Directive 2009/81/EC on the award of contracts in the fields of defence and security

Guidance Note
Research and development

Directorate General Internal Market and Services

1) Principles

1. According to recital 55 of Directive 2009/81/EC, *'stimulating research and development is a key way of strengthening the European Defence Technological and Industrial Base…. The importance of research and development in this specific field [of defence and security] justifies maximum flexibility in the award of contracts for research supplies and services'.* The Directive therefore excludes certain contracts for research and development services from its scope and allows the use of negotiated procedures without publication of a contract notice for the award of supply and service contracts related to research and development.

2. However, opening procurement up to competition is crucial for the competitiveness of Europe's defence industry and the creation of a truly European defence and security equipment market. Hence, recital 55 of the Directive specifies that: '*this flexibility [in the award of research and development contracts] should not preclude fair competition in the later phases of the life cycle of a product. Research and development contracts should therefore cover activities only up to the stage where the maturity of new technologies can be reasonably assessed and de-risked*'. They *'should not be used beyond that stage as means of avoiding the provisions of [the] Directive, including by predetermining the choice of tenderer for the later phases'*.

3. This limitation is particularly important since, under well-established case-law, provisions authorising *'derogations from the rules intended to ensure the effectiveness of the rights conferred by the Treaty in relation to public ... contracts'* must be interpreted strictly. The burden of proving there are exceptional circumstances justifying a derogation lies on the party seeking to rely on such circumstances.[1] Article 11 (on the use of exclusions) and recital 50 (on the use of the negotiated procedure without publication of a contract notice) of the Directive also emphasise the need for a restrictive application of these provisions. To comply with these principles, it is crucial to delimit the research and development phase correctly.

4. In this context, it is important to note the difference between national and cooperative research and development. In the framework of cooperative programmes, not only research and development contracts, but also contracts for subsequent phases of the life cycle are excluded from the Directive (see Article 13 (c) of the Directive and the guidance note on defence-specific exclusions). For

[1] See judgment of 10 April 2003 in Joined Cases C-20/01 and C-28/01 Commission v Germany, paragraph 58.

national programmes, on the other hand, the exclusion covers only the research and development phase as defined in Article 1 (27).

2) The concept of research and development

5. Article 1 (27) of the Directive defines research and development as: *'all activities comprising fundamental research, applied research and experimental development, where the latter may include the realisation of technological demonstrators, i.e., devices that demonstrate the performance of a new concept or a new technology in a relevant or representative environment'*.

Recital 13 develops this definition further: *'For the purposes of this Directive, research and development should cover fundamental research, applied research and experimental development. Fundamental research consists in experimental or theoretical work undertaken mainly with a view to acquiring new knowledge regarding the underlying foundation of phenomena and observable facts, without any particular application or use in view. Applied research also consists of original work undertaken with a view to acquiring new knowledge. However, it is directed primarily towards a particular practical end or objective. Experimental development consists in work based on existing knowledge obtained from research and/or practical experience with a view to initiating the manufacture of new materials, products or devices, establishing new processes, systems and services or considerably improving those that already exist.'*

6. Recital 13 repeats that *'experimental development may include the realisation of technological demonstrators, i.e. devices demonstrating the performance of a new concept or a new technology in a relevant or representative environment'.* But it also introduces an additional element to clarify delimitation of the research and development phase, specifying that *'research and development does not include the making and qualification of pre-production prototypes, tools and industrial engineering, industrial design or manufacture.'* This specification is particularly important to limit the exemption of research and development to activities which do not pre-determine the choice of tenderer for later phases of the procurement cycle.

In terms of Technology Readiness Levels (TRL), research and development in the sense of Article 1 (27) would typically include basic technology research (TRL 1), research to prove feasibility (TRL 2/3), technology development (TRL 3-5) and technology demonstration (TRL 5/6)[2].

[2] Technology Readiness Level (TRL) is a measure used by many companies, international organisations and government agencies to assess the maturity of evolving technologies in the management of research and development projects. The above-mentioned TRLs, for example, are used by the European Space Agency (see http://sci.esa.int/science-e/www/object/index.cfm?fobjectid=37710). In this context, it is important to note that there are a variety of different organisation- or project-specific definitions used for TRLs. The reference to TRLs in this note is therefore only indicative. Recital 13 must always take precedent when interpreting the definition of research and development for the purpose of Directive 2009/81/EC.

3) Instruments

3.1) Basic choice for contracting authorities/entities

7. Clear delimitation of the research and development phase is crucial for choosing the right procedure. A contracting authority/entity that intends to award a research and development contract has a choice between two options:

- It decides to award a contract that covers only research and development as defined by Article 1 (27) and further explained in recitals 13 and 55 of the Directive. It may then benefit from the flexibility provided for in Articles 13 (j) and 28 (2) of the Directive. The subject-matter of such a contract cannot go beyond the demonstration of the '*performance of a new concept or a new technology in a relevant or representative environment*'. All contracts for follow-on phases, including the development of a demonstrator into a pre-production prototype and its qualification, will have to be awarded separately following the normal procedures of the Directive (subject to the applicability of any relevant exclusion).
- It opts for a contract that combines research and development with other pre-production or even production activities. Such a contract will have to be awarded following one of the normal procedures of the Directive (subject to the applicability of any relevant exclusion). Its subject-matter may then go beyond the manufacture of a demonstrator and include the making and qualification of prototypes, other services/supplies related to the pre-production phase, or even combined development and production.

3.2) Instruments for the award of research and development contracts

3.2.1) Article 13 (j): Specific exclusion of certain contracts for research and development services

8. Article 13 (j) provides a specific exclusion for *'research and development services other than those where the benefits accrue exclusively to the contracting authority/entity for its use in the conduct of its own affairs, on condition that the service provided is wholly remunerated by the contracting authority/entity'*.

9. The (somewhat unwieldy) wording of this provision is almost identical to that of Article 16 (f) of Directive 2004/18/EC. In the context of defence and security procurement, the exclusion is principally aimed at service contracts awarded for co-financed research and development activities where the contracting authority/entity and the contractor share costs and/or benefits[3]. Research and development services which the contracting authority/entity funds alone and of which it obtains all the benefits, by contrast, are not covered by this exclusion (but can be awarded according to Article 28 (2)). In this context, the term 'benefits' includes Intellectual Property Rights and all rights to use and/or disclose foreground and (embedded)

[3] See recital 34.

background information related to the findings of the research conducted under the contract in question.

10. Contracting authorities/entities are not obliged to apply one of the procedures of the Directive for the award of contracts covered by Article 13 (j). This gives them the opportunity to devise the award procedure in a way that offers sufficient flexibility, while providing the desired level of competition. They may, for instance, organise a limited competition, conduct negotiations with several potential service providers, or even decide to conclude the contract directly with a specific service provider. They may also award research contracts in parallel to competing providers for specific phases, in order to benefit from alternative approaches.

11. Article 13 (j) applies only to service contracts. According to Article 1 (5) of the Directive, *'a contract having as its object both products and services shall be considered to be a 'service contract' if the value of the services in question exceeds that of the products covered by the contract'*..[4] If, on the other hand, the value of the products (e.g. a demonstrator) exceeds that of the research services, the contract has to be considered as a supplies contract. The value of the products and services thus determines the nature of the contract, and the choice of the rules to be applied. A research service contract would be covered by the exclusion of Article 13 (j), a research-related supply contract, by contrast, could be awarded by negotiated procedure without publication of a contract notice if the conditions set in Article 28 (2) (b) are met. Contracting authorities/entities should base their choice of procedure on a genuine pre-estimate — in accordance with the principles set out in Article 9 — of the relative value of the products and services involved. In most cases, however, research and development contracts are likely to be service contracts.

12. In any case, Article 13 (j) must be applied in the light of Article 11, which is a general safeguard clause against the possible misuse of Articles 12 and 13 for the purpose of avoiding transparent and competitive contract award procedures. Under ECJ case law, provisions which authorise exceptions to EU public procurement rules must be interpreted strictly.[5] This means that exclusions from the scope of the Directive provided under Articles 12 and 13 must be confined to contracts of the type described in these provisions.

3.2.2) Article 28 (2): Negotiated procedure without publication of a contract notice for the award of certain research and development contracts

3.2.2.1) Characteristics of the procedure

13. Article 28 of the Directive contains an exhaustive list of cases justifying the use of the negotiated procedure without prior publication of a contract notice. Unlike the

[4] Unlike in the case of a mixed contract for both works and services, in the present case the determination is based solely on a comparison of the respected values of products and services; it does not depend on an objective analysis of the main purpose of the contract. See judgments of 11 May 2006 in Case C-340/04 Carbotermo, paragraph 31, and of 1 July 1999 in Case C-107/98 Teckal, paragraph 38.

[5] See judgment of 13 December 2007 in Case C-337/06 Bayerischer Rundfunk, paragraph 64.

negotiated procedure with publication of a contract notice, which is one of the normal award procedures provided for by the Directive[6], the negotiated procedure without prior publication is an exceptional procedure restricted to *'certain very specific cases and circumstances'* where the *'use of the negotiated procedure with publication of a contract notice could be impossible or entirely inappropriate'* (recital 50).

14. In a negotiated procedure without publication of a contract notice, the contracting authority/entity is free to consult the economic operators of its choice and to negotiate the terms of contract with one or more of these. This does not mean, however, that the relevant contracts are excluded from the Directive. The general provisions of the Directive laid down in Articles 4 to 7, particularly the principles of equal treatment, non-discrimination and transparency, are still applicable.

Moreover, contracting authorities/entities using the negotiated procedure without prior publication have to publish a contract award notice in accordance with Article 30 (3) of the Directive[7] within 48 days of awarding the contract. The fact that this obligation is explicitly mentioned in Article 28 of Directive 2009/81/EC — but not in the corresponding Article 31 of Directive 2004/18/EC — demonstrates that the publication of contract award notices is particularly important on defence and security markets.

3.2.2.2) Specific cases justifying the use of the procedure

15. Article 28 (2) of the Directive includes two cases that specifically concern the award of contracts for research and development.

16. Article 28 (2) (a) allows the use of the negotiated procedure without prior publication of a contract notice for the award of contracts for *'research and development services other than those referred to in Article 13'*. Logically, this provision therefore applies only to contracts that are wholly remunerated by the contracting authority/entity and where the benefits — i.e. mainly Intellectual Property rights and other user rights of use) — accrue exclusively to the contracting authority/entity.

17. Under Article 28 (2) (b), contracting authorities/entities may apply the negotiated procedure without prior publication of a contract notice for the award of supply contracts *'for products manufactured purely for the purpose of research and development, with the exception of quantity production to establish commercial viability or recover research and development costs'*.

18. Although the term 'products manufactured purely for the purpose of research and development' is not entirely unequivocal, the qualification ('*with the exception of*…') implies that the provision covers not only the supply of tailor-made products

6 See Articles 25, 26 and recital 50; this is one of the main differences between Directive 2009/81/EC and Directive 2004/18/EC.

7 The first subparagraph of Article 28 explicitly states the obligation to publish a contract award notice in the case of contracts awarded by negotiated procedure without publication of a contract notice.

needed for conducting research activities (measuring instruments, testbeds, etc.), but also products resulting from these research and development activities.

3.3) Award under the regular procedures provided by the Directive

3.3.1) Combined contracts

19. As stated in point 3.1, contracting authorities/entities intending to procure research and development services may opt from the outset for a more comprehensive approach and award a contract that goes beyond the research and development phase as defined in Article 1 (27) and includes, for instance, the making and qualification of prototypes or other services/supplies related to the pre-production phase or even combined development and production.

This possibility is explicitly mentioned in recital 55, which states that: *'the contracting authority/entity should not have to organise a separate tender for the later phases if the contract which covers the research activities already includes an option for those phases and was awarded through a restricted procedure or a negotiated procedure with the publication of a contract notice, or, where applicable, a competitive dialogue'*.

20. In such a case, the contracting authority/entity awards the contract in European-wide competition through one of the normal procedures under the Directive. The subject-matter of the contract, as described in the contract documentation, should comprise all services, supplies and work for all phases which are covered. Stipulations related to later phases might take the form of fixed or conditional obligations or options.

However, contracting authorities/entities should be aware of the difficulties that this approach could imply, particularly for complex projects: First, the subject-matter of the contract may evolve in the course of executing the contract when the latter starts at early stages of research and development. Moreover, it might not be possible, at the point of awarding the contract, to fix exact prices for all later phases of the contract performance. All this may necessitate substantial amendments to essential provisions of the contract, which may require a new contract award procedure if these amendments are materially different in character from the initial contract provisions.[8] In any event, in order to avoid practical and legal uncertainties, it would be advisable to provide as much detail as possible at the outset, for instance, by agreeing on a basic scheme or formula for determining prices to be paid for services and supplies in later phases.

3.3.2) Follow-on contracts

21. If a contracting authority/entity that has awarded a research contract under Article 13 (j) or Article 28 (2) intends to conclude follow-on contracts for the pre-production phase and/or supply contracts for the production phase, it has to apply

[8] See judgments of 19 June 2008 in Case C-454/06 pressetext Nachrichtenagentur GmbH, paragraphs 34 to 37, and of 13 April 2010 in Case C-91/08 Wall AG, paragraphs 37 and 38.

the normal procedures provided for by the Directive. This usually means that such contracts have to be awarded in European-wide competition through a restricted procedure or a negotiated procedure with the publication of a contract notice or, where applicable, a competitive dialogue.

This guidance note reflects the views of the services of DG MARKT and is legally not binding. Only the Court of Justice is competent to give a legally binding interpretation of EU law.