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In view of the Working Party on Public Procurement on 9 & 10 February 2012, delegations will find in the Annex a working document on Cluster 1 submitted by the Presidency.

Changes to doc. 5366/12 are underlined, deleted text is ~~strikethrough~~.

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## Cluster 1

### Flexibilisation of procedures

Changes to the substance are highlighted in **bold**; minor modifications or purely linguistic adaptations are not highlighted.

#### *Article 24*

#### *Choice of procedures*

*[Directive 2004/18/EC: Art. 28, 30(1)]*

Article 24 provides a structured menu of five types of competitive procurement procedures available to Member States and contracting authorities.

The open and the restricted procedure are the two most basic forms of procedure and will be available in all national systems.

Member States may, in addition, provide, subject to certain conditions fixed by the Directive, three additional forms of procedure: the competitive procedure with negotiation, the competitive dialogue and the innovation partnership.

1. In awarding their public contracts, contracting authorities shall apply the national procedures adjusted to be in conformity with this Directive, **provided that, without prejudice to Article 30, a call for competition has been published in accordance with this Directive.**

Member States shall provide that contracting authorities may apply open or restricted procedures as regulated in this Directive.

**Member States may provide that contracting authorities may apply innovation partnerships as regulated in this Directive.**

They may also provide that contracting authorities may use a competitive procedure with negotiation **or a competitive dialogue** in any of the following cases:

- (a) **with regard to works, where the works contract has as its object both the design and the execution of works within the meaning of Article 2(8) or where negotiations are needed to establish the legal or financial makeup of the project;**
- (b) in respect of public works contracts, for works which are performed solely for purposes of research or innovation, testing or development and not with the aim of ensuring profitability or recovering research and development costs;
- (c) **with regard to services or supplies, where the technical specifications cannot be established with sufficient precision with reference to any of the standards, European technical approvals, Common technical specifications or technical references within the meaning of points 2 to 5 of Annex VIII;**
- (d) in the event of irregular or unacceptable tenders ~~within the meaning of Article 30(2)(a)~~ in response to an open or a restricted procedure;
- (e) **due to specific circumstances related to the nature or the complexity of the works, supplies or services or the risks attaching thereto, the contract cannot be awarded without prior negotiations.**

## **Modified recital 15**

There is a widespread need for additional flexibility and in particular for wider access to a procurement procedure providing for negotiations, as is explicitly foreseen in the Agreement, where negotiation is allowed in all procedures. Contracting authorities should, unless otherwise provided in the legislation of the Member State concerned, be able to use a competitive procedure with negotiation as provided for in this Directive, in various situations where open or restricted procedures without negotiations are not likely to lead to satisfactory procurement outcomes. This procedure should be accompanied by adequate safeguards ensuring observance of the principles of equal treatment and transparency. This will give greater leeway to contracting authorities to buy works, supplies and services perfectly adapted to their specific needs. At the same time, it should also increase cross-border trade, as the evaluation has shown that contracts awarded by negotiated procedure with prior publication have a particularly high success rate of cross-border tenders. The competitive procedure with negotiation or the competitive dialogue should also be available in cases where an open or restricted procedure resulted only in irregular or unacceptable tenders. Irregular are in particular tenders which do not comply with the procurement documents, have been received late, are the outcome of collusion or have been found by the contracting authority to be abnormally low. Unacceptable tenders include, in particular, tenders submitted by tenderers that do not have the requisite qualification and tenders whose price exceeds the contracting authority's budget as determined and documented prior to the launching of the procurement procedure.

1. The list of cases in which Member States may allow the use of a competitive procedure with negotiation is a great deal larger and more flexible than the catalogue of cases currently justifying the use of the negotiated procedure with publication of a contract notice (Article 30(1) of Directive 2004/18/EC). For the competitive dialogue, the new list of cases replaces the conditions for application currently set by Articles 29 (1) and 1(11)(c) of Directive 2004/18/EC.

2. The proposal introduces three new cases for application of procurement procedures with negotiations (points a, c and e), describing “various situations where procedures without negotiations are not likely to result in satisfactory procurement outcomes” (recital 15). They are characterised by an increased level of uncertainty with regard to the description of the subject matter of the contract which makes it impossible to establish technical specifications or other essentials such as the legal or financial set-up in a sufficiently precise manner to award the contract by a procedure without negotiations. This includes works contracts covering both the design and the execution of works or requiring a complex legal or financial makeup (point a) and services or supply contracts for which the technical specifications cannot be drawn up with sufficient precision with reference to standards (as provided under Article 40(3)(b)) so that the contracting authority has to use performance or functional requirements in accordance with Article 40(3)(a). Point (e) covers all other cases where the nature or complexity of the works, supplies or services to be procured or the risks attached to them require an award procedure with negotiations.

**Member States may decide not to transpose into their national law the competitive procedure with negotiation, the competitive dialogue and the innovation partnership procedures.**

The last subparagraph makes it clear that there is no obligation to transpose these procedures. This allows it for Member States to take better account of preferences and particularities based in their national legal, political and economic culture.

2. The call for competition may be made by one of the following means:

- (a) a contract notice pursuant to Article 47,
- (b) **where the contract is awarded by restricted or competitive procedure with negotiation by a sub-central contracting authority, by means of a prior information notice pursuant to Article 46(2).**

**In the case referred to in point (b), economic operators having expressed their interest following the publication of the prior information notice shall subsequently be invited to confirm their interest in writing by means of an ‘invitation to confirm interest’ in conformity with Article 52.**

Paragraph 2 sets out the basic rules for the organisation of the call for competition which is the core element of all competitive procedures. In line with the relevant GPA provisions (Article VII:5), the proposal provides a simplified system applicable to sub-central contracting authorities, as defined in Article 2(3). Instead of publishing a (voluntary) prior information notice followed by a (mandatory) contract notice, sub-central contracting authorities may just publish a prior information notice with the indication that the contract will be awarded by restricted or competitive procedure with negotiation without further publication of a contract notice. In this case, the prior information notice is published on a continuous basis on the TED website so that economic operators can express their interest in the contract award. The procedural details are described in Articles 46(2) and 49(4).

3. In the specific cases and circumstances referred to expressly in Article 30, Member States may provide that contracting authorities may apply a negotiated procedure without prior publication. Member States shall not allow the use of this procedure in any other cases than those referred to in Article 30.

In line with the general approach followed by the proposal, paragraph 3 leaves it explicitly to Member States to transpose all or only part of the specific cases allowing the use of a negotiated procedure without prior publication.

## New recital 14a

14a In order to make procedures faster and more efficient, time limits for participation in procurement procedures should be kept as short as possible without creating undue barriers to access for economic operators from across the Internal Market and in particular SMEs. The use of electronic means of information and communication, in particular full electronic availability of procurement documents and electronic transmission of communications leads to increased transparency and time savings. Therefore, provision should be made for reducing the minimum periods in line with the rules set by the Agreement and subject to the condition that they are compatible with the specific mode of transmission envisaged at Union level. Furthermore, contracting authorities should have the opportunity to further shorten the time limits for receipt of requests to participate and of tenders in cases where a state of urgency renders the regular time limits impracticable, but does not make a regular procedure with publication impossible. This may be the case where the foreseen budget needs to be committed or spent within a short time or other external deadlines are about to expire. Only in exceptional situations where extreme urgency brought about by events unforeseeable by the contracting authority concerned that are not attributable to that contracting authority (cases of force majeure) makes it impossible to conduct a regular procedure even with shortened time limits, contracting authorities should, insofar as strictly necessary, have the possibility to award contracts by negotiated procedure without prior publication. This may be case where natural catastrophes require immediate action.

## Revised Recital 19

(19) Electronic means of information and communication can greatly simplify the publication of contracts and increase the efficiency and transparency of procurement processes. They should become the standard means of communication and information exchange in procurement procedures, as they greatly enhance the possibilities of economic operators to participate in procurement procedures across the Internal Market. For that purpose, transmission of notices in electronic form, electronic availability of the procurement documents and – after a transition period of two years – fully electronic communication should be made mandatory. ~~The use of electronic means also leads to time savings. As a~~



~~result, provision should be made for reducing the minimum periods where electronic means are used, subject, however, to the condition that they are compatible with the specific mode of transmission envisaged at Union level.~~ Moreover, electronic means of information and communication including adequate functionalities can enable contracting authorities to prevent, detect and correct errors that occur during procurement procedures.

#### *Article 25*

##### *Open procedure*

*[Directive 2004/18/EC: Art. 38(2)(4)(8); Art. 1(11)(a)]*

The basic rules on the open procedure remain largely unchanged. There are, however, some modifications which are mainly the result of using existing flexibilities under the GPA.

1. In open procedures, any interested economic operator may submit a tender in response to a call for competition.

The minimum time limit for the receipt of tenders shall be **35 days** from the date on which the contract notice was sent.

The tender shall be accompanied by the requested information for qualitative selection.

As in the case of the other procedures, time-limits have been adjusted downwards by using the possibilities for reduction of the time-periods provided under the GPA. The GPA provides a minimum period of 40 days for the submission of tenders (Article XI:3).

Reduction of time limits under the GPA: Article XI:5 of the GPA allows it to reduce the time limit for tendering by *five days for each one of the following circumstances*:

- (a) the contract notice is published by electronic means;
- (b) all procurement documentation is made available by electronic means from the date of publication of the contract notice;
- (c) the contracting authority accepts by electronic means.

In the EU system, all contract notices are published by electronic means (through TED, Tenders Electronic Daily, the online version of the 'Supplement to the Official Journal of the European Union', dedicated to European public procurement). Article 51 of the proposal obliges contracting authorities to offer unrestricted and full direct access free of charge by electronic means to the procurement documents. It was therefore possible to shorten the time limits set under the GPA by 10 days. However, under the GPA, the time limit is running from the day of publication of the notice, while under the EU system it starts already on the date on which the contract notice is sent to the Office of Publications of the EU; the EU time limits have thus to be adjusted for the time between sending and effective publication. The new deadline of 40 days is a compromise solution that takes into account SME expectations.

2. Where contracting authorities have published a prior information notice which is not used as a means of calling for competition, the minimum time limit for the receipt of tenders, as laid down in the second subparagraph of paragraph 1 of this Article, may be shortened to **15 days**, provided that both of the following conditions are fulfilled:
- (a) the prior information notice has included all the information required for the contract notice in section I of part B of Annex VI, insofar as that information is available at the time the prior information notice is published;
  - (b) it was sent for publication between **45 days** and 12 months before the date on which the contract notice was sent.

This possibility for reduction is based on Art. XI:4(a) of the GPA. It remains largely as it is in Directive 2004/18/EC; however, the time limit was shortened in accordance with the above described principles.

3. **Where a state of urgency duly substantiated by the contracting authorities renders impracticable the time limit laid down in the second subparagraph of paragraph 1, they may fix a time limit which shall be not less than 15 days from the date on which the contract notice was sent.**

In accordance with Article XI:4(c) of the GPA, extension of the possibility of reducing the time limit for receipt of tenders in a state urgency to open procedures ("open, accelerated procedures"). The corresponding provision of the existing Directive (Article 38(8)) is limited to restricted procedures and negotiated procedures with publication of a contract notice.

- 4. The contracting authority may reduce by five days the time limit for receipt of tenders set out in the second subparagraph of paragraph 1 where it accepts that tenders may be submitted by electronic means in accordance with Article 19(3), (4) and (5).**

Paragraph 4 provides an additional possibility of reduction, in line with Article XI:5(c) of the GPA.

#### *Article 26*

##### *Restricted procedure*

*[Directive 2004/18/EC: Art. 38(3)(4)(8); Art. 1(11)(b)]*

Like in the case of the open procedure, the existing rules remain largely unchanged; time limits have been adjusted downwards using existing flexibilities under the GPA, as explained under Article 25.

1. In restricted procedures any economic operator may submit a request to participate in response to a call for competition by providing the requested information for qualitative selection.

The minimum time limit for receipt of requests to participate shall be **30 days** from the date on which the contract notice or, where a prior information notice is used as a means of calling for competition, the invitation to confirm interest is sent.

2. Only those economic operators invited by the contracting authority following their assessment of the requested information may submit a tender. Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 64.

The minimum time limit for the receipt of tenders shall be **30 days** from the date on which the invitation to tender is sent.

3. Where contracting authorities have published a prior information notice which is not used as a means of calling for competition, the minimum time limit for the receipt of tenders as laid down in the second subparagraph of paragraph 2 of this Article may be shortened to **10 days**, provided that all of the following conditions are fulfilled:

(a) the prior information notice has included all the information required for the contract notice in section I of part B of Annex VI, insofar as that information is available at the time the prior information notice is published;

(b) it was sent for publication between **45 days** and 12 months before the date on which the contract notice was sent.

**4. Sub-central contracting authorities may set the time limit for the receipt of tenders by mutual agreement between the contracting authority and the selected candidates, provided that all candidates have the same time to prepare and submit their tenders. Where it is not possible to reach agreement on the time limit for the receipt of tenders, the contracting authority shall fix a time limit which shall be at least 10 days from the date of the invitation to tender.**

The possibility to set the time limit for tendering by mutual agreement is based on Article XI:8 of the GPA which, however, explicitly reserves this additional flexibility to sub-central contracting authorities only.

5. The time limit for receipt of tenders provided for in paragraph 2 may be reduced by five days where the contracting authority accepts that tenders may be submitted by electronic means in conformity with Article 19(3), (4) and (5).

6. Where a state of urgency duly substantiated by the contracting authorities renders impracticable the time limits laid down in this Article, they may fix:
- (a) a time limit for the receipt of requests to participate which shall not be less than 15 days from the date on which the contract notice was sent;
  - (b) a time limit for the receipt of tenders which shall be not less than 10 days from the date on which the invitation to tender is sent.

**Explanation**

Under Article XI:4(c) of the GPA, the minimum time limit for receipt of tenders in a state of urgency is 10 days. The different time limits in Article 26(b) for the restricted accelerated procedure and Article 25(3) for the open accelerated procedure are due to the fact that in the open procedure the deadline starts running from the sending of the contract notice, so that 5 days have to be added for processing by the Publications Office. These 5 days additional days are not needed in the case of the restricted procedure where the deadline starts running from the sending of the invitation to tender. The only possibility to have the same deadlines would thus be to extend the deadline for the restricted procedure beyond the GPA minimum.

*Article 27*

*Competitive procedure with negotiation*

*[Directive 2004/18/EC: Art. 30(2)(3)(4); Art. 1(11)(d)]*

The competitive procedure with negotiation takes the place of the current negotiated procedure with publication of a contract notice (Article 30 of Directive 2004/18/EC). In view of the wider access to the new procedure (see above, Article 24) it appeared necessary to provide more structured rules with adequate safeguards to ensure objectivity, non-discrimination and equal treatment.

1. In competitive procedures with negotiation, any economic operator may submit a request to participate in response to a call for competition by providing the requested information for qualitative selection.

**In the contract notice, in the invitation to confirm interest or in the procurement documents contracting authorities shall describe the subject-matter of the contract and the minimum requirements to be met and specify the award criteria so as to enable economic operators to identify the nature and scope of the procurement and decide whether to request to participate in the negotiations. In the technical specifications, contracting authorities shall specify which parts thereof define the minimum requirements.**

For the sake of fairness and efficiency of the procedure, it is important that the contracting authority explains right at the outset, which elements of the procurement are negotiable and which are not (the “minimum requirements”). This allows economic operators to decide on whether to participate in the procedure, enables potential tenderers to prepare a realistic offer and guarantees a level playing field for all participants.

The minimum time limit for receipt of requests to participate shall be **30 days** from the date on which the contract notice or, where a prior information notice is used as a means of calling for competition, the invitation to confirm interest is sent; **the minimum time limit for the receipt of initial tenders shall be 30 days from the date on which the invitation is sent. Article 26 (3) to (6) shall apply.**

The time limit for receipt of requests to participate has been adjusted downwards using existing flexibilities under the GPA, as explained under Article 25. The procedure for the first time provides a time limit for the receipt of tenders which has been introduced as an additional safeguard to ensure fair and objective procedures.

2. Only those economic operators invited by the contracting authority following their assessment of the requested information **may submit a written initial tender which shall be the basis for the subsequent negotiations**. Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 64.

The requirement of a written tender as basis for the negotiations has been introduced to ensure objectivity and transparency of the proceedings. Together with the report of the procedure (see Article 85), the written offer forms the backbone of the documentary evidence related to a competitive procedure with negotiations. In the case of contestations, these documents allow to trace back the base offer made by a tenderer and any modifications made during the different stages of the procedure.

3. Contracting authorities shall negotiate with tenderers the tenders submitted by them to **improve the content of the offers in order to better correspond to the award criteria**.~~and minimum requirements referred to in the second subparagraph of paragraph 1.~~

**The following shall not be changed in the course of the negotiations:**

- (a) **the subject-matter of the contract**;
- (b) **the part of the technical specifications which define the minimum requirements**;
- (c) **the award criteria**.

Contracting authorities may award contracts on the basis of the initial tenders without negotiation where they have indicated in the contract notice, the invitation to confirm interest or the procurement documents, that they reserve the possibility to do so.

Paragraph 3 describes the function and objective of the negotiation process. Under the new concept, the link with the written offer submitted by the tenderer is essential: the negotiations are aimed at improving, in a transparent and objective manner, the elements of this offer by reference to the award criteria and minimum requirements that are pre-determined and cannot be changed. This last point is explicitly emphasised in the second subparagraph which corresponds with the publication requirements set in paragraph 1.

4. During the negotiations, contracting authorities shall ensure the equal treatment of all tenderers. To that end, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others. **They shall take particular care to ensure that all tenderers, whose tenders have not been eliminated pursuant to paragraph 5, are informed in writing of any changes to the technical specifications other than those setting out the minimum requirements, in adequate time to allow such tenderers to modify and re-submit amended tenders following these changes, as appropriate.**

This requirement has been added to prevent violations of the principle of equal treatment in the case of changes to the technical specifications during the negotiations. It is based on Article X:11 of the GPA.

**Contracting authorities shall not reveal to the other participants elements of tenders or other confidential information communicated by a candidate participating in the negotiations without its agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific elements of tenders or other confidential information.**

The risk of divulgation of confidential information such as technical details of works, supplies or services offered or business secrets is often seen as a major obstacle to participation in public procurement. The new safeguard clause which is inspired by a similar provision in the competitive dialogue rules (Art. 28(3)) aims at improving the protection of confidential information revealed by tenderers during the negotiation process.



5. Competitive procedures with negotiation may take place in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria specified in the contract notice, in the invitation to confirm interest or in the procurement documents. In the contract notice, the invitation to confirm interest or the procurement documents, the contracting authority shall indicate whether it will use this option.
6. **Where the contracting authority intends to conclude the negotiations, it shall inform the remaining tenderers and set a common deadline to submit any new or revised tenders. They shall assess the tenders as negotiated on the basis of the initially indicated award criteria and award the contract in accordance with Articles 66 to 69.**

1. In order to afford equal treatment to all remaining tenderers in the final stage of negotiations, contracting authorities have to announce the imminent conclusion of negotiations and to give all remaining tenders the opportunity to submit a best and final offer. It is therefore not possible to designate a “preferred bidder” which gets the exclusive opportunity to finish the negotiations and make the final offer since this would result in a discrimination of the other remaining tenderers which have not been excluded in an objective manner under paragraph 5. The new obligation is based on Article XII:2(b) of the GPA.

2. Paragraph 6 confirms also that the final phase of the procedure, i.e. the assessment of tenders and the contract attribution takes place on the basis of the award criteria and under the regular rules, ensuring the same level of objectivity and transparency as in all other procedures.

*Article 28*

*Competitive dialogue*

*[2004/18/EC: Recital 31, Art. 1(11)(c), Art. 29, Art. 38(3) and (5)]*

To a large extent, the provisions on the conduct of the competitive dialogue have remained unchanged as to substance.

1. In competitive dialogues, any economic operator may request to participate .

The minimum time limit for receipt of requests to participate shall be **30 days** from the date on which the contract notice is sent.

The time limit for receipt of requests to participate has been adjusted downwards using existing flexibilities under the GPA, as explained under Article 25.

Only those economic operators invited by the contracting authority following the assessment of the requested information may participate in the dialogue. Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 64. The contract shall be awarded on the sole basis of the award criterion of the most economically advantageous tender in accordance with Article 66(1)(a).

2. Contracting authorities shall set out their needs and requirements in the contract notice and they shall define these needs and requirements in the notice and/or in a descriptive document. At the same time and in the same documents, they shall also set out and define the chosen award criteria.
3. Contracting authorities shall open, with the candidates selected in accordance with the relevant provisions of Articles 54 to 65, a dialogue the aim of which shall be to identify and define the means best suited to satisfying their needs. They may discuss all aspects of the contract with the chosen candidates during this dialogue.

During the dialogue, contracting authorities shall ensure equality of treatment among all tenderers. To that end, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others.

Contracting authorities shall not reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the dialogue without its agreement. **Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific solutions or other specific confidential information.**

This ensures that waivers are given in such a way that the economic operators concerned have a possibility to assess the consequences of giving it or not in respect of specific solutions or specific information. It also answers a widespread preoccupation of industry.

4. Competitive dialogues may take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria defined in the contract notice or in the descriptive document. In the contract notice or the descriptive document, the contracting authority shall indicate whether it will use this option.
5. The contracting authority shall continue the dialogue until it can identify the solution or solutions which are capable of meeting its needs.
6. Having declared that the dialogue is concluded and having so informed the remaining participants, contracting authorities shall ask them to submit their final tenders on the basis of the solution or solutions presented and specified during the dialogue. Those tenders shall contain all the elements required and necessary for the performance of the project.

These tenders may be clarified, specified and fine-tuned at the request of the contracting authority. However, such clarification, specification, fine-tuning or additional information may not involve changes to the basic features of the tender or the call for competition, variations in which are likely to distort competition or have a discriminatory effect.

7. Contracting authorities shall assess the tenders received on the basis of the award criteria laid down in the contract notice or in the descriptive document.

Where necessary, in order to finalise financial commitments or other terms of the contract, the contracting authority may **negotiate the final terms of the contract** with the tenderer identified as having submitted the most economically advantageous tender in accordance with Article 66(1)(a) provided such negotiations do not have the effect of modifying essential aspects of the tender or of the public procurement, including the needs and requirements set

out in the contract notice or in the descriptive document and does not risk distorting competition or causing discrimination.

The changed formulation in paragraph 7 and the elimination of the provision of the current Art. 29(6), second subparagraph (limiting the discussions of the "best and final offers" to "clarification, specification and fine-tuning") have increased the margin of manoeuvre for contracting authorities in the final stages of a competitive dialogue somewhat. Obviously, the principle of equal treatment and the provisions of the last part of the second subparagraph of paragraph 7 ensure that the scope for changes is kept within acceptable boundaries.

8. The contracting authorities may specify prizes or payments to the participants in the dialogue.

#### *Article 29*

#### *Innovation partnership*

*[new]*

The innovation partnership is a new form of procedure designed for situations where a public purchaser has a need that cannot be satisfied by products, services or works available on the market, but requires the development of a new, innovative product, service or works. It aims at establishing a structured long-term partnership covering both the development and the subsequent purchase of a new, innovative product, service or works, provided it can be delivered to previously agreed levels of performance and costs. By combining development and subsequent purchase, the new procedure offers a powerful incentive for the development of an innovative solution.

- 1. In innovation partnerships, any economic operator may submit a request to participate in response to a contract notice with a view to establishing a structured partnership for the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works provided that they correspond to the agreed performance levels and costs.**

- 2. The partnership shall be structured in successive stages following the sequence of steps in the research and innovation process, possibly up to the manufacturing of the supply, the provision of the services or the completion of the works. It shall provide for intermediate targets to be attained by the partner and provide for payment of the remuneration in appropriate instalments. Based on those targets, the contracting authority may decide after each stage to terminate the partnership and launch a new procurement procedure for the remaining phases, ~~provided that it has acquired the relevant intellectual property rights~~.**

**1.** Appropriate structuring is a key element for the success of the partnership. The succession of steps with intermediate targets and their consequential rights and measures (remuneration instalments, right to terminate, and conditions for purchase) should be designed in a way that results in a sensible distribution of risks between the partners, ensuring sufficient incentivising without creating excessive dependency or market foreclosure. The conditions and legal consequences of each step must be clearly identified in the partnership agreement.

**2.** The right to terminate the partnership after each stage is an important instrument to ensure that the contracting authority is not unduly tied in the project and to keep the partner motivated. It is up to the partners to define the exact conditions and consequences of this right in the partnership agreement.

- 3. The contract shall be awarded in accordance with the rules for a competitive procedure with negotiation set out in Article 27.**

**In selecting candidates, contracting authorities shall pay particular attention to criteria concerning the tenderers' capacity ~~and experience~~ in the field of research and development and of developing innovative solutions. They may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 64.**

**Only those economic operators invited by the contracting authority following its assessment of the requested information may submit research and innovation projects aimed at meeting the needs identified by the contracting authority that cannot be met by existing solutions. The contract shall be awarded on the sole basis of the award criterion of the most economically advantageous tender in accordance with Article 66(1)(a).**

1. In awarding an innovation partnership, the contracting authority has to follow the rules for a competitive procedure with negotiation under Article 27. Paragraph 3 provides only some additions and qualifications on procedural aspects that are particular to the innovation partnership.

2. In line with the specific purpose of the procedure, selection criteria should focus mainly on the tenderers' capacities in research and development. This does, of course, not exclude that the contracting authority uses also other, not R & D related criteria such as the financial capacity of tenderers.

3. Instead of tenders, the invited economic operators have to submit "research and innovation projects". The contract has to be awarded on the basis of the criterion of the most economically advantageous tender as described in Article 66. It is up to the contracting authority to determine the exact criteria to be used for evaluation and their weighting. It will most probably focus strongly on the quality of the research and innovation projects and costs, but might also include criteria related to the production/realisation phase.

4. **The structure of the partnership and, in particular, the duration and value of the different phases shall reflect the degree of innovation of the proposed solution and the sequence of the research and innovation activities required for the development of an innovative solution not yet available on the market. The value and importance of the purchase of the resulting supply, service or works shall not be disproportionate in relation to those of the development element.**

**Contracting authorities shall not use innovation partnerships in such a way as to prevent, restrict or distort competition.**

As has been explained under paragraph 1, appropriate structuring of the partnership is of paramount importance. Paragraph 4 emphasises the need to avoid structures that result in unjustified restrictions or distortions of competition. This concerns in particular the relationship and relative importance of the research and production/realisation phase. The basic objective of the procedure consists in providing a sufficient degree of “market pull” in the form of a contract that justifies the investment during the research phase. Therefore, the value of that contract should not be out of proportion to the value of the research investment.

*Article 30*

*Use of the negotiated procedure without prior publication*

*[Directive 2004/18/EC: Art. 31]*

The list of cases justifying the use of the negotiated procedure without a call for competition remains, in substance, largely unchanged. The presentation has been modified in some cases in order to make them more explicit, to codify ECJ case-law or to better comply with GPA obligations.

1. **In the specific cases and circumstances laid down in paragraphs (2) to (5), Member States may provide that** contracting authorities may award public contracts by a negotiated procedure without prior publication. **Member States shall not allow the use of this procedure in any other cases.**

As in Article 24(3), the proposal clarifies that transposition of the cases for application of the negotiated procedure without prior publication is optional for Member States.

2. The negotiated procedure without prior publication may be foreseen for public works contracts, public supply contracts and public service contracts in any of the following cases:

- (a) where no tenders or no suitable tenders or no requests to participate have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not substantially altered and that a report is sent to the Commission **or the national oversight body designated according to Article 84** where they so request.
- (b) **where the aim of the procurement is the creation or acquisition of a work of art or an artistic performance;**
- (c) where the works, supplies or services can be supplied only by a particular economic operator for any of the following reasons :

**(i) the absence of competition for technical reasons;**

(ii) the protection of patents, copyrights or other intellectual property rights;

(iii) the protection of other exclusive rights.

**This exception only applies when no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement;**

Points (b) and (c) replace the current Article 31(1)(b) which allows the use of a negotiated procedure without publication “when, for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator”. The new wording aims at making the cases clearer and more explicit and to bring them closer to the wording in the GPA (Article XIII:1(b)).

**GPA, Article XIII:1(b)**

Provided that it does not use this provision for the purpose of avoiding competition among suppliers or in a manner that discriminates against suppliers of any other Party or protects domestic suppliers, a procuring entity may use limited tendering [GPA terminology for a



negotiated procedure without a call for competition] ... only under any of the following circumstances:

...

(b) where the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute goods or services exist for any of the following reasons:

(i) the requirement is for a work of art;

(ii) the protection of patents, copyrights or other exclusive rights; or

(iii) due to an absence of competition for technical reasons;

...

(d) insofar as is strictly necessary where, for reasons of extreme urgency brought about by **force majeure**, the time limits for the open, restricted or competitive procedures with negotiation cannot be complied with; the circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority;

**For the purposes of point (a), a tender shall be considered not to be suitable where:**

- ~~it is irregular or unacceptable, and~~
- ~~it is completely irrelevant to the contract, being incapable of meeting the contracting authority's needs as specified in the procurement documents~~ **without substantial changes to the basic features of the tender.**

~~In particular, tenders shall be considered to be irregular, where they do not comply with the procurement documents or where the prices offered are sheltered from normal competitive forces~~

**~~In particular, tenders shall be considered to be unacceptable in any of the following cases:~~**

- ~~(a) they have been received late;~~
- ~~(b) they have been submitted by tenderers that do not have the requisite qualifications;~~
- ~~(c) their price either exceeds the contracting authority's budget as determined prior to the launching of the procurement procedure; the prior determination of the budget must be documented in writing;~~
- ~~(d) they have been found to be abnormally low in accordance with Article 69.~~

The current Directive refers to the notions of "irregular", "unacceptable" and "unsuitable" tenders without these notions being explicitly defined in the provisions themselves. This could be a source of legal uncertainty, these concepts have therefore been explicitly defined. The definitions are fully in line with the Commission's long standing interpretations (see e.g. the 1997 "Guide to the Community rules on public supply contracts other than in the water, energy, transport and telecommunications sectors, Directive 93/36/EEC", p. 23 et seq.)

3. The negotiated procedure without prior publication may be foreseen for public supply contracts:
  - (a) where the products involved are manufactured purely for the purpose of research, experimentation, study or development; this provision does not extend to quantity production to establish commercial viability or to recover research and development costs;
  - (b) for additional deliveries by the original supplier which are intended either as a partial replacement of normal supplies or installations or as the extension of existing supplies or installations where a change of supplier would oblige the contracting authority to acquire material having different technical characteristics which would result in incompatibility or disproportionate technical difficulties in operation and maintenance; the duration of such contracts as well as that of recurrent contracts shall not, as a general rule, exceed three years;

- (c) for supplies quoted and purchased on a commodity market ~~or other similar markets such as electricity exchanges~~;
  - (d) for the purchase of supplies on particularly advantageous terms, from either a supplier which is definitively winding up its business activities, or the liquidator in an insolvency procedure, an arrangement with creditors, or a similar procedure under national laws or regulations.
4. The negotiated procedure without prior publication may be foreseen for public service contracts, where the contract concerned follows a design contest organised in accordance with this Directive and is to be awarded, under the applicable rules, to the winner or one of the winners of the design contest; in the latter case, all winners must be invited to participate in the negotiations.
5. The negotiated procedure without prior publication may be foreseen for new works or services consisting in the repetition of similar works or services entrusted to the economic operator to which the same contracting authorities awarded an original contract, provided that such works or services are in conformity with a basic project for which the original contract was awarded according to a procedure in accordance with Article 24(1). The basic project shall indicate the extent of possible additional works or services and the conditions under which they will be awarded.

As soon as the first project is put up for tender, the possible use of this procedure shall be disclosed and the total estimated cost of subsequent works or services shall be taken into consideration by the contracting authorities when they apply Article 4.

This procedure may be used only during the three years following the conclusion of the original contract.

The current provisions of Article 31(4)(a) of Directive 2004/18/EC concerning additional works or services not included in the original project or contract are no longer dealt with in the context of the negotiated procedure without prior publication. Instead these cases are regulated in Article 72(6) *Modification of contracts during their term*. It will be examined under cluster 8.

### **Recital 18**

In view of the detrimental effects on competition, negotiated procedures without prior publication of a contract notice should only be used in very exceptional circumstances. This exception should be limited to cases where publication is either not possible, for reasons of force majeure in line with the standing case-law of the Court of Justice of the European Union, or where it is clear from the outset that publication would not trigger more competition or better procurement outcomes, not least because there is objectively only one economic operator that can perform the contract. Only situations of objective exclusivity can justify the use of the negotiated procedure without publication, where the situation of exclusivity has not been created by the contracting authority itself with a view to the future procurement procedure, ~~and where there are no adequate substitutes, the availability of which should be assessed thoroughly.~~ Contracting authorities relying on this exception should provide reasons why there are no reasonable alternatives or substitutes such as using alternative distribution channels including outside the Member State of the contracting authority or considering functionally comparable works, supplies and services.

Where the situation of exclusivity is due to technical reasons, these should be rigorously defined and justified on a case-by-case basis. They could include, for instance, strict technical impracticability for another economic operator to achieve the required performance or the necessity to use specific know-how, tools or means which only one economic operator has at its disposal. Technical reasons may also derive from specific interoperability requirements which must be fulfilled in order to ensure the functioning of the works, supplies or services to be procured.

Finally, a procurement procedure is not useful where supplies are purchased on a commodity market, including trading platforms for commodities such as agricultural goods, raw materials and energy exchanges, where the regulated and supervised multilateral trading structure naturally guarantees market prices.

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