

The Relationship Between Initial Tender and Mini-Competition: EU and Lithuanian Perspectives on Framework Agreements

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The article conducts a comprehensive scholarly analysis of framework agreements – a public procurement technique often used across different European jurisdictions. Besides examining the general legal framework of the EU and Lithuanian law on framework agreements, the article also examines the newest EU case law. The authors analyse the relationship between the initial tender procedure establishing the framework agreement and the subsequent mini-competition that follows under the former to award the public contract. In contrast to the Lithuanian legal regulation and related case law, the authors argue that these two stages are interconnected and must be viewed as a unified part of the same procurement process in line with European legal doctrine. Finally, the article highlights the differences between framework agreements and public contracts.

Keywords: public procurement, framework agreements, mini-competition, public contract.

Europos Sąjungos ir Lietuvos teismų praktika: pirminių pirkimo procedūrų ir atnaujinto varžymosi santykis

Ši publikacija yra preliminariosios sutarties instituto, kuris dažnai taikomas Europos Sąjungos valstybių narių viešųjų pirkimų praktikoje, išsami analizė. Be to, kad šiame moksliniame straipsnyje yra tiriami bendrieji preliminariosioms sutartims viešuosiuose pirkimuose taikomi teisiniai reikalavimai, analizuojama naujausia teismų praktika, šis darbas taip pat yra skirtas teisiniam ryšiui (santykiui) tarp viešojo pirkimo procedūros, skirtos preliminarajai sutarčiai sudaryti, ir atnaujinto varžymosi, kuris vėliau yra taikomas tam, kad būtų sudaryta viešojo pirkimo sutartis, išanalizuoti. Priešingai esamam Lietuvos teisiniam reguliavimui ir formuojamai teismų praktikai, darbo autoriai siekia pagrįsti, kad, remiantis Europos teisiniu reguliavimu, minėtos dvi viešojo pirkimo proceso stadijos negali būti vertinamos izoliuotai ir yra glaudžiai susijusios. Publikacija baigiama išskiriant skirtumus tarp preliminariosios sutarties ir viešojo pirkimo sutarties.

Pagrindiniai žodžiai: viešieji pirkimai, preliminarioji sutartis, atnaujintas varžymasis, viešojo pirkimo sutartis.

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Introduction

Framework agreements (hereafter: FAs) continue to be an essential public procurement technique often applied in the EU Member States¹. The technique can be effective, and it can reduce the administrative burden for contracting authorities as well as speed up the process of acquiring goods, services and works. That is often due to the possibility of aggregating needs and achieving economies of scale and administrative efficiency. For these reasons, it has been argued that FAs are well suited for centralised or joint cross-border procurement (Albano, Nicholas, 2016). As Locatelli points out, “the provisions on central purchasing bodies themselves, combined with the new specific techniques [...], and the clarifications to the provisions on framework contracts, bear the potential of increasing competition and streamlining the process for buyers and suppliers alike” (Ivo, 2019, p. 39).

FAs are not a new concept. They have been both widely analysed in legal literature and applied in practice (e.g. Andhov, 2021 – forthcoming; Andhov, Janssen, 2020; Andrecka, 2016, p. 505; Andrecka, 2016; Andrecka, 2016; Andrecka, 2016; Andrecka, 2015, p. 127; Andrecka, 2015, p. 231). Nevertheless, noting the recent developments in the EU and national case law, it is safe to say that the FAs continue to be fruitful ground for scholarly analysis (Judgement of 19 December 2018, *Antitrust and Coopservice*, C-216/17 – *further Coopservice*; Judgement of 17 June 2021, *Simonsen & Weel*, C-23/20).

The objective of this article is twofold. Firstly, to examine Article 33 of the Directive 2014/24/EU (hereafter: the Directive) and the relevant implementing rules embedded in Lithuania’s Public Procurement Law (hereafter: LPP)². In particular, the authors aim to analyse the recent developments in the Court of Justice of the European Union (hereafter: CJEU) and Lithuanian courts’ case law. Secondly, the article aims to analyse the legal character of FAs. Namely, whether FAs end the tender process or the process continues towards the public contract’s final award. The analysis is rooted in the controversial Lithuanian case law, which provides the background for this research.

To achieve the goals, the article is structured in the following manner. Section 1 conducts a legal analysis of the FA under the Directive. Section 2 examines the recent CJEU judgement in the *Coopservice*, and *Simonsen & Weel* cases. Section 3 looks at the relevant Lithuanian procurement provisions and focuses on the controversial case *Bitė Lietuva vs CPO LT*. Section 4 provides an analysis of procurement law application and interpretation under Lithuanian case law. Namely, the authors underline the inseparability of both stages of public contract award under an FA, the need to ensure compliance with the principle of transparency, the application of contract modification rules to FAs, and a commentary on differences between an FA and a public contract. Section 5 provides conclusions.

1. Framework agreements under the Directive 2014/24/EU

An FA is an agreement between one or more contracting authorities and one or more economic operators (Article 33 Directive). The purpose is to establish the terms governing public contracts to be awarded during a given period, particularly concerning price and, where appropriate, the quantity envisaged.

¹ FAs are used for about 11% of all contract award notices the number is even higher in terms of value, reaching about 17% of total values according to the PwC, ‘Public Procurement in Europe Cost and Effectiveness – A Study on Procurement Regulation. Prepared for the European Commission’ (2011). In Denmark, they are used in approx. 50% of all public procurements. See: Danish Competition and Consumer authority: “Status for offentlig konkurrence 2020” (January 2021).

² Republic of Lithuania Law on Public Procurement No. I-1491 (2018). TAR. available at: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/badfca72b36811e982dae1db4290b1a9?jfwid=j4ag1lea>

The FA definition suggests that price and quantity are not the only terms that can be established. It is also not always necessary to establish a precise quantity in the FA's terms. A contracting authority or authorities may use FAs to award numerous contracts over a more extended period, either to a single supplier or several suppliers who have been enrolled in the FA. The Directive identifies two types of FAs.

1.1. Types of framework agreements

When it comes to the procedures and their requirements, two different stages need to be considered. These are the procedures used for establishing an FA (hereafter: the initial tender) and procedures used for the subsequent award of a public contract for so-called *call-offs* (hereafter: the subsequent tender). For the initial tender, in practice, applied are open and restricted procedures (Arrowsmith, 2014, p. 1118). However, contracting authorities are free to choose other procedures if they can fulfil the requirements for their use.

The Directive's rules on the subsequent tender are relatively limited, and they depend on a type of FA. Article 33 Directive includes a distinction between two FA types: a single supplier and multiple suppliers' frameworks. In the former type, call-offs under an FA shall be awarded within the terms laid down in the FA. Where an FA is concluded with more than one supplier, the FA shall be performed by:

- a) a so-called direct award of call-offs – following the terms and conditions of the FA without reopening competition, where all the terms and conditions for awarding the call-offs are set;
- b) the application of a so-called mini-competition, where the FA sets out the terms and conditions for a reopening of the competition amongst the providers of the FA for the award of call-offs;
- c) a combination of the direct award and mini-competition (Article 33(4)(b) Directive)³.

The call-offs shall be awarded following the terms and conditions established in the FA and the initial tender documentation. That is, without reopening the competition, where the FA sets out all the terms governing the provision of the works, services and supplies concerned and the objective conditions for determining which of the FA's members shall perform them (direct award) (Article 33(4) (a) Directive). The objective conditions for determining which of the FA members should perform a given task, such as supplies or services intended for use by natural persons, may include the needs or the choice of the natural persons concerned.

In the case of multi-supplier FAs where not all terms and conditions are specified at the outset – besides some limited provisions in the Directive – the method for designing the mini-competition (the subsequent tender) is mostly left to the discretion of the contracting authority. The procedure for call-off awards is often less formalistic and more flexible. Nevertheless, they do resemble procedures established in the Directive.

The mini-competition shall be based on the same terms applied to award the FA (Article 33(4) Directive). Where necessary, more precisely formulated terms, and, where appropriate, other terms might be applied if they have been predicted in the initial tender documentation (Arrowsmith, 2014, p. 1118). It shall be noted that a contracting authority cannot make a substantial modification to the FA's terms as it would violate public procurement principles. All the FA members who can perform the call-off shall be invited in writing to participate in a mini-competition. Contracting authorities shall fix a time limit, which is sufficiently long to allow tenders for each specific call-off to be submitted, considering

³ When both a direct award and mini-competition are to be used, the availability of choice between these two techniques must be indicated in the procurement documents and be based on objective criteria. Recital (61) defines such objective criteria broadly, and they can relate to the quantity, value or characteristics of the works, supplies or services contracted.

the complexity of the subject matter of the call-off and the time needed to send in tenders. Tenders shall be submitted in writing, and their content shall not be opened (the content of the bids shall remain confidential) until the stipulated time limit for reply has expired. Finally, contracting authorities shall award each call-off to the tenderer who has submitted the best offer based on the award criteria set out in the initial tender documentation (Article 33(5)(d) Directive). The available award criteria for FAs is the most economically advantageous tender that shall be identified based on the price or cost, using a cost-effectiveness approach, such as life-cycle costing (Andhov *et al.*, 2020). The award criteria for an award of call-offs may differ from the FA's award criteria as long as they have been established in the initial tender documentation. The award criteria used during the subsequent tender must support the aim of identifying the most economically advantageous tender. This excludes the applicability of using methods such as, e.g., random selection (Andrecka, 2015).

1.2. Duration

FAs should not last longer than four years⁴. In exceptional circumstances, when duly justified in particular by the subject of the FA, the duration may be longer⁵. An example of a justified reason may be when such a duration is necessary to recover the economic operator's significant investment costs in implementing the contract or counteracting potential security risks. The investment costs could include, e.g., an investment in establishing an infrastructure or "where economic operators need to dispose of equipment the amortisation period of which is longer than four years and which must be available at any time over the entire duration of the framework agreement" (Recital 62 Directive). This expressly confirms that call-offs can be awarded just before the FA expiry, therefore surpassing the FA's longevity⁶. That line of argumentation follows from the fact that the Directive does not limit how long a public contract should last. However, a limitation is provided for FAs due to their closed character and impact on competition (Balshøj, 2018)

1.3. Closed Character

The initial tender must include in its notice all the contracting authorities' identities that are to be a part of an FA (Recital 60 Directive). As FAs are closed systems, new suppliers are not permitted to join FAs after they are established⁷. Contracting authorities may be individually named or identified as a recognisable class of contracting authorities, such as central government departments. It must be possible to identify the contracting authority concerned immediately⁸. A reference should be included in the notice where further information may be found in a situation where the class description does not allow the immediate identification of a contracting authority concerned. Reference may be given to a separate document, web page, list etc.

⁴ Under the Utilities Directive 2014/25/EU there is limitation of eight years for FAs.

⁵ In cases where the extension is not justified setting up an FA for more than four years may lead to annulment see e.g. The Danish Complaints Board for Public Procurement ruling: *Klagenævnet for Udbuds kendelse af 22. februar 2018, Access A/S mod Region Hovedstaden*.

⁶ See: Commission Explanatory Note 'Framework Agreements – Classic Directive' (CC2005/03_rev/ of 14.7.2005) 5.

⁷ There are exceptions to this rule, see Art. 72 of Directive 2014/24/EU as well as: Abby Semple and Marta Andrecka, 'Classification, Conflicts of Interest and Change of Contractor: A Critical Look at the Public Sector Procurement Directive' (2015) 10 EPPPL 171.

⁸ Commission Explanatory Note (n 6).

2. CJEU judgements in 216/17 *Coopservice* and 23/20 *Simonsen & Weel*

The *Coopservice* case was the first substantial CJEU ruling specifically on FAs. The judgement caused an extended debate between practitioners and academics. In this case, the CJEU considered whether it was compliant with the procurement law to allow a non-signatory contracting authority to use an FA (Judgement of 19 December 2018, *Antitrust and Coopservice*, C-216/17; Andhov, Janssen, 2020). An Italian contracting authority established an FA. The regional health authority of Valcamonica (hereafter: Valcamonica) was not a signatory to the FA in question. The tender specifications included an “extension clause” that allowed extending the FA to several regional health authorities identified in that clause, including Valcamonica. In 2015, Valcamonica sought to rely on the extension clause and use the FA rather than initiate its tender to award a services contract. This decision to call off a contract under the FA was challenged and ultimately led to a preliminary question to CJEU on “whether EU procurement legislation allowed a contracting authority to conclude a framework agreement not only on its own behalf but also on behalf of other contracting authorities which were not direct parties (signatories) to that agreement but which were specified as potential users of that framework”.

The CJEU confirmed that a contracting authority did not have to be a direct signatory to the relevant framework agreement to call-off contracts under an FA. Instead, it was sufficient for it to: “appear as a potential beneficiary of that framework agreement from the date on which it is concluded by being clearly identified in the tender documents with an explicit reference that makes both the ‘secondary’ contracting authority itself and any interested operator aware of that possibility. That reference can appear either in the framework agreement itself or in another document, such as an extension clause in the tender specifications, as long as the requirements as to advertising and legal certainty and, consequently, those relating to transparency are complied with” (Judgement of 19 December 2018, *Antitrust and Coopservice*, C-216/17).

The second aspect of the *Coopservice* regarded the need to provide the estimated value of an FA. The question arose whether an FA must determine the maximum quantity in terms of a number of goods, works or services or whether the contracting entity can merely state the maximum value of the FA, i.e., the amount that the contracting entity can purchase for a maximum. It seems that the answer is that both the value and quantity must be provided. In this context, a reference to a contracting authority’s “usual requirements” will not be a sufficiently clear indication of quantity. This is important in spelling out the implications of failing to establish the maximum quantity/value.

Following *Coopservice*, it is reasonable to conclude that the potential users of FA shall, firstly, (a) consider the possibility of making use of that FA; secondly, (b) if they decide to use the proposed FA, they need to communicate this information to the public authority establishing the FA (Andhov, 2021 – forthcoming).

In the aftermath of the *Coopservice* judgement, there has been uncertainty about whether an FA has exhausted its effects once the estimated maximum value has been used. If yes, then purchases based on the exceeded FAs’ value are potentially at risk of being declared ineffective. A new ruling from the CJEU in a Danish case *Simonsen & Weel* sheds light on the issue (Judgement of 17 June 2021, *Simonsen & Weel*, C-23/20). *Simonsen & Weel* had sued two regions in connection with establishing an FA tender for purchasing feeding tube kits for home and institutional patients. The plaintiff argued that regions violated the principle of equal treatment and transparency by not stating in the tender notice either the estimated or the maximum quantity and value of the FA. The following questions have been submitted for a preliminary ruling:

1. Should the contract notice contain information on the estimated quantity and/or value of the goods to be delivered under the tendered FA?
2. Should the contract notice or the contract documents stipulate a maximum quantity and/or value of the goods to be delivered under the tendered FA so that the FA in question will have exhausted its effects when this limit is reached?
3. Has the contracting authority awarded a contract without prior publication if the estimated and maximum quantity and/or value of the FA is not disclosed?

In its judgement, the CJEU concluded, similarly as in the *Coopservice* case, that the contracting authority shall indicate: (1) the estimated overall value/quantity of the FA and (2) the maximum quantity and/or a maximum value of the goods or services to be delivered under an FA. Once the estimated value is used, the FA exhausts its effects, and the contract must be retendered. Regarding the importance of missing information, the CJEU stated that (3) the absence of information on the maximum value of the FA does not constitute a serious error, which would be equivalent to a direct award (non-publication of a contract notice). Therefore, the remedy of contractual ineffectiveness does not apply in the event of such a deficiency.

3. Framework agreements under the Lithuanian law

FAs have been introduced to Lithuanian law by a public procurement reform in 2004. Since then, they have often been used in practice.⁹ The Directive has been implemented in the Lithuanian legal system by the new version of the LPP. In general, Lithuanian provisions on FAs replicate the wording of the Directive with some exceptions.

On several occasions, Lithuanian judges had a chance to consider the legal status of FAs. Their interpretation aligns with the Directive and established European legal doctrine on the subject in most cases. The Lithuanian courts confirmed that FAs are not a type of procurement procedures like, e.g., open, restricted, or negotiated procedures. They are an “organisational tool” (in the Directive’s wording, a “procurement technique”) to facilitate a procurement process (Ruling of the Supreme Court of Lithuania of 25 April 2014 in a civil case; ruling of the Court of Appeal of Lithuania of 4 February 2016 in a civil case; ruling of 11 November 2019 in a civil case). Also, Lithuanian courts emphasised that the nature of FAs allows contracting authorities to minimise the administrative burden, speed up the procurement process, and provide increased flexibility (Ruling of the Supreme Court of Lithuania of 25 April 2014 in a civil case; ruling of the Court of Appeal of Lithuania of 4 February 2016 in a civil case; ruling of 11 November 2019 in a civil case).

However, there are some differences between the Directive and the LPP. Mainly, Article 29(2)(1) LPP states that the public procurement procedure ends when parties sign and enter into the FA (after the initial tender). The same law also provides that a new public procurement procedure begins in cases of FAs with mini-competition, when a contracting authority invites the FA members to the mini-competition for the *final* public contract by submitting the “updated” bids (subsequent bid) (Article 29(2)(4) LPP). These provisions are highly controversial. They raise questions, on the one hand, on the correct implementation of the Directive.

On the other hand, the provision raises doubts regarding the interpretation of the EU’s Public Procurement Law. As it is written elsewhere in scholarly literature, “in a very broad sense, the term

⁹ The statement is based on the practical experience of one of the co-authors.

‘procurement’ is used to refer to the entire process of acquisition” (Arrowsmith *et al.*, 2000, p. 2). The entire acquisition process encapsulates the phases of (a) a proper preparation of a procurement, (b) the performance of a tender procedure itself (including the selection of bidder for the public contract), and (c) the implementation of the awarded public contract and its administration. Thus, the term “procurement” defines a continuous acquisition process that cannot be deemed finished until a contracting authority awards a public contract to a relevant economic operator. The same understanding is present in Article 1(2) of the Directive, which states that procurement within the meaning of the Directive is the acquisition of goods, services and works. Hence, there are two important aspects to be taken into consideration. First, procurement is the *acquisition* of the procurement object. Acquisition refers to the award of goods, services or works. Second, a FA in principle does not entail acquiring the procurement subject matter because of its preparatory-organisational nature. This is why Article 29(2) (1) and Article 29(2)(4) of the LPP possibly are in contradiction to the provisions of the Directive. Moreover, this potential inconsistency of the LPP with the EU law has a very negative practical effect of distorting how courts in Lithuania interpret EU law. The application of the mentioned national legal norms and the challenge they pose will be demonstrated based on a controversial Lithuanian case *Bitė Lietuva vs CPO LT* (Ruling of the Court of Appeal of Lithuania 22 December 2020 in a civil case).

3.1. Bitė Lietuva vs CPO LT case

CPO LT, a central purchasing body (hereafter: CPB), carried out its initial tender through the dynamic purchasing system technique and awarded the FA to four tenderers – the leading telecommunication providers in Lithuania. The initial tender documentation included a prohibition to submit a bid with a negative price (hereafter: negative bid prohibition). Subsequently, the CPB used an electronic catalogue to carry out two mini-competitions for the call-offs award (subsequent tender). The electronic catalogue automatically generated the ranking of the tenders based on the ascending order of offered prices. The tenderer that won both mini-competitions proposed a negative price, whereas the claimant was awarded a second place, having submitted a price equal to 0 €.

By arranging the mini-competition and subsequently awarding the call-off to the winner, the contracting authority omitted to apply the negative bid prohibition established in the initial tender documentation¹⁰. It is worth noting that the contracting authority has not expressly mentioned in the initial tender documentation nor in the mini-competition’s terms and conditions that the negative price submission will be allowed at the mini-competition stage. The mini-competition terms did not expressly prohibit the negative option either. When the competitor of Bitė Lietuva was awarded the call-off, the latter challenged the award in court. The claimant argued that the FA members were prohibited from submitting a negative price during the mini-competition.

Consequently, the plaintiff argued that public procurement law had been violated and, more specifically, the equality and transparency principles. The plaintiff claimed that by allowing the negative price, the contracting authority disconnected the FA and the mini-competition procedures, which shall be carried out based on the terms and conditions established in the initial tender. Further, the claimant argued that the contracting authority introduced an unlawful amendment to the terms and conditions referred to in the initial tender documentation and the FA itself (Article 33(2) Directive; Article 78(3)

¹⁰ On the issue of tenders priced at 0€ and the EU rules on abnormally low tenders see case C-367/19 *Tax-Fin-Lex*, EU:C:2020:685.

of LPP). The argument has been based on the fact that, according to the claimant, the market participants have been misled.

The contracting authority and the third parties to the case denied the claim. They maintained the line of defence, which emphasised the separation between the initial tender for establishing the FA and the other, unrelated and different mini-competition procedure for the award of the public contract. The respondents argued that the FA's organisational nature allowed the amendment of the prior negative price prohibition during the call-off procedure, even if this was not directly stated while bidding during the mini-competition. In other words, the respondents argued that the text of the FA did not include such a limitation. Consequently, there was a possibility to propose a negative price, even if such an option was unavailable in the initial tender. The court of the first instance agreed with contracting authority reasoning.

3.1.1. The Court of Appeal's judgement

In its judgement, the Court of Appeal highlighted that an FA and a mini-competition are interconnected procedures. A mini-competition is limited to the tenderers who are part of an FA. At the same time, the mentioned that the procedures in the court's opinion are different because the procurement's subject matter is provided only in general terms when the contracting authority carries out the procurement for an FA. In contrast, in the mini-competition, tenderers compete for the call-off, and the procurement itself is carried out based on buyers' specific needs. The court ruled that although the initial tender and the mini-competition, which is to be conducted based on the former, are interconnected, they are essentially two *separate* public procurement procedures. The existing link between the mini-competition and the initial tender does not contradict the existing legal rules related to the different purposes of these two procedures.

The court explicitly noted that mini-competition is separate from the initial tender because it can be carried out on different criteria (e.g. different aspects of the most economically advantageous tender or lowest price) than in comparison to the initial tender. According to the court, if the mini-competition was only an extension of the initial tender, its purpose, which entails (a) allowing the contracting authority to purchase necessary goods, services or works, and (b) ensuring a rational use of money, would be rendered meaningless.

In the court's opinion, another argument supporting the separability of the two procedures is the different moment of their commencement and conclusion, as the mini-competition cannot start until the initial tender is concluded.

The court finally concluded that in any event, if the initial tender's terms and the terms of the mini-competition differ, they have to be disclosed by the contracting authority. These terms have to be clear and understandable for all tenderers. These terms must remain unchanged throughout the whole public procurement procedure (both stages). When the call-off is awarded, parties cannot make any substantial amendments to the FA terms. However, in the courts' opinion, the legislative prohibition against making substantial amendments to the FA terms does not mean that in the course of the mini-competition it is mandatory to rely on the same terms, which had to be abided by when participating in the initial tender. The Court of Appeal upheld the decision made by the first instance court.

4. Commentary

The judgement in the *Bitė Lietuva vs CPO LT* case shall be criticised, as it seems to artificially separate both of the FA's stages. However, an additional layer of confusion is introduced by the wording of Articles 29(2)(1) and 29(2)(4) LPP, which emphasise the separable nature of the initial and the subsequent procedures. A question arises on what are the legal consequences of LPP suggested separation of both of the FA's stages. Our views are presented below. Further analysis is focused explicitly on a multi-supplier FA with mini-competition.

4.1. One or two procedures?

Lithuanian courts maintain the legal position that the EU and national public procurement law separate the initial tender (with all the included legal requirements) and the mini-competition used to award the call-off (public contract). The mini-competition may introduce new requirements or *omit* the ones that were obligatory during the initial tender. In other words, it is held that the call-off procedure may be implemented on the same terms that were applied in the initial tender or *on the new ones*. Hence, the FA terminates a tender procedure, and the mini-competition and the call-off may be disconnected from it, at least to some extent. The authors disagree with such an artificial separation of the two. Such an approach provides an incorrect interpretation of EU law and deforms the concept of an FA.

Firstly, there is a need to recognise that we cannot talk about two procurement procedures. A legal doctrine establishes broadly that FAs are to be understood as delivered in one procurement procedure that includes two interlinked and inseparable internal phases: (a) the initial phase establishing the FA and (b) the subsequent phase of awarding the call-off – a public contract¹¹. This also follows from the Lithuanian courts' reference to the *organisational tool feature* of FAs or the reference to the Directive's classification of FAs as a *technique*. The support to this thesis is that the initial phase – establishing an FA – includes the publication of the tender notice, a qualification of economic authorities, and an award, but of an FA, and not a public contract. Also, an award notice is published afterwards. Lithuanian courts often refer to the initial phase as shortlisting the tenderers under the FA (Ruling of the Supreme Court of Lithuania 25 April 2014 in a civil case). The word *shortlisting* or *selection* deserves an emphasis because it seems that by putting stress on this feature of the FA, joining it with its organisational character, Lithuanian courts are eager to say that after the tenderers are selected, they end the first procurement. In other words, such a rationale implies that the FA draws the line and ends the procurement procedure. This viewpoint shall be criticised, as a public contract has not been awarded at this stage, and solo gathering the qualified economic operators is not an objective of public procurement. The objective is to award a public contract. This is uncontroversial and follows from Article 1 Directive equally as from Article 1 LPP. Therefore, the award of an FA, which cannot be understood as concluding the procurement process (with some exceptions, see section 4.1). When a multi-supplier FA with mini-competition is awarded, there will be

¹¹ Andhov, 2021 – forthcoming; Andhov, Janssen, 2020; Andrecka, 2016, p. 505; Andrecka, 2016; Andrecka, 2016; Andrecka, 2016; Andrecka, 2015, p. 127; Andrecka, 2015, p. 231. Also: Dorthe Kristensen Balshøj, *Public Procurement and Framework Agreements: the application of competition law to contracting authorities in a procurement context* (DJØF 2018). Sue Arrowsmith, *The Law of Public and Utilities Procurement Regulation in the EU and UK*, vol 1 (3rd edn, Sweet & Maxwell 2014) 1118 – pointing out that under specific circumstances the FA may be also a public contract at the same time. Abby Semple, *A Practical Guide to Public Procurement* (1st edn, Oxford University Press 2015)125. Lichere and Richetto, 'Framework agreements, dynamic purchasing systems and public e-procurement in Lichere, Roberto Caranta, Steen Treumer (eds.) *Modernising Public Procurement the New Directive* (DJØF Publishing 2014) 216.

no obligation established, and detailed terms regarding the final content, quantity, exact value, volume, time, and place of the call-off delivery, even price, may be absent.

The subsequent stage of mini-competition and the call-off award also cannot independently be characterised as a procurement process. The tender notice is not published. Therefore, the transparency principle is not ensured. Similarly, invited are only the FA's members, so equal treatment or open competition are not secured. Finally, there is no legal requirement to publish the contract award notice when awarding the call off. While there could be an argument that Article 33(5)(a) Directive, by its indication that "all tenderers capable of performing the contract" requires some form of qualification, but on its own it does not seem like a viable argument. Altogether, this emphasises that the subsequent phase of awarding a call-off cannot be classified as an independently viable procurement procedure.

In support of the separability between the two phases, the Lithuanian court refers to the mini-competition as the phase in which the general character of terms and conditions in FA transforms to specifics regarding the concrete award call-off (Ruling of the Court of Appeal of Lithuania of 22 December 2020 in a civil case, para 51). This fact is in the court's opinion, emphasising a clear distinction between these two "procedures" (Ruling of the Court of Appeal of Lithuania of 22 December 2020 in a civil case, para 55). What is confusing is that to support this claim, the courts refer to Article 33(5) Directive and Article 78(6) LPP. These provisions state that mini-competition is to be carried out on the same terms as applied for the FA (initial tender) award and, where necessary, on more precisely formulated terms, and, where appropriate, on other terms referred to in the initial tender documentation [emphasis]. This clearly dictates the opposite legal interpretation that both phases must be understood as part of one interlinked and inseparable public procurement procedure. Whenever terms and conditions are to be different at the mini-competition stage, they have to be communicated in the initial tender documentation. In other words, the terms and conditions established in the initial tender phase are applicable later on in the subsequent phase of awarding call-offs (Article 33(5) Directive). Similarly, the requirements related to the subject matter of procurement (price, quality, specification, etc.) continue to be applicable, binding and required when awarding call-offs, unless different information is clearly stated in the initial tender documentation establishing an FA.

This interpretation of the Articles 33 Directive and 78 LPP is not denying or diminishing the FA's organisational nature. On the contrary, the FA's organisational nature means that it is an initial phase, which does not end the tender procedure. The subsequent phase will be continued through this *sui generis* mechanism, even if it is fine-tuned with additional legal requirements.

The rationale of a link between the two stages is based on the requirement to keep the same material legal terms for all the economic operators from the very beginning, when the initial tender was announced, until the very end, when the call-off is awarded. Otherwise, the requirements for participation in the initial FA tender could be circumvented if the contracting authority was to be allowed not to follow them or arbitrarily changed them during the mini-competition. It would lead to a clear violation of the transparency and equal treatment principles. This is a clear example in the case of *Bitė Lietuva vs CPO LT*, where the prohibition of negative bids has been introduced in the initial FA tender documentation but omitted at the stage of a mini-competition, in clear violation of Article 33(5) Directive. Surprisingly, both instances of Lithuanian courts have not acknowledged that violation.

It has been argued that a draft of the FA, which was a part of the initial tender documentation, had not included the prohibition of a negative bid that would apply to the mini-competition. For that reason, the prohibition of the negative bid was not applicable at the later stage. However, the Directive does not require specifically that terms included in the text of the FA or the draft of FA that is part of

the initial tender are to apply to the mini-competition. It does require that the terms introduced in the documentation for the initial tender, meaning any documentation (emphasis added) not solely the draft of the FA, apply to the mini-competition stage. In other words, the requirement does not distinguish between procurement documentation, such as the FA draft and others. Consequently, the fact that the FA's draft has not included the prohibition of the negative bid cannot be used to justify the omission of its application in the mini-competition if other initial tender documentation included such a prohibition. The authors argue that the EU procurement law requires that if the contracting authority did not wish to apply the negative bid prohibition to the mini-competition, it should have clearly stated that in the procurement documents for the initial tender.

4.2. Transparency principle

The link *between* the tender procedure and all encapsulated legal terms therein and the public contract awarded through the FA is extremely relevant from the transparency principle's perspective. It is widely accepted that this principle *inter alia* means that contracting authorities must obey the rules they created themselves by announcing the public tender with the carefully drafted procurement documentation (Arrowsmith, 2021, pp. 8-15). This is confirmed by the CJEU case law, which emphasises the legally binding connection between the tender documentation and the public contract (Judgement of 22 June 1993, *Commission v Denmark*, C-243/89, para 45). Similarly, on numerous occasions, the Lithuanian Supreme Court ruled that the application of the LPP is not limited to the procurement process and extends to the public contract (Ruling of the Supreme Court of Lithuania of 17 October 2011 in a civil case; Ruling of the Supreme Court of Lithuania of 15 February 2018 in a civil case; Ruling of the Supreme Court of Lithuania of 12 November 2020 in a civil case; Ruling of the Supreme Court of Lithuania of 14 October 2020 in a civil case). The Lithuanian Supreme Court held that when hearing the public procurement disputes and related cases, the national courts must consider that the public contract is the public tender's outcome (Ruling of the Supreme Court of Lithuania of 14 October 2020 in a civil case). Therefore, all the legal terms and conditions of the public contract must be read in light of the procurement documentation (Ruling of the Supreme Court of Lithuania of 14 October 2020 in a civil case; ruling of the Supreme Court of Lithuania of 3 July 2020 in a civil case; ruling of the Supreme Court of Lithuania of 30 September 2020 in a civil case). In a more recent case, the Supreme Court even held that the tender documentation's text has priority over the public contract's wording (Ruling of the Supreme Court of Lithuania of 14 October 2020 in a civil case). This perfectly represents the relevance of the transparency principle and its practical applicability to the requirement to follow the tender documentation rules.

There is no argument on why the same legal approach should not be implemented when public contracts are awarded through the FA. The FA does not eliminate the legal requirements and terms included in the initial tender documentation and constituting the FA's precondition. In other words, the FA does not separate the tender from the public contract.

4.3. Substantial amendment of a framework agreement

In its wording, Article 72 of the Directive, and similarly Article 89 of the LPP, expressly confirms that the rules on modifications apply to FAs. This is crucial as it follows from the established EU case law that introducing a substantial modification to a public contract is *de facto* unlawful (Judgement of 7 September 2016, *Finn Frogne*, C-549/14). Consequently, introducing a modification of a substantial

nature under FAs will breach the EU procurement law and require retendering. Following the *Presstext* case (Judgement of 19 June 2008, *Presstext Nachrichtenagentur*, C-454/06) and its codification in Art 73 (4)(a) of the Directive, it is clear that modification of an FA during its term shall be considered to be substantial where it renders the FA materially different in character from the one initially concluded, and in any event when “the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure”. Crucial to note here is that the Directive refers to the “conditions which, had they been part of the initial procurement procedure”, and not the wording of the awarded FA or the wording of a draft of the FA included in the tender documentation. This exact scenario is present in *Bitė Lietuva vs CPO LT*. There might have been economic operators who decided not to participate in the tender due to the prohibition of submitting negative bids in the initial tender.

Meanwhile, if they would be aware that such a prohibition would be lifted at the mini-competition stage, they might have decided to compete in the tender. Consequently, material legal requirements that may affect the economic operators’ decision to participate in the tender must remain unchanged from the beginning (the initial tender) until the very end (award of the public contract) of the procurement process. Such requirements cannot be set aside or amended by their omission or by adding substantially different legal terms during the mini-competition stage, unless such a set-aside or amendment has been clearly predicted and communicated to the market in the initial tender process documentation.

In the *Succhi di Frutta* case, the CJEU confirmed that the contracting authority does not have the discretion to change one of the essential conditions for the award of a contract: “the contracting authority [...] may not alter the general scheme of the invitation to tender by subsequently proceeding unilaterally to amend one of the essential conditions for the award, in particular, if it is a condition which, had it been included in the notice of invitation to tender, would have made it possible for tenderers to submit a substantially different tender. Should the contracting authority wish [...] to amend some conditions of the invitation to tender, after the successful tenderer has been selected, it is required expressly to provide for that possibility, [...] in the notice of invitation to tender (Judgement of 29 April 2004, *Commission v CAS Succhi di Frutta*, C-496/99 P; Ruling of the Supreme Court of Lithuania of 3 July 2020 in a civil case). Consequently, the contracting authority is prohibited from amending the mini-competition by arguing that it is a matter between the FA and the future public contract and not between the public tender for the FA and the public contract. Also, suppose any substantial modifications from the initial tender legal terms are planned. In that case, this option must be so clearly communicated that “all the undertakings interested in taking part in the [initial] procurement procedure are aware of that possibility from the outset” (Judgement of 29 April 2004, *Commission v CAS Succhi di Frutta*, C-496/99 P, paragraph 118). Therefore, as in the *Bitė Lietuva vs CPO LT* case, the material terms cannot be amended through the silence of the FA regarding the particular issue or by reference to the new terms of reopened competition under the framework agreement, which in no clear manner would indicate that the negative prices bids would be allowed. Thus, we disagree with the court’s assessment of this case.

4.4. Is Framework Agreement a public contract?

The only way Article 33(5) of the Directive provisions would not be binding for the contracting authority in the mini-competition is to conclude that a specific FA is, due to its character, simultaneously a

public contract. Subsequently, the mini-competition is not anymore governed by the procurement law. The possibility of FA identification as a public contract is considered below (Andrecka, 2015, p. 127).

In 2005, the Commission issued an explanatory note on FAs, which introduced terminological confusion¹². In its note, the Commission differentiates between “framework contracts” and “framework agreements”. It defined “framework contracts” as “framework agreements that establish all the terms [as] legal instruments under which the terms applicable to any orders under this type of framework” (Article 33(4)(a) Directive). Therefore, the Commission called a multi-supplier FA with a direct award a “framework contract”. On the other hand, the Commission referred to “framework agreements” as FAs that do not include all terms and conditions. They require further specification and, when necessary, more precisely formulated terms. Where appropriate, other terms might be applied if they have been predicted in the initial tender documentation at the stage of awarding call-offs.¹³ So, in other words, the Commission referred to multi-supplier FAs with mini-competition as “framework agreements”.

While the reference to “framework agreements” suggests that they differ from a standard public contract, the “framework contracts” whose terms are set out in a binding manner and do not need to be supplemented before a call-off can be made under them. The Commission suggested that they are “traditional” public contracts. This suggestion seems to confuse the establishment of terms for delivering works, services, or supplies with an obligation to provide, receive, and pay for those works, services, or supplies.¹⁴ The latter is not present under “framework contracts” but is in the public contract, which constitutes an obligation to provide, receive, and pay for works, services, and supplies that are the subject matter of the contract. Further, FAs may lack specific time, date, location, and fixed volumes/values of the supply, service, or work that are the subject matter of the FA, which are elements required to be defined under public contract (Andrecka, 2015, p. 140).

What ultimately matters is how the obligations are formulated in the FAs. Suppose the FA’s parties have committed to each other concerning what, how much, and when to buy and deliver. This might, in specific circumstances, constitute a type of a binding public contract (Andrecka, 2015). However, this must be assessed on a case-by-case basis and will depend on the wording of the individual framework’s conditions and is not a general characteristic of FAs.

It is worth underlining that it is difficult to imagine a multi-supplier FA with mini-competition that could be qualified as a public contract. That is because the procurement winner has not been chosen yet, and the final bids have not been assessed yet.

From that perspective, the provisions in Articles 29(2)(1) and 29(2)(4) LPP, which have been interpreted as amplifying the understanding of the FAs as the public contract or, at the very least, suggesting that the FA, despite being purely an organisational, legal tool, still finishes the procurement procedure are highly controversial in the authors’ opinion. There is a need to revisit such an interpretation and align it with EU procurement law.

Conclusions

Despite the frequent use of FAs, their regulatory framework, both at the EU and Lithuanian levels, is lacking in clarity and creates doubts about the correct application of this procurement technique. Specifically, there has been a doubt about how precisely the maximum value of FAs has to be estab-

¹² Commission Explanatory Note (n 6).

¹³ Ibid 3.

¹⁴ Procurement Lawyers Association, ‘The use of framework agreements in public procurement’, March 2012, 35, available at: https://www.procurementlawyers.org.uk/wp-content/uploads/2017/07/PLA_Paper-on-Frameworks.pdf,

lished, and the consequences after such a value is reached. Some light has been shed on the issues with two recent CJEU judgements in *Coopservice* and *Simonsen & Weel*. The former stated that an FA must provide the total quantity and maximum amount of purchases covered by call-off contracts awarded under an FA. At the same time, the latter case confirmed that an FA exhausts its effects once the estimated value has been used.

In Lithuania, questions have been raised on when the procurement process begins and ends. Particularly in the context of FAs, as they are not directly addressed by Articles 29(2)(1) and 29(2)(4) of the LPP. However, reading these provisions in conjunction with FAs provisions affects the legal interpretation of FAs in Lithuania. This is particularly observed in the context of the FAs with mini-competition where under the LPP, it is suggested that there are two procurement procedures and that the first procurement process ends at the moment of establishing the FA.

The authors find the Lithuanian interpretation of the EU's public procurement law problematic and incorrect. Firstly, such a legal interpretation artificially compartmentalises two stages of the same procurement process, whereas (a) the first stage is the initial tender procedure for the FA, and (b) the second one is the subsequent procedure for the award of a public contract. Secondly, this interpretation leads to the separation of the mentioned stages where the essential legal requirements related to the selection criteria, technical specification, etc., applied during the initial tender for the FA, may become irrelevant and omitted during the mini-competition process. This is incorrect; it is clear from the EU legal doctrine that we are dealing with one interlinked and non-separable procedure rather than two procurement procedures. Thirdly, the LPP interpretation undermines the principles of public procurement (transparency, equal treatment, and non-discrimination) and the provisions on contract modification, clearly illustrated by the examined Lithuanian case law. Finally, it is crucial to underline that as a starting point, the concept of an FA differs from the concept of a public contract.

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The Relationship Between Initial Tender and Mini-Competition: EU and Lithuanian Perspectives on Framework Agreements

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S u m m a r y

This article analyses the concept and application of framework agreements under EU public procurement law. The article has two main aims. Firstly, the authors examine the legal norms of the Directive 2014/24/EU and the Lithuanian national legislation, also examining the relevant decisions of the CJEU and the national courts. The present analysis reveals that Lithuanian public procurement law provisions possibly contradict the Directive 2014/24/EU. Namely, under Lithuanian law, the phases of the initial public tender and the subsequent mini-competition are artificially separated and detached from one another. Secondly, the article is devoted to a legal analysis of the relationship between these two stages of a single procurement procedure. The authors argue that the current Lithuanian understanding of a multi-supplier framework agreement with the mini-competition procurement process is incorrect and must be changed.

Europos Sąjungos ir Lietuvos teismų praktika: pirminių pirkimo procedūrų ir atnaujinto varžymosi santykis

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S a n t r a u k a

Ši mokslinė publikacija skiriama preliminariosios sutarties instituto, taikomo viešuosiuose pirkimuose, analizei. Viena vertus, šiuo straipsniu siekiama supažindinti su pagrindiniais ES ir Lietuvos teisės šaltiniais, kurie įtvirtina reikalavimus preliminariosioms sutartims. Be to, kad šiame darbe pateikiama aktualių teisės normų analizė, publikacijoje taip pat daug dėmesio skiriama ES ir nacionalinei teismų praktikai bei joje pateikiamai atitinkamų teisės normų interpretacijai ir jos vertinimui. Kita vertus, šiame darbe skiriama dėmesio teisiniam santykiui tarp pirminio viešojo pirkimo proceso, kuriuo siekiama sudaryti preliminariąją sutartį, ir atnaujinto varžymosi pagal preliminariąją sutartį, kuria atitinkamai siekiama sudaryti viešojo pirkimo sutartį. Atliktos mokslinės analizės pagrindu darbo autoriai priėjo prie išvados, kad atitinkamos nacionalinio viešųjų pirkimų teisės šaltinio normos galimai neatitinka ES viešųjų pirkimų direktyvų teisinio reguliavimo, nes esamas teisinis reguliavimas ir jį įgyvendinanti nacionalinė teismų praktika suponuoja, kad minėtos dvi viešųjų pirkimų proceso stadijos yra atskiros ir tarpusavyje nesąveikaujančios. Darbo autorių nuomone, tokia teisinė situacija ne tik, kaip minėta, prieštarauja ES teisiniui reguliavimui, bet ir neatitinka viešųjų pirkimų principų bei viešojo pirkimo sampratos ir jos esmės.

Marta Andhov yra Kopenhagos universiteto Teisės fakulteto docentė. Jos tyrimų sritis yra viešųjų pirkimų teisė. Marta yra viena iš populiarios viešųjų pirkimų tinklalaidės „Bestek“ vedėjų, taip pat – dviejų „Horizon 2020“ ES finansuojamų projektų *Sustainability and Procurement in International, European, and National Systems* ir *COCOREADO* dėl tvarių maisto viešųjų pirkimų narė. Praeityje, be kita ko, Marta dalijosi savo įžvalgomis ir patirtimi svarbiuose tyrimuose, vykdytuose Europos Komisijos, Danijos žmogaus teisių instituto ir įvairių nacionalinių pirkimų agentūrų bei universitetų.

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Pagrindinės autoriaus mokslinių interesų, tyrimų ir ekspertinės sritys yra viešieji pirkimai, bylinėjimasis ir alternatyvūs ginčų sprendimo būdai, Europos Sąjungos materialinė teisė (susijusi su laisvu prekių, paslaugų ir asmenų judėjimu).

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