



**COUNCIL OF  
THE EUROPEAN UNION**

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**MAP 5  
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**NOTE**

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from: General Secretariat  
to: Working Party on Public Procurement  
on: 1 February 2012  
No Cion prop.: 18966/11 MAP 10 MI 686  
Subject: Proposal for a Directive of the European Parliament and of the Council on  
public procurement  
- Access to the competitive procedure with negotiation

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During the Working Party on Public Procurement meeting on 23 January, the Working Party discussed access to the competitive procedure with negotiation.

A number of delegations indicated that they might ask for further or general access to the procedure. The Commission on the other hand pointed to restrictions on the access deriving from the Treaty.

In order to help clarify the possibilities and steer further discussions, the Presidency has drawn up three preliminary options based on the discussion in the Working Party:

- Option 1: General access
- Option 2: Awarding on sole basis of MEAT
- Option 3: Except for off-the-shelf procurement

Consequential amendments to the original Commission proposal are outlined in the Annex.

With the consent of delegations, the Presidency intends to ask the Council Legal Service of their views on the legal feasibility of the three options in preparation of the Working Party meeting 9-10 February.

The legal opinion on options 2 and 3 is only relevant if option 1 is not legally feasible. However, even if general access is possible, delegations might agree on limiting the access.

Finally, the Presidency would like to stress that the options presented in this note do not preclude other options from being discussed and agreed upon at a later stage.

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*Option 1 (General Access)*

*Article 24*  
*Choice of procedures*

1. In awarding their public contracts, contracting authorities shall apply the national procedures adjusted to be in conformity with this Directive, provided that, without prejudice to Article 30, a call for competition has been published in accordance with this Directive.

Member States shall provide that contracting authorities may apply open or restricted procedures as regulated in this Directive.

Member States may provide that contracting authorities may apply competitive procedures with negotiation, competitive dialogues and innovation partnerships as regulated in this Directive.

[...]

Member States may decide not to transpose into their national law the competitive procedure with negotiation, the competitive dialogue and the innovation partnership procedures or to restrict the use of one or more such procedures to certain types of public procurement.

2. The call for competition may be made by one of the following means:
  - (a) a contract notice pursuant to Article 47,
  - (b) where the contract is awarded by restricted or competitive procedure with negotiation by a sub-central contracting authority, by means of a prior information notice pursuant to Article 46(2).

In the case referred to in point (b), economic operators having expressed their interest following the publication of the prior information notice shall subsequently be invited to confirm their interest in writing by means of an 'invitation to confirm interest' in conformity with Article 52.

3. Member States may provide that contracting authorities may apply a negotiated procedure without prior publication only in the specific cases and circumstances referred to expressly in Article 30.

**Option 2 (awarding on sole basis of MEAT)**

*Article 24*  
*Choice of procedures*

1. In awarding their public contracts, contracting authorities shall apply the national procedures adjusted to be in conformity with this Directive, provided that, without prejudice to Article 30, a call for competition has been published in accordance with this Directive.

Member States shall provide that contracting authorities may apply open or restricted procedures as regulated in this Directive.

Member States may provide that, where contracts are awarded on the sole basis of the award criterion of the most economically advantageous tender in accordance with Article 66(1)(a), contracting authorities may apply competitive procedures with negotiation, competitive dialogues and innovation partnerships as regulated in this Directive.

[...]

Member States may decide not to transpose into their national law the competitive procedure with negotiation, the competitive dialogue and the innovation partnership procedures or to restrict the use of one or more such procedures to certain types of public procurement.

2. The call for competition may be made by one of the following means:
  - (a) a contract notice pursuant to Article 47,
  - (b) where the contract is awarded by restricted or competitive procedure with negotiation by a sub-central contracting authority, by means of a prior information notice pursuant to Article 46(2).

In the case referred to in point (b), economic operators having expressed their interest following the publication of the prior information notice shall subsequently be invited to confirm their interest in writing by means of an ‘invitation to confirm interest’ in conformity with Article 52.

3. Member States may provide that contracting authorities may apply a negotiated procedure without prior publication only in the specific cases and circumstances referred to expressly in Article 30.

*Article 28*  
*Competitive dialogue*

1. In competitive dialogues, any economic operator may submit a request to participate in response to a call for competition by providing the requested information for qualitative selection.

The minimum time limit for receipt of requests to participate shall be 30 days from the date on which the contract notice is sent.

Only those economic operators invited by the contracting authority following the assessment of the requested information may participate in the dialogue. Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 64. [...]

[Paragraphs 2 to 8 of Article 28 remain unchanged].

**Option 3 (Except for off-the-shelf procurement)**

*Article 24*  
*Choice of procedures*

1. In awarding their public contracts, contracting authorities shall apply the national procedures adjusted to be in conformity with this Directive, provided that, without prejudice to Article 30, a call for competition has been published in accordance with this Directive.

Member States shall provide that contracting authorities may apply open or restricted procedures as regulated in this Directive.

Except for procurement of off-the-shelf supplies, works and services, Member States may provide that contracting authorities may apply competitive procedures with negotiation, competitive dialogues and innovation partnerships as regulated in this Directive.

Supplies, works and services that are commonly used, generally available in a standardised form and capable of meeting the needs of the contracting authorities without adaptations, are deemed to be off-the-shelf for the purposes of this provision.

[...]

Member States may decide not to transpose into their national law the competitive procedure with negotiation, the competitive dialogue and the innovation partnership procedures or to restrict the use of one or more such procedures to certain types of public procurement.

2. The call for competition may be made by one of the following means:

(c) a contract notice pursuant to Article 47,

(d) where the contract is awarded by restricted or competitive procedure with negotiation by a sub-central contracting authority, by means of a prior information notice pursuant to Article 46(2).

In the case referred to in point (b), economic operators having expressed their interest following the publication of the prior information notice shall subsequently be invited to confirm their interest in writing by means of an 'invitation to confirm interest' in conformity with Article 52.

3. Member States may provide that contracting authorities may apply a negotiated procedure without prior publication only in the specific cases and circumstances referred to expressly in Article 30.

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