

Court of Justice confirms open public procurement procedures can use a multi-stage knock out approach (Montte SL v Musikene)

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Public Law analysis: The Court of Justice clarified that it is permissible during an open public procurement procedure to exclude bids at an initial stage based on technical criteria, and to only permit those who pass that stage to have their bids assessed at a second economic evaluation stage. The court noted that this approach was not expressly excluded by Directive EU 2014/24/EU and indeed the same is the case for the Public Contract Regulations 2015. Written by Adam Heppinstall, barrister, Henderson Chambers.

Montte SL v Musikene, Case [C-546/16](#))

What are the practical implications of this case?

The Public Contracts Regulations 2015 (PCR 2015), [SI 2015/102](#), which implement [Directive 2014/24/EU](#) the European Parliament and of the Council of 26 February 2014 on public procurement and repealing [Directive 2004/18/EC](#) (the Public Contracts Directive) in England, Wales and Northern Ireland, provide for different forms of public procurement procedures:

- open procedure
- restricted procedure
- competitive procedure with negotiation (also known as the negotiated procedure)
- competitive dialogue procedure, and
- innovation partnership procedure

It was thought that the main difference between the open procedure and, say, a negotiated or competitive dialogue procedure was that in an open competition any tenderer may make a bid so long as they are not excluded on certain grounds (under PCR 2015, [SI 2015/102, reg 57](#)) whereas the other procedures follow a two-stage process where initial bids are assessed and only those who pass certain pre-selection criteria are allowed to go through a further stage of assessment and evaluation.

Technical criteria are seen as selection criteria under PCR 2015, [SI 2015/102, reg 58](#) and not exclusion criteria under PCR 2015, [SI 2015/102, reg 57](#). What this case confirms, however, is that there is nothing to stop a public authority using the open procedure under PCR 2015, [SI 2015/102, reg 27](#), but applying a multi-stage knock out approach where tenderers who do not meet a certain technical threshold are excluded from further consideration. Regulation 58 of PCR 2015 is worded so as to permit this approach, albeit not expressly so. For example, PCR 2015, [SI 2015/102, reg 58\(2\)](#) refers to imposing certain technical requirements for participation (ie if not met they could lead to exclusion).

In an open procedure, it is more usual to mark all bids using weighted criteria, including technical ability and price, at the same time, but this case confirms that a staged approach is also permitted even in an open competition. It therefore brings clarity to that issue, which is not expressly made clear in either the Public Contracts Directive or the PCR 2015.

What was the background?

Musikene is a Basque public sector foundation which held a public procurement competition for provision of musical instruments and the like using the open procedure. The procurement exercise was carried out in two stages—starting with a ‘technical’ stage where the tenderers had to get at least 35 points out of 50 to proceed to the ‘economic’ stage when the price and value offered would be assessed, again with a maximum of 50 points, with the final score being given out of 100.

Montee, a prospective tenderer, lodged an appeal with the Administrative Board of Contract Appeals of the Autonomous Basque Community, arguing that it was unlawful to exclude bidders from the economic stage of the competition because they were not awarded at least 35 points at the technical

stage. They also objected to a final score being given out of 100, as bidders would not know which tenderer had been the cheapest at the final stage (as the two 'out of 50' scores would not be disclosed, just the final score out of 100).

The Board of Contract Appeals referred the case to the Court of Justice because it was concerned that an open competition under the Public Contracts Directive could not proceed in stages, as this was reserved for negotiated or competitive dialogue (or equivalent) procedures only. The Board also thought that it was not appropriate to reduce the number of competing tenderers using a technical knockout stage and that that 35 out of 50 might be too high a threshold in any event.

What did the court decide?

First, as a preliminary issue, the court confirmed that the Board of Contract of Appeals was a 'court' which was able to make a preliminary reference, as this had been contentious.

Secondly, the court noted that the Public Contracts Directive does not set out any rules (apart from time limits) as to how an open public procurement procedure is to be conducted. Indeed it expressly permits the setting of minimum technical requirements for bidders. The Court of Justice also noted that in selecting the most economically advantageous tender, the contracting authority is able to take into account technical merit.

So long as a contracting authority proceeds in accordance with the principles of transparency, non-discrimination and equal treatment so as to guarantee an objective comparison of the relative merits of the tenders in aid of the overall aim of effective competition, contracting authorities are free to determine the level of technical merit which bids must have and they can achieve this by setting a minimum knockout threshold as a first stage.

While there is express authority in the Public Contracts Directive enabling such a multi-stage approach (eg in negotiated or competitive dialogue procedures), which is absent from provisions relating to the open procedure, there is also nothing within the Directive which prevents such an approach to be taken during an open procedure.

The court held that this is the case even if the number of tenderers which get through to the second stage is drastically reduced following the application of the minimum technical score at the initial knockout stage. If after that stage there were no bids it wished to accept left, the contracting authority could always hold a new competition designed differently with different award criteria.

Case details

- Court: Court of Justice
- Judge: T von Danwitz, C Vajda, E Juhász, K Jürimäe and C Lycourgos
- Date of judgment: 20 September 2018

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