

# Competitive Dialogue and Competitive Procedure with Negotiation

## Legal framework

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## Scope – 1

- Overview of main changes in procedural rules in Directive 2014/24/EU
- Directive 2014/24/EU - Legislative framework for Competitive Dialogue and Competitive Procedure with Negotiation
- Directive 2014/24/EU - Justification for use of Competitive Dialogue and Competitive Procedure with Negotiation
- Directive 2014/24/EU - Procedural rules for use of Competitive Dialogue
- Directive 2014/24/EU - Procedural rules for use of Competitive Procedure with Negotiation



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## Scope – 2

- Competitive Dialogue and Negotiated Procedures in Directive 2014/25/EU
- Key issues arising from changes to Competitive Dialogue and Negotiated Procedures in Directive 2014/24/EU and Directive 2014/25/EU
- Other key provisions in Directive 2014/24/EU impacting on Competitive Dialogue and the Competitive Procedure with Negotiation

## Overview of main changes in procedural rules in Directive 2014/24/EU

- More context in recitals (cf. Recitals 42-45, Directive 2014/24/EU with Recital 31, Directive 2004/18/EC)
- Obligation in Directive 2014/24/EU for Member States to legislate for Competitive Dialogue by Contracting Authorities (Art 26(4)) cf. option in Directive 2004/18/EC)
- Changes in procedural rules for Competitive Dialogue (cf. Art 29, Directive 2004/18/EU and Art 30, Directive 2014/24/EU)
- More procedural rules for Competitive Procedure with Negotiation as compared to Negotiated Procedure with Prior Publication of a Contract Notice (cf. Art 30, Directive 2004/18/EC and Art 29, Directive 2014/24/EU)

## Legislative framework for Competitive Dialogue and Competitive Procedure with Negotiation

- Recitals 42-45, Directive 2014/24/EU
- Justification for use of procedures (Art 26(4), Directive 2014/24/EU)
- Procedural rules for Competitive Dialogue (Art 30, Directive 2014/24/EU)
- Procedural rules for Competitive Procedure with Negotiation (Art 29, Directive 2014/24/EU)
- Other relevant legislative provisions in Directive 2014/24/EU (Art 26(5), Art 53(1), Art 55(2)(d), Art 83(6) and Art 84(2), Directive 2014/24/EU)

## Recital 42

- (42) “There is a great need for Contracting Authorities to have additional flexibility to choose a procurement procedure, which provides for negotiations. A greater use of those procedures is also likely to 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. Member States should be able to provide for the use of the Competitive Procedure with Negotiation or the Competitive Dialogue, in various situations where Open or Restricted Procedures without negotiations are not likely to lead to satisfactory procurement outcomes. It should be recalled that use of the Competitive Dialogue has significantly increased in terms of contract values over the past years.

## Recital 42 (continued)

- It has shown itself to be of use in cases where Contracting Authorities are unable to define the means of satisfying their needs or of assessing what the market can offer in terms of technical, financial or legal solutions. This situation may arise in particular with innovative projects, the implementation of major integrated transport infrastructure projects, large computer networks or projects involving complex and structured financing. Where relevant, Contracting Authorities should be encouraged to appoint a project leader to ensure good co-operation between the economic operators and the Contracting Authority during the award procedure.”

## Recital 43

- (43) “For works contracts, such situations include works that are not standard buildings or where works includes design or innovative solutions. For services or supplies that require adaptation or design efforts, the use of a Competitive Procedure with Negotiation or Competitive Dialogue is likely to be of value. Such adaptation or design efforts are particularly necessary in the case of complex purchases such as sophisticated products, intellectual services, for example some consultancy services, architectural services or engineering services, or major information and communications technology (ICT) projects. In those cases, negotiations may be necessary to guarantee that the supply or service in question corresponds to the needs of the Contracting Authority.

## Recital 43 (continued)

- In respect of off-the-shelf services or supplies that can be provided by many different operators on the market, the Competitive Procedure with Negotiation and Competitive Dialogue should not be used.”

## Recital 44

- (44) “The Competitive Procedure with Negotiation should also be available in cases where an Open or Restricted Procedure resulted only in irregular or unacceptable tenders. In such cases, Contracting Authorities should be allowed to conduct negotiations with the aim of obtaining regular and acceptable tenders.”

## Recital 45

- (45) “The Competitive Procedure with Negotiation should be accompanied by adequate safeguards ensuring observance of the principles of equal treatment and transparency. In particular, Contracting Authorities should indicate beforehand the minimum requirements which characterise the nature of the procurement and which should not be changed in the negotiations. Award criteria and their weighting should remain stable throughout the entire procedure and should not be subject to negotiations, in order to guarantee equal treatment of all economic operators.

## Recital 45 (continued)

- Negotiations should aim at improving the tenders so as to allow Contracting Authorities to buy works, supplies and services perfectly adapted to their specific needs. Negotiations may concern all characteristics of the purchased works, supplies and services including, for instance, quality, quantities, commercial clauses as well as social, environmental and innovative aspects, in so far as they do not constitute minimum requirements.

## Recital 45 (continued)

- It should be clarified that the minimum requirements to be set by the Contracting Authority are those conditions and characteristics (particularly physical, functional and legal) that any tender should meet or possess in order to allow the Contracting Authority to award the contract in accordance with the chosen award criteria. In order to ensure transparency and traceability of the process, all stages should be duly documented. Furthermore, all tenders throughout the procedure should be submitted in writing.”

## Justification for use of Competitive Dialogue and the Competitive Procedure with Negotiation – 1

- Justification required in Directive 2014/24/EU for use of Competitive Dialogue and the Competitive Procedure with Negotiation
- Common justification for both procedures in Directive 2014/24/EU (Art 26(4))
- Justification intended to increase frequency of use of both procedures

## Justification for use of Competitive Dialogue and the Competitive Procedure with Negotiation – 2

“(a) with regard to works, supplies or services fulfilling one or more of the following criteria:

- (i) the needs of the Contracting Authority cannot be met without adaptation of readily available solutions
- (ii) they include design or innovative solutions
- (iii) the contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, the complexity or the legal and financial make-up or because of the risks attaching to them

## Justification for use of Competitive Dialogue and the Competitive Procedure with Negotiation – 3

(a) with regard to works, supplies or services fulfilling one or more of the following criteria (continued):

- (iv) the technical specifications cannot be established with sufficient precision by the Contracting Authority with reference to a standard, European Technical Assessment, common technical specification or technical reference....



## Justification for use of Competitive Dialogue and the Competitive Procedure with Negotiation – 4

(b) with regard to works, supplies or services where, in response to an Open or a Restricted Procedure, only irregular or unacceptable tenders are submitted. In such situations Contracting Authorities shall not be required to publish a contract notice where they include in the procedure all of, and only, the tenderers which satisfy the criteria set out in Articles 57 to 64 and which, during the prior Open or Restricted Procedure, submitted tenders in accordance with the formal requirements of the procurement procedure.

## Justification for use of Competitive Dialogue and the Competitive Procedure with Negotiation – 5

(b) (continued) In particular, tenders which do not comply with the procurement documents, which were received late, where there is evidence of collusion or corruption, or which have been found by the Contracting Authority to be abnormally low, shall be considered as being irregular. In particular, tenders submitted by tenderers that do not have the required qualifications, and tenders whose price exceeds the Contracting Authority's budget as determined and documented prior to the launching of the procurement procedure shall be considered as unacceptable."

## Procedural rules (Art 30, Directive 2014/24/EU) – 1

“1. In Competitive Dialogues, any economic operator may submit a request to participate in response to a contract notice by providing the information for qualitative selection that is requested by the Contracting Authority. The minimum time limit for receipt of requests to participate shall be 30 days from the date on which the contract notice was sent.

Only those economic operators invited by the Contracting Authority following the assessment of the information provided may participate in the dialogue. Contracting Authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 65. The contract shall be awarded on the sole basis of the award criterion of the best price-quality ratio in accordance with Article 67(2).

## Procedural rules (Art 30, Directive 2014/24/EU) – 2

2. Contracting Authorities shall set out their needs and requirements in the contract notice and they shall define these needs and requirements in that 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 and set out an indicative timeframe.

3. Contracting Authorities shall open, with the participants selected in accordance with the relevant provisions of Articles 56 to 66, a dialogue the aim of which shall be to identify and define the means best suited to satisfying their needs. They may discuss all aspects of the procurement with the chosen participants during this dialogue.

### Procedural rules (Art 30, Directive 2014/24/EU) – 3

3. (continued) During the dialogue, Contracting Authorities shall ensure equality of treatment among all participants. To that end, they shall not provide information in a discriminatory manner which may give some participants an advantage over others.

In accordance with Article 21, Contracting Authorities shall not reveal to the other participants solutions proposed or other confidential information communicated by a candidate or tenderer 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 information.

### Procedural rules (Art 30, Directive 2014/24/EU) – 4

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 laid down 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 that 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 each of them to submit their final tenders on the basis of the solution or solutions presented and specified during the dialogue.

## Procedural rules (Art 30, Directive 2014/24/EU) – 5

6. (continued) Those tenders shall contain all the elements required and necessary for the performance of the project.

Those tenders may be clarified, specified and optimised at the request of the Contracting Authority. However, such clarification, specification, optimisation or additional information may not involve changes to the 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, where variations to those aspects, needs and requirements are likely to distort competition or have a discriminatory effect.

## Procedural rules (Art 30, Directive 2014/24/EU) – 6

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.

At the request of the Contracting Authority, negotiations with the tenderer identified as having submitted the tender presenting the best price-quality ratio in accordance with Article 67 may be carried out to confirm financial commitments or other terms contained in the tender by finalising the terms of the contract provided this does not have the effect of materially 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.

## Procedural rules (Art 30, Directive 2014/24/EU) – 7

8. Contracting Authorities may specify prizes or payments to the participants in the dialogue.”

## Procedural rules (Art 29, Directive 2014/24/EU) – 1

“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 information for qualitative selection that is requested by the Contracting Authority.

## Procedural rules (Art 29, Directive 2014/24/EU) – 2

1. (continued) In the procurement documents, Contracting Authorities shall identify the subject-matter of the procurement by providing a description of their needs and the characteristics required of the supplies, works or services to be procured and specify the contract award criteria. They shall also indicate which elements of the description define the minimum requirements to be met by all tenders. The information provided shall be sufficiently precise to enable economic operators to identify the nature and scope of the procurement and decide whether to request to participate in the procedure.

## Procedural rules (Art 29, Directive 2014/24/EU) – 3

1. (continued) 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 was sent. The minimum time limit for the receipt of initial tenders shall be 30 days from the date on which the invitation was sent. Article 28(3) to (6) shall apply.

## Procedural rules (Art 29, Directive 2014/24/EU) – 4

2. Only those economic operators invited by the Contracting Authority following its assessment of the information provided may submit an initial tender which shall be the basis for the subsequent negotiations. Contracting Authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 65.

3. Unless otherwise provided for in (Article 29(4)), Contracting Authorities shall negotiate with tenderers the initial and all subsequent tenders submitted by them, except for the final tenders within the meaning of (Article 29(7)), to improve the content thereof. The minimum requirements and the award criteria shall not be subject to negotiations.

## Procedural rules (Art 29, Directive 2014/24/EU) – 5

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

## Procedural rules (Art 29, Directive 2014/24/EU) – 6

5. 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 inform all tenderers, whose tenders have not been eliminated pursuant to (Article 29(6)), in writing of any changes to the technical specifications or other procurement documents, other than those setting out the minimum requirements. Following these changes, Contracting Authorities shall provide sufficient time for tenderers to modify and re-submit amended tenders, as appropriate.

## Procedural rules (Art 29, Directive 2014/24/EU) – 7

5. (continued). In accordance with Article 21, Contracting Authorities shall not reveal to the other participants confidential information communicated by a candidate or a tenderer 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 information.



## Procedural rules (Art 29, Directive 2014/24/EU) – 8

6. 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 another procurement document. In the contract notice, the invitation to confirm interest or in another procurement document, the Contracting Authority shall indicate whether it will use that option.

## Procedural rules (Art 29, Directive 2014/24/EU) – 9

7. 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. It shall verify that the final tenders are in conformity with the minimum requirements and comply with Article 56(1), assess the final tenders on the basis of the award criteria and award the contract in accordance with Article 66 to 69.

## Competitive Dialogue and Negotiated Procedures in Directive 2014/25/EU – 1

- No justification required for use of either Competitive Dialogue or the Negotiated Procedure with Prior Call for Competition (Art 44(2) and Art 44(3), Directive 2014/25/EU)
- Virtually identical procedural rules for Competitive Dialogue to those in Directive 2014/24/EU (cf. Art 30, Directive 2014/24/EU and Art 48, Directive 2014/25/EU)

## Competitive Dialogue and Negotiated Procedures in Directive 2014/25/EU – 2

- Procedural rules for Negotiated Procedure with Prior Call for Competition more limited than for Competitive Procedure with Negotiation in Directive 2014/24/EU (cf. Art 29, Directive 2014/24/EU and Art 47, Directive 2014/25/EU):
  - 30 days (minimum) for expressions of interest from contract notice
  - 15 days (minimum) where periodic indicative notice used as call for competition from invitation to confirm interest
  - Selection/limitation of economic operators to participate in negotiations

## Competitive Dialogue and Negotiated Procedures in Directive 2014/25/EU – 3

- Procedural rules for Negotiated Procedure with Prior Call for Competition more limited than for Competitive Procedure with Negotiation in Directive 2014/24/EU (cf. Art 29, Directive 2014/24/EU and Art 47, Directive 2014/25/EU):
  - Possibility to set time limit for receiving tenders by mutual agreement with candidates (10 days minimum in absence of agreement)

## Other key legislative provisions in Directive 2014/24/EU

- Publicity for contracts
- Availability of procurement documents
- Transparency requirements
- Documentation requirements

## Publicity for contracts (Art 26(5), Directive 2014/24/EU) – 1

- “Where the contract is awarded by Restricted Procedure or Competitive Procedure with Negotiation, Member States may provide, notwithstanding the first subparagraph of this paragraph, that sub-central Contracting Authorities or specific categories thereof may make the call for competition by means of a prior information notice pursuant to Article 48(2)
- Where the call for competition is made by means of a prior information notice pursuant to Article 48(2), 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.....”

## Publicity for contracts (Art 26(5), Directive 2014/24/EU) – 2

### Key issues:

- Will the option for launch by PIN for sub-central Contracting Authorities, if provided by Member States, be widely used in practice?
- Will the option for launch by PIN for sub-central Contracting Authorities be a factor influencing the use of the Competitive Procedure with Negotiation as compared to Competitive Dialogue?

## Availability of procurement documents (Art 53(1) and Art (2)(1)(13) Directive 2014/24/EU) – 1

- “Contracting Authorities shall by electronic means offer unrestricted and full direct access free of charge to the procurement documents from the date of publication of a notice...or the date on which an invitation to confirm interest was sent. The text of the notice or the invitation to confirm interest shall specify the internet address at which the procurement documents are accessible”

## Availability of procurement documents (Art 53(1) and Art (2)(1)(13) Directive 2014/24/EU) – 2

- A “procurement document” means any document produced or referred to by the Contracting Authority to describe or determine elements of the procurement or the procedure, including the contract notice, the prior information notice where it is used as a means of calling for competition, the technical specifications, the descriptive document, proposed conditions of contract, formats for the presentation of documents by candidates and tenderers, information on generally applicable obligations and any additional documents”

## Availability of procurement documents (Art 53(1) and Art (2)(1)(13) Directive 2014/24/EU) – 3

### Key issues:

- What are the implications of these provisions for preparation and planning for Competitive Dialogue and the Competitive Procedure with Negotiation?
- To what extent do they affect the ability of a Contracting Authority to make changes to the scope and content of the procurement documents during the course of the procedure?

## Transparency requirements (Art 55(2)(d) and Recital 82, Directive 2014/24/EU) – 1

- Specific provisions for transparency about the conduct of dialogue and negotiations in the Competitive Dialogue and the Competitive Procedure with Negotiation (Art 55(2)(d), Directive 2014/24/EU) -obligation to disclose to “any tenderer that has made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers” NB Similar provisions in Art 75(2)(d), Directive 2014/25/EU
- Right to withhold in certain circumstances (Art 55(3)) but clear from Recital 82 must be “serious grounds” for withholding

## Transparency requirements (Art 55(2)(d) and Recital 82, Directive 2014/24/EU) – 2

### Key issues:

- How will Contracting Authorities comply with the disclosure requirements?
- How will the exemptions in Art 55(3) be applied?

## Documentation requirements (Recitals 45 and 126, Directive 2014/24/EU) – 1

- Recital 45 “In order to ensure transparency and traceability (of a Competitive Procedure with Negotiation) all stages should be duly documented”
- Recital 126 “The traceability and transparency of decision-making in procurement procedures is essential for ensuring sound procedures, including efficiently fighting corruption and fraud. Contracting Authorities should therefore keep copies of concluded high-value contracts, in order to be able to provide access to those documents to interested parties in accordance with applicable rules on access to documents. Furthermore, the essential elements and decisions of individual procurement procedures should be documented in a procurement report”

## Documentation requirements (Article 83(6), Directive 2014/24/EU) – 2

- Art 83(6) “Contracting Authorities shall, at least for the duration of the contract, keep copies of all concluded contracts with a value equal to or greater than:
  - (a) 1 000 000 EUR in the case of public supply contracts or public service contracts;
  - (b) 10 000 000 EUR in the case of public works contracts.
- Contracting Authorities shall grant access to those contracts; however, access to specific documents or items of information may be denied to the extent and on the conditions provided for in the applicable...rules on access to documents and data protection.”

## Documentation requirements (Article 84(2), Directive 2014/24/EU) – 3

- Art 84(2) “Contracting Authorities shall document the progress of all procurement procedures..... To that end, they shall ensure that they keep sufficient documentation to justify decisions taken in all stages of the procurement procedure, such as documentation on communications with economic operators and internal deliberations, preparation of the procurement documents, dialogue or negotiation if any, selection and award of the contract. The documentation shall be kept for a period of at least three years from the date of award of the contract.”



## Documentation requirements (Article 84(2), Directive 2014/24/EU) – 4

### Key issues:

- How will Contracting Authorities comply with the documentation requirements in this Article e.g. to deal with challenges?
- What records will auditors and regulators expect Contracting Authorities to keep in respect of this Article e.g. to be able to justify decisions during the dialogue/negotiation phase?

## Competitive Dialogue and the Competitive Procedure with Negotiation – Legal framework

### QUESTIONS AND ANSWERS