of *performance levels* which are devised by reference to plausible *attributes*, while *relative or interdependent* scoring methodologies are based on actual *attributes*.

There is an array of multi-criteria decision analysis methods[9] which can be used in order to operationalise *scoring methods* in the context of public procurement and are explicitly or implicitly built around the basic elements of an evaluation model as described so far.

Besides targeting the calculation of scores, the operationalisation methodologies also have another major goal: to determine how the *criteria* relate to each other, i.e. how the price-quality trade-off judgment should be made. Indeed, after partially scoring price and non-price *attributes*, the total score of each tender is dependent on some sort of aggregation of the partial scores. This 'balancing exercise' can be done in many different ways. The most common technique is the abovementioned weighted factor score, but there are many other alternatives.[10] An example of an alternative technique is the buyer's monetary equivalent for quality (BME) and the monetary value of a point (MVP). This technique provides answers to the following questions: "what amount of money is the buyer willing to pay for quality? What price–quality combinations can be considered equivalent from the standpoint of the buyer? What price discount does the buyer require to award an extra point?".[11] This is, essentially, a monetisation approach to price-quality trade-off: finding out how much money one additional score is worth and what is the equivalent in terms of non-price attributes. In the end, it is possible to know that, according to the contracting authority's preferences in the context of a particular public procurement procedure, 1 score = x € = y quality units.

8. GL Albano (n7) 690.
9. Linear weighting models, such as AHP; mathematical programming models; statistical models; value models, such as MACBETH; outranking methods, such as ELECTRE; etc. For a review of some of these methods, see L de Boer, E Labro and P Morlacchi, "A review of methods supporting supplier selection" (2001) 7 *European Journal of Purchasing & Supply Management* 75-89.
10. For a brief explanation and a couple of illustrations of compensatory/non-compensatory/semi-compensatory alternative solutions for the price-quality trade-off, see L de Boer et al., "An analysis of some mistakes, miracles and myths in supplier selection", *15th IPSERA Conference Proceedings* (San Diego, 6-8 April 2006) 6.
11. F Dinni (n4) 296.

Additional elements

Evaluation models may also include *aids to evaluation* which act as evidence of *attributes* proposed in the tenders.[12] References, interviews, site visits, samples, models, and tests are examples of *aids to evaluation* which can be requested by the contracting authority for the purpose of verification of the tenders' merit. Despite the need to be linked to the subject matter of the contract, in order to assist in identifying the MEAT, *aids to evaluation* should not be considered *(sub-) criteria*. In fact, they are not evaluated in themselves: they are used to provide data to support the evaluation of certain qualitative *(sub-) criteria*. *Aids to evaluation* which are likely to be associated with the tenderers' qualification (such as references and interviews) should only be used when they prove to be the sole or the best means of evaluating a particular *attribute*, in order to avoid the potential overlap between qualification and award stages.

Finally, evaluation models may comprise other additional elements, such as a *sensitivity analysis* tool in order to check how robust the scoring method and its outcomes are; a *maximum reserve price* or any other *maximum or minimum requirement* regarding any of the (sub-) criteria, which enable the exclusion of tenders whose *attributes* are above or below them; a *threshold price or quality level*, which may refer to the ideal price or quality level in order to guide tenderers as to what the preferences of the contracting authority are; etc. The additional elements vary depending on the methodology chosen by the contracting authority. It seems apparent that the more detailed and comprehensive the evaluation model is, the more well-defined the contracting authority's preferences should be, and the more structured the margin of discretion will become.

3. The use of evaluation models

3.1. Legal framework and practice

As shown by the national reports collected for this book, contracting authorities retain a wide margin of discretion as regards the set-up and application of evaluation models.[13] There are instances where regulatory rules and case law

12. Procurement Lawyers' Association, *Issues in evaluating public sector tenders* (June 2010) 3.1.3 and 3.3.2 (available at http://www.procurementlawyers.org/Docs/Evaluation%20Paper.pdf).
13. It is assumed, for the purposes of this chapter, that national legal frameworks fit in with the EU law requirements of the MEAT (especially art. 53 of the Public Sector

aim to structure that discretion to different degrees. In other situations, soft law and 'self-instructing' choices result in the structuring of discretion to a varying extent. By contrast, flexibility is favoured in some of the selected jurisdictions. This section presents a comparative overview of the national rules, case law and practices (where illustrations are available) regarding the choice of criteria, sub-criteria and respective weightings, as well as the formulation of scoring methods.

Criteria, sub-criteria and respective weightings

As regards the choice of criteria, sub-criteria and respective weightings, contracting authorities tend to be free with few exceptions.

Indeed, in most of the selected jurisdictions,[14] it is clear that the MEAT must include price or that it would be practically impossible to exclude it. In France, however, it has long been established that, under certain circumstances, price can be absent from the MEAT. That is the case of street furniture procurement, where the supplier is not paid any remuneration by the contracting authority, but will profit from the subsequent sale of advertising space on the surface on the said furniture.[15]

In certain jurisdictions, the use of specific criteria is mandatory in particular circumstances, e.g. the 'highest energy efficient class' criterion whenever energy-related products are procured in Germany; life-cycle-costing in the context of environmental criteria also used in Germany;[16] the statutory criteria in the case of partnership contracts in France.[17]

Concerning the choice of weightings, in almost all of the selected jurisdictions[18] there is no maximum or minimum weighting required as regards the

Directive and the CJEU's case law on this topic), according to which: the criteria must be linked to the subject matter of the contract; the criteria must assist in identifying the tender which is the most economically advantageous; the criteria may not confer an unrestricted freedom of choice on the contracting authority; the criteria must be formulated and applied in an objective way, so as to assure the compliance with the principles of transparency, non-discrimination and equal treatment. For further detailed analysis of the EU regime about this issue, see the first chapter of this book.

14. It is clear from at least the Italian, Polish, German, Danish and Spanish chapters in this book.
15. See the chapter by F Lichère.
16. See the chapter by M Burgi.
17. See the chapter by F Lichère.
18. As stated in the Italian, Polish, German, UK, French, Romanian and Spanish chapters in this book.

price criterion. Indeed, a weighting as low as 10 % is admitted in Poland,[19] should the contracting authority prefer to highlight the relative importance of the non-price criteria. By contrast, because of corruption concerns, the Romanian courts have ruled that the weighting of the price criterion must be predominant while weightings of non-price criteria must be less relevant in order to avoid the manipulation of the evaluation (e.g. by choosing the tender with the highest price).

On a different note, the Spanish Supreme Court has ruled that assigning the same weighting to all criteria is unlawful, which contradicts the French approach to the same issue.[20]

Scoring Methods

With regard to the scoring methods, there is a variety of different legal solutions, which range from mandatory scoring methods, to milder rules and guidance of specific elements such as the notation of scores, to jurisdictions where contracting authorities have total flexibility (including to do without scoring methods).

The Italian jurisdiction provides an example of a high level of parameterization of the contracting authorities' discretionary powers in the evaluation stage. Not only are there rules dictating which scoring methods should be used taking into account the type of contract, but there is also abundant guidance on the methodologies used to operationalise those scoring methods.[21] On the one hand, this reveals a very professional approach to evaluation in the field of public procurement. On the other hand, it is suggested that this might be a manifestation of a wider effort to fight corruption by reducing the opportunities to abuse discretion afforded by the award stage of public procurement procedures.

In a somewhat less extreme way, the Romanian, the Polish and the Spanish public procurement laws stipulate rules on the set-up and application of the scoring methods, whilst not imposing specific methodologies. In Poland, the law provides that criteria shall be measurable so as to enable the ranking of the tenders according to their final scores. In addition to the legal provisions, there is also guidance which favours quantifiable criteria, so as to allow

19. See the chapter by M Spyra and P Szwedo. In similar terms in Germany, see the chapter by M Burgi.
20. See chapters by S Sanchez Graells and F Lichère, respectively.
21. Including some of the methodologies mentioned above, for instance the weighted factor score ("metodo aggregativo compensatore"), AHP and ELECTRE.

the use of mathematical formulas.[22] In Romania, the law seems to allude to the contracting authorities' obligation to come up with a price-quality trade-off and clearly define how that ratio applies to price and non-price attributes of the tenders.[23] Furthermore, the review bodies have decided on several occasions to reject criteria which are considered to be non-measurable, namely because they are vaguely formulated or lack an appropriate scale.[24] Although there are no mandatory rules on how to set up a scoring method in Spain,[25] its law strongly encourages contracting authorities to choose quantitative criteria, in order to allow the use of mathematical formulas. This explicit fondness for an 'automatic' type of evaluation is stressed by another legal preference: that contracting authorities assign more than 50 % of the weighting to quantitative criteria,[26] so as to minimise the relative importance of qualitative criteria which are thought to make room for favouritism and corruption. In addition, a three-stepped evaluation process tends to be followed in practice: first, non-price qualitative criteria are evaluated, then non-price quantitative ones (through mathematical formulas), and finally the price. On top of that, the Spanish law also lists a significant numbers of cases where the use of MEAT is mandatory.

In an intermediate level, in terms of the amount of legal constraints on the contracting authorities' margin of discretion, is the Danish situation. Notwithstanding the fact that there are no mandatory rules not even guidance on scoring methods, the Danish Complaints Board has been very active in its rulings on evaluation cases. There are a number of interesting decisions regarding relative or interdependent scoring methodologies (see below). As a result of that, it could be said that the contracting authorities' margin of discretion is somehow limited to the extent that compliance with the said rulings is due.

In some other jurisdictions, there is only non-mandatory official guidance about scoring methods, albeit generally being very detailed. This happens in Germany regarding different possible scoring methods for the IT-sector, which are regularly published by the Federal Ministry of the Interior.[27] It also

22. See chapter by M Spyra and P Szwedo.
23. See chapter by D Dragos, B Neamtu and R Suciu.
24. Idem.
25. See chapter by A Sanchez Graells.
26. Should this not occur, then three types of safeguards apply: the qualitative attributes of the tenders shall be (i) submitted in a separate envelope, and (ii) evaluated by experts (iii) before the quantitative evaluation takes place. See the chapter by A Sanchez Graells.
27. See the chapter by M Burgi.

occurs in France with the recent publication of guidelines concerning the "price in public procurement",[28] which focuses on the evaluation of price (leaving out non-price criteria). In practice, contracting authorities in both this countries often use scoring methods, which may be very elaborate in the case of complex contracts.

On the opposite end of the spectrum is the UK, where neither regulations nor case law prescribe mandatory rules about scoring methods, and the official guidance on the topic is almost inexistent. In practice, though, "there are a number of different models in use",[29] which means that contracting authorities, while enjoying a very wide margin of discretion regarding the set-up and application of scoring methods, may choose to parameterize it, at least as regards price evaluation in the context of complex contracts.

Operationalisation methodologies

On the one hand, it appears that the weighted factor score is a fairly common methodology,[30] which is not unexpected as it consists in a rather straightforward methodology, as explained above. By contrast, the original version of the German 'easy guiding value method'[31] arrives at the final score of each tender by employing a price-performance ratio, i.e. by dividing the partial price score by the partial quality score.[32]

On the other hand, some jurisdictions[33] seem to adopt linear techniques for allocating scores, i.e. when there is a direct proportional relationship between an increase in score and a variation in the respective attribute, e.g. decrease in price or increase in quality. Non-linear techniques are equally valid: it is ultimately up to the contracting authority to decide which technique best pursuits the MEAT in a given public procurement procedure.

28. Ministère de l'Économie et des Finances/Direction des Affaires Juridiques, "Le prix dans les marchés publics: Guide et recommandations" (April 2013).
29. Procurement Lawyers' Association (n12) 2.4. See also 3.3.3.
30. As shown by the Polish contribution to this book, as well as by the Italian guidance (n21), and by the UfBA-II-method mentioned in the German chapter.
31. See the chapter by M Burgi.
32. It should be noted, however, that the remaining illustrations of German methodologies are not based on a ratio, rather on a (partially) weighted sum.
33. As emerges from the German and Danish chapters in this book. Both the Italian guidance (n21) and the French one (n28) include linear methods.

More importantly, it is also apparent that relative or interdependent scoring methodologies are frequently used.[34] All German methodologies which have been illustrated in this book, for instance, fall under this category, as either the lowest price, the best quality, or medians are used as reference levels for the allocation of scores. Other examples can also be seen in the French guidance on price evaluation, which refers to both lowest and median price,[35] and in the abovementioned Italian guidance (though it also includes examples of absolute or independent scoring methodologies).

Many voices argue that relative or interdependent scoring methodologies are not adequate in the field of public procurement. Some invoke rules of social choice theory, such as the *independence of irrelevant alternatives*, according to which the relative ranking of two tenders, for instance, should not be affected by the arrival on the scene of a third tender.[36] Others have managed to prove, either theoretically[37] or empirically,[38] that absolute or independent scoring methodologies stimulate the submission of more economically advantageous tenders. Indeed, according to one empirical study, "*Independent scoring rules facilitate bidding and encourage suppliers to be more aggressive on the economic side. This suggests that interdependent scoring rules are only an obstacle to bidding in already complex procurement environments*."[39]

These conclusions assume, however, that the scoring methodology is disclosed in good time for tenders' preparation. This begs a link to the next subsection (see below).

Having presented some economics arguments against relative or interdependent scoring methodologies, it is very interesting to realise how the Danish Complaints Board came to rule, in several cases, that the relative evaluation of non-price qualitative criteria is illegal and, in one single case (so far), that the relative evaluation of price, namely by reference to the lowest price, is also illegal.[40] As for the non-price qualitative criteria, a breach of the principle of equal treatment of tenderers was invoked in order to deem their rela-

34. As seems to be the case in Poland (at least in terms of price), in some of the methods put forward by the Italian guidance (n21), in all of the German illustrations presented in this book, and in most of the formulas included in the French guidance (n28).
35. See Ministère de l'Économie et des Finances (n28) 52-53.
36. TH Chen, "An economic approach to public procurement" (2008) 8 *Journal of Public Procurement* 412.
37. J Telgen (n3).
38. GL Albano (n7) 697.
39. Idem.
40. See chapter by S Treumer.

tive evaluation as unlawful. Therefore, these criteria must now be evaluated by reference to the quality requirements specified in the contract documents. As for the price criterion, however, the Danish ruling used some sort of an irrationality argument in order to judge its relative evaluation "unsuitable as the basis for the concrete award",[41] namely taking into account the respective weighting and the fact that the tenders were close. This case seems to be a one-off situation, which appears to have been motivated by the specific circumstances of the procedure at stake. All in all, and despite the skepticism and controversy these rulings may have generated, it must be said that they are actually in line with the economics critique of relative or interdependent scoring methodologies as explained above.

Other elements of the evaluation models

The comparative appraisal of the national reports collected for this book on the topic of evaluation models offers some other interesting findings.

Firstly, in Italy, for instance, there are mandatory rules which establish that the evaluation of each tender must result in the allocation of a final score expressed in "one and just one"[42] figure. Hence, in Italy, final scores cannot be semantic (e.g. excellent, very good, etc.) nor represented by an alternative type of notation (e.g. ratio price/quality). In practice, that actually seems to be the most common way of allocating final scores. By contrast, the Danish Complaints Board has already confirmed that semantic scoring is legal, albeit also having considered certain uses of semantic scoring to be illegal.[43]

Secondly, the French courts have ruled, and the guidance has reiterated, that contracting authorities should avoid using scoring methods which are likely to produce either negative scores and/or scores above the maximum limit of the scale.[44] The Danish Complaints Board also decided against negative scores when evaluating the price criterion.[45]

Thirdly, Polish law makes a reference to an elementary version of performance levels (regarding non-quantifiable criteria) which should be set up by contracting authorities in order to limit their discretion in the evaluation stage. This appears to be associated with the so called 'best effort obligation' to

41. Idem.
42. See chapter by R Caranta and M Comba.
43. See chapter by S Treumer.
44. Ministère de l'Économie et des Finances (n28) 52.
45. See chapter by S Treumer.

specify the criteria in a comprehensive way, namely by reference to the precise description of the object of the contract.[46]

3.2. Transparency requirements

The disclosure of the criteria, sub-criteria and respective weightings, as well as of the scoring method, represents the core transparency requirement as regards evaluation models. Since contracting authorities are bound by the information disclosed, there is an inversely proportional relationship between the degree of disclosure and the margin of discretion left for the contracting authorities to exercise their powers in the evaluation stage. On the flip side, the more information contracting authorities allow tenderers, the better they are said to be able to optimise their tenders in light of the contracting authorities' preferences which have been disclosed.[47]

At this stage, it is submitted that disclosing relative or interdependent scoring methodologies does not meet the transparency requirement and may produce a perverse effect from an economics perspective. Indeed, "*it is only possible to publish all details of the scoring method when an absolute scoring method is used. Relative scoring methods can be published as abstract formula, but a supplier can never calculate the scores as they depend on other bids coming in as well. Relative scoring methods will never guarantee to fit the preferences of the buyer, as their exact form and position depends on the bids coming in. As such, relative scoring methods replace the preferences of a buyer to a certain extent by a lottery, because the lowest price is determined by the market and not by the buyer. Only absolute scoring methods can be used to accurately represent the value functions of the buyer, as the buyer can indicate what he believes to be a good price and quality*."[48]

The abovementioned empirical study concludes that relative or interdependent scoring (by reference to the lowest or average price, the highest quality, etc.) encourages the submission of tenders "as close as possible to what they expect the best or average price will be".[49] In fact, the uncertainty associated with this type of methodology is believed to be able to "trigger a precautionary or not aggressive bidders' behavior on the price side".[50] Ultimately, this discussion is about predictability, which has been shown to provide

46. See chapter by M Spyra and P Szwedo.
47. TH Chen (n36) 407.
48. J Telgen (n3).
49. GL Albano (n7) 684.
50. Idem.

incentives for price reduction, the same way it should stimulate an increase in quality.

Having realised the connection between the type of scoring methodology and its disclosure, it must be said that there is an even split between the selected jurisdictions in terms of the transparency requirement. It is apparent from the Italian, Polish, German and Romanian reports that not only the criteria, sub-criteria and respective weightings, but also the scoring methods, shall be fully disclosed. Whereas the UK, France, Denmark and Spain seem to follow the 'EU disclosure standard' on this topic: in the trail of the *Lianakis* and *ATI* cases,[51] the sub-criteria and the respective weightings shall be disclosed (in addition to the criteria and respective weightings). As regards the next step, i.e. the disclosure of the scoring method, the national approaches differ slightly.

On the one hand, while there may be a perceived reluctance on the part of contracting authorities in the UK[52] to disclose information regarding the evaluation model, there is a general view,[53] backed up by some case law, that the transparency requirement should extend to scoring methods (if they exist) whenever the *ATI* conditions are not met. A similar situation happens in Spain,[54] where, despite the lack of rules and case law, there is a consensual view that scoring methods should be disclosed in the light of the said EU case law. This view has been supported by an explicit recommendation of the Consultative Board along the same lines.

On the other hand, both in France and Denmark, there have been rulings by the courts and the Complaints Board, respectively, which have decided against the need to disclose the scoring method. It has been argued in both jurisdictions that logic would dictate that the *ATI* conditions should also be applicable to the scoring methods.

Other transparency issues

The rules on keeping minutes may be viewed as a secondary transparency issue. Minutes allow an ex post verification of the compliance with the procedural and substantive rules, including the general principles. Some jurisdictions regulate the obligation to keep minutes with a varying degree of detail.[55] This obligation may also be associated with the duty to give reasons, which is

51. See detailed analysis of these cases in the first chapter of this book.
52. See the chapter by P Telles.
53. Procurement Lawyers' Association (n12) 3.2.1 and 3.2.2.
54. See chapter by A Sanchez Graells.
55. As results from the Italian, Polish and German chapters.

a common principle of administrative law in general, and public procurement in particular.

As for the rule about the submission of the tenders in separate envelopes, it usually indicates a two-stage evaluation model, whereby the non-price attributes of each tender are evaluated before (and unknowingly) of the respective price.[56] This system is put in place in order to avoid the potential risk of good price attributes influencing the evaluation of non-price ones.

3.3. Changes to evaluation models

This section aims to summarise the comparative findings among the selected jurisdictions as regards the admissibility to introduce changes to the different elements of the evaluation models. Firstly, it is apparent that the majority of the national rules and case law on this topic refers to changes to the (sub-) criteria and respective weightings – leaving the question about changes to the scoring methods unanswered.

Secondly, the most common approach[57] to changes to (sub-) criteria and respective weightings is to deem them inacceptable, namely after the deadline for the submission of tenders has expired. The Polish report, in a mitigated way, alludes to the possibility to change the 'description' of the criteria as long as the *ATI* conditions are met. In Germany, on the other hand, it is admissible to change the weightings of the sub-criteria after the submission of tenders but before their opening (subject to the *ATI* conditions). This grey period – after the submission of tenders but before their opening – is a risky one in terms of allowing changes to take place. Therefore, this type of changes would be considered inacceptable in most jurisdictions. In the context of more complex procedures, such as the competitive dialogue, jurisdictions like the UK and Denmark have shown a more flexible approach as regards developing and adapting the sub-criteria and respective weightings throughout the procedure.

Thirdly, there are two jurisdictions whose answer to the question about changes to scoring methods, after the deadline for submission of tenders has expired, is clearly negative: Romania and Germany. A margin for changing or amending scoring methods seems to have been accepted in Italy ("when they just don't work"). By contrast, in France, the admissibility to change the

56. This is expressly mentioned to be the case in Italy and Romania.
57. As emerges from the Italian, the French, the German, the Romanian, the Spanish and (at least, partially) the Polish chapters.

scoring methods appears to have been inferred from the abovementioned lack of duty to disclose them in the first place.[58]

All in all, it is suggested that the margin for changing the evaluation models tends to be inversely proportional to the extent of the obligation to disclose them.

4. Judicial review of evaluation models

The review of evaluation models focuses not only on their set-up but also on their actual application. This section covers the review done by courts and by review bodies in the selected jurisdictions.

The starting point of the review of evaluation models, common to the majority of the jurisdictions,[59] is the deferential approach of courts and review bodies towards the wide margin of discretion enjoyed by the contracting authorities as regards the decision-making process of setting up and applying the said models. This diferential approach determines the extent of the review, which usually consists in a decision of illegality of a particular element of the evaluation model, or an annulment of the award decision. Thus, courts and review bodies tend not to replace contracting authorities in their evaluative task,[60] in name of the principle of separation of powers. This means there is no full judicial review of evaluation models. An exception would be the Spanish jurisdiction where the courts (not the administrative tribunals) are competent to re-award the contract, should they have enough information to carry out the evaluation and choose the 'new' best tender.[61] In the remaining jurisdictions, though, the extent of the judicial review is limited. Nevertheless, the Danish Complaint Board has shown a significant willingness to exercise its control over scoring methods; while in Poland the courts are more willing to verify the evaluation of quantitative attributes rather than qualitative ones. Along the same lines, it flows from the German report that in that jurisdiction the extent of the review powers are directly proportionate to the relative importance of price as a criterion of the MEAT.

A number of grounds for review are common to most or some of the selected jurisdictions:

58. This is debatable from the perspective of the transparency principle, as well as in the light of the abovementioned EU case law.
59. At least, Italy, France, Germany, Denmark and Spain – see respective chapters.
60. As expressly mentioned, at least, in the Danish and German chapters.
61. See the chapter by A Sanchez Graells.

a) Irrationality[62] – according to which any element of the set-up, or any measure of the application of a particular evaluation model, may be deemed inappropriate or unsuitable to achieve the desired aim, i.e. the choice of the MEAT. This notion of irrationality is also likely to cover secondary grounds such as, "unfairness",[63] "unsuitable" relative scoring methodologies regarding the price,[64] and "inefficient use of public funds".[65]
b) Breach of public procurement principles: transparency, non-discrimination and equal treatment[66] – this ground for review has proved to be particularly adequate to exercise a judicial control over the set-up and application of scoring methods.
c) Breach of procedural rules[67] – which includes the breach of the obligation to disclose the criteria and respective weightings; as well as the breach of the duty to give reasons.
d) Breach of substantive requirements[68] – such as, lack of link to the subject matter of the contract, use of prohibited or non-measurable criteria, and non-compliance with evaluation rules set in the contract documents. It is also submitted that, in those jurisdictions where strict rules about the set-up and application of evaluation models (or at least of some of their elements) are in place, non-conformity with these rules should be considered an illegality (e.g. Italian rules about scoring methods).
e) Manifest error – one of the most common grounds for review, which includes unrealistic attributes. The relative importance of this ground denotes the hands-off approach usually taken by courts and review bodies as regards evaluation models.

62. Irrationality tout court is mentioned in the Italian chapter. Irrationality is also listed as a ground for review in the UK, although its precise notion may be slightly different from the Italian one. See Procurement Lawyers' Association (n12) 4.1.3, including an explanation about for the *Wednesbury* rationality test performed in the UK.
63. See the German chapter.
64. See the Danish chapter.
65. See the Romanian chapter.
66. See the Italian, the Polish, the German, the Spanish, the Danish and the Romanian chapters.
67. See the German, the Italian, the French and the Spanish chapters. See Procurement Lawyers' Association (n12) 4.1.3 for the UK.
68. See the Polish, the German, the Spanish and the Romanian.

5. Conclusions

The comparative findings show that, with regard to the set-up and application of evaluation models, there are diverging approaches in terms of the extent of the regulatory impact on the structuring of the contracting authorities' margin of discretion. In fact, there is a variety of national legal solutions regarding the scoring methods, which range from mandatory scoring methods, to milder rules and guidance of specific elements such as the notation of scores, to jurisdictions where contracting authorities have total flexibility (including to do without scoring methods).

These differences are hardly surprising taking into account the fact that the legal systems from the selected jurisdictions come from different legal traditions. On top of that, the respective public procurement systems have been shaped in order to target different objectives. Indeed, is it apparent that some jurisdictions favour the mandatory structuring of the contracting authorities' margin of discretion so as to reduce the opportunities for favouritism or corruption; whereas other jurisdictions are interested in allowing the contracting authorities the flexibility to choose the most adequate evaluation model in the context of each public procurement procedure.

It is argued that, despite commonly used, the relative or interdependent scoring methodologies as less adequate than absolute or independent ones, namely because the former lack sufficient information about the contracting authority's preferences and may produce a perverse effect from an economics perspective (i.e. attract higher prices), as shown by the abovementioned empirical research.

Furthermore, in terms of disclosure of the evaluation models, it is submitted that there is an inversely proportional relationship between the degree of disclosure and the margin of discretion left for the contracting authorities to exercise their powers in the evaluation stage. On the flip side, the more information contracting authorities allow tenderers, the better they are said to be able to optimise their tenders in light of the contracting authorities' preferences which have been disclosed. The comparative findings suggest a split between jurisdictions where full disclosure of the evaluation models (including the scoring methods) is mandatory, and those which apply the 'EU disclosure standard', namely the *ATI* conditions, in a varying degree of precision.

On a different note, after the deadline for the submission of tenders has expired, changes to the criteria, sub-criteria and respective weightings are broadly considered inacceptable, while the same cannot be said of the scoring methods. It is suggested that the margin for changing the evaluation models

tends to be inversely proportional to the extent of the obligation to disclose them.

Finally, judicial review of evaluation models is based on a deferential approach of courts and review bodies towards the wide margin of discretion enjoyed by the contracting authorities as regards the decision-making process of setting up and applying the said models. Therefore, courts and review bodies tend not to replace contracting authorities in their evaluative task. The most common grounds for review are: irrationality; breach of public procurement principles: transparency, non-discrimination and equal treatment; breach of procedural rules; breach of substantive requirements; and manifest error.

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ISBN 978-87-574-3153-7