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## THE SELECTION CRITERIA FOR APPOINTING THE CONTRACTOR FOR BUILDING WORKS IN PUBLIC PROCUREMENT PROCESS IN SELECTED EU COUNTRIES

### KRYTERIA WYBORU WYKONAWCY NA ROBOTY BUDOWLANE W PRZETARGACH PUBLICZNYCH W WYBRANYCH KRAJACH UNII EUROPEJSKIEJ

#### Abstract

This paper presents an analysis of selected criteria for choosing the most suitable contractor in a public procurement process, and for appointing the contractor whose tender best meets the criteria used in Poland, Germany, United Kingdom and France. The national procurement regulations are based on the European directive 2004/18/EC that allows for an objective multi-criteria assessment of a tender offer. As foreign examples prove, the procedures used in the process of tenders' evaluation, followed by a selection of the best bidder, vary, depending on the country of their application. Moreover, they show that the lowest price is not the most appropriate choice for the contracting authorities, if they adhere to the rule 'value for money'.

*Keywords: public procurement, selection of the contractor, criteria of selection*

#### Streszczenie

W artykule przedstawiono analizę kryteriów wyboru odpowiedniego wykonawcy w drodze przetargu publicznego na przykładzie Polski, Niemiec, Wielkiej Brytanii i Francji. Uregulowania zawarte w przepisach krajowych bazują na postanowieniach dyrektywy 2004/18/WE, która zakłada możliwość obiektywnej wielokryteriowej oceny ofert. Zagraniczne przykłady pokazują, że procedury selekcji wykonawców różnią się od siebie znacznie w zależności od kraju stosowania, a najniższa cena nie jest najlepszym wyborem dla zamawiającego i zamawiający stosują zasadę *value for money*.

*Słowa kluczowe: przetarg publiczny, wybór wykonawcy, kryteria wyboru*

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## **1. Introduction**

The procedures for the award of public works, supply and service contracts in the European Union, relating to the rules of selecting contractors and awarding contracts have been changing throughout the years.

One of the crucial changes was the EU Directive 2004/17/EC [1] introduced in 2004, which referred to the procedure of awarding contracts by the contracting authorities operating within the sectors of the water, energy, transport and postal services, and Directive 2004/18/EC [2] regarding the coordination of procedures for awarding public works contracts for supplies and services. Both of these Directives standardised the procedure for the award of public contracts across all EU countries whereby the Directives have been implemented in their legal systems. Moreover, EU Commission regulation no. 213/2008 [3] introduced Common Procurement Vocabulary (CPV).

In several countries the selection of a contractor is not strictly linked with a price while the applied criteria used in the pre-qualifying procedure and main proceedings aim at selecting competitive (“the most economically advantageous”) tender offers which proposes the best price for delivering a particular service or the works within the lifecycle of the service or works. In other words, the offered construction cost is the lowest possible in order to keep the servicing, maintenance and repairs at the lowest possible level during the set time of utilising the building. For the contracting authorities it brings a reduction of risk throughout the duration of the construction process, such as risk related to the utilisation of poorer quality materials, prolongation of a due date, or disputes over additional works. Consequently, it has become necessary to establish a set of transparent criteria for the contractors and to outline the evaluating procedures for these criteria. It has become increasingly apparent across the countries of EU that decisions made strictly in relation to the lowest price is risky and may result in a project’s failure.

## **2. Procedure for selecting tender offer and appointing contractor in selected EU countries**

Directive 2004/18/EC of the European Parliament and of the European Council of 31st March 2004 on the coordination of procedures for the award of public works, supply and service contracts obliged EU member states to implement EU directives into their national law systems in order to comply with EU regulations. The directive specifies two types of procedures leading to the award of public contracts: standard procedure (open and restricted procedure) and special procedures (competitive dialogue, negotiated procedure with prior publication, negotiated procedure without publication).

Directive 2004/18/EC highlights the importance of main EU principles of non-discrimination and equal treatment which translate into assessing the offers in light of the principle of effective competition. Consequently, the directive allows for the application of only two contract award criteria: ‘the most economically advantageous’ tender offer and ‘the lowest price’. In relation to ‘the most economically advantageous’ offer the selection criteria may refer to: quality, price, technical merit, aesthetic and functional characteristics, environmental, characteristics, running costs, cost-effectiveness, after-sales service, technical assistance, delivery date and delivery period or period of completion.

Despite conducting the process of standardisation of the regulations across all EU member states' legal systems, practical realisation of the rules vary between the countries, in relation to the evaluation of offers, selecting tender offers and appointing contractors.

Presented below is a process for appointing contractors in selected European Union member states. The article presents an analysis of public advertisements published by the Official Journal of the European Union from the years 2010 to 2013 and regarding the works for complete or part construction and civil engineering work (CPV 45200000-9). Five types of procedures were taken into consideration: open procedure, restricted procedure, competitive dialogue, negotiated procedure with prior publication, negotiated procedure without publication. The analysis presents the number of procurement processes in each analysed country, identifying the number of appointments based on the 'price criterion', and those based on 'the most economically advantageous tender' criterion.

## 2.1. Poland

Poland's legislation within the area of public procurement is specified by the Act of Parliament of 29th of January 2004, Public Procurement Law (*Prawo Zamówień Publicznych*) [4].

As the act states, the evaluation criteria may include: price or price and other criteria regarding the object of tendering. The act gives precedence to the price criterion before 'other criteria'. This rule stands in opposition to the EU directive 2004/18/EC where the price is placed in second position. Furthermore, Polish act does not refer to pre-qualifications, meaning – the introductory selection of contractors.

As a common practice the pre-qualifying procedure is not usually conducted and the lowest price is the only assessment criterion.

Table 1 show that between 2010 and 2013 in Poland the majority of procurement processes took form of an open procedure (89.5%). Other processes occurred as follows: restricted procedure – 6.2%, competitive dialogue – 0.6%, negotiated procedure with prior publication – 1.1% and negotiated procedure without publication – 2.6%.

In open tender procedures the price occurred as the only applied criterion in 89.5% of proceedings, and the most economically advantageous tender was chosen in only 10.2% of cases. In restricted tender the tendency proved to be similar and showed the 'lowest price' criterion to be pivotal in 80.2%.

It is noticeable (Table 2) that the number of open and restricted tender procedures based strictly on the price criterion is declining year after year while the number of the tender procedures based on the most economically advantageous tender consistently increases.



## 2.2. Germany

German procurement process procedures are laid down in VOB (*Vergabe-und Vertragsordnung für Bauleistungen* – German construction contract procedures) [6].

First publication of this act appeared in 1926 and it has been re-edited several times since then. The rules governing the process of awarding contracts are included in part VOB/A. In order to ensure compliance with VOB with the EU legislation, directives 2004/18/EC and 2004/17/EC were implemented in VOB/A in May 2006. VOB/A specifies the procedure for appointing contractors by means of considering the price and other criteria in relation to the object of the contract. Moreover, VOB/A defines the criteria of the contractors pre-qualification.

Table 3 shows that between 2010 and 2013 the majority of procurement processes in Germany took the form of an open procedure (92.1%). Other processes occurred as follows: restricted procedure – 1.8%, competitive dialogue – 0.1%, negotiated procedure with prior publication – 5.1% and negotiated procedure without publication – 0.9%.

In the open tender procedures the price was the only applied criterion in 56.8% of proceedings, and the most economically advantageous tender was chosen in 40.7% of all cases. Restricted tenders showed the ‘lowest price’ criterion to be pivotal in only 35.7%.

It is noticeable (Table 4) that the number of open and restricted tender procedures based strictly on the price criterion is increasing year after year, while the number of the tender procedures based on the most economically advantageous tender consistently decline.

## 2.3. UK

The Public Contracts Regulations SI 2006 No. 5 [7] are the set of rules governing the contract procurement process for works, services and supplies in Great Britain, Wales and Northern Ireland and came into force on 31st January 2006 preceded by an implementation of the EU directive.

Article 30 of the Regulations defines criteria for the award of a public contract and appointing the contractor. Similar to other countries, ‘the most economically advantageous tender’ (MEAT) or the lowest price tender has precedence over other criteria. The contracting authority specifies in the Specification the criteria for evaluating the tender offers. Criteria is strictly related to the object of the contract and need to be determined by its weighting (given to each criterion) [7] or should the contracting authority be unable to determine the weighting of the criteria, the criteria need to be marked in descending order from the most to the least important one. Furthermore, the criteria may have ‘sub-criteria’, e.g. the criterion ‘cost’ – 40% the sub-criterion is ‘the contract value’ – 20%, ‘contract management’ – 10%, ‘consultants’ – 10%.

**Selection criteria for appointing the contractors in Germany in 2010, 2011, 2012, 2013 – Number of tenders [5]**

Criteria	Type of procedure																				
	Competitive dialogue				Open procedure				Restricted procedure				Negotiated procedure without publication					Negotiated procedure			
	2010	2011	2012	2013	2010	2011	2012	2013	2010	2011	2012	2013	2010	2011	2012	2013	2010	2011	2012	2013	
Year	6	10	12	9	5355	4972	4372	4158	108	103	123	107	52	75	84	89	514	543	563	507	
The most economic tender					6143	6296	6616	7237	76	55	90	105	7	12	5	12	82	70	70	58	
Lowest price					308	302	272	303	23	53	58	12	21	35	42	41	31	61	49	21	
Not specified																					

Table 4

**Percentage of contract award criteria in two types of procedures in Germany**

Criteria	Open procedure				Restricted procedure			
	2010	2011	2012	2013	2010	2011	2012	2013
Year								
The most economic tender	45,4%	43,0%	38,8%	35,5%	52,2%	48,8%	45,4%	47,8%
Lowest price	52,0%	54,4%	58,8%	61,9%	36,7%	26,1%	33,2%	46,9%
Not specified	2,6%	2,6%	2,4%	2,6%	11,1%	25,1%	21,4%	5,3%

Table 5 shows that between 2010 and 2013 in UK the majority of procurement processes took the form of a restricted procedure (66.1%). Other processes occurred as follows: open procedure – 14.5%, competitive dialogue – 8.9%, negotiated procedure with prior publication – 9.7% and negotiated procedure without publication – 0.8%.

In the open tender procedures the price occurred as the only applied criterion in only 9.8 % of proceedings, and the most economically advantageous tender was chosen in 87.3% of cases. Restricted tender proved to be similar and showed the ‘lowest price’ criterion to be pivotal in 6.7%.

## 2.4. France

Public Procurement Regulations in France (Code des marchés publics) implemented the rules of the EU directive and adopted them in the decree no. 2006-975 of 1st August 2006 (Décret n°2006-975 du 1 août 2006 [8]). Article 53 of the decree outlines the criteria used by contracting authorities while conducting the procurement process. The criteria comply with their equivalents defined by the EU directive 2004/18/EC. The act also allows for the application of only one criterion which is price. Usually, the weighting of a criterion is the first element taken into consideration, e.g. technical value – 50%, price – 40%, innovation – 10%. In a situation where the contracting authorities are unable to determine the weighting of individual criteria, it needs to be described and organised according to their descending order of importance. The tender offer is evaluated in relation to all initially set criteria and an overall rate is given to the tenders that best meet the criteria. In case the price is constituted to be the only criterion, contracting authorities need to take the overall cost, e.g. including amortization, servicing, etc into account.

In accordance with the article 52 and decree no. 0039 of 15th February 2012 (JORF – *Journal officiel de la République française* n°0039 du 15 février 2012 – In the Official Journal of the Republic of France) [9] responsible for the Public Procurement Code of Conduct, the contractor must not be prevented from tendering for works due to the lack of their ongoing operation and performance within the area of works similar to the subject of the contract. However, the contracting authorities are responsible for determining a contractor’s suitability.

Article 87 outlines the element of support given to small and medium-sized enterprises and creates the opportunity of requesting an advanced payment of up to 5% of the contract value, if the value of the tendered works is higher than 50 000€ and the time of accomplishment exceeds two months. Such support has not been proposed by the legislation of any other discussed countries.

Selection criteria for appointing the contractors in UK in 2010, 2011, 2012, 2013 – Number of tenders [5]

Criteria	Type of procedure																				
	Competitive dialogue			Open procedure			Restricted procedure			Negotiated procedure without publication				Negotiated procedure							
	2010	2011	2012	2013	2010	2011	2012	2013	2010	2011	2012	2013	2010	2011	2012	2013					
Year	186	165	161	136	198	196	227	321	1245	1117	1038	1107	2	2	6	7	164	179	201	158	
The most economic tender																					
Lowest price		2			19	19	33	36	112	83	55	82		2	3		2	2	6	6	
Not specified	1	1	5		6	9	10	5	20	26	37		6	9	18	6	1	2	3		

Table 6

Selection criteria for appointing the contractors in France in 2010, 2011, 2012, 2013 – Number of tenders [5]

Criteria	Type of procedure																				
	Competitive dialogue			Open procedure			Restricted procedure			Negotiated procedure without publication				Negotiated procedure							
	2010	2011	2012	2013	2010	2011	2012	2013	2010	2011	2012	2013	2010	2011	2012	2013	2010	2011	2012	2013	
Year	135	133	107	113	7760	8157	7632	7740	656	601	552	524	27	21	14	10	727	726	828	794	
The most economic tender																					
Lowest price					249	282	241	235	50	30	25	17	34	38	19	24	199	171	154	118	
Not specified	5	14	16	13	453	524	564	535	64	99	82	59	6	5	5	6	151	169	216	150	



Table 6 shows that between 2010 and 2013 in France the majority of procurement processes took the form of an open procedure (81.2%). Other processes occurred as follows: restricted procedure – 6.5%, competitive dialogue – 1.3%, negotiated procedure with prior publication – 10.5% and negotiated procedure without publication – 0.5%.

In open tender procedures price occurred as the only applied criterion in only 3.0% of proceedings, and the most economically advantageous tender was chosen in 91.0% of cases. In restricted tenders, the tendency proved to be similar and showed the ‘lowest price’ criterion to be pivotal in 4.3%.

### 3. Conclusions

The process of selecting the most competitive tender offer and appointing the most suitable contractor for the construction works is a complicated and risk-related task. Growing awareness of the importance of this process is increasingly more apparent between the parties involved in public procurement processes in the EU. Nowadays, public contracting authorities realise more often that a selection based strictly on appointing a contractor offering the lowest price may lead to a failure of the project.

The correct appointment of a competent and suitable contractor may have a positive impact on the outcomes of the works and result in: lowering construction cost, increased quality of delivered works, shortening of the works realisation time, higher number of qualified and competent workers, increased safety and lower number of accidents.

The analysis proves that procedures adopted in Germany, France and the UK complies with the UE directives. The examples from France and the UK show that the tendering processes in these countries are based on the award criterion of the most economically advantageous tender (MEAT). The German tendering process is more equal – almost half of all tenders are awarded based on MEAT criterion, and the rest is selected based on the lowest price.

Poland is the opposite with price as the only applied criterion in around 90% of the open tender proceedings. However, results of the analysis of the process in Poland between 2010 and 2013 prove that the number of the open and restricted tender procedures, based strictly on the price criterion is declining gradually year after year; while the number of the tender procedures based on the most economically advantageous tender consistently increases. The trend may have appeared due to the fact that the contract authorities began to realise the benefits emerging as a result of applying the non-price criteria in the process of the evaluation of offers.

It is very important that the selection of the assessment criteria is based upon individual elements of the offers and related to the specifics of the subject of contract.

### References

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