

THE EC RULES ON ELECTRONIC AUCTIONS: SCOPE AND ADEQUACY OF THE RULES

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Introduction

This paper reflects a summary of the work so far carried out by the author on a wider research project which examines the adequacy of the provisions on electronic auctions in the EC Procurement Directives.¹ Its objectives are firstly to present an overview of the EC rules on electronic reverse auctions with the aim of describing the scope of the rules, including aspects of the rules that introduce uncertainties on use of the technique as well as aspects of the rules capable of creating practical difficulties when using the technique. Secondly, to provide a commentary on the empirical research being conducted to elicit practical information regarding the EC rules on the technique.

The paper is organised as follows: The first part deals with background issues and the EC rules on electronic auctions. We begin in section 2 by considering some preliminary issues on electronic auctions. Section 3 briefly considers the introduction of rules on electronic auctions into the EC Procurement framework. Section 4 highlights the scope of the Directives through a review of the specific rules on electronic auctions. The second part of the paper deals with the empirical research: In section 5 we discuss the empirical process and highlight some initial findings from the research in the final section.

2. Electronic reverse auctions: preliminary issues

In its basic form, an electronic auction is a dynamic auction in which a number of suppliers compete against each other on an electronic platform by submitting successively lower priced bids in an effort to win a contract.²

Electronic auctions are relatively novel procurement techniques that emerged following advancements in electronic technologies. Within the private sector, these auctions have been

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¹ In this paper, we use the terms “electronic auctions” and “electronic reverse auctions” interchangeably.

² S. Beall, C. Carter, P. Carter, T. Germer, T. Hendrick, S. Jap, L. Kaufmann, D. Maciejewski, R. Monczka, and K. Petersen, “The Role of Reverse Auctions in Strategic Sourcing” available at www.capsresearch.org/publications/pdf-protected/beall2003ecom.pdf

used for procurement from around the mid 1990s.³ Public sector entities began using the tool more recently with the most significant events generally occurring within the last seven years.⁴

Electronic auctions have significant benefits⁵ including the potential to support procurement goals such as value for money. Value for money arises as a result of the increased competitive pressure in auction environments which encourages participants to offer their best terms. The technique can also inhibit corruption as it is more transparent than regular tendering procedures in that information on all bids are simultaneously available to all participants, which could reduce the scope for favouring preferred bidders or abusing discretion in tender evaluation. In addition, the technique can encourage significant savings in costs and time and can improve wider market accessibility.

Being a recent development, the technique has attracted significant attention globally. Within the private sector, attention has focused mainly on the impact that the technique has on buyer-supplier relationships.⁶ On the other hand, Public procurement regimes are more concerned with issues relating to regulations on the technique including, whether or not regulations should be provided, the nature and the contents of any regulations.⁷ Wallace notes that,

“there are many questions regarding the technique: “is or ain’t it used at all? ... is it regulated? ... should it be used and/or encouraged? ... should it be available for anything other than off-the shelf items? ... should the auction be limited to price only? ... can it be used for services? If so, what kind— only those most precisely specifiable? There are endless questions about the procedures for auctions: should the

³For a detailed history of electronic reverse auctions see S. Tully, “The B2B tool that really is changing the world” [2000] 141(6) Fortune 132; J. Stoddard ‘Strategies for Reverse Auction Survival’ White Paper 2 of E-Business Council http://www.gain.net/PIA_GATF/PDF/ebcreverseauctionfinal.pdf

⁴ On experiences in several countries, see generally information available at www.uncitral.org.uk

⁵ See generally S. Arrowsmith, *The Law of Public and Utilities Procurement* (2nd ed., 2005, Sweet & Maxwell), at 1180; O. Soudry, Promoting Economy: Electronic Reverse Auctions under the EC Directives on Public Procurement [2004] 4 Journal of Public Procurement 340.

⁶ M. Emiliani, “Business-to-business online auctions: key issues for purchasing process improvement”. [2000] 5 (4) Supply Chain Management 176.

⁷ See generally, C. Yukins and D. Wallace, “UNCITRAL considers Electronic Reverse Auctions, as Comparative Public Procurement comes of age in the US” [2005] P.P.L.R 183; Arrowsmith, *supra* n. 5 at 1158 notes that electronic auctions present a particular challenge for regulators.

law detail them, given the novelty of the method and hence the opportunities for abuse and error?”⁸

Most international procurement frameworks have recognised electronic auctions. For example, in 2005, the Multilateral Development Banks (MDB) issued Guidelines⁹ on the technique. Provisions on the technique are also included in the World Trade Organisation revised text on the Government Procurement Agreement (GPA)¹⁰ provisionally agreed in December 2006. Currently, the United Nations Commission on International Trade Law (UNCITRAL) is working on provisions on the technique to include provisions on the technique in the revised Model Law and the Guide to Enactment.¹¹

One significant point to note is the influence of the EC rules on the development of electronic auctions in these jurisdictions. To a large extent the EC rules on electronic auctions served as a model to these regimes. This is reflected for example in the wording of some provisions in the Guideline on electronic auctions introduced by the MDB, the contents of the GPA provisionally agreed text and considerations given to the EC rules in the ongoing discussions on including provisions on the technique in the UNCITRAL Model Law. Consequently, any examination of the EC rules should be of interest to these jurisdictions.

3. Introduction of electronic reverse auctions into the EC Procurement framework¹²

The EC procurement framework comprises primary rules contained in the EC Treaty and secondary rules in the form of Directives adopted by the Community. The relevant EC Treaty rules include Article 12 which contains a general prohibition on discrimination on grounds of nationality, Article 28 on free movement of goods, Article 43 on freedom of establishment and Article 49 on free movement of services. Basically, the Treaty provisions seek to prohibit conduct that hinders access to government markets in other Member States, prohibit

⁸ D. Wallace, “UNCITRAL: Reform of the Model Law” [2005] 35 Public Contract Law Journal 485 at 489.

⁹ e-Auctions Guidelines for MDB Financed Procurement

¹⁰ See Article XIV of the Committee on Government Procurement: revision of the Agreement on Government Procurement as at 8 December 2006, Prepared by the Secretariat, GPA/W/297 available http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm

¹¹ On the progress of the UNCITRAL revisions, see the work of Working Group 1 (Public Procurement) available at <http://www.uncitral.org>

¹² On the European Union, see generally, A. Arnulf, Wyatt and Dashwood's *European Union Law*, London: Sweet & Maxwell, (5th ed., 2006); P. P. Craig, and G. De Burca, EU law: text, cases, and materials, Oxford, Oxford University Press (3rd ed., 2003).

discrimination and certain non-discriminatory measures that have the effect of hindering access to government markets.¹³

The rules and general principles of the EC Treaty were considered inadequate in prohibiting discrimination in public procurement and so starting from 1971,¹⁴ the EC introduced specific Directives on public procurement.¹⁵ Generally, the Directives require Member States to take positive steps to achieve effective Europe-wide participation in their markets. In particular they require that entities to which the Directives apply award contracts with a framework of procedures aimed at transparency.¹⁶

The initial Directives introduced during the 1970s were subsequently replaced by the later detailed Directives adopted during the 1990s.¹⁷ Electronic auction was not mentioned in any of these early Directives, although the Directives adopted during the 1990s made some reference to the use of electronic means for public procurement. Probably, this was due to the fact that the technique had not really developed within procurement at the time these Directives were adopted;

Previous work¹⁸ has suggested that the absence of specific reference to the technique did not mean that it was not permissible to award contracts using the technique as the technique could be accommodated within the framework of the Directives adopted during the 1990s since nothing in these Directives precluded use of the technique. Practical experience also supports this position as entities within some Member States used the technique during the

¹³ Arrowsmith, *supra* n. 5, Chapter 4.

¹⁴On the evolution of the various EU Public Procurement Directives, see generally, S. Arrowsmith, "The Past and Future Evolution of EC Procurement Law: From Framework to Common Code? [2006] 35 (3) *Public Contract Law Journal* 338, Y. Allain, "The New European Directives on Public Procurement: Change or Continuity, [2006] 35 *Public Contract Law Journal* 517; Arrowsmith, *supra* n. 5, chapter 3, chapter 3 and J. Verdeaux, "Public Procurement in the European Union and the United States: A comparative Study" [2003] 32 (4) *Public Contract Law Journal* 713.

¹⁵ Council Directive 71/305/EEC coordinating procedures for the award of public works contracts [1971] O.J No. L185/5 (as amended) and Council Directive 77/62/EEC coordinating procedures for the award of public supply contracts [1977] O.J No. L13/1 (as amended)

¹⁶ See the discussion in Arrowsmith, *supra* n. 5, at 126-135.

¹⁷ Council Directive 93/36/EEC co-ordinating procedures for the award of public supply contracts [1993] O.J No. L 199/1, (as amended); Council Directive 93/37/EEC concerning the co-ordination of procedures for the award of public works contracts [1993] O.J No. L 199/54, (as amended); Council Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts [1992] O.J No. L 209/1, (as amended); Council Directive 90/531 regulating supplies and works contracts in the transport, water, energy and telecommunications sectors [1990] O.J.L 297/1, (as amended).

¹⁸ S. Arrowsmith, "Electronic Auctions under the EC Procurement Rules: Current Possibilities and Future Prospects" [2002] 11 *Public Procurement Law Review* 299.

period of the previous Directives.¹⁹ Notably, the technique was explored by various entities within the United Kingdom from around 2002.²⁰

Initial suggestions on including rules on the technique in the Procurement Directives were put forward in the Proposal²¹ submitted by the European Parliament in response to the European Commission's Proposal²² for new Procurement Directives. The Parliament recommended that since "electronic auctions offer contracting authorities and tenderers the opportunity to award or apply for public contracts by means of a speedy and inexpensive procedure,"²³ provisions on the technique should be included in the Directives to enable entities fully exploit the potential provided by the technique. Following subsequent amendments and clarifications by the Commission²⁴ and the Parliament and Council,²⁵ provisions on the technique were finally included in the current Directives: Directive 2004/17 on the coordination of procurement procedures of entities operating in the water, energy, transport and postal services sectors (Utilities Directive)²⁶ and Directive 2004/18 on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts (Public sector Directive).²⁷

4. Consideration of the EC rules on electronic auctions.²⁸

4.1 Definition of electronic auctions

Article 1 (7) Public sector Directive and Article 1(6) Utilities Directive define an electronic auction as "a repetitive process involving an electronic device for the presentation of new prices, revised downwards, and or new values concerning certain elements of tenders, which

¹⁹Rambøll Management, *Electronic Public Procurement in EU Member States: Country Reviews* available at http://ec.europa.eu/internal_market/publicprocurement/docs/eprocurement/2004-12-country-reviews_en.pdf

²⁰Information on electronic auctions in the United Kingdom can be found at <http://www.ogc.gov.uk>.

²¹European Parliament, Committee on Legal Affairs and the Internal Market, *Report on the proposal for a directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts* (COM(2000) 275 C5 0367/2000).

²²European Commission, *Proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts* COM(2000) 275/2 final [2001] O.J.C 531 E/02; European Commission, *Proposal for a Directive of the European Parliament and of the Council co-ordinating the procurement procedures of entities operating in the water, energy and transport sectors* COM (2000) 276 final [2001] O.J.C 29 E/03.

²³European Parliament, Committee on Legal Affairs and the Internal Market, above, note 1, new Articles 1 (6a), 28 (4) Article 32 (a) of the Draft Legislative Resolution, amendment 65

²⁴European Commission, *"Amended proposal for a European Parliament Council Directive concerning the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts* COM(2002) 236 final.

²⁵Common Position adopted by the Council on 20th March 2003 with a view to adopting Directive 2003/.../EC of the European Parliament and the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. [2003] OJ C 147E/01 24.6.2003.

²⁶ [2004] O.J. L. 134/1

²⁷ [2004] O.J.L 134/114

²⁸ The original definition section was entitled reverse auctions.

occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods.”²⁹ From this definition, we can identify certain features of the technique permitted under the EC Directives.

a) an *electronic device* must be used in the auction.³⁰ Thus only electronic auctions are permissible and the use of electronic devices for revision of tenders is mandatory. This differs from some jurisdictions in which both electronic auction and conventional auction formats can be used in procurement, for example, in Brazil.³¹

b) *the technique is to be used for the presentation of new prices and/or new values.* This means that in the auction phase both price and non-price elements of the contract can be revised. In the Parliament’s proposal,³² it was suggested that the technique should be used for the presentation of prices only. Taking a more flexible view, the Commission rejected the suggestion on the basis that such a definition would limit use of the technique solely to award procedures where the basis of the contract is lowest price. It recommended the reformulation of a definition that would widen the scope of auctions to include variables other than price.³³

c) *downward revision of the price or value.* This in essence implies that a reverse auction format is the only permitted format thus excluding other auction formats.

d) *the auction is to occur after an initial full evaluation of tenders,* which means that all aspects of the tenders including those aspects, which participants may later revise in the auction phase, are to be subjected to the initial evaluation. See also Article 54(4).

4.2 Use of auctions in Member States

Article 54(1) Public sector Directive and Article 56(1) Utilities Directive indicate that Member States may provide that contracting authorities may use electronic auctions. Recital 16, Public sector Directive and Recital 24, Utilities Directive provide that Member States are allowed to choose whether contracting authorities may use electronic auctions as defined and

²⁹ Article 1(7) Public sector; Article 1(6) Utilities Directive.

³⁰ See also Annex X Public sector Directive; Annex XXIV Utilities Directive. See also R. Bickerstaff, “The New Directives’ Rules on E-communication Mechanisms in Public and Utilities Procurement” [2004] 13 P.P.L.R. 277; Arrowsmith, *supra* n. 5, at 1172 -1175.

³¹ See R. Levy and M. Correia, “Electronic Procurement of Goods and Services in Brazil under the Procurement Auction Procedure” [2003] 12 P.P.L.R. 21

³² European Parliament, Committee on Legal Affairs and the Internal Market, *supra* n.20, Amendment 1 (6a)

³³ European Commission, *supra* n. 23, Amendment 23.

regulated by the Directives.³⁴ These provisions indicate that availability of the technique in any Member State is optional. Additionally, the provisions imply that Member States may decide whether or not to impose additional conditions beyond those contained in the Directives.³⁵

4.3 Procedures under which entities may use electronic auctions.

Article 54(2) Public Sector Directive states that in the open, restricted or negotiated procedures, contracting authorities may decide that the award of a public contract may be preceded by an electronic auction. Under the negotiated procedure, however auctions may only be used where the contracting entity has adopted a negotiated procedure with a notice/call for competition in circumstances where the open, restricted or competitive dialogue procedures cannot be brought to a satisfactory conclusion.³⁶ Electronic auctions may also be held on the reopening of competition among the parties to a framework agreement and on the opening for competition of contracts to be awarded under the dynamic purchasing system.³⁷

Under the Utilities Directive,³⁸ entities may use electronic auctions in the open, restricted or negotiated procedures with a prior call for competition. An electronic auction may be held on the opening for competition of contracts to be awarded under the dynamic purchasing system. Unlike the Public sector Directive which provides for the use of the technique within framework agreements, the Utilities Directive does not refer expressly to the use of auctions under frameworks. Arrowsmith³⁹ notes that this is possibly because of the different wording of the framework provisions themselves under the utilities rules, which indicate that frameworks should be awarded just like contracts and that despite the absence of express mention of use of electronic auctions in frameworks, utilities may use auctions in that procedure since in general, the utilities rules are more flexible than the public sector rules; and

³⁴ Recital 16 Public Sector Directive; Recital 16 Utilities Directive.

³⁵ The United Kingdom (England, Wales and Northern Ireland) and France have more extensive rules on some issues. See S. Arrowsmith, “Implementation of the new EC Procurement Directives and the Alcatel Ruling in England, Wales and Northern Ireland: A review of the new Legislation and Guidance” [2006] 2 P.P.L.R 86: F. Lichere, *The Regulation of Auctions in France*, Paper presented at the Public Procurement: Global Revolution III, University of Nottingham, 19th-20th June 2006.

³⁶ Article 30 (1) (a) and Article 54 (2) Public Sector Directive.

³⁷ Article 54 (2) Public Sector Directive.

³⁸ Article 56 (2) Utilities Directive.

³⁹ Arrowsmith, *supra* n.5 at 1189.

to permit use of electronic auctions in frameworks in the public sector while precluding their use by utilities would run contrary to the flexible nature of the utilities directives.

During preparatory discussions on proposals for the current Directives, the European Parliament⁴⁰ proposed that auctions should be organised as a separate award procedure. The Commission rejected the suggestion, pointing out that having electronic auctions as a separate procedure will run counter to the aim of simplification and flexibility pursued by the revision agenda. It therefore recommended that electronic auctions should be used as a phase within other award procedures.⁴¹ From Article 54(2) Public sector Directive,⁴² it is clear that the electronic auctions permitted under the EC framework cannot be organised as separate “award procedure,” as occurs in some countries, notably in Brazil.⁴³ Rather, such auctions must be used as a phase in the award stage of one of the enumerated regular procedures, and within frameworks and dynamic purchasing systems.

4.4 Contracts for which the technique may be available/unavailable

The EC framework on electronic auctions does not provide a positive list of the contracts for which the technique may be available⁴⁴ nor does it restrict the products or services for which auctions can be used.⁴⁵ Possibly, one can infer the types of contracts the Community legislators consider suitable to an award procedure involving an electronic auction phase from some of its provisions. Specifically, Recital 14 Public Sector Directive and Recital 22 Utilities Directive state that “provision should be made for electronic auctions to deal only with contracts for works, supplies or services for which the specification can be determined with precision. Such may in particular be the case for recurring supplies, works and service contracts.” This could mean that as long as a contract is capable of precise specification, an electronic auction is available for such contracts.

Regarding contracts for which the technique may probably be unsuitable, the situation is less clear. This is as a result of two provisions which presumably give rise to various

⁴⁰ European Parliament, Committee on Legal Affairs and the Internal Market, *supra* n.31, Amendment 54.

⁴¹ European Commission, *supra*, n.23

⁴² Article 56(2) Utilities Directive.

⁴³ Levy and Correia, *supra* n. 31.

⁴⁴ *ibid*

⁴⁵ Unlike the draft provisions in the UNCITRAL Model Law which suggests restricting use of the technique to commonly used goods, generally available on the market or common and simple service or construction, generally available on the market.

interpretations.⁴⁶ The provisions are contained in Recital 14 and Article 1(7) Public sector Directive and Recital 22 and Article 1(6) Utilities Directive. While the Recitals state that *certain service contracts* and *certain works contracts* having as their subject-matter intellectual performances, such as the design of works, *should* not be the object of electronic auction, the definition articles⁴⁷ provides that *certain service contracts* and *certain works contracts* having as their subject-matter intellectual performances, such as the design of works, *may* not be the object of electronic auctions.

One possible interpretation is that the provisions merely constitute a caution against using electronic auctions for such contracts. A more extreme interpretation is that for contracts having as their subject matter intellectual performance, it *is never possible* to use electronic auctions. Yet another possible reasoning could argue that the exclusion on using auctions does not apply to the contracts but only to aspects of contract not capable of quantification. This could be inferred from wordings in the Recitals, stating that “on the other hand, those aspects of the tenders which imply an appreciation of non-quantifiable elements should not be the object of electronic auctions. Consequently, certain service contracts and certain works contracts having as their subject-matter intellectual performances, such as the design of the works, should not be the object of electronic auction.”

Consideration of the legislative proposal on which the provisions are based, indicates that while the initial Common Position adopted by the Council⁴⁸ did not include any similar provision in relation to contracts involving intellectual performances, the Parliament’s Proposal⁴⁹ adopted at the second reading expressly stated that *an electronic auction is in no way suited to the award of works contract or contracts for intellectual-creative and other complex services*. This position was however rejected by the Commission on the basis that such exclusion would be excessive, in view of the definition of electronic auction which already restricts its use to the elements that are “suitable for automatic evaluation by

⁴⁶ Possible interpretations are discussed in Arrowsmith *supra* n 5, at 1190-1191. For the position in the United Kingdom, see Regulation 21, Public Contracts Regulations 2006, S.I.2006/5 and Utilities Contracts Regulations 2006, S.I.2006/6. See also Arrowsmith, *supra* n.35

⁴⁷ Article 1(7) Public Sector Directive; Article 1(6) Utilities Directive.

⁴⁸ Council Common Position of 20 March 2003 with a view to adopting Directive 2003/.. ./EC of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2003] O.J.C 147/E/01

⁴⁹ European Parliament, Position of the European Parliament adopted at the second reading on 2nd July 2003 with a view to adopting Directive 2003/.. ./EC of the European Parliament and of the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [2004] O.J.C 74/E/286

electronic means, without any intervention by the contracting authority” and Article 54 (1) which allows Member States that consider it desirable to permit or restrict use of the technique in appropriate circumstances.

Whatever the interpretation one may wish to follow, there seems to uncertainty on this point.

4.5 Rules on information requirements

The directives contain rules on various information requirements that contracting authorities must provide to potential participants in an award process involving an auction phase.

Firstly, the Directives require the authorities to indicate in advance their intention to use the technique. Since the requirement is mandatory, any entity which fails to declare such intention is precluded from later deciding to use the technique. For contracts covered by the Public sector Directive, Article 54(3) requires such entities to state the fact in the contract notice. Under the Utilities Directives, entities are to state this fact in the notice used as a means of calling for competition.⁵⁰

Secondly, Article 54(3) Public sector Directive and Article 56(3) Utilities Directive require that contracting authorities include certain detailed information in the specifications including:

- (a) the features whose values will be the subject of electronic auction;
- (b) any limits on the values which may be submitted, as they result from the specifications relating to the subject of the contract;
- (c) information which will be made available to economic operators in the course of the electronic auction and, where appropriate, when it will be made available to them;
- (d) relevant information concerning the electronic auction process;
- (e) the conditions under which the economic operators will be able to bid and, in particular, the minimum differences which will, where appropriate, be required when bidding; and
- (f) the relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection.

Thirdly, contracting authorities are required to include further information in the invitation to participate in the auction phase issued to suppliers that succeed in moving forward to the

⁵⁰ Article 56(3) Utilities Directive.

auction phase.⁵¹ The required information must include:

- (a) all relevant information concerning individual connection to the electronic equipment being used;
- (b) the date and time of start of the electronic auction;
- (c) when the contract is to be awarded on the basis of the most economically advantageous tender, the outcome of a full evaluation of the relevant tenderer;
- (d) the mathematical formula to be used in the electronic auction to determine automatic re-rankings on the basis of the new prices and/or new values submitted. Where variants are authorised, a separate formula must be provided for each variant; and
- (e) certain information concerning the close of the auction.⁵²

It has been suggested that the main problems with these requirements is that, in relation to utilities, it is not clear how such intention can be declared where the entity elects to use an award procedure advertised through a Periodic Indicative Notice or a qualification system.⁵³ This is because at the time when such notice is issued, the utility will not know the details of specific award procedures. In the case of a notice of a qualification system, the utility may not even know the contracts to be awarded under the system. Possibly, the provision was included without considerations for methods of advertising other than a contract notice

Although, some of the required information may seem necessary, other information required to be provided, specifically the information required to be included in the specifications seem superfluous as contracting authorities are generally required to fulfil such requirements under obligations arising from the general transparency principle.

4.6 The auction process

Article 54(4) Public Sector Directive and Article 56 (4) Utilities Directive regulate the actual auction phase. To prepare for the auction, contracting authorities must make a full initial evaluation of the tenders received from potential suppliers. Such evaluation must be done in accordance with the award criterion/criteria set and with the weighting fixed. Thereafter, potential suppliers that have submitted admissible tenders are to be invited to participate in the auction.

⁵¹ Article 54(7) Public Sector Directive and Article 54(7) Utilities Directive

⁵² *ibid*

⁵³ Arrowsmith, *supra* n.5 at 1192

The auction may either be based either solely on prices where the contract is to be awarded to the lowest bidder, or alternatively on prices and/or on new values of the features of the tenders indicated in the specification where the contract is to be awarded to the most economically advantageous tenders, it can be based

The auction may be conducted in phases.⁵⁴ During the auction, the tenders must be evaluated automatically through the electronic devices.⁵⁵ This forecloses any form of subjective assessment. Contracting authorities are required to communicate instantaneously with all participants at least sufficient information to enable them ascertain their relative rankings.⁵⁶ This requirement to disclose relative rankings means that it must be clear to tenderers where they stand in the procedure overall.⁵⁷ In addition, the procuring entity may, if it wishes, also communicate other information concerning “other prices or values submitted”, provided that that is stated in the specifications.⁵⁸

The auction can close either at a previously agreed time and date, when no more new prices or new values meets the requirements concerning minimum differences or if the auction is conducted in a number of phases, when the number of phases has been completed.⁵⁹ Contracting authorities are allowed to close the auction using a combination of these methods. Once the auction closes, the procuring entity must award the contract on the basis of the results of the auction.⁶⁰

5. Empirical research

5.1 Rationale for empirical research

The foregoing analysis has indicated the scope of the rules on electronic auctions in the Procurement Directives. One issue which emerges from the discussion is that the rules on electronic auctions are very detailed, almost to the extent of departing from the general framework nature of the procurement Directives.⁶¹ A second issue relates to the fact that some

⁵⁴ Article 54(6) Public sector Directive and Article 56 (6) Utilities Directive.

⁵⁵ Article 1 (7) and Recital 14 Public sector Directive; Article 1(6) and Recital 22 Utilities Directive.

⁵⁶ Article 54(6) Public sector Directive and Article 56 (6) Utilities Directive.

⁵⁷ Arrowsmith, *supra*. n 5, 1203.

⁵⁸ Article 54(6) Public sector Directive; and Article 56(6) Utilities Directive.

⁵⁹ Article 54(7) Public Sector Directive; Article 56(7) Utilities Directive.

⁶⁰ Article 54(8) Public Sector Directive and Article 56(8) Utilities Directive.

⁶¹ On the changing nature of the framework, see generally, Arrowsmith “The Past and Future Evolution of EC Procurement Law: From Framework to Common Code?”, *supra* n. 14

aspects of the framework on auctions create uncertainties in the use of auctions, are unclear or could potentially constitute impediments to the growth in the use of the technique within the EC.

Given however that the analysis is limited to a purely theoretical assessment of the rules, the case may be that the perceived problems are speculative or – it may be even that the identified issues do not actually pose real practical difficulties for entities affected by the framework or possibly that there may exist other practical issues in relation to the framework which cannot be identified from a purely textual analysis of the rules. In order to provide a more comprehensive assessment on the regime on electronic auctions, the author's research complements the 1 analysis with empirical research. The merit of such an approach is that the empirical research could help reveal the real status of the uncertainties and other issues identified with the rules on electronic auction.

Two types of empirical research approaches are available to researchers-quantitative and qualitative research. While quantitative research is suited to a project that seeks to measure phenomena, or the distribution of patterns⁶² and involves a reduction of such phenomena to numerical codes, qualitative research on the other hand is more appropriate where a project seeks to discover or explore the depth of a concept. It involves examining ongoing processes, studying records that shape or are produced by these processes, and interviews with people who are engaged in or affected by the processes being studied⁶³ to study how experience is created and given meaning.⁶⁴ Qualitative methods can also be used to better understand any phenomenon about which little is known or to gain more in-depth information that may be difficult to convey quantitatively.⁶⁵ Considering that the objective in this research is investigative, the approach most likely to assist in a better appreciation of the issues connected with the EC provisions on electronic auctions is one which involves interaction with persons who apply the rules or are affected by them. Essentially, the author has opted to explore experiences with the rules using perceptions from selected subjects (the rationale for

⁶² D. Black, "The Boundaries of Legal Sociology" [1972] 81 Yale Law Journal 1076

⁶³ S. B. Coutin, "Qualitative Research in Law and Social Sciences" available at <http://www.wjh.harvard.edu/nsfqual/Coutin20%Paper.pdf>

⁶⁴ See N. K. Denzin & Y. S. Lincoln, "Introduction: Entering the Field of Qualitative Research" in *Strategies of Qualitative Inquiry*, (Norman K. Denzin & Yvonna S. Lincoln eds., 1998).

⁶⁵ A. Strauss & J. Corbin, *Basics of qualitative research: Grounded theory procedures and techniques*. (Newbury Park, CA: Sage Publications, In, 1990).

selection of subjects is explained below) within one Member State of the EC—the United Kingdom⁶⁶—(England, Wales and Northern Ireland).⁶⁷

The Member State was selected for further examination for the primary reason that amongst Member States of the EU, it is one of the few countries with key comparative experience with the technique. Basically, in the absence of formal Community rules on technique, entities within the State used electronic auctions. Following the introduction of the Directives, it not only implemented the provisions on auctions into its domestic procurement framework, but there exists significant government support aimed at encouraging uptake of electronic auctions.⁶⁸ In these circumstances, information from the State is likely to provide data for a more comprehensive appreciation of practical issues raised by the rules.

5.2 The research design

Once I had decided that it was necessary to engage in qualitative research for a better understanding of the issues. I was required to design the framework research. This mainly involved identifying and selecting potential research subjects, and designing used for the data collection technique.

Research population

The EC Procurement Directives are directed at Member States. However various entities within the Member States are affected by its provisions. We first identified that perceptions from all entities that will be possible be affected by the framework could be a useful source of information. Within the United Kingdom, possible entities that could be affected by the rules include policy makers who have responsibility for implementing the EC framework in

⁶⁶ Within the paper, the term “United Kingdom” refers to England, Wales and Northern Ireland and excludes Scotland. This is because in implementing the current Directives, Scotland has elected to implement the Directives in its own national legislations (Scottish Statutory Instrument 2006 No. 1, the Public Contracts (Scotland) Regulations 2006 and Scottish Statutory Instrument 2006 No 2 The Utilities Contracts (Scotland) Regulations 2006) in exercise of the devolution arrangements under the Scotland Act 1998, whereby the Scottish Parliament can make primary and secondary legislation in areas not reserved to the Westminster government (specified in schedule 5 of the Act) or protected from modification (also specified in schedule 5). See generally, section 53 and sch.8, para.15, Scotland Act 1998 c. 46 which provides for ministerial functions under existing legislation to be exercisable by Scottish Ministers, including (without further designation) implementation of EC law under European Communities Act 1972 s.2(2). See also the Government of Wales Act 1998 and the Northern Ireland Act 1998. On the implications for public procurement see Henderson, “The Impact of Devolution on Public Procurement in the UK” [2003] 12 P.P.L.R. 175; Arrowsmith, *supra* n.5 at 2.3-2.5.

⁶⁷ The current Directives are implemented in England, Wales and Northern Ireland in the Public Contracts Regulations 2006, S.I.2006/5 and the Utilities Contracts Regulations 2006, S.I.2006/6. For a detailed commentary on implementation for England, Wales and Northern Ireland see S. Arrowsmith, “Implementation of the new EC Procurement Directives and the Alcatel Ruling in England, Wales and Northern Ireland: A review of the new Legislation and Guidance” [2006] 2 P.P.L.R 86.

⁶⁸ See generally www.ogc.gov.uk

domestic rules and policies, contracting authorities that may need to use the rules on electronic auctions, electronic auction service providers that organise the events for the contracting authorities, suppliers that compete in the events and legal practitioners responsible for advising these various subjects regarding the rules.

The Research Sample

In qualitative research, it is often impossible, impractical, or simply not necessary to examine all the units of the population in which the researcher is interested,⁶⁹ because of practical difficulties; including lack of knowledge of the total subjects in the research population, problems of access to the entire population or problems which may arise in handling too much qualitative data. In these circumstances, researchers usually have to reduce the wider research subjects into smaller samples using sampling strategies.⁷⁰ One sampling strategy is the theoretical sampling. The principle underlying the strategy is that the choice of subjects is “geared towards essential, typical and theoretically important units.”⁷¹

Using these, principles, we then considered which subjects within the wider research population could be brought within the principle- “essential, typical and theoretically important.”

a) Policy makers- Potentially, this category could include all corporate procurement departments within regulated entities. However as it would be impossible to access all entities falling within the category because of limitations such as those identified above, I opted to limit the category to the most significant policy makers, mainly entities responsible for developing central civil government procurement policies, defence procurement policy and regional procurement policy.

b) Contracting authorities- The category includes all public sector bodies and utilities. As it would have been impossible to investigate perceptions from all of these entities, I limited the research category to all central government departments and their agencies,⁷² utilities (including entities that had used and those that had not used the technique) and local

⁶⁹ J. Mason, *Qualitative Researching*, London: Sage Publications 2002.

⁷⁰ Q. Patton, *Qualitative Evaluation and Research Methods*, Newbury Park, CA: Sage Publications, Inc, 1990 2nd ed., at 169-183

⁷¹ S. Sarantakos, *Social Research*, Hampshire: Palgrave, 1988, p 26.

⁷² It was possible to identify all central government departments on the government website www.direct.gov.uk

authorities with large procurement spend as these are likely to have their procurement covered by the EC Procurement Directives.

- c) Electronic auction service providers- this was limited to auction service providers that are part of the OGC eAuctions framework as they are likely to have more significant experience with conducting electronic auctions for clients in the public sector.
- d) Major government suppliers and suppliers that have participated in eAuctions. This was limited to suppliers identified on the OGCbuyingsolutions website⁷³ as major government suppliers and those that had participated in electronic auctions identified through searching the contract award notices published in the Official Journal.
- e) Legal advisers involved in advising entities on European procurement law selected from major law firms on the basis of their knowledge and experience with EC procurement law. The selected individuals were identified from searches conducted on the law society website⁷⁴ and various legal directories including Legal 500,⁷⁵ and Martindale Hubbell⁷⁶ using the key words “Public Procurement,” “Government Contracts.” We also used “European Law,” “Competition Law” and “PFI” “Construction Law” as lawyers involved in these areas are likely to have advised clients on the EU Public Procurement framework. Information on additional legal practitioners was obtained from other research subjects. Specifically, contracting authorities identified legal practitioners that advised them regarding the technique. In addition, my supervisor also suggested some subjects that could be invited to participate in the research.

Research aids

The main research aids which the researcher identified as needed in the researcher were an interview guide⁷⁷ to help structure the discussion in a defined but flexible way, and a digital recorder to ensure accuracy of recollection of the information provided by participants.⁷⁸

⁷³ <http://www.ogcbuyingsolutions.gov.uk>

⁷⁴ <http://www.lawsociety.org.uk/choosingandusing/findasolicitor/view=solicitorswithspecialism.law?orgid=440723&specialism=Z&searchType=L>

⁷⁵ <http://www.legal500.com>

⁷⁶ <http://www.martindale.com/>

⁷⁷ One guide was used the interview as the author was of the view that most of the issues could be commented on by majority of the participants. In some instances however, some questions were more appropriate to specific categories of subjects. In some instances, the guide was sent to the subject ahead of the interview.

⁷⁸ Yin, p.91

Data Collection

At the preparatory stage, I identified face to face interviews as the primary data collection method that will be used. The choice was based on the fact that I required a technique that will yield maximum access to information sought.⁷⁹ However, I could not restrict collection of data solely to this means as some entities indicated unavailability for face to face interviews, due mainly to work commitments. As a result, a combination of face to face interviews,⁸⁰ telephone interviews and written responses were used to collect data from subjects. The bulk of the information was however obtained from respondents in face to face meetings which took place in the subject's offices. Prior to each interview, I sent formal invitations to the Head of Procurement or the equivalent in the identified organisation, requesting to interview him/her or any alternative personnel with some knowledge of the EC rules on the technique. This was usually by email but where requested by the subject, regular post was also used (only in three instances). The invitation explained the scope of the research, indicated the subject's role in the research, the scope of the information sought and informed the subject about how information obtained from them will be used.

Most of the interviews were conducted between October 2006 and May 2007. The average duration of the face to face interviews was between 30 and 90 minutes, while the phone interviews were completed between 10 and 45 minutes.

6. Preliminary findings

This section contains initial findings from the research. It reflects responses from interviews conducted with four categories of research subjects- 4 Policy makers, 17 Contracting authorities (central government departments and agencies (9) Utilities (5), local authorities (3)), 4 Electronic auction service providers and 5 Legal practitioners on selected issues. We have not included any response from the suppliers' category since at the time of writing we had so far been able to interview only one subject.

Definition of auctions

Respondents were generally satisfied with the nature of auctions as described in the Directives. Respondents submitted that as the technique is novel, there was some rationale in limiting the kinds of auction formats that are permissible in order that entities gain some

⁷⁹ On interviews, see generally, J. Mason, *supra* n 69, Bailey, *Methods of Social Research* (1987), ch 6, R. C. Bogdan & S. K Biklen, *Qualitative research for education: An introduction to theory and methods* Boston: Allyn and Bacon, Inc, 1982.

⁸⁰ J. Mason, *supra* n 69 at 66.

experience with one format before trying to learn how to structure other formats. One respondent, an electronic auction service provider however differed from this general view submitting that the restriction could deter progressive development in the public sector as it takes a lot of time for the EC to amend its procurement framework, often leading to a situation where rules lag behind practice, with the effect that even when entities might have learnt how to operate newer and possibly more efficient models, they could be reluctant to use the technique on the basis that there is a prohibition against use of any such format.

Level of detail in the rules

Generally, all respondents expressed satisfaction with having express provisions on electronic auctions in the new Directives. Respondents indicated that the inclusion of specific provisions has made people aware that auctions are an available option and has also helped resolve the question of “are electronic auctions allowed” (policy maker). However, respondents differed in opinion regarding the effect of the scope of the rules. One respondent (legal practitioner), indicated that the rules are prescriptive and have come about in advance of people understanding auctions and could possibly reduce the flexibility previously enjoyed when conducting auctions. This view was supported by 3 other legal practitioners that I interviewed.

An opinion expressed by an electronic service provider submits that the rules have the potential to alter the apprehension that most procurement officers within the United Kingdom have towards the technique and that it actually mirrors the process that entities will ordinarily have to follow, even if there were no rules. This view was re-echoed by a number of respondents from other categories. Yet another respondent, a procuring authority stated, “what they (Directives) ask of us is to conduct a fairly standard European compliant process with an additional process at the end.” Some policy makers submitted that the detailed rules had contributed in making a simple process appear highly complex, that there was differential treatment in the Directives between the rules on electronic auctions and the rules on the conventional tendering, that the rules had introduced the concept of weighted bidding which in some ways, make it more challenging for contracting authorities to use the technique, and that the rules have thrown out people who are not ready to explore the technique, by significantly reducing the attractiveness of auctions.

Award Procedures within which the technique is used

Generally most respondents (including utilities) use the technique almost exclusively within the restricted procedure. This was also the procedure adopted before the introduction of the new Directives. The major factors given by respondents for using the restricted procedure were:

- 1) they wished to pre-select economic operators to avoid issuing large numbers of invitations to tender and therefore the subsequent resource-intensive processing of a large number of responses;
- 2) they wished to avoid the rapid response required to requests for documentation under the open procedure and again, potentially large number of responses, and
- 3) few respondents appeared comfortable with the negotiated procedure.

In addition, one legal practitioner mentioned that her client, a public sector contracting authority had used the technique for call off under framework agreements following the introduction of the Directives. None of the subjects interviewed had used or knew of any entity that had used the technique within the dynamic purchasing system.

Thus although the textual analysis indicated that the Utilities neglected to provide that auctions could be used as part of the negotiated procedure which could lead to potential problems, it appears that no such problems arise in actual practice since most entities actually adopt the technique within the restricted procedure.

On the issue of whether respondents would have preferred the technique to be operated as a separate procedure, rather than being used within the regular procedures, the general comment was that electronic auctions should be treated as a “tool”; “a process,” “a mechanism” that provides opportunities for entities to improve their bids, which may lead to the view that the rules are very adequate on this respect.

Contracts for which the technique may be available/unavailable

Interviewed subjects use the technique for a wide range of contracts, mainly supplies and a few services. Entities were asked to comment on the use of auctions for “service or works contract having as their subject matter intellectual performances,” we obtained different opinions. A number of respondents simply stated that they understood electronic auctions could not be used for such contracts. When asked if they agree with the view: One respondent (electronic auction service provider) indicated that in his opinion, “the intention of the provision (resting as it does on transparency) was simply to articulate the somewhat obvious

fact that if an element of a tender cannot be assigned either a cost or some kind of score in an evaluation, then it cannot be subject to automatic re-ranking within an electronic auction" however that it was wrong to conclude that there is a general prohibition on the use of electronic auctions for such contracts.

Interestingly, another respondent (procuring entity) indicated that "before the directives were introduced, we used electronic auctions for contracts with a large service element. However since the introduction of the new Directives, we do not get into any intellectual arguments about it as it isn't really worth the hassle, certainly not from our perspective because we've got a number of more basic requirements that we can use the technique for. Previously, for a design and build contract for instance on a piece of equipment we explored the opportunity of using the technique because what we are looking for is an output for the requirement. We don't really care what the design is, provided it does the job. But now we have to think seriously about what percentage of the value and everything else is a service element of the contract and as it is all time consuming, we tend to shy away from exploring whether or not auctions would be suitable. It is a case of if in doubt don't run an auction."

Conduct of the auction

Two issues were identified here: the first relates to whether economic operators interested in a contract who refuse to participate in the auction stage could be allowed to participate using only paper tenders. The opinion was divided, while some entities indicated that such operator will automatically be excluded from the contract, other entities submitted that they will admit the entity to the auction stage and have the electronic service providers input the tenders submitted by them in the paper tenders as their final offers.

The second issue concerns the issue of weightings. Respondents indicated that the requirement has affected their ability to conduct collaborative auctions as they are now required to allocate weightings up front before suppliers can be admitted to the auction phase and that it can sometimes be a laborious exercise and usually creates delays in the procurement process.

Conclusion

From the foregoing, the initial analysis of the rules from a practical context reveals that the EC's first attempt at regulating electronic auctions seems to have created both positive and

negative responses amongst entities affected by the rules. The research is ongoing and as a result no conclusive opinion on the adequacy of the rules can be expressed at this point. However one issue that seems to have emerged is that the respondents are satisfied with the principle of having rules on the technique but divided regarding the contents of rules. It is hoped that further research will assist in providing a clearer conclusion not merely as regards having rules on electronic auctions in the EC Procurement Directives but as regards the adequacy of such rules.