

# Ensuring transparency in the call-off award with the reopening of mini-competition

For the conference on:

Public Procurement: centralization and new trends

**Atakilti Haileselassie GebreMichael**

Ph.D Fellow

Faculty of Law, University of Copenhagen

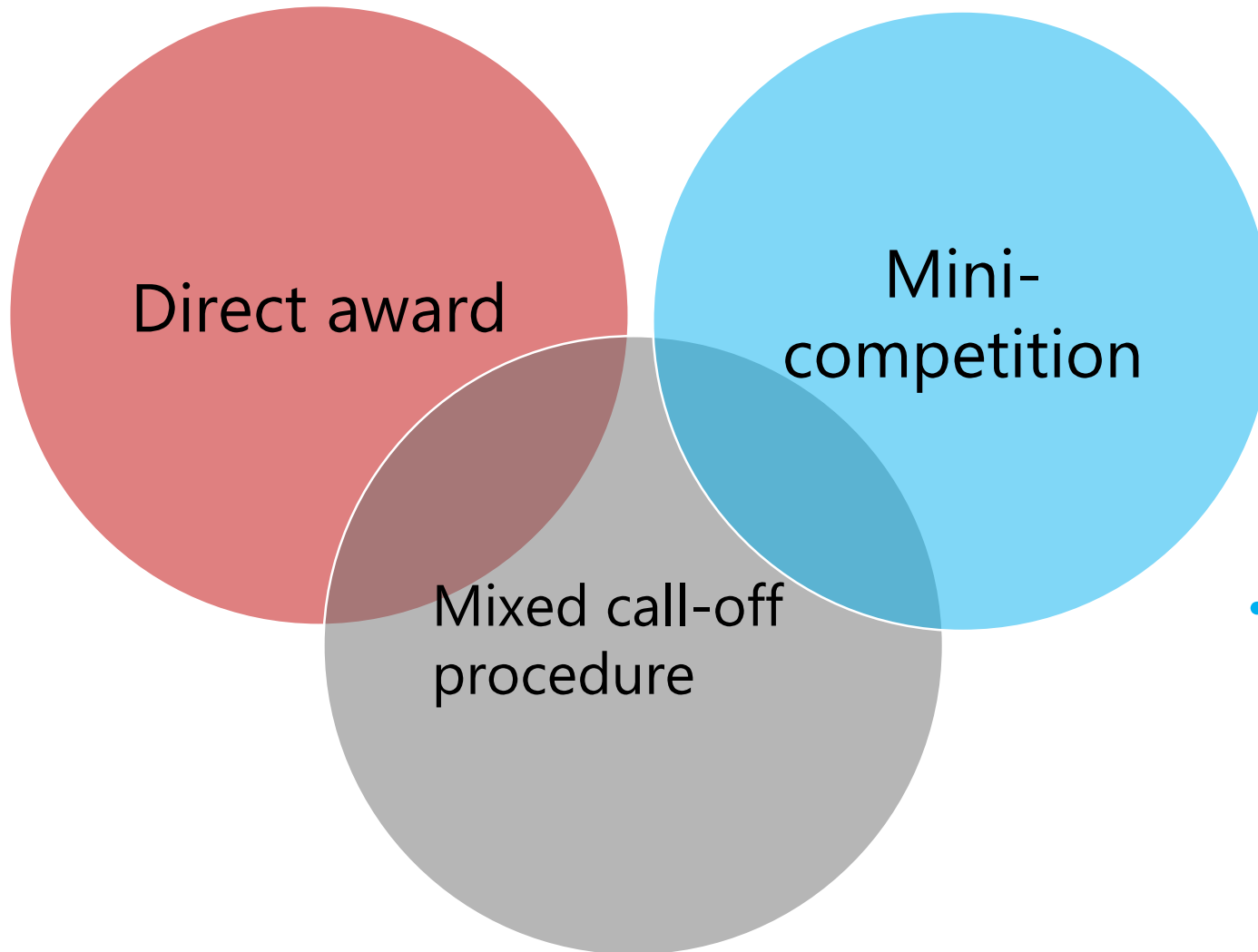
Email: [atakilti.gmichael@jur.ku.dk](mailto:atakilti.gmichael@jur.ku.dk)

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# Call-offs in multi-supplier framework agreements

## Art. 33(4) of Directive 2014/24



The scope of transparency in:

- The requirements for prior publication
- The means to call mini-competition
- Determining the objective criteria
- Peculiar features to the mixed procedure

## Some transparency concerns in the mini-competition

- Uncertainty regarding the scope of discretion of contracting authorities,
- Uncertainty in ensuring transparency of the objective criteria determining the EO to perform the contract,
- Inadequate rules in the Directive to ensure transparency in the call-off award procedure such as:
  - Exception of requirements to publish contract notice and call-off contract award notice, and
  - Lack of a clear mechanism for calling mini-competition,
- Recital 59 of Directive 2014/24 already projects that the aggregation and centralization of purchases could negatively impact transparency,...
- Thus, there should be "careful regulation (...) *to preserve transparency and competition.*"

## The requirements for prior publication Art. 33(4) (c)

- Contracting authorities demand for flexibility awarding call-off contracts by further specifying existing conditions & additional criteria.
- The flexibility enables contracting authorities to adapt, and further clarify existing conditions without an obligation of prior publication.
- The Directive's emphasis on preserving transparency is mostly limited to the first stage of the framework agreement.
- The lack of emphasis to ensure the principle of equal treatment at the call-off stage implies a narrow scope to observe transparency while favouring for broader discretion of contracting authorities.
- The measure of objective criteria and equal treatment ensured at the call-off stage depends on the scope of transparency obligation observed during the conclusion of the framework agreement.

## Calling for the mini-competition Article 33(5) (a) – (d) of Directive 2014/24

- **Informal means:** consult in writing the EOs of performing the contract
- **Invitation:** exclusive to those qualified for a specific lot in the agreements
- The rules do not indicate any mandatory content of the invitation,
- CJEU's case law ( C-23/20, *Simonsen & Weel*) is so far limited to transparency requirements at the first stage.
- The contract notice or procurement documents for the framework agreement serves as the primary measure of ensuring transparency for the call-off procedure.
- The exemption of prior publication requirements leaves contracting authorities with the discretion of what information to disclose (additional criteria, other award criteria, and their respective weightings) in the invitation for the mini-competition.



## Determining the award criteria Art. 33(5) of Directive 2014/24

- The call-off award criteria can be determined in three possible ways:
  - Possibility 1 (P1): same criteria as applied to conclude the framework agreement and
  - Possibility 2 (P2) : P1 + 'more precisely' formulated terms, where necessary,
  - Possibility 3 (P3) : P1+ 'other terms' referred to in the procurement documents, where appropriate.
- The second and third possibilities offer contracting authorities to adapt the award criteria further to their specific needs.

## Determining the award...cont. Art. 33(5) of Directive 2014/24

- No transparency requirement regarding the further specification of the award criteria; hence, more discretion for the contracting authority.
- Two views on whether the call-off award criteria can be different from the original criteria:
  - The award criteria can be completely different from those used to conclude the framework agreement,
  - The award criteria cannot be completely independent of the original criteria applied in the FA
- Even if there seems no direct rule, a contracting authority must ensure that the '**other**' award criteria are appropriate and compliant to the principles of equal treatment, transparency, and the limits for modification of terms of a framework agreement.

# Some peculiarities of the mixed procedure

## Art. 33(4)(b)

- Flexible option allowing contracting authorities to opt for a mini-competition over a direct award,
- Prior transparency - for the possibility of the mixed award procedure
- Prior transparency - regarding the terms subject to direct award and award with the reopening of mini-competition.
- Transparency can only be satisfied if the objective criteria must be advertised in the procurement document for the framework agreement.
- Directive 2014/24 does not state to what extent of a contract can be awarded partially with the reopening of mini-competition and a direct award; and which award criteria can be left unspecified in the contract notice.
- Thus, it leaves significant flexibility to the contracting authorities in specifying the award criteria in relation to quantity, value or characteristics of the purchases concerned.



## Concluding remarks

- the limited emphasis on the principle of equal treatment resulted in a narrow scope for transparency requirements in the call-off award with a mini-competition.
- the measure of objective criteria and ensuring equal treatment at the call-off stage depends much on the extent of transparency observed at the conclusion of the framework agreement.
- The requirement of transparency in calling the mini-competition is limited to less formal invitation in writing leaving broad discretion to the contracting authorities.
- The balance between ensuring transparency and flexibility in the call-off favours broader discretion in the absence of adequate rules focused on the principles of transparency.
- Consequently, the broad discretion enjoyed by contracting authorities may result in uncertainties regarding the scope of transparency requirements.

A top-down view of a white ceramic coffee cup filled with a frothy coffee beverage, topped with a dark, circular shadow. The cup sits on a matching white saucer. The entire scene is set against a light brown, textured background, with numerous dark brown coffee beans scattered around the cup and saucer. The lighting is soft, creating gentle shadows.

*THANK YOU!*