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DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

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PUBLIC PROCUREMENT BY THE EUROPEAN UNION INSTITUTIONS

NOTE

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EUROPEAN PARLIAMENT

DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

Public procurement by the European Union institutions

Briefing Note

Abstract

In awarding contracts the Community institutions are subject to the rules set out in Directive 2004/18/EC of 31 March 2004. The provisions of the directive are reproduced and adapted in Community Financial Regulations Nos 1605/2002 and 2342/2002 of 25 June 2002. These provisions ensure that all economic operators in the EU have non-discriminatory access to European contracts.

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AUTHOR

Stéphane BRACONNIER
Université Panthéon-Assas (Paris II)
Cabinet Bird & Bird AARPI

RESPONSIBLE ADMINISTRATOR

Danai PAPADOPOULOU
Policy Department C: Citizens' Rights and Constitutional Affairs
European Parliament
B-1047 Brussels
E-mail: danai.papadopoulou@europarl.europa.eu

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ABOUT THE EDITOR

To contact the Policy Department or to subscribe to its monthly newsletter please write to:
poldep-citizens@europarl.europa.eu

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CONTENTS

LIST OF ABBREVIATIONS

BOAMP	Official Gazette of public contract notices (Bulletin officiel des annonces des marchés publics, France)
CE	Council of State (Conseil d'Etat, France)
CFIEU	Court of First Instance of the European Union (now the General Court)
CJEC	Court of Justice of the European Communities
CJEU	Court of Justice of the European Union
DPS	Dynamic purchasing system
EC	European Communities
EP	European Parliament
Fasc.	Fascicle
JurisCl.	JurisClasseur (LexisNexis)
LGDJ	Librairie générale de droit et de jurisprudence (France)
OJEU	Official Journal of the European Union
PW	Public works
TFEU	Treaty on the Functioning of the European Union
WTO	World Trade Organization

EXECUTIVE SUMMARY

Background

The purpose of this note is to present the legal rules which apply when the EU institutions award public contracts and thus to contribute to the debate on the emergence of EU administrative law. The question is whether, beyond the special rules applicable to public procurement, a consistent body of rules and principles might emerge which, drawing on national legislation, would apply to all contracts awarded by the Community institutions.

Aim

- To present the legislation applicable to public procurement by the Community institutions.
- To describe how that legislation is applied.
- To describe the main features.
    - Types of procedures.
    - Access for economic operators to contracts awarded by the Community institutions.
    - Advertising of contracts awarded by the Community institutions.
    - Legal disputes concerning contracts awarded by the Community institutions.

GENERAL INFORMATION

KEY FINDINGS

- Contracts awarded by the Community institutions are subject to general Directive 2004/18/EC of 31 March 2004[1].
- That directive was implemented in Financial Regulations Nos 1605/2002[2] and 2342/2002 of 25 June 2002[3].

1. THE COMMUNITY INSTITUTIONS AS CONTRACTING AUTHORITIES

In its fundamental judgment in Case C-294/83 *'Les Verts'* v *European Parliament* [1983] ECR 1339, the European Court of Justice formally stated that the Community institutions cannot avoid a review of whether the measures they adopt, including contracts they find it necessary to award in order to meet their own needs, are in conformity with the 'basic constitutional charter', the Treaty. The fact remains, however, that just like the 1957 Treaty of Rome and the subsequent Treaties of Maastricht (1992), Amsterdam (1999) and Nice (2000), the Lisbon Treaty on the Functioning of the European Union, which came into force on 1 December 2009, does not contain any specific provisions on public contracts.

The Treaty does, admittedly, include special rules on the free movement of goods, services, workers, capital and payments, and on freedom of establishment, free competition and State aid, but there are no rules or principles on public contracts or, *a fortiori*, public procurement by the Community institutions. There are obvious reasons for this.

First of all, the growing importance of public purchasing as the Single Market developed was not understood or identified as a development priority until the 1970s (Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts, OJ L 185 of 16.8.1971, p. 5) and, above all, the 1990s (see in particular Directive 92/50/EEC of 18 June 1992, OJEC L 209 of 24 July 1992, Directive 93/36/EEC of 14 June 1993, OJEC L 199 of 9 August 1999, and Directive 93/37/EEC of 14 June 1993, OJEC L 199 of 9 August 1999, concerning the coordination of procedures for the award of, respectively, public works contracts, public supply contracts and public works contracts).

Secondly, and above all, it was simply not feasible in practical terms to include detailed and consistent rules on public procurement at European level in the actual body of the original Treaty. The presence of such highly specialised rules in the Treaty would have been very much out of keeping with its constitutional dimension.

[1] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134 of 30.4.2004).

[2] Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities.

[3] Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities.

Lastly, the Community institutions have the power under the Treaties (in particular Article 5(3) EC) to take action in the field of public contracts, so there was no need to include detailed rules on the subject in the Treaties. Directives, which are based on the technical harmonisation of national legislation, appeared to be the optimum method for establishing Community principles in the field of public purchasing, where regulations tend to vary widely from one Member State to another.

It is therefore only in secondary Community legislation that there is a major series of directives on public contracts, particularly general Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, which together form a highly detailed body of legislation which has binding force for those to whom it applies.

The Community institutions obviously also come under this secondary legislation. They are in principle subject to acts of secondary legislation which translate and implement the rules contained in the Treaties (see in particular Case 7/56 *Algera* [1957] ECR). Since the secondary legislation on public contracts was adopted on the basis of primary legislation, in this particular case Article 95 EC (now Article 114 TFEU), and since the general principles contained in the Community Treaties affect public contracts beyond the limits defined by the 'public contracts' directives (Case C-324/98 *Telaustria Verlags GmbH* [2000] ECR), the procurement procedures that must be followed by the European institutions for awarding contracts to meet their needs are ordinary law procedures defined in particular by Directive 2004/18/EC of 31 March 2004. Indeed, paragraph 24 of the preamble to Regulation No 1605/2002 of 25 June 2002 (see below) provides that 'As regards contracts awarded by the institutions of the Communities on their own account, provision should be made for the rules contained in the Directives of the European Parliament and of the Council coordinating the procedures for the award of public works, service and supply contracts to apply'.

Directive 2004/18/EC applies in practice to 'contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive'.

Article 104 of Council Regulation No 1605/2002 of 25 June 2002 applicable to the general budget of the European Communities provides that the Community institutions are deemed to be contracting authorities in the case of contracts awarded on their own account (see also Regulation No 2342/2002, Article 116(7)).

However, the award of a public contract by an EU institution falls within a complex institutional framework which sometimes gives rise to special situations which the 2002 regulations were intended to take into account.

Two particular situations can be mentioned at this point.

The first is the joint procurement procedure with a Member State (Article 125(4) of Regulation No 2342/2002/EC). Where a procurement procedure is organised jointly by an EU institution and the contracting authority of one or more Member States, the procedural rules applicable to the Community institution apply in principle.

However, if the proportion of the estimated total value of the contract payable, or managed, by the Member State's contracting authority is 50% or more, or in other duly justified cases, the institution may decide that the procedural rules applicable to the Member State's contracting authority will apply, provided that they can be regarded as equivalent to the institution's rules.

The institution and the Member State's contracting authority involved in the joint procurement procedure must agree, in particular, on the practical arrangements for

evaluating requests to participate or tenders, the award of the contract, the law applicable to the contract, and the court with jurisdiction in the event of any disputes.

The second special situation concerns contracts awarded between the Community institutions, for which an interinstitutional procedure (Article 91 of Council Regulation No 1605/2002 of 25 June 2002) has been devised.

The directive thus applies, as a matter of principle and across the board, to contracts awarded by the Community institutions on their own account. However, it only applies to the Community institutions themselves in so far as is provided for in the Financial Regulation of 25 June 2002, supplemented by Regulation No 2342/2002/EC, adopted to implement the Financial Regulation, which set out one or two special rules and exceptions designed to take account of the special nature of the procurement procedure used by the European institutions.

From this point of view the Community institutions are in exactly the same situation as the Member States, in that the 2002 Financial Regulations, in the same way as national legislation, appear to be the vehicle for transposing the requirements set out in the 2004 general directive.

It has to be said that these two Financial Regulations implement the directive very accurately on all aspects of public procurement.

2. TYPES OF PROCEDURE APPLICABLE

KEY FINDINGS

- The procedures applicable to public contracts awarded by the Community institutions largely depend on the value (threshold rules).
- The procedures applicable are those laid down in the general Community legislation on public procurement.

In accordance with the requirements of Directive 2004/18 of 31 March 2004, a public contract may be awarded by an EU institution, according to the provisions of Regulation No 2342/2002 (Article 122(1)), 'by call for tender, using the open, restricted or negotiated procedure after publication of a contract notice or by negotiated procedure without prior publication of a contract notice, where appropriate following a contest'.

Article 119 of Regulation No 2342/2002 also includes the concept of 'advertising by appropriate means' developed by the Court of Justice in its *Telaustria* judgment referred to earlier and applicable to contracts not covered by the Community directives.

The thresholds which determine the arrangements for publication of contract notices, prior information notices and award notices, the choice of procedures and the corresponding time limits are those laid down in the Parliament and Council Directives (Regulation No 1605/2002, Article 105).

The Community legislature thus expressly intends contracts awarded by the Community institutions to be subject to the general rule, which in this case means the 2004 directives.

However, these directives are, by their very nature, merely harmonising legislation and are therefore not directly applicable. It is left to the Member States to decide how to achieve the stated objectives. Similarly, the directives have been adapted to the specific requirements and constraints of the Community institutions by the relevant Community regulations. Directive 2004/18/EC thus establishes a relationship between the legislation applicable to public procurement by the Member States and public procurement by the EU institutions. This shared relationship is playing a part in the emergence of reasonably homogeneous European law on public contracts.

At this point, however, questions arise about the relevance of this shared relationship in the particular case of the EU institutions. The aim of the 2004 directives as far as the Member States are concerned is not necessarily exactly the same as the aim which it seems the legislation applicable to public procurement by the EU institutions should have. In the former case, the 'public contracts' directives are geared towards integration and promoting the interpenetration of national economies. In the latter case, the application of advertising and competitive tendering procedures under the 2004 directives is mainly designed to ensure that all economic operators in the EU have free, non-discriminatory access to public contracts awarded by the European institutions.

The aim of the 2002 Financial Regulations is therefore to address, on the basis of a single piece of legislation (the 2004 directive) the different aims pursued by the legislation on public contracts, according to whether it applies to the Member States or the EU institutions.

2.1. Thresholds

Article 105 of Council Regulation No 1605/2002 of 25 June 2002 states that, subject to the specific provisions on contracts awarded in the context of external actions, Directive 2004/18/EC lays down the thresholds applicable to contracts awarded by the European institutions on their own account, which determine:

- the publication arrangements;
- the choice of procedures;
- the corresponding time limits.

For information, Article 158 of Regulation No 2342/2002 (as amended by Commission Decision 2010/78/EU of 9 February 2010) fixed these thresholds at:

- EUR 4 845 000 for works contracts;
- EUR 125 000 for the supply and service contracts listed in Annex II A to Directive 2004/18/EC (with the exception of the research and development contracts listed in category 8 of that annex);
- EUR 193 000 for the service contracts listed in Annex II B to Directive 2004/18/EC, and for the research and development contracts listed in category 8 of Annex II A.

It is for each delegated or subdelegated authorising officer within each institution to assess whether the thresholds laid down in Directive 2004/18 have been reached (Article 149a of Regulation No 2342/2002).

2.2. Description of procedures

Article 91 of Regulation No 1605/2002 provides that procurement procedures can take one of the following forms: the open procedure, the restricted procedure, contests, the negotiated procedure or competitive dialogue.

Regulation No 2342/2002 details the procurement procedures that may be followed by the Community institutions.

2.3. Open or restricted procedures

Under Article 28 of Directive 2004/18 and Article 122 of Regulation No 2342/2002, the Community institutions must award public contracts using the open or restricted procedure, the contract being regarded as open where all interested economic operators may submit a tender, and restricted where all economic operators may ask to take part but only candidates satisfying the selection criteria referred to in Article 135 of Regulation No 2342/2002 and invited simultaneously and in writing by the Community institutions may submit a tender.

The number of candidates invited to submit a tender may not be less than five, provided that a sufficient number of candidates satisfy the selection criteria (Article 123 of Regulation No 2342/2002), but (an interesting feature), the contracting authority may also provide for a maximum number of twenty candidates, depending on the subject of the contract and on the basis of objective and non-discriminatory selection criteria. In such

cases, the range and criteria must be indicated in the contract notice or the call for expressions of interest (Article 123 of Regulation No 2342/2002).

Article 128 of Regulation No 2342/2002 provides for the special situation where there is a restricted procedure following a call for expressions of interest.

A call for expressions of interest is a means of preselecting candidates who will be invited to submit tenders in response to future restricted invitations to tender for contracts of a value of EUR 60 000 or more. The list drawn up following a call for expressions of interest is valid for no more than three years from the date on which the notice is sent to the Publications Office, and any interested person may submit an application at any time during the period of validity of the list, with the exception of the last three months of that period.

Where a specific contract is to be awarded, Article 128 of Regulation No 2342/2002 authorises the contracting authority to invite either all candidates entered on the list or only some of them, on the basis of objective and non-discriminatory selection criteria specific to that contract, to submit a tender.

2.3.1. Contests

Contests are procedures which enable the contracting authority to acquire, mainly in the fields of architecture and civil engineering or data processing, a plan or design proposed by a selection board after being put out to competitive tender with or without the award of prizes (Regulation No 2342/2002, Article 122(4)).

The selection board, appointed by the responsible authorising officer, is made up exclusively of natural persons who are independent of participants in the contest and must be autonomous in its opinions. Projects must be submitted anonymously by the candidates and must be based solely on the criteria set out in the contest notice.

The contracting authority then takes a decision giving the name and address of the candidate selected and the reasons for the choice by reference to the criteria announced in the contest notice, especially if it departs from the proposals made in the selection board's opinion.

2.3.2. Negotiated procedures

Under Article 124 of Regulation No 2342/2002, the Community institutions may negotiate with tenderers the tenders they have submitted in order to adapt them to the requirements set out in the contract notice or in the specifications and in any additional documents, and in order to find the tender offering best value for money.

During the negotiation, the contracting authorities must ensure equal treatment for all tenderers.

Regulation No 2342/2002 provides, in line with Directive 2004/18/EC, for two categories of negotiated procedures: the negotiated procedure without prior publication of a contract notice, and the negotiated procedure after prior publication of a contract notice.

In both cases, the negotiated procedure may be used only in the situations listed in Regulation No 2342/2002.

It should be noted here that the Financial Regulation departs from the predominantly qualititative approach to competitive tendering in the 2004 directive and adopts a purely quantitative approach. Thus for contracts with a value of EUR 60 000 or below the negotiated procedure without prior advertising may be used, provided that at least five

candidates are consulted. Similarly, for contracts with a value of EUR 25 000 or below the negotiated procedure with consultation of at least three candidates may be used. Finally, contracts with a value of EUR 5 000 or below may be awarded on the basis of a single tender, and costs of EUR 500 or below may be simply be paid against invoice, without prior acceptance of a tender (Article 129 of Regulation No 2342/2002).

2.3.3. Competitive dialogue

Where a contract is particularly complex, if the Community institutions consider that the direct use of the open procedure or the existing arrangements governing the restricted procedure will not allow the contract to be awarded to the tender offering the best value for money, they may use the competitive dialogue referred to in Article 29 of Directive 2004/18/EC.

Clearly, it will be more exceptional for the Community institutions to use this option than the Member States, since the contracts awarded by the Community institutions are more 'standardised' than some of those awarded by the Member States.

Article 125b of Regulation No 2342/2002 on procurement by the institutions reproduces the general conditions set out in Article 29 of Directive 2004/18/EC.

Under the legislation referred to above, a contract is regarded as particularly complex where the contracting authorities find it objectively impossible to define the technical means of satisfying their needs or objectives or of establishing the financial or legal make-up of the project.

2.3.4. Dynamic purchasing systems

Under Article 33 of Directive 2004/18/EC and Article 125a of Directive 2342/2002, the Community institutions may use a dynamic purchasing system, which is a completely electronic process for making commonly used purchases that is open throughout its validity to any economic operator satisfying the selection criteria and having submitted an indicative tender which complies with the specification and any possible additional documents. Indicative tenders may be improved at any time, provided that they continue to comply with the specification. A dynamic purchasing system may not last for more than four years, except in duly justified exceptional cases (Article 125a of Regulation No 2342/2002).

3. ACCESS TO PUBLIC CONTRACTS AWARDED BY THE COMMUNITY INSTITUTIONS

KEY FINDINGS

- Participation in tendering procedures must be open on equal terms to all natural and legal persons coming within the scope of the Treaties and to all natural and legal persons in a third country which has with the European Communities a special agreement in the field of public procurement.
- EU legislation has established special procedures designed to prevent conflicts of interest in public procurement by the European institutions.

3.1. Opening the Community institutions' contracts to competitive tendering

Participation in tendering procedures must be open on equal terms to all natural and legal persons coming within the scope of the Treaties and to all natural and legal persons in a third country which has with the European Communities a special agreement in the field of public procurement under the conditions laid down in that agreement (Regulation No 1605/2002, Article 106).

Furthermore, where the Multilateral Agreement on Government Procurement concluded within the World Trade Organization applies, the contracts must also be open to nationals of the States which have ratified this agreement, under the conditions laid down in that agreement.

The European institutions' specifications must require tenderers to indicate in which State they have their headquarters or domicile and to present the supporting evidence normally acceptable under their own law.

3.1.1. Exclusion from participation in procurement procedures

Articles 93 and 94 of Council Regulation No 1605/2002 of 25 June 2002 give a precise list of cases where a tenderer must automatically be excluded from an EU institution's public procurement procedure.

Candidates or tenderers are excluded from participating in procurement procedures if they are bankrupt or being wound up, they have been convicted of an offence concerning their professional conduct, they have not fulfilled obligations relating to the payment of taxes or social security contributions, or they have been the subject of a judgment which has the force of *res judicata* for fraud, corruption, involvement in a criminal organisation or any other illegal activity detrimental to the Communities' financial interests.

Article 93 of Regulation No 1605/2002 states that candidates or tenderers must certify that they are not in one of the situations listed above. The institutions may, however, decide not to require such certification with contracts of a very low value (under EUR 10 000).

Article 94 of Regulation No 1605/2002 also states that contracts may not be awarded to candidates or tenderers who, during the procurement procedure, are subject to a conflict of interests (see below) or are guilty of misrepresentation in supplying the information

required by the contracting authority as a condition of participation in the contract procedure or fail to supply this information.

3.1.2. The central database

The Commission has set up a central database in compliance with Community rules on the processing of personal data. It contains details of candidates and tenderers who are in one of the exclusion situations described above, and is shared by all the Community institutions.

Under Article 95 of Regulation No 1605/2002, the authorities of the Member States and third countries involved in the implementation of the budget must forward to the responsible authorising officer information on candidates and tenderers who are in one of the exclusion situations, where the conduct of the operator in question has been detrimental to the Communities' financial interests.

The responsible authorising officer receives this information and asks the accounting officer to enter it in the database.

Articles 133a and 134a of Regulation No 2342/2002 detail the conditions for the operation of the central database.

3.2. Managing conflicts of interest

3.2.1. Definition

According to Article 52 of Council Regulation No 1605/2002 of 25 June 2002, there is a conflict of interests where the impartial and objective exercise of the functions of a candidate or tenderer is compromised for reasons involving family, emotional life, political or national affinity, economic interest or any other shared interest with the beneficiary.

There is considered to be a presumed conflict of interests if an applicant, candidate or tenderer is a member of staff covered by the Staff Regulations, unless he or she has been given prior authorisation by his or her superior to take part in the procedure.

3.2.2. Checking procedures

As a matter of principle, under Article 94 of Council Regulation No 1605/2002 of 25 June 2002 contracts awarded by the Community institutions on their own account may not go to candidates or tenderers who are subject to a conflict of interests during the procurement procedure.

To that end the regulation requires candidates and tenderers to provide sworn certification, duly dated and signed, stating that they are not subject to a conflict of interests.

However, depending on its assessment of the risks, the contracting authority may decide to waive this certification with contracts of a value of EUR 5 000 or below.

The regulation does not specifically include any additional measures allowing the institutions to ensure that there is no conflict of interests when awarding their contracts.

However, the Community courts ruled against the European Commission for not acting with due diligence to ensure that there was no conflict of interests (Case T-160/03 *AFCon Management Consultants* [2005] ECR).

In that particular case, the applicants complained that the Commission had failed to draw conclusions from the conflict of interests between a member of the evaluation committee and one of the tenderers. They considered, in essence, that the Commission had not acted with due diligence once it had discovered that there was a conflict of interests and that it should not have allowed the tenderer to take part in the next stage of the tendering procedure.

The Court of First Instance stated that 'the fact that a person who helps to evaluate and select tenders for a public contract has the contract awarded to him is highly questionable and constitutes a chargeable offence under the criminal law of several Member States, regard being had to the principle of equal treatment in the award of public contracts, the concern for sound financial management of Community funds and the prevention of fraud (Case T-277/97 *Ismeri Europa* v *Court of Auditors* [1999] ECR II-1825, paragraph 112).

After the discovery of a conflict of interests between a member of the evaluation committee and one of the tenderers, the Commission must act with due diligence and on the basis of all the relevant information when formulating and adopting its decision on the outcome of the procedure for the award of the tender at issue. That obligation derives in particular from the principles of sound administration and equal treatment (see, by analogy, Case T-231/97 *New Europe Consulting and Brown* v *Commission* [1999] ECR II-2403, paragraph 41). The Commission is required to ensure at each stage of a tendering procedure equal treatment and, thereby, equality of opportunity for all the tenderers (see, to that effect, Case C-496/99 P *Commission* v *CAS Succhi di Frutta* [2004] ECR I-0000, paragraph 108, and Case T-145/98 *ADT Projekt* v *Commission* [2000] ECR II-387, paragraph 164)'.

The Court of First Instance considered that once a conflict of interests has been discovered, the institutions must act with due diligence and on the basis of all the relevant information when formulating and adopting their decision on the outcome of the procedure for the award of the tender in question.

However, once a conflict of interests has been discovered the institutions have a certain discretion in determining the measures to be taken concerning the conduct of the subsequent phases of the tendering procedure.

This problem is very similar to the more general problem of objective competitive advantages, which the Court of Justice considered in its judgment of 3 March 2005 in *Fabricom SA*, when it adopted a rather ambiguous position, allowing the Member States considerable discretion in assessing whether undertakings with a competitive advantage from the outset should be excluded from competitive tendering (Joined Cases C-21/03 and C-34/03 *Fabricom SA* [2005] ECR). Called upon to decide on the legality of Belgian national rules which exclude as a matter of principle undertakings which have been involved in the preparation of a contract from the competitive tendering procedure for that contract, the Court ruled that 'taking account of the situation in which a person who has carried out certain preparatory work may find himself, therefore, it cannot be maintained that the principle of equal treatment requires that that person be treated in the same way as any other tenderer', thereby acknowledging, with certain provisos, that the Belgian rules requiring contracting authorities to exclude candidates who have been involved in preparing the contract are consistent with the Community directives.

4. ADVERTISING OF PUBLIC PROCUREMENT BY THE COMMUNITY INSTITUTIONS

KEY FINDINGS

- All contracts must, in principle, be published in the Official Journal of the European Union.
- The advertising rules relate to the phase prior to the competitive tendering procedure and the phase after award of the contract.

4.1. The principle of advertising

According to Article 90 of Financial Regulation No 1605/2002, all contracts must be published in the Official Journal of the European Union except those below the thresholds provided for in Articles 105 and 167 of that regulation.

The latter contracts are, like the service contracts referred to in Annex II B of Directive No 2004/18/EC, to be advertised by appropriate means in accordance with the provisions of the implementing rules.

4.2. Advertising rules

4.2.1. Advertising rules for contracts above the thresholds

According to Article 118 of Regulation 2342/2002 publication for contracts with a value equal to or above the thresholds referred to in Articles 157 and 158 of Regulation 2342/2002 must consist of a pre-information notice, a contract notice and an award notice.

4.2.2. Advertising of contracts not covered by Directive 2004/18/EC and for contracts referred to in Annex II B to that directive (Article 119 of Regulation No 2342/2002)

Advertising of contracts with a value below the thresholds laid down in Article 158 of the Financial Regulation and service contracts referred to in Annex II B to Directive 2004/18/EC must involve, if no contract notice has been published, notice of a call for expressions of interest for contracts covering a similar subject with a value equal to or greater than the amount referred to in Article 128(1), and the annual publication of a list of contractors, specifying the subject and the value of the contract awarded, for contracts with a value over EUR 25 000.

Ex ante advertising and the annual publication of the list of contractors for the other contracts is on the Internet site of the institutions; ex post publication takes place by no later than 31 March of the following financial year.

Publication may also be in the Official Journal of the European Communities.

4.2.3. Publication of notices

Article 120 of Regulation 2342/2002 provides that the Publications Office must publish the notices referred to in Articles 118 and 119 of Regulation 2342/2002 in the Official Journal of the European Communities no later than twelve calendar days after their dispatch.

That period is reduced to five calendar days in the case of fast-track procedures.

The contracting authorities must be able to provide evidence of the date of dispatch.

4.2.4. Other forms of advertising

Article 121 of Regulation 2342/2002 states that in addition to the advertising provided for in Articles 118, 119 and 120 of that regulation, contracts may be advertised in any other way, notably in electronic form.

Such advertising may not introduce any discrimination between candidates or tenderers nor contain details other than those contained in the contract notice, if one has been published.

5. SELECTION OF CANDIDATURES AND TENDERS

KEY FINDINGS

- The selection criteria used by the EU contracting authorities must, as a general rule, be clear and non-discriminatory.
- The responsible authorising officer decides to whom the contract is awarded, in compliance with the selection criteria and award criteria laid down in advance in the documents relating to the call for tenders and the procurement rules.

5.1. Selection criteria for requests to participate and tenders

As a general rule, the provisions of Article 135 *et seq*. of Regulation No 2342/2002 reproduce the requirements of the 2004 general directive. The selection criteria used by the Community institutions' contracting authorities must thus be clear and non-discriminatory (Article 135(1) of Regulation No 2342/2002).

The award criteria set out in Article 138a of Regulation No 2342/42 are also based on the provisions of Article 53 of Directive 2004/18.

For contracts awarded by the institutions on their own account with a value of EUR 60 000 or below, the European institutions may, however, depending on their assessment of the risks, decide not to require the candidate or tenderer to provide proof of their financial, economic, technical and professional capacity. In such cases no pre-financing is paid unless a financial guarantee of an equivalent amount is provided (Article 135(6) of Regulation No 2342/2002).

5.2. Examination of requests to participate and tenders by the Community institutions

Under Article 98 of Regulation 1605/2002, the arrangements for submitting tenders must ensure that there is genuine competition and that the contents of tenders remain confidential until they are all opened simultaneously.

Article 140 of Regulation 2342/2002 reproduces the provisions of Article 38 of Directive 2004/18 which fixes the minimum time limits for receipt of requests to participate and tenders depending on the procedure followed by the contracting authority.

5.3. Conclusion of contract

Under Article 100 of Regulation 1605/2002, the responsible authorising officer decides to whom the contract is to be awarded, in compliance with the selection criteria and award criteria laid down in advance in the documents relating to the call for tenders and the procurement rules.

Moreover, the contracting authority may, by a substantiated decision brought to the attention of the candidates or tenderers, either abandon the procurement or cancel the award procedure before the contract is signed, without the candidates or tenderers being entitled to claim any compensation (Article 101 of Regulation No 1605/2002).

5.3.1. Information for unsuccessful candidates and tenderers (Article 149 of Regulation 2342/2002)

For contracts awarded by the Community institutions on their own account with a value equal to or above the thresholds fixed by Directive 2004/18/EC and not excluded from the scope of that directive, economic operators who have taken part in the competitive tendering procedure must be given specific information under the provisions of the 2004 general directive. For these contracts the contracting authority must notify each unsuccessful candidate or tenderer individually and simultaneously, by letter, fax or email, that their application or tender has not been successful, at one of the following stages:

- shortly after the adoption of decisions on the basis of the exclusion and selection criteria and before the decision to award the contract, where the procurement procedures are organised in two separate phases;
- for award decisions and decisions to reject a tender, as soon as possible after the award decision, and at the latest during the following week.

5.3.2. Standstill period prior to signature of the contract (Article 158a of Regulation 2342/2002)

Like the 2004 general directive (Article 41), the Financial Regulation provides for a standstill period allowing economic operators claiming to be the victims of an infringement of the advertising and tendering rules to bring proceedings before the relevant court, if appropriate.

The contracting authority must allow a period of fourteen calendar days to elapse before signing the contract or framework contract covered by Directive 2004/18/EC with the successful tenderer.

This period runs from one of the following dates:

- the day after the date on which the award and rejection decisions are simultaneously notified;
- where the contract or framework contract is awarded following a negotiated procedure with prior publication of a contract notice, the day after publication of the contract award notice in the Official Journal of the European Union.

In principle, any contract signed before the period referred to in the first paragraph is null and void.

The period does not apply in the following cases:

- open procedures where only one tender has been submitted;
- restricted or negotiated procedures following prior publication of a contract notice, where the tenderer to whom the contract is to be awarded was the only one satisfying the exclusion and selection criteria, provided that the other candidates or tenderers have been informed of the reasons for their exclusion or rejection shortly after the adoption of the corresponding decisions on the basis of the exclusion and selection criteria;
- specific contracts based on a framework contract and awarded under the terms laid down in that framework contract, without competitive tendering;
- extreme urgency.

6. DISPUTES CONCERNING CONTRACTS AWARDED BY THE COMMUNITY INSTITUTIONS

KEY FINDINGS

- In disputes relating to public procurement by an EU institution natural and legal persons with a legal interest in bringing proceedings have three legal remedies.

6.1. Application for an interim order suspending the application of a decision on the basis of Article 278 TFEU

An application may be made for an interim order suspending the application of the following decisions taken in the context of public procurement by a Community institution: a decision rejecting the tender submitted by a candidate in the context of a call for tenders (see, for example, the order in Case T-383/06 *Icuna.Com SCRL* v *European Parliament* [2008] ECR) and a decision to sign the contract with a company following an invitation to tender (see, for example, the order in Case T-383/06 *Icuna.Com SCRL* v *European Parliament* [2008] ECR).

6.2. Action for annulment of a measure pursuant to Article 263 TFEU (formerly Article 230 TEC)

The following decisions may be the subject of a direct action for annulment:

- a Commission decision annulling an invitation to tender (see, for example, Case T-13/96 *Team SRL* v *Commission of the European Communities* [1998] ECR)
- a Parliament decision not to select a tender in the context of an invitation to tender (see, for example, Case T-139/99 *Alsace International Car Services (AICS)* v *European Parliament* [2000] ECR)
- a Commission decision to award a contract to another tenderer (Case T-437/05 *Brink's Security Luxembourg SA* v *Commission of the European Communities* [2009] ECR).

6.3. Action for damages

Lastly, unsuccessful tenderers may bring an action for damages based on the Community's non-contractual liability under the second paragraph of Article 340 TFEU (formerly the second paragraph of Article 288 TEC). The applicant must then prove the unlawfulness of the conduct alleged against the institution, the fact of damage and the existence of a causal link between the conduct in question and the damage complained of (see, for example, Case T-139/99 *Alsace International Car Services (AICS)* v *European Parliament* [2000] ECR).

Whatever the type of action chosen by the applicant, it must first be brought before the General Court [formerly the Court of First Instance] of the European Union (Article 256(1) TFEU and Article 51 of the Statute of the Court of Justice of the European Union). An appeal

before the Court of Justice, on points of law only, may be brought against decisions of the General Court (second paragraph of Article 256(1) TFEU).

It is clear from the case-law, particularly of the General Court, that most judgments dismiss actions for annulment brought by unsuccessful tenderers.

It is a fundamental principle that the institutions have a broad discretion with regard to the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender, and that review by the Court must be limited to checking that the rules governing the procedure and statement of reasons are complied with, the facts are correct and there is no manifest error of assessment or misuse of powers (Case T-145/98 *ADT Projekt* v *Commission* [2000] ECR II 387, paragraph 147, and Case T-169/00 *Esedra* v *Commission* [2002] ECR II 609, paragraph 95).

As an example, the General Court stated in its judgment in Case T-195/08 *Antwerpse Bouwwerken* v *Commission* [2009] ECR that the Commission enjoyed a broad discretion in the context of invitations to tender and that review by the Court must be limited to checking that no manifest error of assessment had been committed. Although the specifications stated that failure to state prices would result in exclusion, the General Court ruled that the absence of prices was a clerical error for which there might be a simple explanation and it endorsed the Commission's decision to allow companies to provide further information on certain points in their tenders.

7. CONCLUSIONS

The emergence of European administrative law has been on the cards for some time now, given the combined influence of national administrative law on Community law and, *vice versa*, of Community law on administrative law[1]. European administrative law should, eventually, be able to encompass all issues which directly or indirectly concern the European institutions' administrative activities. The action taken by the national administrations and the Community administration very often present similar problems, as we can see from public procurement. This should therefore lead to 'convergent solutions, in that the social, political and economic contexts are similar'[2].

This is particularly true in the field of public contracts since the legislation applicable to contracts awarded by the Community institutions and that applicable to contracts awarded by the national contracting authorities share a common root: Directive 2004/18/EC of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. The uniformity between the law applicable to the EU institutions and national legislation in this field is obviously likely to encourage the emergence of a body of European administrative law.

Furthermore, the requirement to protect human rights under the Convention for the Protection of Human Rights and Fundamental Freedoms applies to the Community legal system just as it does to the national legal systems. The case-law of the European Court of Human Rights, which is based on the concept of a 'democratic society', pervades administrative law in particular, correcting the structural inequality between the administered citizen and the administrating State. This phenomenon, which is particularly evident in the Member States, is also seen, though in a different form, in the EU administration.

The Court of Justice often takes account of the European Convention on Human Rights as more than just a source of inspiration in defining the general principles of Community law, referring directly to the Convention and the judgments of the European Court of Human Rights (see Cases C-273/99 P and C-274/99 P *Bernard Connolly* v *Commission of the European Communities* [2001] ECR I-1575 and 1611).

What is more, and above all, Article 6(2) TFEU expressly provides for the EU to accede to the European Convention on Human Rights and Fundamental Freedoms, as is also now provided for by Protocol 14 to the ECHR, which came into force on 1 June 2010. In this context, the European Commission published negotiating directives in March 2010 for the EU's accession to the ECHR (IP/10/291). The negotiations began in July 2010.

In acceding to the ECHR the European Union will be placing itself on an equal footing with its Member States as regards the system for the protection of fundamental rights, which the European Court of Human Rights in Strasbourg is responsible for enforcing. It will then itself be liable, before the Court of Human Rights, if any of its secondary legislation, including administrative legislation, where appropriate, infringes the Convention. Once the EU has acceded to the ECHR, the Convention will constitute a common core on which European administrative law can be grounded.

[1] SCHWARTZE J., Droit administratif européen, Brussels, Bruylant, 1994. – AUBY J.-B. and DUTHEIL de La ROCHERE J. [eds.], Droit administratif européen, Brussels, Bruylant, 2007

[2] DUBOS O. Droit administratif et droit communautaire, JurisCl. Adm., 2007, Fasc. 24.

Even though the system of the European Convention on Human Rights has little impact in the field of procurement (see, however, ECHR, *Raffineries grecques Stran and Stratis Andreadis*, judgment of 9 December 1994, Series A No 301-B), the Convention is clearly likely to promote the emergence in this sector of a series of common principles on which European administrative contract law might be based.

There are at least three caveats here, however.

The first is constitutional. Article 6(3) TFEU provides that '*the Union shall respect the national identities of its Member States*'. Administrative law, which is a 'relatively ethnocentric' discipline, is certainly an element of that national identity. As O. Dubos points out, 'European administrative law never fundamentally calls into question the national institutions or the concepts of domestic law. At the most it adapts them. European administrative law is not a process of acculturation'.

The second is institutional. Clearly, although the European Union acts as a State, administratively speaking, in that it employs staff, awards contracts and incurs operating expenditure just as any State does, it is not, either *de lege lata* or *de lege ferenda*, a State.

That being so, the administrative operation of its institutions, and therefore its administrative law, face problems which are unknown in the national systems. Conversely, it will not face problems familiar to the national administrations.

In the field of public procurement, the Community institutions do not, for instance, have to deal with differences between contracts awarded by the central institutions (the State in particular) and those awarded by local institutions. More generally, organic issues to do with public procurement, particularly those relating to the setting up and operation of the selection committees, are less of a problem in EU law than in national legislation. Similarly, as we have seen, some procedures, such as competitive dialogue, are less relevant in EU law than in national legislation because the needs are different.

Conversely, public contracts awarded by the EU institutions face problems not encountered in national law: special checking procedures, prevention of conflicts of interest, different ways of handling disputes, etc.

At the same time, a principle of territoriality resulting from the unilateral definition of the scope of domestic law tends to predominate in the field of administrative law. A variation on the theory of the immunity of the State, this rule has two consequences. First, administrative measures under French law cannot legally have any effect outside the national territory. Second, and alongside this, foreign administrative measures cannot have any effect outside the territory of the state which adopted them. The idea of joining up legal systems thus, in principle, does not apply to administrative law, which is built around the sovereignty and immunity of the State. Only international or transnational contracts awarded by the administration[1] call this territoriality principle in administrative law into question, and even then only marginally. It thus appears that, territorially, only these international or transnational contracts[2] can be the subject of a genuinely European administrative contract law.

[1] AUDIT M., Les conventions transnationales entre personnes publiques, Paris, LGDJ, 2002. See also: LAAZOUZI M., Les contrats administratifs à caractère international, Paris, Economica, 2008 and LEMAIRE S., Les contrats internationaux de l'administration, Paris, LGDJ, 2005.
[2] BRACONNIER S., Partenariats public-privé internationaux, JurisCl. Contrats et marchés publics, 2010, fasc. 610.

The third and final reason likely to hinder the emergence of European administrative law in the field of administrative contracts is functional. It seems, from our analysis, that the objectives pursued by the European public procurement legislation, particularly the Directive of 31 March 2004 and the subsequent case-law of the CJEU, differ according to whether the EU institutions or the Member States are involved.

More precisely, the main aim of the European public procurement legislation, when applied to the Member States, is to promote or guarantee the free movement of goods and services within the Union. The aim there is therefore to promote economic rights, which actually or potentially benefits the EU's economic operators above all. It is only indirectly that the competition which Community law introduces into national public procurement should enable the contracting authorities to get the best value for money when purchasing goods, services and works. In other words, the aim of sound administration appears a more secondary consideration here.

When applied to the EU institutions, however, the main aim of the European public procurement legislation is to ensure that the award process is transparent, Community spending is legal and, in general, that funding from the EU budget is used properly. From this point of view the implementation of the 2004 Directive by the amended 2002 Financial Regulations is clearly focused on the contracting authority, in the form of the Community institutions, rather than on the economic operators who might win contracts. The sound administration of the Community institutions takes precedence here over preserving intra-Community competition.

The different objectives pursued by the two bodies of legislation (the Community financial regulations and the national public procurement legislation), despite their common roots, constitute an obstacle to the establishment of European administrative law, which would tend to be based mainly, or even exclusively, on national laws and practices. Instead they show, if it was not already obvious, that the specific needs of the Community institutions and the particular problems they face mean that this emerging administrative law must, in the procurement field, be dissociated from the contingencies of national legislation and instead have a highly developed European identity.

REFERENCES

- AUBY J.-B. and DUTHEIL DE LA ROCHERE J., Droit administratif européen, Brussels, Bruylant, 2007.
- AUDIT M., Les conventions transnationales entre personnes publiques, Paris, LGDJ, 2002.
- BERTRAND G., La prise de décision dans l'Union européenne, Paris, La Documentation française, 2nd edition, 2002.
- BLUMANN C., La fonction législative communautaire, Paris, LGDJ, 1995.
- BOUVERESSE A., Le pouvoir discrétionnaire dans l'ordre juridique communautaire, Brussels, Bruylant, 2010.
- BRACONNIER S., Précis du droit des marchés publics, Paris, Le Moniteur, 3rd edition, 2009.
- BRACONNIER S., Partenariats public-privé internationaux, JurisCl. Contrats et marchés publics, 2010, Fasc. 610.
- BRACONNIER S, Jurisprudence de la Cour européenne des droits de l'Homme et droit administratif français, Brussels, Bruylant, 1997.
- CASSIA P., L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires, Paris, Dalloz, 2002.
- CHITI M.-P., Diritto administrativo europeo, Milan, Giuffré, 1999.
- COSSALTER P., Les délégations d'activités publiques dans l'Union européenne, Paris, LGDJ, 2007.
- COUTRON L., La contestation incidente des actes de l'Union européenne, Brussels, Bruylant, 2008.
- CRAIG P., EU Administrative Law, Oxford, Academy of European Law and Oxford University Press, 2006.
- DUBOS O. Droit administratif et droit communautaire, JurisCl. Adm., 2007, Fasc. 24
- HAMONIAUX T., L'intérêt général et le juge communautaire, Paris, LGDJ, 2001.
- JORDA J., Le pouvoir exécutif de l'Union européenne, Aix-en-Provence, PUAM, 2001.
- LAAZOUZI M., Les contrats administratifs à caractère international, Paris, Economica, 2008.
- LEMAIRE S., Les contrats internationaux de l'administration, Paris, LGDJ, 2005.
- NOGUELLOU R. and STELKENS U. (eds.), Droit comparé des contrats publics, Brussels, Bruylant, 2010.
- PESCATORE P., l'ordre juridique des communautés européennes, Brussels, Bruylant, 2006.
- PESACTORE P., Le droit de l'intégration, Brussels, Bruylant, 2005.
- PRECHAL S., Directives in EC Law, Oxford University Press, 2005.
- RICHER L., L'Europe des marchés publics, Paris, LGDJ, 2009.
- SCHWARTZE J., Droit administrative européen, Brussels, Bruylant, 2009.

- SIMON D., Le droit communautaire et les métamorphoses du droit, Strasbourg, PUS, 2003.
- SIRINELLI J., Les transformations du droit administratif par le droit de l'Union européenne. Contribution à l'étude du droit administratif européen, Paris, LGDJ, 2011.
- Comments by Julie DUPONT-LASSALLE, Europe No 5, May 2010, comm. 169
- Note by Julie DUPONT-LASSALLE, Europe No 10, October 2010, comm. 319
- *Doing business with the European Commission. Tips for potential contractors*, 2009 Commission publication, available at: http://ec.europa.eu/budget/library/publications/public_contracts/doing_business_EN.pdf
- *European Code of Best Practices: Facilitating access by SMEs to public procurement contracts*, Commission Staff Working Document of 26 May 2008, available at: http://ec.europa.eu/internal_market/publicprocurement/docs/sme_code_of_best_practices_en.pdf

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