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Article

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1. Introduction

It is common knowledge that the current directives on public contracts 2014/23/EU, 2014/24/EU and 2014/25/EU allow the use of award rules to foster sustainability. In particular, the main directive on public procurement, i.e. Directive 2014/24/EU, states that 'this Directive clarifies how the contracting authorities can contribute to the protection of the environment and the promotion of sustainable development while ensuring that they can obtain the best value for money for their contracts' (recital 91). It stems from it that this new 'horizontal' objective must be conciled with the core of public procurement rules, best value encapsulating free access to public contracts, equal access and transparency. In other words, there might be situations where those core principles may limit the use of public procurement for enhancing sustainability.

Bearing in mind this potential conflict, can the new award procedures put in place in 2014 be an efficient tool to promote the sustainability objective? Here lies the question we propose to deal with in this article.

One must first make clear what the expression of new award procedures covers since the 2014/24/EU directive does not refer to any 'new procedures". When it comes to novelties, it only refers to 'new rules' for cross border joint procurement (recital 72). But making no reference to any new procedures does not necessarily means that no new award procedure was introduced. Indeed, at least one may be ranked in this category. Strictly speaking, the only real new procedure introduced in 2014 is the innovation partnership. It is aimed 'at the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works, provided that they correspond to the performance levels and maximum costs agreed between the contracting authorities and the participants' (article 31.2 of directive 2014/24). 'In the procurement documents, the contracting authority shall identify the need for an innovative product, service or works that cannot be met by purchasing products, services or works already available on the market. It shall indicate which elements of this description define the minimum requirements to be met by all tenders. The information provided shall be sufficiently precise to enable economic operators to identify the nature and scope of the required solution and decide whether to request to participate in the procedure'. There can be either just one or several partner in developing the innovative solutions (article 31.1 of directive 2014/24) (Cerqueira Gomes, 2021).

However, two other procedures are relevant for the topic we are addressing: the competitive procedure with negotiation and the competitive dialogue. They actually existed before – the former under a different name – but they can be treated as new non just because their legal regimes have been slightly updated but because, and more importantly, the legal conditions set for their use have been considerably extended. For instance, under the 2004 directive, competitive dialogue was

only allowed when a procurement contract was 'particularly complex' i.e. when contracting authorities where not objectively able to define the technical means capable of satisfying their needs or objectives, and/or were not objectively able to specify the legal and/or financial make-up of a project (article 1.11.c of Directive 2004/18/EU). Negotiated procedures, as they were then called, where allowed in a limited number of exceptional situations. Both procedures are now subject to the same conditions so widely drafted that they are very likely to be easily met in practice (article 26.4.a. of Directive 2014/24/EU) (Telles and Butler, 2021).

The following reflections are based on the analysis of the text of the Directives, of the legal and economic literature regarding sustainable public procurement (SPP) and on a survey that the Chair on public contracts law is currently running[1]. This Chair uses on the field investigation methods (interviews, online surveys) in order to assess the impact of public contracts rules on the actual purchasing practice. We will first analyse why these new procedures could have been a good tool for sustainable public procurement and then why this has not the case before drawing some conclusions.

2. Why the new award procedures could be good vehicles for SPPs?

In theory these new procedures should be a good legal vehicle for SPP. True, these new procedures were not introduced in the EU legislation as a way to enhance SPP, but in order to introduce more flexibility in the public sector buying practices. Precisely this flexibility may contribute to a good use of SPP.

Indeed, several economic studies have pointed out that one of the main obstacles for using public procurement to foster sustainability is the lack of knowledge and competence of civil servants in charge of drafting the award process and the future contracts. Flexibility may help contracting authorities to use SPP by allowing market participants to inform contracting authorities about innovative goods, services or production and construction processes enhancing sustainability. For example, all three procedures offer the option of reducing the number of candidates to be invited to submit tenders, or to set a staged procedure in order gradually to reduce the number of tenders to be negotiated or solutions to be discussed. This flexibility allows contracting authorities to learn from the market.

Innovation partnership and competitive dialogue enable the contracting authorities to set the technical specifications in a way to promote horizontal goals. Article 42.1 of Directive 2014/24/EU provides that 'The technical specification shall lay down the characteristics required of a works, service or supply. Those characteristics may also refer to the specific process or method of production or provision of the requested works, supplies or services or to a specific process for another stage of its life cycle even where such factors do not form part of their material substance provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives'. Article 42.1. is not specific to the above-mentioned procedures, but they authorize the definition of those specifications in such a way that will allow candidates to make proposals during the award procedure, thus creating the condition for a knowledge transfer from the market to the contracting authority.

Competitive dialogue seems to be even more adequate to this end: article 30.3 of Directive 2014/24/EU reads 'Contracting authorities shall open, with the participants selected in accordance with the relevant provisions of Articles 56 to 66, a dialogue the aim of which shall be to identify

[1] https://chairedcp.univ-lyon3.fr/

and define the means best suited to satisfying their needs. They may discuss all aspects of the procurement with the chosen participants during this dialogue.'

Despite the clear potential synergies between the flexibility inherent in these three new procedures and SPP, it seems that SPP do not depend on their use. In the legal and economic literature, no references are made to those procedures nor to any types of procedures. In other words, award procedures appear neither as obstacles nor as incentives to SPP. In the interview the Chair is currently running on the topic 'public contracts and the protection of the environment', none of the interviewees have indicated that the choice of the award procedure plays any role in fostering SPP.

3. Why the new award procedures in practice do not work as good vehicles for SPPs?

The explanations may be found in the award procedures themselves as well as in external causes. While widely worded, the conditions to use competitive procedure with negotiation and competitive dialogue can be interpreted strictly. Indeed, the French *Conseil d'Etat* ruled out the use of the former procedure in the case of a public procurement contract for real estate diagnoses required by law (Council of State, 7 October 2020, 440575, *Lyon Métropole Habitat*). In other words, there is still a legal risk in having recourse of those procedures. As far as innovation partnerships are concerned, they are rarely used and this may be due to the legal uncertainty which goes with the vague concept of 'innovation'.

There seems also to exist a reluctance to define the needs in broad terms so as to leave enough room for specifying them during the award process. The reason may be that, by doing so, contracting authorities will end up with comparing goods or services which are quite different. They might fear that their decision to choose one over another would be challenged.

Finally, the complexities of the rules of competitive dialogue and innovation partnerships do not render them very attractive, not to mention that these procure are time consuming and resource intensive for the contracting authorities.

One interviewee of the Chair said he tends to limit the use of SPP to small value contracts as he does not want to take any management or legal risk, for bigger contracts, of either a pointless procedure (if no one submits tenders or suitable tenders) or of the annulment of the procedure if a court deems the SPP criteria or clauses as inappropriate or too favourable to local candidates. Such a risk of aborting the award procedure would be too costly.

Other explanations of the fact that new procedures do not constitute an ideal legal environment for SPP are to be found elsewhere than in the award procedures rules and more generally outside legal rules.

In the economic literature, the obstacles to SPP are identified with different considerations, which can be classified in order of importance as follows: the search for efficiency (cost killings), the lack of knowledge, as already said, the complexity added by SPP to the award process, the absence of willingness from senior managers, the lack of political willingness, the resistance to change, the absence of external assistance, the increase of risk of procedural fiascos, the existence of a legal risk but not linked to the type of award procedure chosen (Testa et al., 2012; Chiappinelli et al., 2019).

From the interviews run by the Chair, people insist on the importance of prior information gathering, in particular in relation to what the firms are capable of providing. However, scouting for information adds an additional phase in the award process which is already seen as too long.

The question of human resources during the award phase is also of utmost importance. The political orientation of the contracting authority might also play a role although a recent French economic study has shown it is not that obvious.

4. Conclusions

To conclude, the promotion of SPP - or the other way around the obstacles to it - depends very rarely on legal issues and when it does, it is not linked to the types of award procedures chosen by the contracting authority. However, lawyers have an important role for finding legal tools in order to fight non-legal obstacles for the Directive to have macro-economic effects on SPP, which certainly represent the future of public procurement.

We think there is a clear misunderstanding regarding SPP. While the legal rules appear to allow for SPP with no insurmountable legal restrictions anymore, i.e. contracting authorities may find ways to promote green public procurement for example, they do so at a very limited scale. This is why, if the stakeholders want to promote SPP, whether it being the European Commission or Member states, they shall adopt compulsory criteria. Although the European Commission does not seem to go far enough in that direction, it is not yet sure that courts will be able to impose such obligations by their own, even in countries like France or the Netherlands where the courts have called the governments to act promptly and effectively towards more action to fight climate change. By the way, among different SPP objectives, low carbon public procurement, as it is sometime called, should be given priorities precisely because of the Paris agreement that has put concrete legal duties on the shoulders of public authorities.

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