

**European Procurement Law Series**

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Mario E. Comba & Steen Treumer (Eds.)

**Award of Contracts  
in EU Procurements**



DJØF Publishing  
Copenhagen 2013

In parallel, procedural requirements applicable to both cases seem to be growing closer and the *inter partes* procedure foreseen for abnormally low tenders has been more or less extended (with some adaptations) to the request of clarifications concerning imprecise or apparently non-compliant tenders, at least in connection with the existence of obvious or apparent mistakes (although this area is showing less uniformity and some countries may be adopting flexible approaches that exceed the room of manoeuvre granted by the CJEU in its case law). In both areas, then, domestic rules and practice are increasingly echoing the development of 'good administration' duties and, in that regard, mirror the developments at the EU level (which should be welcome, particularly in view of the upgrade of the contents of the EUCFR to Treaty level after Lisbon).

All in all, in my view, the only area that seems to be significantly underdeveloped is that of the treatment of abnormally low bids tainted with State aid, which may call for a revision of the rules at the EU level and, possibly, for the development of more effective enforcement mechanisms at domestic level – with the desirable implication of the national competition authorities.

## 11 The electronic award of public procurement

*Gabriella M. Racca*

### 1. Introduction. E-procurement strategies in Europe: overcoming inertia and fragmentation

The Digital Agenda of the European Commission is one of the seven elements of the *Europe 2020 Strategy* which sets objectives for the growth of the European Union. The Digital Agenda proposes to better exploit the potential of Information and Communication Technologies tools (IT) in order to foster innovation, economic growth and progress.<sup>1</sup> Such tools can also contribute to maximise, in times of crisis, the efficiency of public expenditure and favour new sources of economic growth.

The 2004 Directives on public procurement put electronic and traditional means of communication and information exchange on the same level.<sup>2</sup> New techniques (e-auctions, dynamic purchasing system) and tools (e-Signatures, e-Catalogues, e-Notification, Buyer profiles, Electronic access to documents) were provided to favour the use of electronic communication to improve pro-

1. Commission (EU) 'A Digital Agenda for Europe', COM(2010)245 final, 19 May 2010, where a lack of interoperability is identified and "weaknesses in standard-setting, public procurement and coordination between public authorities prevent digital services and devices used by Europeans from working together as well as they should"... L. Valadares Tavares, *An Essay on the Future of e-Public Procurement in Europe: 2015-2025*, paper presented at the 1<sup>st</sup> European Conference on e-Public Procurement, Barcellona, March 2013, 4.
2. Directive 2004/18/EC, whereas No. 35. See: S. Arrowsmith 'Electronic reverse auctions under the EC public procurement rules: current possibilities and future prospects' (2002) in P.P.L.R., 299-330; R. Bickerstaff 'E-communication Regulation in Public Procurement: the EC and UK perspective' in S. Arrowsmith (eds.) *Reform of the UNCITRAL model law on procurement* (Thomas Reuters/West, Danvers, 2009), 288 et seq.

curement outcomes.<sup>3</sup> Nonetheless, the use of such instruments has been scarce. It is well known that the 2005 predictions on the use of such tools ("by 2010 at least 50 % of public procurement above the EU public procurement threshold will be carried out electronically"<sup>4</sup>) were incorrect.

The Commission<sup>5</sup> recognized that less than 5 % of total procurement budgets in the Member States is awarded through electronic systems.<sup>6</sup> Such percentage is very low if compared to US, Korea and Brazil.<sup>7</sup>

According to the European Commission's data, "*Contracting authorities and Public entities that have already implemented e-Procurement report savings of between 5 % and 20 % of their procurement expenditure. The total size of the EU's procurement market is estimated to be more than 2 trillion*

3. R. Bickerstaff 'The New Directives' Rules on E-communication Mechanisms in Public and Utilities Procurement' (2004) in *P.P.L.R.*, 277; ID., 'Review: Commission Staff Working Document on the Requirements for Conducting Public Procurement Using Electronic Means' (2005) in *P.P.L.R.* NA17.
4. Ministerial Declaration 24 November, 2005, Manchester on the occasion of the Ministerial eGovernment Conference "Transforming Public Services" of the United Kingdom Presidency of the European Council and of the European Commission, Ministers of European Union (EU) Member States, Accession States and Candidate Countries and Ministers of the European Free Trade Area (EFTA) Countries, responsible for eGovernment policy, under the chairmanship of Minister Jim Murphy, representing the UK Presidency and in the presence of European Commissioner for Information Society and Media Mrs Viviane Reding. "By 2010 all public administrations across Europe will have the capability of carrying out 100 % of their procurement electronically and at least 50 % of public procurement above the EU public procurement threshold will be carried out electronically". See G. M. Racca 'The role of IT solutions in the award and execution of public procurement below threshold and list B services: overcoming e-barriers' in D. Dragos – R. Caranta (eds. By) *Outside the EU Procurement Directives – inside the Treaty?*, (Djøf, Copenhagen, 2012), 375.
5. Commission (EC) 'Evaluation of the 2004 Action Plan for Electronic Public Procurement Accompanying document to the Green Paper on expanding the use of e-Procurement in the EU' SEC (2010) 1214 final October 2010, 9. "The EU average figure is estimated to be less than 5 % of total value, other than in Portugal, where the mandatory approach results in nearly 100 % use of e-Procurement. France and Italy, notwithstanding being first mover countries in e-Procurement, estimate that only 4 % and 2.5 % respectively of their total procurement is conducted electronically.
6. The Portugal Law advanced in this regard as use of e-Procurement tools is mandatory for phases from notification to tender award since November 1, 2009.
7. Commission (EU) 'A strategy for e-procurement' 20 April 2012, COM(2012) 179 final, 1. "A full online procurement market place has already been achieved in Korea, which generated savings of US\$ 4.5 billion (about 8 % of total annual procurement expenditure) annually by 2007; in Brazil 80 % of public procurement is carried out electronically".

euro, so each 5 % saved could result in about 100 billion euro of savings per year".<sup>8</sup>

Considering that Electronic tools can assure such saving and are constantly improving in quality and ease of use, the question is why it is so difficult to achieve their application either as means of communications<sup>9</sup> in the submission, or in the evaluation and award phase of public procurement.<sup>10</sup>

E-procurement can simplify the procurement procedures, reducing waste<sup>11</sup> and delivering lower price and better quality, by stimulating transparency and competition across the EU Internal Market.<sup>12</sup> Nonetheless, the main obstacle

8. Commission (EU) 'Delivering savings for Europe: moving to full e-procurement for all public purchases by 2016', IP/12/389, 20 April 2012. See also: Deutsche Bank Research: E-procurement, February 2011. Concerning possible saving in Italy see: F. P. Schiavo 'The role of eProcurement and PEPPOL in Italy' speech at the 7<sup>th</sup> PEPPOL conference, Rome, 29 May 2012.
9. Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, Article 1, § 12 e 13, "12. 'Written' or 'in writing' means any expression consisting of words or figures which can be read, reproduced and subsequently communicated. It may include information which is transmitted and stored by electronic means. 13. 'Electronic means' means using electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means".
10. Commission (EU) 'Green Paper on expanding the use of e-Procurement in the EU', COM(2010) 571 final, 18 October 2010, 3. See also OECD 'Discussion paper on public procurement performance measures. OECD Meeting of Leading Practitioners on Public Procurement', 11-12 February 2012, 10, where the adoption of ICT solutions in public procurement ("e-procurement") is justified "on the ground of speeding up processes and enlarging the set of potential participants". R. Bickerstaff 'E-communication Regulation in Public Procurement: the EC and UK perspective' in S. Arrowsmith (edited by) *Reform of the UNCITRAL model law on procurement* cit., 288 et seq., where the author put in evidence the risk of new e-barriers in cross-border trade. See also: K. Vaidya – G. C. Callender – A.S.M. Sajeew 'Facilitators of Public E-Procurement: Lessons Learned from the U.K., U.S., and Australian Initiatives' in Khi V. Thai (eds.) *International Handbook of Public Procurement* (Auerbach Publications Taylor & Francis Group 2009), 475 et seq.
11. Directive 2004/18/EC, whereas No. 38.
12. Directive 2004/18/EC, whereas No. 12. See also: Commission (EU) 'Proposal for a Directive of the European Parliament and of the Council on public procurement' COM(2011) 896 final, December 20, 2011, whereas No. 19 and 23. Commission (EU) 'The European eGovernment Action Plan 2011-2015. Harnessing ICT to promote smart, sustainable & innovative Government' 15 December 2010, COM(2010) 743 final, see also the final compromise text of 12 July 2013. Commission (EU) 'Green Paper on expanding the use of e-Procurement in the EU', cit., 4, where the

remains public officials' "inertia", resisting to any change of their ingrained habits. The need of an in-depth and intense retraining of the staff is evident.

The second related obstacle is the widespread "market fragmentation that can emerge from the existence of a wide variety of systems, sometimes technically complex, deployed across the EU (and sometimes within a single Member States) that can lead to increased costs for economic operators/suppliers".<sup>13</sup>

Together with the market fragmentation there is demand-side fragmentation, considering the existence of 250,000 contracting entities<sup>14</sup> in EU, which does not allow the achievement of significant professional skills to tackle the use of IT solutions. Fragmentation of procuring entities is connected with markets fragmentation and the award of a relevant number of small contracts with evident limits to an effective competition throughout the internal market. The ensuing result is that cross-border procurement reaches only 1.6 % of contracts.<sup>15</sup>

E-procurement could provide the reduction of distance barriers and information gaps.<sup>16</sup> Moreover, the use of IT solutions allows collection of data and information on all transactions and connected payments from the contracting

benefits of e-procurement are identified in: 1. increased accessibility and transparency, 2. benefits for individual procedures compared to paper based systems, 3. benefits in terms of more efficient procurement administration, 4. Potential for integration of EU procurement markets. See: S. Croom – A. Brandon Jones 'Key Issues in E-Procurement: Procurement Implementation and Operation in the Public Sector' in Khi V. Thai (eds.) *International Handbook of Public Procurement* cit., 447; A. Deckers – Head of Unit for e-procurement and economic analysis of procurement markets 'New perspectives on e-procurement in Europe' speech at the 7<sup>th</sup> PEPPOL conference, Rome, 29 May 2012.

13. Commission (EU) 'A strategy for e-procurement' 20 April 2012, COM(2012) 179 final, 5.
14. Commission (EU) 'Evaluation Report – Impact and Effectiveness of EU Public Procurement Legislation' 27 June 2011, SEC(2011) 853 final, vi.
15. EU Commission, 'Green Paper on the modernisation of EU public procurement policy – Towards a more efficient European Procurement Market', COM(2011) 15.
16. K. Dooley – S. Purchase 'Factors Influencing E-Procurement Usage' in Khi V. Thai (eds.) *International Handbook of Public Procurement*, cit., 461-462. In the same book see also: K. Vaidya – G. C. Callender – A.S.M. Sajeev 'Facilitators of Public E-Procurement: Lessons Learned from the U.K., U.S., and Australian Initiatives', 478-479.

authorities to economic operators involved.<sup>17</sup> Such amount of data leads to a precise map of public spending quality and quantity.<sup>18</sup>

The EU Commission provided some non-legislative initiatives to clarify and encourage the use of e-procurement<sup>19</sup> to overcome administrative and technical barriers to cross-border e-procurement (Pan-European Public Procurement Online – PEPPOL,<sup>20</sup> e-CERTIS<sup>21</sup> and open e-PRIOR<sup>22</sup>).

17. Italian law recently (d.l. 9 February 2012, n. 5, art. 20, c. I, lett. a, converted in Law n. 35 of 2012) implemented the "national database on public contracts" (Banca Dati Nazionale dei contratti pubblici) that will acquire the data of economic operators related to the technical, organizational, economic, financial and general requirements for the qualitative selection of tenderers in the procedures. See the Italian Authority for the Supervision of Public Contracts for works, services and supplies, Atto di Segnalazione n. 1 del 12 gennaio 2012, in [http://www.avcp.it/portal/public/classic/Atti\\_vitaAutorita/AttiDellAutorita\\_Atto?ca=4890](http://www.avcp.it/portal/public/classic/Atti_vitaAutorita/AttiDellAutorita_Atto?ca=4890). About the relevance of eProcurement in information processing see: M. Essig – M. Amann 'E-procurement and Its Role in Supply Management and supplier Valuation' in C. Harland – G. Nissimbeni – E. Schneller (eds.) *The SAGE Handbook of strategic Supply Management* (SAGE, London, 2013), 425-426.
18. A. Merrill – Procurement & Commercial Director – Scottish Government 'PEPPOL & Public Procurement Reform' speech at the 7<sup>th</sup> PEPPOL conference, Rome, 29 May 2012. In this perspective the experience of the 'Scottish Management Information Hub' seems very interesting. The Hub has been in existence since 2006 and is a centrally funded and sophisticated analytical tool provided with the Scottish Procurement Reform Programme. "The Hub allows organisations to: identify how much they are spending on external goods and services from third party suppliers, identify who the key suppliers are, ascertain how many transactions were made with each supplier, highlight commonality across suppliers and spend categories, identify spend with small and medium sized suppliers, highlight spend with local suppliers". See also: Scottish Government, in <http://www.scotland.gov.uk/Topics/Government/Procurement/eCommerce/ScottishProcurementInformationHub>. Participating organisations are required provide a detailed annual extract from their accounts payable system. The specification and example data extract templates can be downloaded by anyone with a log-in to <http://www.spikescavell.net/>
19. Commission (EU) 'Action plan for the implementation of the legal framework for electronic public procurement' 29 December 2004, SEC(2004)1639.
20. The Pan-European Public Procurement Online (PEPPOL) project is completed at the end of August 2012. Now the Open PEPPOL association promote European businesses to easily deal electronically with any European public sector buyers in their procurement processes. See <http://www.peppol.eu/>
21. Commission (EU) 'Proposal for a Directive of the European Parliament and of the Council on public procurement' COM(2011) 896 final, December 20, 2011, whereas No. 33. "Commission provides and manages an electronic system – e-Certis, which is

Progress has been made in the electronic publication and dissemination of information about procurement opportunities. However, the developing of common approaches, standards or templates for the on-line submission and processing of tenders is delayed. It has been underlined that “while solutions have been engineered for individual e-procurement platforms, no attention has been devoted to aligning methods or approaches for submitting tenders electronically”.<sup>23</sup> The use of electronic means in public procurement in Europe requires standardisation<sup>24</sup> and interoperability<sup>25</sup> among the systems used in different Member States and in the phases of the awarding procedure.<sup>26</sup> Otherwise, as already pointed out,<sup>27</sup> the risk is to build new electronic barriers.

updated and verified on a voluntary basis by national authorities. The aim of e-Certis is to facilitate the exchange of certificates and other documentary evidence frequently required by contracting authorities. Experience acquired so far indicates that voluntary updating and verification is insufficient to ensure that e-Certis can deliver its full potential for simplifying and facilitating documentary exchanges for the benefit of small and medium-sized enterprises in particular. Maintenance should therefore be rendered obligatory in a first step; recourse to e-Certis will be made mandatory at a later stage”, see also the final compromise text of 12 July 2013.

22. F. G. Moran ‘Pan-European interoperable electronic public procurement: enabling its implementation within the European Union institutions, agencies and other bodies, and facilitating its adoption across the member States’ (2012) *5<sup>th</sup> International Public Procurement Conference*, in <http://www.ippa.org/IPPC5/Proceedings/Part2/PAPER2-4.pdf>.
23. Commission (EU) ‘Green Paper on expanding the use of e-Procurement in the EU’, cit., 17.
24. The standardisation refers to tender and contract documents and also to technical specifications. An example it’s provided by the Common Procurement Vocabulary (CPV) that was adopted by Regulation (EC) No 2195/2002, which is a hierarchically structured nomenclature, divided into divisions, groups, classes, categories and sub-categories.
25. Commission (EC) ‘Requirements for conducting public procurement using electronic means under the new public procurement Directives 2004/18/EC and 2004/17/EC’ 8 July 2005, SEC(2005) 959, 8. ‘Interoperability’ is used here to refer to the capability of ICT systems (and of the business processes they support) to exchange information or services directly and satisfactorily between them and/or their users, so as to operate effectively together.
26. Directive 2004/18/EC, whereas No. 35, where it is stated “As far as possible, the means and technology chosen should be compatible with the technologies used in other Member States”.
27. G. M. Racca ‘The role of IT solutions in the award and execution of public procurement below threshold and list B services: overcoming e-barriers’ in D. Dragos – R.

The recent Green Paper on expanding the use of e-procurement in the EU has highlighted the need to identify solutions to improve and enhance interoperability between local, regional and national e-procurement systems. Member States should participate in a “collaborative process, in which independent systems belonging to unrelated parties interact through the exchange of business information”.<sup>28</sup> To achieve such goals, the EU Commission has established an e-Tendering Expert Group (e-TEG) tasked with defining a blueprint for pre-award e-procurement that provides a basis for the development of “best-of-breed” solutions. The objective is to promote solutions that achieve the optimal balance between usability and other attributes, such as security. An essential task for the e-TEG is to define an effective model for e-submission, as this is currently the main bottleneck for the wider implementation of e-procurement. On-going standards work, such as that carried out by the CEN BII workshop, will be leveraged by the e-TEG.<sup>29</sup>

A case-book on the best practices on the implementation of e-procurement platforms that assure accessibility, ease of use and cost-effectiveness has been published recently.<sup>30</sup> The costs of e-procurement facilities require invest-

Caranta (eds. By) *Outside the EU Procurement Directives – inside the Treaty?*, cit., 376 et seq.

28. Commission (EU) ‘Green Paper on expanding the use of e-Procurement in the EU’, cit., 13.
29. Commission (EU) ‘A strategy for e-procurement’ 20 April 2012, COM(2012) 179 final, 8, the e-TEG will also present recommendations on actions to be taken by the EU institutions and Member States to ensure the roll-out of eprocurement platforms that guarantee cross-border access and facilitate use by all economic operators in particular SMEs, whilst nonetheless preserving Member State autonomy to design solutions that best fit national requirements and can be integrated with existing platforms. See the recommendations provided by the Expert Group on e-tendering (e-TEG) in the ‘High level Report – Part I’, in [http://ec.europa.eu/internal\\_market/publicprocurement/docs/eprocurement/conferences/121214\\_e-tendering-expert-group-draft-report-part1\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/eprocurement/conferences/121214_e-tendering-expert-group-draft-report-part1_en.pdf) and in the ‘Operational Recommendations – Part II’, in [http://ec.europa.eu/internal\\_market/publicprocurement/docs/eprocurement/conferences/121214\\_e-tendering-expert-group-draft-report-part2\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/eprocurement/conferences/121214_e-tendering-expert-group-draft-report-part2_en.pdf)
30. Pwc, ‘Golden Book of e-Procurement good Practice’ 5 December 2012, in [http://ec.europa.eu/internal\\_market/publicprocurement/docs/eprocurement/conferences/121214\\_e-procurement-golden-book\\_en.pdf](http://ec.europa.eu/internal_market/publicprocurement/docs/eprocurement/conferences/121214_e-procurement-golden-book_en.pdf). The outcome of this work will be used to promote convergence towards and take-up of such good practices by Member States and public authorities investing in e-procurement infrastructure.

ments that cannot be supported by all contracting authorities.<sup>31</sup> New organizational models are required to overcome fragmentation.

In the recent proposal for a new Directive on public procurement, the electronic means of communications are recommended and a general obligation to use such means will be imposed earlier on central purchasing bodies, after a transition period.<sup>32</sup> The use of electronic procedures by Central Purchasing Bodies (CPBs) can reduce costly procurement back-office functions and reap scale economies in procurement administration.<sup>33</sup> The future EU Directive underline the difference between small procuring entities and wider organizations such as CPB, which can afford the change of the instruments and the improvement of strategic sourcing skills.

## 2. Efficiency and transparency through e-procurement solutions.

The principle of transparency is connected to other principles of the Treaty such as the principle of freedom of movement of goods, freedom of establishment and freedom to provide services.<sup>34</sup> Transparency assures impartiality and non-discrimination and favours the participation of economic operators

in the selection for the award of public contracts.<sup>35</sup> Transparency seems also relevant to improve monitoring contracts in all the phases of “procurement cycle”, from the definition of needs to the end of the contract performance, avoiding conducts aimed at distorting competition in the relevant market. The advertising of the will to award a contract has the aim to favour competition between the economic operators and to facilitate control of the compliance with the award criteria.<sup>36</sup>

Transparency provides “a system of openness into public purchasing in Member States, so a greater degree of accountability should be established and potential direct discrimination on grounds of nationality should be eliminated”.<sup>37</sup> Transparency in public procurement is achieved through communi-

31. Commission (EU) ‘Green Paper on expanding the use of e-Procurement in the EU’, cit., 5. The ability to perform procurement electronically requires investment throughout the procurement chain to build the necessary capacity and manage the change-over. Investment costs in national and regional e-Procurement facilities – spanning e-portals to more comprehensive solutions – range from 0.5m€ to 5m€.
32. Commission (EU) ‘Proposal for a Directive of the European Parliament and of the Council on public procurement’ COM(2011) 896 final, December 20, 2011, whereas No. 25, where it is stated that “electronic means of communication are particularly well suited to support centralised purchasing practices and tools because of the possibility they offer to re-use and automatically process data and to minimise information and transaction costs. The use of such electronic means of communication should therefore, as a first step, be made compulsory for central purchasing bodies, while also facilitating converging practices across the Union”, see also the final compromise text of the 12 July 2013.
33. Commission (EU) ‘Green Paper on expanding the use of e-Procurement in the EU’, cit., 4. For a different perspective see: A. Sánchez Graells ‘Public Procurement and EU Competitions Rules’ (Hart Publishing, Oxford, 2011).
34. Directive 2004/18/EC, whereas No. 2. See also art. 2 and S. Arrowsmith ‘EC Regime on Public Procurement’ in K. H. V. Thai (eds.) *International Handbook of Public Procurement* (Auerbach Publications Taylor & Francis Group 2009) 267-268.

35. Case C-260/04, *Commission v. Italy* [2007] E.C.R. I-7083; Case C-231/03, *Consorzio Aziende Metano (Coname) Comune di Cingia de’ Botti (Coname)* [2005] E.C.R. I-7316; Case C-275/98, *Unitron Scandinavia A/S v. Ministeriet for Fodevarer e Landbrug og Fiskeri*, [1999]. Concerning a contract of certain cross-border-interest see: Case C-412/04 *Commission v. Italy* [2008] E.C.R. I-619, § 66-78. Concerning a below threshold contract see: Case C-220/06 *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia v Administración General del Estado* [2007] E.C.R. I-12175. See: A. Brown ‘Transparency Obligations Under the EC Treaty in Relation to Public Contracts that Fall Outside the Procurement Directives: A Note on C-231/03, *Consorzio Aziende Metano (Coname) v Comune di Cingia de’ Botti*’ in *PPLR* 2005, NA153-NA159. See also: G. Skovgaard Ølykke ‘How Should the Relation between Public Procurement Law and Competition Law Be Addressed in the New Directive?’ in G. Skovgaard Ølykke – C. Risvig Hansen – C. D. Tvarnø, *EU Public Procurement – Modernisation, Growth and Innovation* (Djof publishing, Copenhagen, 2012), 62-63 and 67.
36. Opinion of AG Stix-Hackel in Case C-247/02, *Sintesi S.p.A. v Autorità per la Vigilanza sui Lavori Pubblici* [2004] E.C.R. I-9215, par. 39 where it is stated that “A minimum degree of transparency is required to guarantee competition. To that end, the directives on the award of contracts lay down a number of obligations concerning publicity. The obligation placed on the contracting authority to define the criteria in advance and also to adhere to them thereafter serves competition. On the other hand, in certain cases the need to ensure competition makes it necessary to withhold certain information about an undertaking from other undertakings”. L. Valadares Tavares, *Why e-Public Procurement?*, paper presented at the 1<sup>st</sup> *European Conference on e-Public Procurement*, Barcellona, March 2013, 7.
37. C. H. Bovis ‘EU Public Procurement Law’ (Cheltenham 2007), 65, where are also examined the effects of the Principle of Transparency. S. Arrowsmith – J. Linarelli – D. Wallace ‘Regulating Public Procurement: National and International Perspectives’ (Kluwer Law International London 2000) 72-73 where the authors suggested that the concept of transparency can in fact be broken down into four distinct aspects: Publicity for contract opportunity, publicity for the rules governing each procedure, a principle that limits the discretion of procuring entities, the possibility for verification

ty-wide publicity and advertisement of public procurement contracts over certain thresholds".<sup>38</sup> The EU case-law on transparency in public procurement, implies an obligation to provide "a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procurement process to be reviewed".<sup>39</sup> All potential tenderers have to be in a position of equality<sup>40</sup> as regards the scope of the information in a contract notice.<sup>41</sup> In the pre-award phase the principle of transparency "implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract".<sup>42</sup> The

electronic instruments can greatly improve the effectiveness of the principle of transparency and efficiency.

The correct use of interoperable IT solutions can improve the accessibility of the call for tenders and thus increase the participation of SMEs, also in cross-border procurement.<sup>43</sup>

It is important to remove barriers that currently discourage newcomers from undertaking onerous registration or authentication procedures required by some platforms – in some cases requiring the use of tools and assets only available in the country concerned.

### 3. Pre-award electronic advertising: the evolution towards full electronic means for the submission of the requirements and of the offers.

In the procurement process, the electronic means have been, so far, one of the ways provided by EU directives to give economic operators information of an award procedure.<sup>44</sup> The 2004 Directives, in some cases, limited the right of contracting authorities to choose the means of communication and imposed the electronic one.<sup>45</sup> Tender documents can be either made available or sent to economic operators by electronic means.<sup>46</sup> In the case of a Dynamic Pur-

of the fact that the rules have been followed. See also: C. Loyola – M. Ortíz 'The experience of information acquisition in Chilean public market via bi implementation' (2012) *5<sup>th</sup> International Public Procurement Conference*, in <http://www.ipppa.org/IPPC5/Proceedings/Part9/PAPER9-10.pdf>

38. C. H. Bovis 'EU Public Procurement Law' cit., 65, where are also examined the effects of the Principle of Transparency.
39. Case C-324/98, *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG*, [2000], E.C.R. I-10745 § 61-62. See also: Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7213, § 81, and *Joined Cases C-21/03 and C-34/03 Fabricom* [2005] ECR I-1559, § 26. See: Directive 2004/18/EC, art. 42(2), where are provided the rules concerning the general availability and non discrimination in the use of the selected electronic means.
40. Case C-213/07 *Michaniki* [2008] ECR I-0000, § 44 and 45; Case C-231/03, *Consorzio Aziende Metano (Coname) Comune di Cingia de' Botti (Coname)* [2005] E.C.R. I-7316, § 17; C-315/01 *GAT* [2003] ECR I-6351, § 73; Case C-470/99, *Case C-448/01 EVN and Wienstrom* [2003] ECR I-14527, § 47, *Universale-Bau and Others* [2002] ECR I-11617, § 93; Case C-19/00 *SIAC Construction* [2001] ECR I-7725, § 34. R. Caranta 'Transparence et concurrence', in R. Noguellou – U. Stelkens (eds.) *Droit comparé des Contrats Publics* (Bruxelles, Bruylant, 2010), 149.
41. Case C-199/07 *Commission v. Greece*, [2009] ECR I-10669 § 38; Case C-231/03, *Consorzio Aziende Metano (Coname) Comune di Cingia de' Botti (Coname)* [2005] E.C.R. I-7316, § 18 and 21. P. Trepte 'Transparency and accountability as tools for promoting integrity and preventing corruption in procurement: possibilities and limitations' Expert Group Meeting on Integrity in Public Procurement, 20-21 June 2005, Château de la Mouette, Paris.
42. Case C-496/99 *EU Commission v. CAS Succhi di Frutta SpA* [2004] E.C.R. I-3801, § 111; Case T-437/05 *Brink's Security Luxembourg v. Commission* [2009] E.C.R. II-3233, 114-115.

43. Directive 2004/18/EC, whereas No. 35.

44. Directive 2004/18/EC, art. 42, where it is also specified that "the means of communication chosen must be generally available and thus not restrict economic operators' access to the tendering procedure".

45. Commission (EC) 'Requirements for conducting public procurement using electronic means under the new public procurement Directives 2004/18/EC and 2004/17/EC' 8 July 2005, SEC(2005) 959, 6 and 7, Where it is also stated that "Technical problems within the contracting authority's network, service disruptions and system failures may impede access to contract documents, or may disrupt the procurement process at a critical moment (e.g. during the transmission of requests for clarification or the corresponding answers, during receipt of tenders or requests to participate, or during auctions). Problems within the public or open network and problems specific to the device or the platform of the contracting authority should be distinguished; only in the latter case must the contracting authority remedy the failure by, for example extending the deadlines and providing the relevant information to all interested parties. The contracting authority is not responsible for the open network failure and is not obliged to take any remedial actions, even though it may do so where this seems appropriate (respective disclaimers may be included in an appropriate location)".

46. See the national article of this book. See also F. Lichère 'The Regulation of Electronic Reverse Auctions in France' in S. Arrowsmith (edited by) *Reform of the UN-*

chasing System, it is mandatory to offer unrestricted and full direct electronic access from the date the notice setting up the system is published, until the expiry of the DPS.<sup>47</sup> Where the contracting authority offers unrestricted and full direct access by electronic means to the contract documents and any supplementary documents from the date of publication of the notice, the time limits for receipt the tenders may be reduced by five days.<sup>48</sup> Electronic means can be used to send and receive tenders and requests to participate, as well as plans and projects in design contests.<sup>49</sup>

All types of notices are published by the Publications Office of the EU. Within twelve days (or five days in the case of the accelerated form of restricted or negotiated procedures), the Publications Office publishes the notices in the Supplement to the Official Journal and via the TED (*Tenders Electronic Daily*) database. TED is a single, accepted and well-used system for the publication of above threshold notices across the EU, supported by

CITRAL *model law on procurement*, (Thomas Reuters/West, Danvers, 2009), 459-463 and M. Burgi 'The Policy on Regulating Electronic Communications in Germany' in S. Arrowsmith (edited by) *Reform of the UNCITRAL model law on procurement*, cit., 323-324.

47. Directive 2004/18/EC, art. 33(3)(c) and Directive 2004/17/EC, art. 15(3)(c). See also: Directive 2004/18/EC, art. 42(5)(d) and Directive 2004/17/EC, art. 48(5)(d) where it is provided that the receipt of documents, certificates and declarations that do not exist in electronic format must be organised following the traditional procedures on paper. Directive 2004/18/EC, art. 1(7) second indent and 1(6) "some procuring methods/instruments such as auctions and dynamic purchasing systems may only be conducted by electronic means". Commission (EC) 'Requirements for conducting public procurement using electronic means under the new public procurement Directives 2004/18/EC and 2004/17/EC' 8 July 2005, SEC(2005) 959, 7. Where there are reasons to believe that, due to the volume and/or complexity of the data to be submitted, the communication, exchange and storage of it cannot be properly handled by electronic means, and therefore the requirements of Articles 42(3) and 48(3) are not satisfied, they should be handled by traditional means of communication. In such cases data shall be exchanged on physical supports like paper or generally used supports for electronic storage of data such as floppy disks, CD-ROMs or memory sticks.
48. Directive 2004/18/EC, art. 38(6) and Directive 2004/17/EC, art. 45(6). In open procedures it is possible to cumulate the two possibilities of reduction, the one for electronic transmission of the notice and the one for the unrestricted and full direct access to tender documents, leading to a total reduction of the deadline for submitting tenders of twelve days.
49. Directive 2004/18/EC, art. 42(5) and Directive 2004/17/EC, art. 48(5) determine the key rules and refer to Annexes X and XXIV for the specific minimum requirements for the security and confidentiality of electronic reception devices.

compatible infrastructures at national level.<sup>50</sup> Two notices are published; in full in their original language only, and in summary form in the other Community languages. The Publications Office takes responsibility for the translations and summaries.<sup>51</sup> Where notices are drawn up and transmitted by electronic means, the time limits for the receipt of tenders and for the receipt of requests to participate can consequently be shortened by seven days.<sup>52</sup>

The use of a common database ensures the accessibility of information but it lacks the idea of translating all the content of the notices in a common language, as the translation of a summary in all languages seems insufficient to assure a wider participation. As well known, the EU language issue in the field of public procurement risks undermining opportunities of participation and of growth of European economic operators. The use of IT solutions can be simplified by standard forms for the publication of notices, as provided by EU rules.<sup>53</sup>

### 3.1. The electronic submissions of tenders and of e-signatures.

Most concerns encountered in the submission of tenders relate to the authentication through means such as electronic signatures and recognition of electronic identification. Such issues are not specific to the e-procurement context but arise in any situation where authentication/signatures are required. The EU Commission has adopted measures to allow authorities to identify the origin/certification of partner countries signatures. The PEPPOL project developed solutions to provide on-line tools permitting automatic recognition of electronic signatures from other Member States to be used in a procurement context. Other concerns arise from the requirement for contracting authorities to assess documents submitted by tenderers to prove eligibility for selection. These documents are issued at national/local level in accordance with the relevant conventions, formats and languages. E-procurement was expected to find ways to increase efficiency and to reduce such repeated burden on economic operators. Many solutions developed go some way to fulfilling these

50. Commission (EU) 'Green Paper on expanding the use of e-Procurement in the EU', cit., 8, where it is reported that "in 2009 just over 90% of forms sent to TED (Tenders Electronic Daily) were received electronically and in a structured format. The electronic publication of notices for below threshold procurement has also advanced at national or regional level".
51. C. H. Bovis 'EU Public Procurement Law' cit., 66.
52. Directive 2004/18/EC, art. 38(5) and Directive 2004/17/EC, art. 45(3).
53. Regulations EU No 842/2011 of 19. August 2011 establishing standard forms for the publication of notices in the field of public procurement and repealing Regulation (EC) No 1564/2005. L. Valadares Tavares, *Why e-Public Procurement?* cit., 18.

objectives, without relying on complicated high tech solutions. In some countries, economic operators provide a statement (often a simple electronic document which may or may not be electronically signed) in which they maintain that they are not in breach of any of the set criteria. Only the winning bidders are asked to provide the actual documents and this may be done electronically or on paper.

The Polish legal system provides that in case of lowest price the procedure can be based on a request-of-quotations or an electronic bidding and the price may take the form of a lump sum. In case of request of quotation, such quotation might be submitted with an e-mail. In case of electronic bidding the tender must be submitted through a platform and has to comply with EU and national procurement law allowing the recording of data and timing. It is evident that e-submission of tender (especially if done with an e-mail) might give rise to the possibility of not being received by the procuring entity with the consequent issues of responsibility by either the manager of the platform or the contracting authority. Actually, there is no case law concerning such problem. Italian contracting authorities may turn to a subject for the technical management of IT systems<sup>54</sup> and provide in their procurement documents a specific clause to exempt from any responsibility the contracting authority and the manager of the system.<sup>55</sup>

The 2004 Directives provide that Member States may regulate the level of electronic signature required and restrict the choice of contracting authorities to qualified signatures.<sup>56</sup> "In 2010, 18 countries expressly require the use of electronic signatures in e-procurement procedures, while 13 countries do not explicitly require them. In terms of the type of signature required, 13 out of the 27 Member States have introduced a legal requirement specifying the use of advanced e-signatures. The regulatory choices of Member States in regard to e-signatures may indicate their preferences in relation to security and trust

but also need to be considered from a cross-border and inter operability perspective".<sup>57</sup>

The Commission's evaluation of the e-procurement Action Plan reveals concerns that the preference for qualified electronic signatures may constitute an unnecessary entry barrier to e-procurement – particularly for partner country suppliers in the absence to date of operational tools for the recognition of different electronic signatures.<sup>58</sup> Given this assessment, it may be useful to revisit the assumption in favour of qualified electronic signatures provided for in EU procurement legislation. The Digital Agenda for Europe foresees a review of e-signatures legislation and a stepping up of work in the area of e-identification.<sup>59</sup>

The proposal for a Directive on public procurement provides some simplification concerning administrative burdens deriving from tenderers requirements (the need to produce attestations, certificates or other documents evidencing tenderer's suitability).<sup>60</sup> The production of documentary evidence could have been facilitated by a standardised document, the "European Procurement Passport" which should have provided means of electronic for the absence of grounds for exclusion.<sup>61</sup> Unfortunately, the final compromise text (12 July 2013) deleted the provision of such passport nevertheless,<sup>62</sup> steps towards such direction have already been taken especially in the UK, particularly in Wales,<sup>63</sup> Scotland<sup>64</sup> and it is foreseen in Italy<sup>65</sup> too.

54. See the Italian Procurement Regulation enforcing the code, d.P.R. 7 October 2012, No. 207, art. 290.

55. For an example you can see: Consip S.p.A., *Disciplinare di gara a procedura aperta per la prestazione del servizio di noleggio a lungo termine di autoveicoli senza conducente per le pubbliche amministrazioni ai sensi dell'art. 26 legge n. 488/1999 e s.m.i. e dell'art. 58 legge n. 388/2000*, in <http://www.consip.it/on-line/Home/Gare/scheda934.html>, par 4.1, 17 et seq.

56. Directive 2004/18/EC, art. 42(5)(b) and Annex X. For utilities sector see Directive 2004/17/EC, art. 48(5)(b) and Annex XXIV. The device for the electronic receipt of tenders and requests to participate must guarantee that the electronic signatures used are in conformity with the national provisions adopted pursuant to Directive 1999/93/EC.

57. Commission (EC) 'Evaluation of the 2004 Action Plan for Electronic Public Procurement Accompanying document to the Green Paper on expanding the use of e-Procurement in the EU' cit., 35.

58. Commission (EC) 'Action plan for the implementation of the legal framework for electronic public procurement' 13 December 2004.

59. Commission (EU) 'A Digital Agenda for Europe', cit.

60. G. M. Racca 'The role of IT solutions in the award and execution of public procurement below threshold and list B services: overcoming e-barriers' in D. Dragos – R. Caranta (eds. By) *Outside the EU Procurement Directives – inside the Treaty?*, cit., 382-383.

61. Commission (EU) 'Proposal for a Directive of the European Parliament and of the Council on public procurement' cit., Article 59, § 2. For the content of the European Procurement Passport see Annex XIII. This provision was deleted in the final compromise text of 12 July 2013.

62. Commission (EU) 'Proposal for a Directive of the European Parliament and of the Council on public procurement' cit., Article 59, § 3. See also the compromise amendments of 11 December 2012 provided by European Parliament, art. 59.

63. See the article of P. Telles of this book (par. 2), with reference to the 'Supplier Qualification Information Database (SQUID)'.

#### 4. E-procurement solutions for the automatic evaluation of bids and tenders: the lowest electronic price and the most economically advantageous electronic tender

Contracting authorities can choose<sup>66</sup> between the criteria of the lowest price and the most economically advantageous tender according to the characteristics of the subject matter of the contract.<sup>67</sup> The evaluation of bids and tenders could take place through electronic means as well. Such step in the use of electronic tools seems to be one of the most challenging, especially in the case of the criteria of the most economically advantageous tender.

When the lowest price is the award criterion, contracting authorities will not refer to any other qualitative element in the award of the contract. The lowest price is the sole quantitative benchmark that can differentiate the offers submitted by the tenderers.<sup>68</sup>

The criterion of the lowest price is appropriate when the subject matter of the contract is ordinary in relation to the widespread presence of economic operators on the market able to provide the requested product/service/work. The standardization of the product/service makes it easier to define the requirements of the subject matter of the contract. Nonetheless, through an in-

tense and detailed preliminary work it is possible to define the exact quality standard required and consider the possible different options submitted by the tenders irrelevant; in such cases, the precise previous definition of the quality required enables to receive and evaluate on a price basis only offers that assure all such level of quality. Such previous work can open a wider room for the adoption of the criterion of the lower price without sacrificing quality and facilitates the use of electronic evaluation. Obviously, if there are no preferences concerning the different quality variants of the same good, service or work, the economic operators in the relevant market will offer the most cost-effective solution of the contract request. However, contracting authorities can reject a tender if the price is considered abnormally low.

The contracting authority should analyze and define its needs and therefore specify the subject-matter of the contract performance. Significant professional skills are required to properly pinpoint such needs and the quality level required. Otherwise, an improper definition of the needs and of the quality standards required will lead to an unsatisfactory award.

When the contracting authority fails to define the object of the contract performance precisely, the only criterion for the award of the contract is the most economically advantageous tender. Specific concerns arise in the electronic evaluation of such set of criteria, in the attribution of scores and in the sum of them. In such cases, different elements linked to the subject-matter of the contract must be evaluated, e.g. quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion.<sup>69</sup> As well-known, the above-listed criteria are not exhaustive. The technical specifications of the services and goods or works required (quality of the bid)<sup>70</sup> must obviously be distinguished from the criteria for the qualitative selection of participants (quality of bidder) evaluated electronically in the future through databases.

69. Directive 2004/18/EC, art. 53(1) and Directive 2004/17/EC, art. 55(1). Concerning the scoring rules provided from the contracting authority see: F. Dini, R. Pacini, T. Valletti 'Scoring rules', in N. Dimitri – G. Piga – G. Spagnolo (eds.) *Handbook of procurement* (Cambridge University Press, Cambridge, 2006), 294 et seq.

70. Case C-532/06, Emm G. Lianakis AE v. Alexandroupolis, (2008) E.C.R. I-251; On this ECJ case law see: 'Application and Implications of the ECJ's Decision in Lianakis on the Separation of Selection and Award Criteria in EC Procurement Law' (2009) in *P.P.L.R.* (special issue) 103. For a general EU perspective, see S. Treumer 'The Distinction Between Selection and Award Criteria in EC Public Procurement Law: A Rule Without Exception?' (2009) in *P.P.L.R.*, 103.

64. See footnote No. 18 in this article, concerning the 'Scottish Management Information Hub'.

65. See the Italian Public Contract Code, art. 6 bis (introduced with d.l. 9 February 2012, n. 5, art. 20, c. I, a), converted in Law 4 April 2012, No. 35), where it is provided the National Database of Public Contracts (NDPC). From 1<sup>st</sup> January 2013, contracting authority use NDBC to take information about the quality of tenderers.

66. Commission (EU) 'Proposal for a Directive of the European Parliament and of the Council on public procurement' COM(2011) 896 final, December 20, 2011, whereas No. 37. "Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment. These criteria should guarantee that tenders are assessed in conditions of effective competition, also where contracting authorities require high-quality works, supplies and services that are optimally suited to their needs, for instance where the chosen award criteria include factors linked to the production process. As a result, contracting authorities should be allowed to adopt as award criteria either 'the most economically advantageous tender' or 'the lowest cost', taking into account that in the latter case they are free to set adequate quality standards by using technical specifications or contract performance conditions". About the equivalence of two award criteria see: Authority for the Supervision of Public Contracts for works, services and supplies, Determinazione, 24 November 2011, n. 7, in [http://www.avcp.it/portal/public/classic/AttiVitaAutorita/AttiDellAutorita/\\_Atto?ca=4846](http://www.avcp.it/portal/public/classic/AttiVitaAutorita/AttiDellAutorita/_Atto?ca=4846)

67. Case C-247/02, Sintesi S.p.A. v Autorità per la Vigilanza sui Lavori Pubblici [2004], cit.

68. Directive 2004/18/EC, art. 53(1)(b)

The contracting authority must specify the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender in the contract notice or in the contract documents. This weighting may be expressed as a range with a minimum and maximum weighting, where the authority considers this appropriate.<sup>71</sup> Those weightings can be expressed by providing a range with an appropriate maximum spread. Whenever the weighting is not possible for demonstrable reasons, the contracting authority must indicate the criteria in descending order of importance in the contract documents. The implementation of such criteria in an electronic system of evaluation requires to define only objectively measurable qualitative element that can receive an automatic score in case of relevant changes or amelioration proposed.

The electronic evaluation of the tender, whichever the award criteria, is provided through the instrument defined as e-auctions to be applied in open or restricted procedures or in different kinds of framework agreements<sup>72</sup> and Dynamic Purchasing System, as already provided by the 2004 Directive on public procurement.

#### 4.1. Electronic auctions as a tool for electronic evaluation of tenders.

The significant step in the use of electronic tools is the electronic evaluation of the tenders that implies an automatic processing of the offers according to the evaluation criterion.<sup>73</sup>

The electronic auction (electronic reverse auction or e-auction)<sup>74</sup> is not an autonomous awarding procedure, in addition to the open, restricted and nego-

tiated procedure, but it is a procurement tool that emerged as a result of progress in electronic technology.<sup>75</sup> In this perspective, e-auctions merely allow to carry out the award process electronically in one of the ordinary procedures. Electronic auctions<sup>76</sup> may be used as part of open, restricted or negotiated procedures,<sup>77</sup> and also in case of framework agreements or dynamic purchasing systems.

Electronic auctions<sup>78</sup> imply automatic evaluation, which are possible whenever services and works contracts have not intellectual performances – such as the design of works<sup>79</sup> – as their subject-matter. Some Member States (as France) have already identified further limits on the use of e-auctions.<sup>80</sup>

Green Paper on expanding the use of e-procurement in the EU' cit., 32, where is stated that "in 2004, seven countries reported some experience with e-Auctions, while 23 countries expressed the intention to introduce e-Auctions. In 2010, 26 countries support its use. Among the six countries that have not transposed the e-auctions provisions, only two countries do not intend to do so (DE and LI)". For US experience on eAuctions: C. Yukins 'Use and Regulation of Electronic Reverse Auctions in the United States' in S. Arrowsmith (eds.) *Reform of the UNCITRAL model law on procurement*, (Thomas Reuters/West, Danvers, 2009), 471 et seq.

75. E-auctions constitute a particular step of the awarding stage of the procurement procedure and as such they shall always be preceded by the full evaluation of the tenders received, which will result in a score (notation) that enables the contracting authority to rank the tenders using automatic evaluation methods.
76. Directive 2004/18/EC, art. 54(3) and Directive 2004/17/EC, art. 56(3). Contracting authorities have to announce their intention to hold e-auctions in the contract notice. Once the e-auction has been announced it becomes mandatory to hold it, unless only one valid tender is received.
77. Directive 2004/18/EC, art. 54(2) and Directive 2004/17/EC, art. 56(2). In open, restricted or negotiated procedures in the case referred to in Article 30(1)(a), the contracting authorities may decide that the award of a public contract shall be preceded by an electronic auction when the contract specifications can be established with precision.
78. In open, restricted, negotiated procedures with prior publication of a contract notice justified by the presence of irregular or unacceptable tenders in the case of Article 30(1)(a), on the reopening of competition among the parties of a framework agreement and on the opening of competition under a DPS if it is possible to establish the contract specifications with precision (Art. 54(2) of Directive 2004/18/EC); in open, restricted or negotiated procedures with a prior call for competition and on the opening for competition of contracts to be awarded under a DPS (Article 56(2) of Directive 2004/17/EC).
79. Directive 2004/18/EC, art. 1(7) second indent and Directive 2004/17/EC, art. 1(6). See also whereas No. 14 "provision should be made for such electronic auctions to deal only with contracts for works, supplies or services for which the specifications

71. Directive 2004/18/EC, art. 53(2) and Directive 2004/17/EC, art. 55(2). For example, an authority could perhaps assign in the documents a weighting of 80 % to price and 20 % to quality; or state in the documents that the weighting will be 80-85 % for price and 15-20 % for quality, and later decide on the more precise weighting.

72. L. Folliot-Lalliot 'The French Approach to Regulating Frameworks under the New EC Directives' in S. Arrowsmith (eds.) *Reform of the UNCITRAL model law on procurement*, (Thomas Reuters/West, Danvers, 2009), 198 et seq. on French rules on framework agreements.

73. A. Eyo 'Electronic auctions in EU procurement: reflections on the auction rules from the United Kingdom' (2012) *P.P.L.R.*, 1-17.

74. Directive 2004/18/EC, art. 54(1) and Directive 2004/17/EC, art. 56(1), where it is stated that Member States may regulate and limit the resort to e-auctions. See also Directive 2004/18/EC, art. 54(3) and Directive 2004/17/EC, art. 56(3), where is stated that contracting authorities which decide to hold an electronic auction shall provide information about the electronic equipment used and the arrangements and technical specifications for connection. See also: Commission (EC) 'Evaluation of the 2004 Action Plan for Electronic Public Procurement Accompanying document to the

Through e-auctions economic operators compete to win contract opportunities, submitting a bid and subsequently proposing a rebate, or revise their tender on an electronic platform.<sup>81</sup> Anyway, the subsequent rebate phase is considered optional.

The e-auction can be based either solely on prices (whether award criteria is the lowest price) or on prices and/or new values for other features that are indicated in the specification (in case of most advantageous tender).<sup>82</sup> As usual, the award criteria is published in the contract notice or tender documents. An equal and transparent treatment towards tenderers is required.<sup>83</sup> Moreover, "in order to guarantee compliance with the principle of transparency, only the elements suitable for automatic evaluation by electronic means, without any intervention and/or appreciation by the contracting authority, may be the object of electronic auctions, that is, only the elements which are quantifiable so that they can be expressed in figures or percentages. On the other hand, those aspects of the tenders which imply an appreciation of non quantifiable elements should not be the object of electronic auctions".<sup>84</sup>

can be determined with precision. Such may in particular be the case for recurring supplies, works and service contracts.

80. F. Lichère 'The Regulation of Electronic Reverse Auctions in France' in S. Arrowsmith (edited by) *Reform of the UNCITRAL model law on procurement*, cit., 459-463. Where is stated that the decree of September 18, 2001 "limited the use of electronic auctions to goods available on the general market". The author take into account the perspective of the code des marchés publics.
81. Directive 2004/18/EC, art. 1(7) and Directive 2004/17/EC, art. 1(6). A. Eyo 'Electronic auctions in EU procurement: reflections on the auction rules from the United Kingdom' (2012) *P.P.L.R.*, 1-17, in 2008 only 38 contract notices published on OJEC used such tool. In other member States the use of e-auctions seems even much lower: Denmark (1); France (1); Hungary (1); Netherlands (3); Poland (8) and Romania (10).
82. S. Arrowsmith, Ch. 8 on "Electronic Procurement" in S. Arrowsmith (ed.), *EU Public Procurement Law: An Introduction* p. 255: "A procuring entity using both price and quality criteria in an auction for motor vehicles will need to establish before the auction the financial value to entity of the different quality aspects of the vehicles offered by different tenderers. The prices offered by tenderers will be subject to revision during the auction, and as the prices are changed the auction software must automatically re-rank the tenders taking into account both the current prices tendered and quality features as evaluated prior to the auction"
83. S. Arrowsmith 'Electronic Reverse Auctions under the EC Public Procurement Rules' (2002) in *P.P.L.R.*, 299.
84. Directive 2004/18/EC, whereas No. 14. See also Directive 2004/18/EC, art. 54(2) and Directive 2004/17/EC, art. 56(2).

A full evaluation of the tenders based on the award criteria and their relative weighting published in the contract notice must precede the auction.<sup>85</sup> At the end of the full initial evaluation, all tenderers who have been submitted as admissible tenders shall be invited<sup>86</sup> simultaneously to submit new prices and/or values,<sup>87</sup> whenever provided.

The award criteria must permit to establish the respective ranking of the tenderers at any stage of the electronic auction.<sup>88</sup> The rules provide only auctions in which suppliers can ascertain their ranking during the auction, and thus can establish at any time whether they have submitted the best tender. This is an important feature of e-auctions under the EU provisions which should motivate suppliers at a later stage to improve their tenders to the level necessary to win the contract, enhancing value for money for the procuring entity. New prices, revised downwards, or the improvement of elements of the tenders other than prices can be submitted electronically.<sup>89</sup>

The procuring entity may also communicate other information concerning other prices or values submitted, provided that that is stated in the specifications. They may also – at any time – announce the number of participants in that phase of the auction. In no case, however, may they disclose the identities of the tenderers during any phase of an electronic auction.<sup>90</sup>

85. Directive 2004/18/EC, art. 54(5) and Directive 2004/17/EC, art. 56(5). When the contract is to be awarded on the basis of the most economically advantageous tender the invitation shall indicate the result of the full initial evaluation by communicating the notation (i.e. the number of points allocated to the individual tenderer). See also: Commission (EC) 'Requirements for conducting public procurement using electronic means under the new public procurement Directives 2004/18/EC and 2004/17/EC' 8 July 2005, SEC(2005) 959, 19, where is stated that there is no obligation to communicate at this stage the precise ranking (i.e. the relative position of the individual tenderer compared to the other participants) so long as this is done when the auction starts.
86. Invitations shall be sent individually by electronic means to each admissible tenderer.
87. Directive 2004/18/EC, art. 54(4) and Directive 2004/17/EC, art. 56(4). A full evaluation of the tenders based on the award criteria published in the notice or in the specification and their relative weighting must precede the auction. At the end of the full initial evaluation, all tenderers who have submitted admissible tenders shall be invited simultaneously to submit new prices and/or values
88. Directive 2004/18/EC, whereas No. 14.
89. S. Arrowsmith, fn. 82 above.
90. Throughout each phase of an electronic auction the contracting authorities shall instantaneously communicate to all tenderers at least sufficient information to enable them to ascertain their relative rankings at any moment. Directive 2004/18/EC, art. 54(6) and Directive 2004/17/EC, art. 56(6). Cfr. S. Arrowsmith – A. Eyo 'Electronic Auctions in the EC Procurement Directives and a perspective from UK Law and

In case of the lowest price, e-auctions enables contracting authorities to ask tenderers to submit new prices, revised downwards.<sup>91</sup> The 2004 Directives define the conditions of integrity and security of the data that the contracting authority has to fulfil by the chosen means of communication during the communication, exchange and storage of information.<sup>92</sup>

In the awarding phase, contracting authorities shall take appropriate steps to give evidence the progress of award procedures conducted by electronic means.<sup>93</sup> This requirement of traceability refers to each stage of the procurement process conducted electronically. "There should be equipment and functionalities in place to maintain the original version of all documents and a true and faithful record of all exchanges with economic operators in order to provide any of the evidence which might be needed in case of litigation".<sup>94</sup>

The effective use of e-auctions is still quite rare in most of the EU Member States, especially in Denmark<sup>95</sup> and Germany.<sup>96</sup> It is considered to undermine the participation of SMEs and affects the quality of goods, works and services acquired. In France, the use of e-auctions is provided only in

Practice' in S. Arrowsmith (edited by) *Reform of the UNCITRAL model law on procurement* (Thomas Reuters/West, Danvers, 2009), 422. This seems to indicate that tenderers need to know where they are ranked overall in the competition, and arguably how many tenderers are participating, and not merely whether or not the tenderer is the highest-ranked. In the empirical study referred to earlier two electronic service providers interviewed expressed concern that providing such detailed information creates greater scope for collusion and considered that a rule allowing for disclosure only of whether the tender is the first ranked bidder would be preferable".

91. Directive 2004/18/EC, whereas No. 14.

92. Directive 2004/18/EC, art. 42(3) and Directive 2004/17/EC, art. 48(3). These are not typically conditions specific to electronic means, because they also apply traditionally to paper-based communication. The Secure channels (https, SSL) and/or encryption may be used to preserve the data integrity and the confidentiality of tenders and requests to participate, although encryption may require higher levels of ICT literacy from economic operators.

93. Directive 2004/18/EC, art. 43, second indent and Directive 2004/17/EC, art. 50(1) last indent.

94. Commission (EC) 'Requirements for conducting public procurement using electronic means under the new public procurement Directives 2004/18/EC and 2004/17/EC' 8 July 2005, SEC(2005) 959, 10. Where it is also stated that "Traceability should make it possible to verify what message/data has been transmitted or made available, by whom, to whom, and when, including the duration of the communication. It should also be possible to reconstitute the sequence of events including any automatic data processing or automated calculations". See also: Directive 2004/18/EC, whereas No. 30.

95. See the article of S. Treumer of this book (par. 5).

96. See the article of M. Burgi of this book (par. 5.2).

case of 'quantifiable criteria'.<sup>97</sup> The Polish Public Procurement Law provide, the preferential use of quantifiable criteria and allows the use of e-auctions as a second-step procedure whenever during the prior award procedure all the tenders have been rejected and the original conditions of the contract are not materially amended.<sup>98</sup> Such second step of competition concerns only the evaluation of qualitative criteria and not of the price. In Romania, the use of e-auctions highlighted the problem of abnormally low tenders that might be discouraged through some forms of sanctions for the tenderers.<sup>99</sup>

The evaluation of tenders in e-auctions requires the use of a mathematical formula in order to sum the scores and define the ranking. This one, stated in the invitation of tenderer, will be used "to determine automatic re-rankings on the basis of the new prices and/or new values submitted".<sup>100</sup> Such formula shall incorporate the weighting of all the criteria fixed to determine the most economically advantageous tender, as indicated in the contract notice or in the specifications. The ranges shall, however, be reduced beforehand to a specified value. Where variants are authorised, a separate formula shall be provided for each variant.<sup>101</sup>

The use of electronic means permits to evaluate only measurable quality and requires a significant effort to define *ex ante* the parameters that are really significant and whose improvement assures a concrete value added to the contracting entity. Such instruments could assure a greater degree of the objectivity of the evaluation, as it reduces the discretionary power of the contracting authority renouncing to the evaluation of non-measurable quality elements. The objectively measurable technical and qualitative criteria, (e.g. the delivery can be measured in days, the distance between the supplier's warehouse and the place of delivery and measured in kilometers, saving energy in Kw/h, etc.) will be the only ones to evaluate, while other non-objectively

97. See the article of F. Lichere of this book (par. 4.3).

98. See the article of M. Spyra and P. Szwedo of this book (par. 5.2).

99. See the article of D. Dragos, B. Neamtu, R. Suciuc of this book (par. 3.6), in case of lowest price award criteria.

100. Directive 2004/18/EC, art. 54(5) and Directive 2004/17/EC, art. 56(5). The purpose of the formula is to calculate a single score for each tender submission and will determine the automatic re-ranking of participants on the basis of the new prices and/or new values submitted. In the initial contract specification, some features may be stated as ranges. These will have to be reduced to a single value for use within the formula.

101. Directive 2004/18/EC, art. 54(5) and Directive 2004/17/EC, art. 56(5).

measurable criteria (technical merit, aesthetic characteristics) could not be taken into account.<sup>102</sup>

The discretionary power of technical assessment of the jury, whenever provided, or directly of the contracting authorities in the evaluation of qualitative elements of the tenders, must ensure to be reasonable, consistent and not illogical in order to avoid discriminations.

The electronic evaluation could provide more transparency and predictability of the evaluation but it can also be used in a distorted and discriminatory way.

Some Member States<sup>103</sup> provide for the use of mathematical formula in the traditional award of public procurement as well, to sum up quality evaluation.<sup>104</sup> The contracting authority shall determine a mathematical formula to represent the different criteria and their relative weightings used to determine the most economically advantageous tender.<sup>105</sup> The independent mathematical formulae take into account elements of the each single offer evaluated, while the interdependent formulae in addition to the evaluated tender are taken in account elements of other tender. The use of interdependent mathematical formulae could lead to distortion of competition between economic operators as a collusion between economic operators can drive the result of the evaluation.<sup>106</sup>

102. In addition to these quality characteristics a “non-negotiable” quality has been pointed out. This quality is observable but difficult to evaluate and define *ex ante* and therefore defined as “non-negotiable”: G. L. Albano, G. Calzolari, F. Dini, E. Iossa, G. Spagnolo ‘Procurement contracting strategies’, in N. Dimitri – G. Piga – G. Spagnolo (eds.) *Handbook of procurement*, cit., 101 et seq.

103. The Italian Public Procurement Code: d.lgs. No 163 of 2006, art. 83 § 5, where in the specification of the rules concerning the most economically advantageous tender the use of methodology that allows to identify, with a single numeric parameter end the most advantageous offer is provided for. See also: the Government regulation enforcing the IPPC (d.P.R. 5 October 2010, n. 207), Annex P.

104. F. Dini, R. Pacini, T. Valletti ‘Scoring rules’, in N. Dimitri – G. Piga – G. Spagnolo (eds.) *Handbook of procurement*, cit., 304 et seq.

105. P. S. Stilger ‘Formulas for Choosing the Most Economically Advantageous Tender – a Comparative Study’ (2011) in <http://igitur-archive.library.uu.nl/student-theses/2012-0327-200536/StilgerPSMA2011Part%20I.pdf>. For France see: F. Lichere ‘Award of the contracts in EU Procurements’ in this book, where state that mathematical matrix reduce the evaluation discretion of “Commission d’appel d’offre”. See also the interesting German perspective included in this book by M. Burgi.

106. Cons. Stato, sect. VI, 2 March 2004, No. 926, concerning an awarding procedure carried out by Consip S.p.A. for substitute services to canteen meal vouchers. About this case see also the investigation activity provided by the Italian Competition Authority

The mathematical formulae solely translate the scores given by the evaluation committee (jury) into a ranking. The problem is often not the formula itself but the subjectivity of the scores, which can cover the will to orient the award. In such case, the assessment of the jury continues to have a discretionary content and the mathematical formulae are used only to give a semblance of objectivity to a subjective evaluation.

In many Member States, mathematical formulas define ranking whenever Most Economically Advantageous Tender is provided. According to the Spanish Law on Public Sector, mathematical formulas can be used to allow automatic evaluation of tenders to minimise the influence of subjective evaluation by the Jury.<sup>107</sup> No indication for automatic tender evaluation is provided within the Spanish Law on Public Sector. Yet, “the Spanish Law on Public Sector strongly pushes for the adoption of automatic evaluation methods based on (mathematical) formulas, which should at least be given 50 % or more of the total weight in order to avoid a tender evaluation (partial and/or subjective) by independent committees or special agencies”. In England and Wales, no methodological restrictions can be enforced to score tenders. In Scotland and Wales, the evaluation practice seems to be more focused on simpler scoring schemes and mathematical matrixes.<sup>108</sup> In France and Denmark, the use of mathematical methods raises communication issues on tender evaluation methods because the contracting authorities are not obliged to communicate them prior to tender submission and this is in contrast with the EU principles of transparency, equal treatment and competition.<sup>109</sup> Yet, Contracting Authorities might abuse changing the mathematical model used based on submitted tenders.<sup>110</sup> A mandatory provision in the Romanian Procurement Law imposes to the Contracting Authority to include in the procurement documents both the methodology and the mathematical formula

in <http://www.agcm.it/component/domino/open/41256297003874BD/934143B3AF9C783AC125705F002CBAF3.html>. See also: Authority for the Supervision of Public Contracts for works, services and supplies, Determinazione, 24 November 2011, n. 7, in <http://www.avcp.it/portal/public/classic/AttivitaAutorita/AttiDellAutorita/Atto?ca=4846>; F. Dini, R. Pacini, T. Valletti ‘Scoring rules’, in N. Dimitri – G. Piga – G. Spagnolo (eds.) *Handbook of procurement*, cit., 309-310.

107. See the article of A. S. Graells concerning the Spanish Public Procurement Law (par. 4.1, 4.4 and 5.1) of this book.

108. See the article of P. Telles of this book (par. 6).

109. See the article of S. Treumer of this book (par. 4). In particular we have to underline that the “relative assessment” is an interdependent method and the contents of one tender may influence the evaluation of the others.

110. See the article of F. Lichere of this book (par. 4.6).

applicable in the evaluation. The possible abuse by the contracting authority may persist because the Romanian system provides to change the methodology of evaluation in the event of claims filed by tenderers.<sup>111</sup> The Italian Public Procurement Code provides both the use of mathematical formulas and more complex methodologies that allow to identify the Most Economically Advantageous Tender. A non-mandatory list of methods<sup>112</sup> is provided by the Procurement Regulation enforcing the Code and concerning works,<sup>113</sup> services and supplies<sup>114</sup> providing some simplified arrangements for services and supplies.<sup>115</sup> In Poland, the use of mathematical matrixes to evaluate tenders is thought to be paramount to enforce public spending rationality in the event of an most economically advantageous tender.<sup>116</sup> Based on the German experience, some mathematical formulas are provided, particularly in the IT sector.<sup>117</sup>

## 5. Conclusions

Electronic means in public procurement can assure a higher degree of transparency and traceability which can guarantee the accountability of public officials involved. The issue of integrity in public contracts could be also tackled through electronic evaluation and its traceability.

Nonetheless, recourse to e-auctions to evaluate tenders received electronically and to define ranking for the award is not yet widespread. All the criticalities related to the objectivity of the public procurement award arise with electronic means too. The advantages of such tools are evident in the award of dynamic purchasing systems<sup>118</sup> and of framework agreements by central

purchasing bodies, whenever technical specifications are well defined and there are accepted standards. Whenever e-evaluations occur through the most advantageous economic tender, it is necessary to stress the relevance of reasonableness and proportionality in the allocation of weights to the elements involved, in order to avoid discrimination in the award. Recourse to e-auctions can contribute to highlight such problems, but not necessarily to solve them. E-auctions seem to assure the advantage of limiting evaluation only to measurable quality, which could assure further ex post control over the evaluation in order to guarantee a higher degree of objectivity. Nonetheless, the other quality elements cannot be evaluated and this may be considered sometimes a limit for contracting entities.

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111. See the article of D. Dragos, B. Neamtu, R. Suciuc of this book (par. 4.3).
112. Like the analytic hierarchy process (AHP), the evamix method, the technique for order preference by similarity to ideal solution (TOPSIS).
113. See the Italian Procurement Regulation enforcing the code, d.P.R. 7 October 2012, No. 207, annex G (for work).
114. d.P.R. 7 October 2012, No. 207, annex P (for supply and services) and annex M (for services related to architecture and engineering).
115. See the article of R. Caranta and M. Comba of this book (par. 4.3).
116. See the article of M. Spyra and P. Szwedo of this book (par 3.3 and par. 4.1).
117. See the article of M. Burgi of this book (par. 4.3).
118. Framework agreements are arrangements whereby a purchaser and a provider establish the terms on which purchases may or will be made over a period of time. Their basic rationale is to allow the parties to establish the terms of (future) transactions in advance of specific orders, leading to more rapid procedures and reduced costs when

it comes to actually placing an order. Framework arrangements are often used in practice when contracting authorities have recurring or continuing needs to purchase certain particular products or services – for example stationary, computers or maintenance services – and in particular, where contracting authorities do not know the exact timing or quantity of their requirements.

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