



# How to engage the market

An overview of the European legal framework



**PROCURA+**  
European Sustainable  
Procurement Network



## Imprint

**How to engage the market** - an overview of the European legal framework

**Date published:** January 2021

**Publisher:**

ICLEI – Local Governments for Sustainability, European Secretariat  
Leopoldring 3, 79098 Freiburg, Germany - Email: [procurement@iclei.org](mailto:procurement@iclei.org)

**Main Author:**

ICLEI – Local Governments for Sustainability: Francesca Novello

**Terms of use:**

This publication has been produced as part of the Make ICT Fair Project and is licensed under a Creative Common Attribution 4.0. International (CC BY-ND 4.0).



This publication has been produced with the assistance of the European Union. The contents of this publication are the sole responsibility of the Make ICT Fair Project and can in no way be taken to reflect the views of the European Union. The European Commission is also not responsible for any use that may be made of the information contained herein. The project has received funding from the European Union's EuropeAid programme under grant agreement CSO-LA12017/388-226.

## Table of contents

<b>01 Introduction</b> .....	<b>4</b>
<b>02 Principles</b> .....	<b>4</b>
<b>03 The EU level: Directive 2014/24/EU</b> .....	<b>4</b>
Preliminary market consultations .....	2
Competitive dialogue .....	2
The negotiated procedure .....	4
The negotiated procedure without prior publication .....	5
Innovation partnership .....	6
<b>04 Country level</b> .....	<b>8</b>
Spain .....	8
The United Kingdom .....	8
The Netherlands .....	8
Sweden .....	9
Norway .....	9

make  
ICT  
fair

## 01 Introduction

The power of public buyers is immense, especially if they follow a strategic approach based on dialogue with market actors. Engaging in different formats with industry is gaining ground as means to increase sustainability, innovation and responsibility of products, supply-chains and services.

This document gives a brief overview of the legal frameworks underpinning market engagement aiming to enable public buyers to practice dialogue. The overview provides a legal background beyond a specific format of engagement, outlining regulation on Competitive Dialogue, the Negotiated Procedure or Innovation Partnership. In addition, the document details how some countries have regulated market engagement based on the EU directives.

## 02 Principles

The 2014 EU directives on public procurement regulate market dialogue, providing for preliminary market consultations, competitive dialogue and negotiated procedure with or without prior publication. It contains elements of market dialogue also in the innovative partnership, which will be briefly described later.

Core EU principles always applicable in procurement, also apply to market dialogue:

- ★ non-discrimination based on nationality;
- ★ freedom of movements and establishment;
- ★ economy;
- ★ efficiency;
- ★ equal treatment;
- ★ transparency;
- ★ mutual recognition;
- ★ proportionality.

## 03 The EU level: Directive 2014/24/EU<sup>1</sup>

### Preliminary market consultations

Recital 42<sup>2</sup> (directive 2014/24/EU) mentions competitive dialogue as a useful tool «*in cases where contracting authorities are unable to define the means of satisfying their needs or of assessing what the market can offer in terms of technical, financial or legal solutions*».

Competitive dialogue was introduced with the 2004 directives and updated in the 2014 directives. While choosing the type of procedure, Art. 26 (directive 2014/24/EU) establishes that contracting authorities may choose a competitive procedure with negotiation or a competitive dialogue in cases of procurement for which:

- Irregular offers (with signs of corruption/collusion/abnormally low) or unacceptable offers (submitted by tenders without the required qualification/bids above the administration's budget) have been submitted in the context of an open/restricted procedure; or
- In case one or more of the following situations occur:
  - a) necessity to adapt readily available solutions;
  - b) the procurement includes design or innovative solutions;
  - c) the procurement needs prior negotiations due to specific circumstances related to the nature, the complexity or the legal and financial make-up or because of the related risks;
  - d) technical specifications cannot be established with sufficient precision by the contracting authority.

Art. 30 (directive 2014/24/EU) regulates competitive dialogue and it foresees the following:

- Any economic operators can request to join the competitive dialogue but only those invited can actually participate and the contracting authorities can limit the number of participants.

<sup>1</sup> The analysis will follow the content of directive 2014/24/EU on public procurement, given that the other two directives 2014/23/EU on concession contracts and 2014/25/EU on special sectors contain similar provisions.

<sup>2</sup> Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0024&from=IT>.

- The minimum timeframe for receiving requests for participation is 30 days.
- The procurement is awarded according to the best price-quality criterion.
- The contract notice indicates the administration's needs and requirements, that shall be described in the notice itself or in a descriptive document; in the same place they shall also set out and define the chosen award criteria together with an indicative timeframe.
- Then, contracting authorities open the dialogue with participants in which they can discuss all the aspects of the procurement.
- During the dialogue, equal treatment among participants is guaranteed and contracting authorities shall not disclose any information that may cause discrimination.
- The proposed solutions or other confidential information communicated by a candidate or tenderer shall not be disclosed without its prior permission.
- The dialogue may take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage and it shall continue until it can identify the solution(s) that can meet the administration's needs.
- Once the dialogue is closed, on the basis of the solutions presented and specified during the dialogue phase, participants submit their bids.
- Such solutions can be clarified, specified and optimized upon the administration's request; however, a modification of essential elements of the tender/procurement which has an impact on fair competition or implies discriminatory effects, is not allowed.
- At the request of the contracting authority, negotiations with the tenderer who presented the bid with the best price-quality ratio may be carried out (in order to confirm financial commitments or other terms) by finalizing the terms of the contract (without materially modifying essential aspects of the tender/procurement).
- Contracting authorities may specify prizes/ payments to the participants in the dialogue.

## The negotiated procedure

Such a procedure consists of two phases. First, the contracting authority publishes a notice and economic operators submit their initial tenders, which will be the basis for negotiations with the competent authority that take place in the second part of the process.

As per Art. 26 of directive 2014/24/EU, the negotiated procedure may be chosen in the same cases of competitive dialogue (see par. 2.2). Art. 29 lays out such procedure:

- Any economic operator may request to join, but only invited by the contracting authority may submit an initial tender (that will be the basis for the negotiations). At the same time, the authority may limit the number of candidates to be invited.
- The procurement documents shall contain: precise identification of the subject-matter (i.e. a description of their needs and the characteristics required of the procurement, by including also which elements of the description define the minimum requirements) and precise specification of the award criteria. Minimum requirements and award criteria shall not be subject to subsequent negotiations.
- 30 days is the minimum time limit for:
  - a) receiving requests to participate (starting from the date of the contract notice / invitation to confirm interest;
  - b) receiving initial tenders (starting from the date on which the invitation was sent).  
The Article also recalls Art. 28 parr. 3-6 which refers to conditions for shorter time limits (also in case of urgency) and mutual agreements for setting time limits.
- To improve their content, contracting authorities shall negotiate with tenderers the initial and all subsequent tenders submitted by them, except for the final tenders.
- The contract notice or the invitation to confirm interest may indicate whether the contracting authority reserves the possibility to award contracts on the basis of the initial tenders, without negotiations.
- During the negotiations, equal treatment is guaranteed to all tenderers.

Contracting authorities:

- a) shall not provide information to advantage some tenderers and discriminate others
  - b) shall inform in writings all tenderers (who have not been eliminated) about any changes to the technical specifications or other procurement documents, other than those setting out the minimum requirements. In such cases, contracting authorities shall also provide sufficient time for modification and resubmission of tenders.
- Contracting authorities shall also not reveal to other participants confidential information communicated by a candidate/tenderer without its prior express and specific agreement.
  - Such procedure may also take place in successive stages, in order to reduce the number of tenders to be negotiated by applying the chosen award criteria. The procurement documents shall indicate if such an option will be used.
  - Once the contracting authority wants to conclude the negotiations, it shall inform the remaining tenderers and set a common deadline to submit final tenders. Then it shall award the contract on the basis of the chosen award criteria, after assessing that the final tenders are compliant with the minimum requirements and with selection criteria.

### The negotiated procedure without prior publication

- Art. 32 establishes that, in the following cases, public work/supply/service contracts may be awarded by negotiation without a prior publication of a contract notice:
  - a) Where no tenders/requests to participate or no suitable tenders/requests to participate have been received<sup>3</sup> in response to an open/restricted procedure, provided that the initial conditions of the contract are not substantially changed.
  - b) Due to i) artistic reasons or ii) the protection of rights (also intellectual property rights) or iii) lack of competition for technical reasons the contract can be executed only by a particular economic operator (in cases ii) and iii), only if no reasonable alternative or substitute exist and the absence of competition is not the result of an artificial narrowing of the parameters of the procurement)
  - c) Where circumstances of extreme urgency (in any case not attributable to the contracting authority) brought about by unforeseeable events make the timeframe for other procedures too long and upon the condition that it is strictly necessary.
- In case of public supply contracts, §3 establishes that such procedure can be used for:
  - a) Products manufactured purely for research/experimentation/study/development purposes (but this not apply to quantity production to establish commercial viability or to recover research and development costs);
  - b) Additional deliveries by an original supplier (either a partial replacement or installations or the extension of existing supplies/ installation) where a change of supplier would imply different technical characteristics which in the end result in incompatibility/ disproportionate technical difficulties in operation and maintenance (in any case the duration of such contracts shall generally be limited to 3 years);
  - c) supplies quoted and purchased on a commodity market;
  - d) Purchase of supplies on particularly advantageous terms (from a supplier ceasing its activity / from a liquidator in an insolvency procedure, an arrangement with creditors, or a similar procedure).
- In case of public service contracts, §4 establishes that such procedure can be used for design contests (organized in accordance with the directive's rules on design contest) that are awarded the winner(s) of the contest, provided that, in case of more than one successful candidate, the negotiation is undertaken with all successful candidates.
- In case of public work/service contracts, §5 establishes that such procedure can be used in case such works/services consist in the repetition of similar works or services entrusted to the

<sup>3</sup> Art. 32(1) precise that «A tender shall be considered not to be suitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the contracting authority's needs and requirements as specified in the procurement documents. A request for participation shall be considered not to be suitable where the economic operator concerned is to be or may be excluded pursuant to Article 57 or does not meet the selection criteria set out by the contracting authority pursuant to Article 58».

same economic operator of the original contract, under the condition that the procurement is in conformity with a basic project for which the original contract was awarded, following a competitive procedure. The basic project shall indicate the extent of possible additional works or services and the related conditions.

### **Innovation partnership**

Innovation partnership was introduced by the 2014 directives and it is regulated in Article 31. It may be used when there is a need to develop products, services or works that are not presently available on the market. It shall aim at the consequent purchase of the outcomes, upon the condition that they correspond to the performance levels and maximum costs agreed between the contracting authorities and the participants.<sup>4</sup>

The text of the directive establishes the following:

- The procurement documents shall contain (in a sufficiently precise way to identify the nature and scope of the required solution): the identification of the need for an innovative product, service or works that cannot be found already on the market, the minimum requirements to be met.
- The contracting authority may decide to organize the innovation partnership with one or more partners conducting separate research & development (R&D).
- 30 days from the notice shall be the minimum timeframe for sending requests to participate.
- Any economic operator may request to join, but only invited by the contracting authority may submit an initial tender. At the same time, the authority may limit the number of candidates to be invited.
- The contract shall be awarded only on the basis of the best price-quality ratio.
- The innovation partnership shall be structured in successive phases following the sequence of steps in the R&D process and shall set intermediate targets. The contracting authority may decide after each phase to terminate the innovation partnership or to reduce the number of partners by terminating individual contracts (if this possibility was included in the procurement documents).
- To improve their content, contracting authorities shall negotiate with tenderers the initial and all subsequent tenders submitted by them, except for the final tenders. In any case this does not apply to minimum requirements and award criteria. Negotiations may take place in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria (this option shall be mentioned before in the contract notice/procurement documents).
- Equal treatment is guaranteed to all participants the same as for the above-mentioned procedures.
- While selecting candidates, the contracting authority applies criteria regarding the capacity in the field of R&D and of developing and implementing innovative solutions. Research and innovation projects may be submitted only by invited operators.
- The procurement documents shall regulate intellectual property rights.
- The structure of the partnership, the duration and value of the different phases shall reflect the level of innovation of the proposed solution and the sequence of the research and innovation activities required; the estimated value of supplies/ services/works shall be proportionate to the investment required for the development.

---

<sup>4</sup> See Art. 31(2).

## 04 Country Level

### Spain

The Spanish legislator transposed the content of the EU directives of 2014 into national law (Law No. 9 of 8 November 2017<sup>5</sup>) quite symmetrically.

Preliminary market consultations are included in Art. 115 of law No. 9/2017. The negotiated procedure is structured in Articles 166-171, while competitive dialogue is regulated in Articles 172-176.

More in particular, Art. 172 sets out the scope of the competitive dialogue procedure; Art. 173 foresees the possibility of premiums and compensations; Articles from 174 to 176 set out the steps for the execution of the dialogue.

Art. 166 defines the negotiated procedure and Art. 167 lists the cases in which competitive dialogue and negotiated procedure can be used.

Art. 168 and 170 specifies cases in which the negotiated procedure without prior publication is applicable. They overall reflect those included in Art 32 of directive 2014/24/EU<sup>6</sup>.

Art. 169 and 171 lay out the steps of the procedure and they replicate the directive's provisions, with the addition that the contracting authority must keep record of negotiations.

Art. 177 provides for innovation partnership.

### The United Kingdom

The same as for Spain, The British law reflects the EU directives of 2014 without major changes. Rules are included in the Public Contracts Regulations No. 102 of 2015.<sup>7</sup>

Preliminary market consultations in the UK are foreseen under Regulation 40; while competitive dialogue is included in Regulation 29; the negotiated procedure with or without prior publication is foreseen under Regulation 32 and Innovation partnership is found under Regulation 31.

Regulation 54 disciplines invitation to candidates in all the above-mentioned procedures; while Regulation 65 deals with reduction in the number of candidates.

### The Netherlands

The Netherlands transposed the content of the EU directive into the Procurement Act of 2012 (Law of 1 November 2012, containing new rules regarding procurement)<sup>8</sup> and there are no relevant changes. Unlike Spain and the UK, there is not a particular Article that regulates preliminary market consultations; Art. 2.26 just mentions that the contracting authority applies one of the procedures foreseen to award a public contract, whether or not after market consultation.

Competitive dialogue is regulated under § 2.2.1.4. Art. 2.28 identifies the cases in which it can be used; while Article 2.29 provides for the steps of the procedure.

Competitive procedure with negotiation can be found in § 2.2.1.5. Art. 2.30 deals with the cases in which the procedure is applicable. Art. 2.31 lays out the structure of the negotiated procedure itself. § 2.3.8.3 deals with the award phase of competitive dialogue. Article 3.34a mentions the case in which special sector companies apply the competitive dialogue.

Under § 2.2.1.7 there is the negotiation procedure without prior notice and its Articles 2.32-2.37 establish the cases in which the contracting authority can opt for it.

Innovation partnership is regulated under §2.2.1.6 and its Articles. 2.31a and 2.31b provides for the steps of the procedure.

Art. 2.71 establishes terms; Art. 2.99 and 2.100 deal with limitation of candidates by the contracting authority; Article 3.65 contains provisions about exclusion and selection criteria. These provisions are applicable to all the dialogue-related procedures mentioned.

5 Law 9/2017 of 8 November 2014 on Public Sector Contracts by which the directives of the European Parliament and of the Council 2014/23/EU and 2014/24/EU of 26 February 2014 are transposed into the Spanish legal system. Available at: [www.boe.es/buscar/act.php?id=BOE-A-2017-12902&p=20200919&tn=1#a1-27](http://www.boe.es/buscar/act.php?id=BOE-A-2017-12902&p=20200919&tn=1#a1-27)

6 Art. 168 refers also to the case of a contract declared secret or reserved or which execution is accompanied by special security measures or cases in which State security is involved.

7 Available at: [www.legislation.gov.uk/ukxi/2015/102](http://www.legislation.gov.uk/ukxi/2015/102)

8 Available at: <https://wetten.overheid.nl/BWBR0032203/2019-04-18>



## Sweden

The Swedish Law transferred the EU directives' contents into national law with the Public Procurement Act (2016:1145)<sup>9</sup> and the contents are substantially the same.

Albeit the Act does not mention specifically preliminary market consultations, they are allowed and they are becoming more common.<sup>10</sup> Nonetheless, Chapter 4, Section 8 of the Public Procurement Act refers to the case of candidate/tenderer involved in the preparations of a procurement procedure. In such a case, the Swedish Law establishes that if a supplier has participated in the preliminary work, the contracting authority must ensure that all the others get access to any information relevant to the procurement that has been given in that context. Whether it is not possible to respect the principle of equal treatment, the law imposes to exclude the supplier from participation.

The negotiated procedure is disciplined in Chapter 6, Sections from 4 to 11. These Sections respectively provide for: access to the procedure, cases of application, the content of the procurement documents, the content of the negotiations.

The following Sections from 12 to 19 list cases in which the negotiated procedure does not need a prior notice and they are coherent with the directive.

Competitive dialogue is included in Chapter 6, Sections from 20 to 29. These Sections respectively deal with: cases in which the procedure may be used, the content of the procurement documents, the management of the dialogue, invitation to submit final tenders, clarifications of tenders, evaluation, final negotiations and compensation and prizes for joining the dialogue. All Sections reflect the directive's provisions.

Innovation partnership is regulated under Chapter 6, Sections from 30 to 41. These Sections contain provisions on the following: cases of application, requirements for candidates, content of procurement documents, object of the negotiations, requirements for establishing an innovation partnership, evaluation of tenders and steps for the implementation of the procedure. Chapter 5, Section 15 provides for the value of an innovation partnership.

Other relevant provisions may be found in Chapter 4, Sections 6-7 (about limiting the number of candidates that may submit tenders) and in Chapter 10, Section 9 (about written invitation to tender or participate in a dialogue). Chapter 11 is about time limits.

## Norway

Norway is not a Member State of the EU but it is party to the Agreement on the European Economic Area (EEA), hence its procurement system is based on the EU directives.

Public procurement rules are included in the Public Procurement Act of 2016 and its complementary regulations<sup>11</sup>, the most important being the Public Procurement Regulation. The latter contains provisions on dialogue with the market.

In particular, in Part II of the Act (which relates to contracts below EU thresholds) § 8.1 and § 8.2 regulate preliminary market consultation and are in line with the 2014/24/EU directive. § 9.3 is about dialogue with suppliers and reflects the directive too.

Part III deals with contracts above the EU threshold and its provisions are coherent with the directive. § 12.1 and 12.2 are about preliminary market consultations.

§ 13.2 mentions cases in which negotiated procedure and competitive dialogue are applicable; § 13.3 lists the cases in which the negotiated procedure can be used without prior notice. § 16.12 foresees possibility of limitation of the number of suppliers selected to participate in tenders.

§ 20.4 and § 20.5 set timeframes in negotiated procedures, competitive dialogue procedures and innovation partnerships.

§ 23.2 regulates invitations to the procedures. §§ 23.8, 23.9 and 23.10 deal with steps for the implementation of competitive dialogue, its closing and equal treatment during the procedure. §23.11 is about reduction of the number of offers in all dialogue-related procedures (negotiated, competitive dialogue and innovation partnership).

§ 28.8 defines the steps for conducting innovation partnerships.

<sup>9</sup> Non official English translation available at: [www.konkurrenserverket.se/globalassets/english/publications-and-decisions/swedish-public-procurement-act.pdf](http://www.konkurrenserverket.se/globalassets/english/publications-and-decisions/swedish-public-procurement-act.pdf)

<sup>10</sup> <https://practiceguides.chambers.com/practice-guides/public-procurement-government-contracts-2020/sweden>

<sup>11</sup> Available at: [www.regjeringen.no/no/tema/naringsliv/konkurransepolitikk/offentlige-anskaffelser-/forste-kolonne/regelverk-og-skjemaer-listeside/lov-om-offentlige-anskaffelser-med-forsk/id2518877](http://www.regjeringen.no/no/tema/naringsliv/konkurransepolitikk/offentlige-anskaffelser-/forste-kolonne/regelverk-og-skjemaer-listeside/lov-om-offentlige-anskaffelser-med-forsk/id2518877)

## How to engage the market

An overview of the European legal framework



**PROCURA+**  
European Sustainable  
Procurement Network