HUMBOLDT FORUM RECHT
- Die juristische Internet-Zeitschrift an der Humboldt-Universität zu Berlin -

HFR 1/2014 ISSN 1862-7617 Aufsatz

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The experience of the Bidder as Award Criterion in EU Public Procurement Law

The rule "experience may not be used as an award criterion" originally derives from the distinction between selection and award phase, has been the subject of various cases in the European Courts and has ever since been debated vividly in the academic literature. However, in order to reflect its more nuanced meaning, it should be reformulated to: "At award stage, experience may only be used for the assessment of lawful award criteria, provided that the consideration of experience is aimed at identifying the MEAT and not essentially linked to the evaluation of the tenderers' ability." Despite some authors arguing the opposite, such a flexible or soft interpretation is not ruled out by the ECJ's judgment in Lianakis.

As contracting authorities would like to consider experience at the award stage, especially when dealing with complex service contracts, they must be advised not to rely on experience as a sole basis and if using experience, to indicate that it will be used as one consideration to be taken into account in judging a valid award criterion such as quality. However, it must be noted that such extensive care does not need to be taken for public contracts that are neither covered by the directives nor by the Financial Regulation.

Independently of a strict or flexible interpretation, some authors call for an abolition of the rule as a whole because they fear adverse effects on price and quality if contracting authorities may not asses previous experience as such in the award phase. However, the distinction of selection and award criteria as well as the principles of equal treatment and anti-discrimination and ultimately the prerogative of the internal market provide for the best arguments in favour of the rule.

In its current proposals for a reform of the procurement directives, the European Commission recognises the desire of contracting authorities in the field of service contracts and design works to consider experience of the staff assigned to performing the contract and therefore allows for its assessment in the award phase.

A. Introduction

1 Every year, government and utilities expenditure for the procurement of goods, works and services accounts for around one fifth of the EU gross domestic product. Approximately 20% of these procurements exceed the relevant value thresholds of the Public Sector Directive[1] and the Utilities Directive[2] and are thus covered by their rules. In 2010, the total value of contracts regulated by the two directives amounted to circa EUR 447 billion.[3] Rules on public procurement therefore have a significant impact upon the EU economy and the development of the EU internal market.

[1] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30.4.2004, p. 114; henceforth Directive 2004/18/EC, Public Sector Directive or Classic Directive.
[2] Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 134, 30.4.2004, p. 1; henceforth Directive 2004/17/EC or Utilities Directive.
[3] European Commission, Annual Public Procurement Implementation Review, 2012, p. 6, in: http://ec.europa.eu/internal_market/publicprocurement/docs/implementation/20121011-staff-working-document_en.pdf, 05.03.2014.

2 Many firms throughout the EU have been awarded a public contract more than once in a public procurement procedure or have otherwise gathered experience in carrying out contracts similar to those procured. In this context, experience includes knowledge and skills that the economic operator has gained through completing one or more similar contracts before. Awarding the contract to an experienced operator opens the chance to benefit from a higher level of knowledge and skills and may therefore correlate with a lower rate of failure and a faster completion of a project. For these reasons, contracting authorities like to consider experience not only for the purpose of the selection of suitable bidders but also for the award of the contract. However, the rule is: "The experience of a bidder may be used as a selection criterion but not as an award criterion."

3 In the academic literature as of today, this rule has been subject to a vivid debate. Notably, most authors militate against it, whereas only few academics support it. Accordingly, arguments pleading the abolition of the rule are presented in high numbers but only a few arguments in favour of the rule have been articulated. Moreover, most articles and comments relate to one or more specific cases, leaving a gap for a thorough discussion of the rule in the abstract. Therefore, this essay mainly aims at clarifying the scope of the rule, developing further arguments in support it and critically evaluating it independently from a specific case.

4 The essay will begin with an analysis of the rule (B) and conclude with its evaluation (C). For the purpose of the analysis, the author will define the rule's object and scope (B.I) and describe its practical implications (B.II). In the course of the evaluation, the author will examine the application of the rule in the "Lianakis" judgment (C.I) and finally critically evaluate the rule in the abstract (C.II). The essay ends with a short conclusion (D).

5 B. Analysis of the Rule

I. Object and Scope of the Rule

Although the two processes of selection of the tenderers and award of the contract may be conducted simultaneously, suitability and award evaluation are two distinct procedures and are governed by different rules.[4] The selection of the tenderers is regulated in Artt. 45 – 52 of the Public Sector Directive (Chapter VII Section 2) and Artt. 52 – 54 of the Utilities Directive (Chapter VII Section 1) whereas the award of the contract has to be carried out based on criteria laid down in Artt. 53 (Chapter VII Section 3) and 55 (Chapter VII Section 2) respectively. The choice of the Union legislator to regulate the two operations in different sections of the directives shows that selection and award evaluation are distinct by law.[5] This separation becomes even clearer when considering that a tenderer only reaches the award stage after having passed the selection stage.[6] This is explicitly stated in Art. 44 para 1 of the Public Sector Directive and is implied by Art. 53 of the Utilities Directive. Furthermore, the focus of each stage is a different one: The selection of tenderers is concerned with the tenderers' personal situation, his suitability to pursue the professional activity, his economic and financial standing and his technical and professional ability, thus with the tenderer himself. However, the contract has to be awarded to the tender which is the most economically advantageous (MEAT) from the point of view of the contracting

[4] Case 31/87, Judgment of the Court (Fourth Chamber) of 20 September 1988. Gebroeders Beentjes BV v State of the Netherlands. paras 15-16.
[5] Hölzl/Friton, Entweder – Oder: Eignungs- sind keine Zuschlagskriterien,in: Neue Zeitschrift für Baurecht und Vergaberecht (NZBau), 2008, 307, 308.
[6] Christiani/Puhland, in: Pünder/Schellenberg (Ed.), Vergaberecht, 2011, VOB/A § 16 Prüfung und Wertung der Angebote, para 112.

authority or which is lowest in price. So, in the award stage the tender, not the tenderer is evaluated.

Thus, selection and award are two distinct procedures, regulated in different sections of the directives and with different aims.

6 It follows from the clear distinction between selection and award that the criteria used in both stages need to be different. Whereas criteria used for selection need to focus on the tenderer, only criteria linked to the subject-matter of the public contract in question may be used to identify the MEAT.[7] Consequently, the one and the same criterion cannot be used for the purpose of selection and award[8] and a criterion used for the selection is not a valid award criterion.[9] Experience may be used to evaluate the ability of economic operators to provide the service or to execute the installation or the work, Art. 48 para 5 of the Public Service Directive. Thus, "experience" may not be used as a criterion for the award of the contract. Also, a higher level of experience than necessary to pass the selection stage may not serve as an award criterion.[10] Hence, since selection and award are distinct procedures with different purposes, experience in itself is not a valid award criterion.

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7 The Courts of the European Union endorsed the conclusion drawn from this legalistic approach. Although, in "Beentjes", the European Court of Justice (ECJ) had already recognised that selection and award are two distinct procedures[11] and governed by different rules,[12] thus acknowledging the basis for excluding experience as an award criterion, the General Court (GC, formerly Court of First Instance) ruled in "Renco" with regard to a public works contract under Council Directive 93/37/EEC, a predecessor of the current Public Sector Directive, that experience is a valid award criterion.[13] In 2008, however, in its famous "Lianakis" judgment,[14] the ECJ confirmed the legalistic approach and ruled out experience as an award criterion. This approach has been endorsed ever since by the ECJ and the GC in various judgments, including

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- "ED v EFSA",[15] "ED v EC"[16] and - "ED v ECJ",[17] all with regard to the Financial Regulation and the Implementing Rules which only apply to institutions of the EU but are based on the public procurement directives,
- "ED v BEI",[18] where neither directives nor Financial Regulation and

[7] Frister, in: Kapellmann/Messerschmidt (Ed.), VOB Teile A und B, VgV, 2010, VOB/A § 16 Prüfung und Wertung der Angebote, para 76.
[8] Frister (n 7), para 77; Kruger, Superiority in experience and skills may distinguish a better tender bid! Critical reflections from Norway on the Lianakis ruling, in: Public Procurement Law Review (PPLR), 2009, 138, 139.
[9] Christiani/Puhland (n 6), para 112 ; Frister (n 7), para 76.
[10] Puhland, in: Pünder/Schellenberg (Ed.), Vergaberecht, 2011, VOB/A § 16 Prüfung und Wertung der Angebote, para 52.
[11] Case 31/87 (n 4), para 15.
[12] Case 31/87 (n 4), para 16.
[13] Case T-4/01, Judgment of the Court of First Instance (Fifth Chamber) of 25 February 2003. Renco SpA v Council of the European Union, para 68.
[14] Case C-532/06, Judgment of the Court (First Chamber) of 24 January 2008. Emm. G. Lianakis AE, Sima Anonymi Techniki Etaireia Meleton kai Epivlepseon and Nikolaos Vlachopoulos v Dimos Alexandroupolis and Others, para 32.
[15] Case T-457/07, Judgment of the General Court (Third Chamber) of 12 December 2012. Evropaiki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v European Food Safety Authority (EFSA), para 104.
[16] Case T-39/08, Judgment of the General Court (Eighth Chamber) of 8 December 2011. Evropaiki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v European Commission, para 23.
[17] T-447/10, Judgment of the General Court (Third Chamber) of 17 October 2012. Evropaiki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v Court of Justice of the European Union, para 40.

Implementing Rules applied but where the GC found that the rules or principles laid down in or derived from the directives can be relied on against an administration when they themselves simply appear to be the specific expression of fundamental rules of the EC Treaty and of general principles of law which are directly applicable to the EU administration, and finally

- "EC v Greece",[19] with regard to the Utilities Directive.

9 Accordingly, there is an established jurisprudence, with respect to all procurement procedures, which rely on the distinction between selection and award stage, that experience may not be used as an award criterion.

10 Although it is clear from the above mentioned judgments and the underlying legalistic theory that the general previous experience of the economic operator may not be used,[20] it may still be possible to use specific experience for the evaluation of the tender in the award stage. This depends on whether the rule is interpreted strictly or flexibly. Under a strict interpretation, experience, regardless of what kind and for which purpose, may never be used in assessing the tender. A flexible or soft interpretation would allow for experience to be included if the criterion is aimed at assessing the quality of the tender and not of the tenderer.[21]

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11 Many authors are in favour of the flexible interpretation. Lee explains why judging the experience of the specific team is relevant in assessing the tender: "Evaluating an entity's ability to perform the contract on the one hand, and comparing the strengths of different teams proposed by tenderers are not the same thing. For example, an awarding authority seeking management consultancy services is likely to find that the global consultancy firms have the capacity and manpower to carry out almost any given management consultancy project. However, it is self-evident that the success of the project will depend not on the capacity of the firm but on the specific resources made available by that firm for the project."[22] Rubach-Larsen writes: "the ECJ has opened up for the lawful choice of bidder-related criteria as award criteria, provided that these are not essentially linked to the selection of qualified tenderers, but instead to the evaluation of the offers, and not principally related to the tenderers' experience, qualification or means, but to the quality of the works, supplies or services they have offered."[23] Hölzl and Friton conclude that admissibility of an award criterion depends on whether it is essentially linked to the evaluation of the tenderers' ability to perform the contract in question or whether it is aimed at identifying the tender which is economically the most advantageous.[24] In the latter case, experience may also be used. A flexible interpretation of the rule, as favoured by the literature, appears very

[18] Case T-461/08, Judgment of the General Court (Fourth Chamber) of 20 September 2011. Evropaiki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v European Investment Bank (BEI), para 142; see also Braun, The right to an effective remedy against procurement award decisions of the European Investment Bank, disclosure of reasons and permitted award criteria - Evropaiki Dynamiki v European Investment Bank (T-461/08), in: Public Procurement Law Review (PPLR), 2012, 23, 26.

[19] Case C-199/07, Judgment of the Court (Fourth Chamber) of 12 November 2009. Commission of the European Communities v Hellenic Republic, para 55; see also Kotsonis, Discriminatory selection criteria and the nature of award criteria - applying the Lianakis ruling in a utilities context: Commission v Greece (C-199/07), in: Public Procurement Law Review (PPLR), 2010, 77, 81.

[20] Beresford-Jones, New cases on selection/award criteria - good news for contracting authorities, 2010, in: http://www.procurementportal.com/blog/blog.aspx?entry=28, 10.01.2013.

[21] Timmermans/Bruyninckx, Selection and award criteria in Belgian procurement law, in: Public Procurement Law Review (PPLR), 2009, 128, 136.

[22] Lee, Implications of the Lianakis decision, in: Public Procurement Law Review (PPLR), 2010, 47, 48.

[23] Rubach-Larsen, Selection and award criteria from a German public procurement law perspective, in: Public Procurement Law Review (PPLR), 2009, 112, 119-120.

[24] Hölzl/Friton (n 5), p. 309.

plausible.

12 The case law of the EU Courts supports or at least does not contravene such an interpretation. In its "Lianakis" judgment the ECJ states that award criteria do not include criteria, which "are essentially linked"[25] or "principally relate"[26] to the evaluation of the tenderers' ability to perform the contract in question. This leaves room for criteria, which also touch the question of the tenderer's ability, but which are foremost concerned with identifying the MEAT. Arrowsmith acknowledges that one way of interpreting the jurisprudence is that "Lianakis does not rule out considering the qualities of the individuals or team who will actually carry out the project, which may be considered to the extent they are relevant to judging the quality of the work to be done under the contract."[27] Or as others state, "(Lianakis) does not deal expressly with whether "comparative experience" can still be regarded as an indicator of economic advantage, compared to "adequate experience".[28]

In addition, further cases as decided by the European Courts support a soft interpretation. In "GAT v ÖSAG",[29] where the award criterion simply referred to previous experience in general, it was judged unlawful. The judgment does not, however, state that experience may never be used as an award criterion. A reference to experience might be possible where it refers "to matters that are relevant to the question of the most advantageous tender."[30]

In "ED v EMCDDA" [31] and "AWWW v EFILWC" [32] the GC acknowledges that a contracting authority may use relevant professional experience for the assessment of other award criteria where they are inseparable elements of those criteria and not additional criteria. This illustrates that experience may be used in the award evaluation, "provided this is done comparatively and in relation to the particular contract being let."[33]

Finally, Petersen interprets the GC judgment in case T-589/08 as flexible since "it seems that the General Court considers the experience and qualifications of the team members offered to perform the specific contract to be admissible considerations for the award decision."[34]

Hence, a flexible interpretation is favoured by the jurisprudence as well.

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[25] Case C-532/06 (n 14), para 30.
[26] Case C-532/06 (n 14), para 31.
[27] Arrowsmith, in: Arrowsmith (Ed.), EU Public Procurement Law: An Introduction, University of Nottingham, 2010, in: https://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/eupublicprocurementlawintroduction.pdf, 05.03.2014, 173-174.
[28] Procurement Lawyers Association, Issues in Evaluating Public Tenders, 2010, in: http://www.procurementlawyers.org/Docs/Evaluation%20Paper.pdf, 10.01.2013, section 3.1.2.
[29] Case C-315/01, Judgment of the Court (Sixth Chamber) of 19 June 2003. Gesellschaft für Abfallentsorgungs-Technik GmbH (GAT) v Österreichische Autobahnen und Schnellstraßen AG (ÖSAG), para 66.
[30] Arrowsmith (n 27), p. 175.
[31] Case T-63/06, Judgment of the General Court (Fifth Chamber) of 9 September 2010. Evropaïki Dynamiki – Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), para 51.
[32] Case T-211/07, Judgment of the Court of First Instance (Fourth Chamber) of 1 July 2008. AWWW GmbH ArbeitsWelt-Working World v European Foundation for the Improvement of Living and Working Conditions, para 61.
[33] Beresford-Jones (n 20).
[34] Petersen, Refining the rules on the distinction between selection and award criteria - Evropaiki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v European Commission (T-589/08), in: Public Procurement Law Review (PPLR), 2011, 246, 248; see Case T-589/08, Judgment of the General Court (Eighth Chamber) of 3 March 2011. Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v European Commission.

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13 Considering all of the above, the simple rule "the experience of a bidder may be used as a selection criterion but not as an award criterion" should be subject to a flexible or soft interpretation. Taking experience into account may be a means of assessing valid award criteria. But it has to be kept in mind that selection and award are two different operations and that "(s)ince a tender necessarily relates to the subject-matter of the contract, it follows that the award criteria (…) must themselves also be linked to the subject-matter of the contract."[35] The rule should therefore be specified as follows: At award stage, experience may only be used for the assessment of lawful award criteria, provided that the consideration of experience is aimed at identifying the MEAT and not essentially linked to the evaluation of the tenderers' ability. Henceforth, whenever this essay refers to "the rule" in the following, it shall be in the above sense.

14 **II. Practical Implications of the Rule**

Contracting authorities face various practical problems when implementing the rule, namely general uncertainties as to the interpretation of the case law and with regard to complex services. Although contracting authorities may consider the experience of the individual or team at the award stage, where the ability of the proposed team member(s) may affect the value of the offer,[36] it might be problematic to ascertain whether the criterion in the case at hand is "essentially linked" or "principally relates" to the suitability of the tenderer[37] or whether it only slightly affects the suitability assessment so as to be an eligible factor in the award phase. This may lead to uncertainty in using experience as a criterion in public procurement in general but is especially of importance in the procurement of high value/complex services,[38] such as planning services,[39] high-tech consultants' services, IT innovative projects, turn key construction projects,[40] facilities management and contracts for professional services.[41] Comba explains the significance of the differences between different kinds of services:

15 > "For example, in the case of a cleaning service there is a clear distinction between the company which organises the service and the employed people who effectively realise it. (…) (I)t can be even irrelevant to identify the people employed for the cleaning activity since they, being poorly specialised workers, can be changed by the company without any damage to the quality of the service. This is contrary to the case of highly specialised technical assistance as the distinction between the company and the team which is giving the service is much more subtle, in the sense that often the company is the team, particularly when it is a small partnership between professionals [or in the extreme case a single professional – note by author]. In the latter case the previous experience and the curriculum vitae of any single member of the team are essential elements to be evaluated for the award of the contract. As a consequence it is reasonable for the contracting authority to establish the experience of any single person who provides the service in order to award the contract and to forbid any change in the team, which was awarded the contract without a prior consent of the contracting authority. (…) In this case, it is

[35] Case C-513/99, Judgment of the Court of 17 September 2002. Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin kaupunki and HKL-Bussiliikenne, para. 59.
[36] Procurement Lawyers Association (n 28), section 3.1.2.
[37] Hölzl/Friton (n 5), p. 310.
[38] Lee (n 31), p. 47.
[39] Neun/Otting, Die Entwicklung des europäischen Vergaberechts in den Jahren 2011/2012, in: Europäische Zeitschrift für Wirtschaftsrecht (EuZW), 2012, 566, 567.
[40] Kruger (n 8), p. 140.
[41] Arrowsmith (n 27), p. 173.

possible to say that the bidder is the offer". [42]

16 Thus in the fields of complex services, it is understandable that contracting authorities have an on-going desire to evaluate experience when awarding the contract.

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17 Having recognised the wish to use experience as a means of evaluation, there needs to be practical advice for the contracting authorities. Contracting authorities must avoid "ability focussed, backward looking award criteria" such as experience, manpower and ability to complete and should only use experience to support proposals at award stage.[43] There should be a very explicit link between the award criteria and the evaluation of the experience, which is used in the assessment of those criteria, and it must be made clear that the evaluation of the experience is not linked to the assessment of the suitability of the tenderer.[44] The Office of Government Commerce (OGC) explicitly warns not to take experience "as the sole or primary basis for their assessment of whether or not a particular tender is the most economically advantageous."[45] Accordingly, Arrowsmith advises contracting authorities not to use experience as award criterion in the sense of "'I have been doing this for 20 years' or 'I've done this 10 times before',"[46] but "to state that quality (and/or specific aspects thereof) is/are the award criterion, and to indicate that experience is one consideration to be taken into account in judging that quality."[47]

Beresford-Jones, drawing on the decisions against "ED", mentioned above, goes as far as suggesting that it "is possible to use the same information at both stages, provided it is used in a way appropriate to that particular stage."[48] The author does not agree with Beresford-Jones as this approach bears the high risk of confusing selection and award. The two phases have to be considered separately and the distinction has always been endorsed by the European Courts. Confusion of selection and award criteria will in general entail the consequence of having to restart the procurement process at the point before submission of the bids or to call off the procurement in its entirety.[49] In the view of the author, the advice of the OGC and Arrowsmith best reflect the case law of the European Courts. Contracting authorities should therefore not rely on experience as a sole basis and if using experience, indicate that it will be used as one consideration to be taken into account in judging a valid award criterion such as quality.

18 Throughout the EU, contracting authorities already seem to have adopted a flexible

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[42] Comba, Selection and award criteria in Italian public procurement law, in: Public Procurement Law Review (PPLR), 2009, 122, 125.
[43] Curran, What does the Lianakis ruling require in practice in terms of distinguishing between selection and award criteria in procurement procedures?, Applying EU Procurement Rules to Major Projects - White Paper Conference, Brussels, 2010, in: http://www.whitepaperdocuments.co.uk/index.php?option=com_docman&task=doc_download&gid=1235, 10.01.2013.
[44] Rubach-Larsen (n 23), p. 120.
[45] Office of Government Commerce (OGC), Requirement to distinguish between "selection" and "award" stages of a public procurement, and to give suppliers complete information about the criteria used in both stages, Action Note 04/09, 2009, in: http://webarchive.nationalarchives.gov.uk/20110822131357/http:/www.ogc.gov.uk/documents/PPN0409.pdf, para 13.
[46] PLC Public Sector, PLA Question Time: experience at award stage, 2010, in: http://publicsector.practicallaw.com/blog/publicsector/plc/?p=418, 10.01.2013.
[47] Arrowsmith (n 27), p. 175.
[48] Beresford-Jones (n 18).
[49] Diemon-Wies/Graiche, Vergabefremde Aspekte – Handhabung bei der Ausschreibung gem. § 97IV GWB, in: Neue Zeitschrift für Baurecht und Vergaberecht (NZBau), 2009, 409, 410.

interpretation of the rule and to follow a pragmatic approach in dealing with the criterion "experience".[50] In general, contracting authorities indeed encounter the problem of experience as an award criterion mostly in cases concerning services of a more complex nature.[51] National courts seem to have adopted a soft interpretation of the rule,[52] allowing the contracting authorities to take into account experience where it is linked to the subject-matter of the contract[53] and has not been established as a selection criterion.[54] In the overall practice, contracting authorities and national courts seem to pragmatically deal with the rule, interpreting it flexibly.

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19 Although the rule has been applied in the case where neither directives nor Financial Regulations and Implementing Rules bound the European Investment Bank, an interinstitutional body of the EU,[55] it is doubtful whether the rule has to be applied by contracting authorities in all cases regardless whether covered by the directives or not. Brown convincingly argues that the rule does not need to be applied in cases not covered by the directives because the distinction between selection and award criteria, although highly important within the system of the procurement directives, "is not, however, essential for preserving equal treatment or transparency. As long as the authority is even-handed and open about its intention to apply "selection criteria" (such as the bidder's experience and manpower) at the award stage, then there should be no offence against the Treaty principles of equal treatment and transparency."[56] The author agrees with this view and stresses that this finding can be of particular importance since several services, which under certain circumstances may belong to the category of complex services, are either entirely excluded from the scope of the Public Procurement Directive, such as arbitration and conciliation services, Art. 16 lit. c, or are only subject to the rules on technical specifications (Art. 23) and certain notification obligations (Art. 35 para 4), such as legal services or other services, Art. 21 in conjunction with Annex II B. It can therefore be concluded that contracting authorities are even more flexible in dealing with the procurement of complex services that is not covered by the directive in the way that experience on its own may be used as an award criterion, provided equal treatment and transparency are ensured.

20 ## C. Evaluation of the Rule

I. Application of the Rule in the Lianakis Case

The rule as described above in section II.1 has first been explicitly applied by the ECJ in its famous "Lianakis" judgment.[57] A Greek national court referred a question to the ECJ under the Art. 276 TFEU proceedings concerning the disclosure of subcriteria in applying the contract award criteria. The contract to be awarded was a service contract for a project involving the cadastre, the town plan and implementing measures for an area of Greece, falling within the scope of the Services Directive 92/50/EEC, a predecessor to the current Public Sector Directive with the same wording as regards

[50] It is noted that the Public Procurement Law Review dedicated almost an entire issue (4/2009) as to what implications the "Lianakis" judgment has in respect to administrative practice and jurisprudence in the various Member States. The author will therefore only briefly comment on the situations in the Member States.
[51] Treumer, The distinction between selection and award criteria in EC public procurement law: the Danish approach, in: Public Procurement Law Review (PPLR), 2009, 146, 153.
[52] Timmermans/Bruyninckx (n 21), p. 136.
[53] Frister (n 7), para 78; Hölzl/Friton (n 5), p. 309.
[54] OLG München, decision of February 10, 2011, file no. Verg 24/10; OLG Düsseldorf, decision of May 5, 2008, file no. Verg 5/08, OLG Düsseldorf, decision of April 28, 2008, file no. Verg 1/08.
[55] Case T-461/08 (n 18), para 142.
[56] Brown, EU primary law requirements in practice: advertising, procedures and remedies for public contracts outside the procurement directives, in: Public Procurement Law Review (PPLR), 2010, 169, 178.
[57] C-532/06 (n 14).

the rules on criteria for the award of contracts. The award criteria included:

i) the proven experience of the expert on projects carried out over the last 3 years;

ii) the firm's man power and equipment; and

iii) the ability to complete the project by the deadline, together with the firm's commitments and professional potential.[58]

As the Commission doubted the legality of some of the criteria in its observations, the ECJ first examined the criteria and only then answered the referred question about the disclosure of subcriteria. It is noted that, although also highly important in practice and ever since well-established case law, the latter answer does not fall within the scope of this essay.[59]

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21 As to the legality of the award criteria in question, the ECJ found that:

> "(31) (…) the criteria selected as 'award criteria' by the contracting authority relate principally to the experience, qualifications and means of ensuring proper performance of the contract in question. Those are criteria which concern the tenderers' suitability to perform the contract and which therefore do not have the status of 'award criteria' pursuant to Article 36(1) of Directive 92/50.
>
> (32) Consequently, it must be held that, in a tendering procedure, a contracting authority is precluded by Articles 23(1), 32 and 36(1) of Directive 92/50 from taking into account as 'award criteria' rather than as 'qualitative selection criteria' the tenderers' experience, manpower and equipment, or their ability to perform the contract by the anticipated deadline."[60]

22 Implementing the ECJ's interpretation, the Greek Council of State later annulled the administrative acts in question.[61]

23 For many, the ECJ's ruling came as a surprise as the reference question did not relate to the legality of the award criteria and the case did not attract much attention: neither any national government made observations nor was there an Advocate General's Opinion. Only the Commission raised the point about the legality of the award criteria. But since there was no oral hearing, the defendant or any intervener did not have the opportunity to argue against this new point.[62] Following up on the initial surprise, many authors in academic literature criticised the judgment as being inconsistent with former case law, creating legal uncertainty and being incoherent. The author will henceforth evaluate this critique as it specifically concerns the "Lianakis" judgment. An evaluation

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[58] For a very sound summary of the facts see Arrowsmith (n 27), p. 173; and Kotsonis, The nature of award criteria and the subsequent stipulation of weightings and sub-criteria: Lianakis v Dimos Alexandroupolis (C-532/06), in: Public Procurement Law Review (PPLR), 2008, 128, 129.

[59] The ECJ ruled that „read in the light of the principle of equal treatment of economic operators and the ensuing obligation of transparency, Article 36(2) of Directive 92/50 precludes the contracting authority in a tendering procedure from stipulating at a later date the weighting factors and sub-criteria to be applied to the award criteria referred to in the contract documents or contract notice." – C-532/06 (n 14), para 45.

[60] C-532/06 (n 14), paras 31-32; for a very sound paraphrase of the essential point see Andersson, Selection and award criteria in Swedish public procurement law, in: Public Procurement Law Review (PPLR), 2009, 189.

[61] For a detailed description of the later proceedings in the Greek Council of State see Georgopoulos, Greek jurisprudence: Lianakis v Dimos Alexandroupolis, No.1794/2008 of the Council of State (Simvoulion tis Epikrateias), in: Public Procurement Law Review (PPLR), 2009, 98, 101.

[62] Coppel, Tenderer selection and contract award criteria, 2008, in: http://www.11kbw.com/articles/docs/ProcurementContractawardcriteriaJasonCoppel.pdf, 10.01.2013.

of the rule in general will follow in the next section.

24 Arrowsmith[63] and Frister[64] mainly criticise the apparent inconsistency with the previous case law, such as "Renco",[65] where the court accepted without comment the experience of the undertaking as an award criterion and "Evans Medical",[66] where the Court did not demand mutual exclusivity of selection and award criteria and allowed a tenderer-focused criterion (the ability to provide reliable and continuous supplies) to be taken into account for the award.

Andersson fears legal uncertainty arising from the "Lianakis" judgment, which in her view is unclear and thus provoked diverging judgments from national courts.[67]

According to Kotsonis the ECJ is incoherent in ruling out the "ability to complete the project by the anticipated deadline" as an award criterion, although there is no, or not an essential, conceptual difference to the criterion of "delivery date, delivery period or period of completion", both aimed to determine and evaluate the bidders' ability to perform the contract within a specific timeframe, the latter being explicitly allowed as award criterion in Art. 53 para 1 lit a.[68]

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25 These points of critique can be countered as follows:

Kotsonis' argument might be valid as regards the ECJ's ruling on the third award criterion[69] but his critique does not cover the issue of assessing experience and will thus not be treated in this essay.

As to the inconsistency argument raised by Arrowsmith and Frister, one needs to be reminded that first, the European Courts are allowed to change or adapt their jurisprudence and, secondly, those changes are often welcome as they reflect the modern, evolved perception of a particular legal issue. Especially in fields of law involving the internal market, as it is the case for public procurement law, one should not be surprised by gradual changes in jurisprudence towards a stricter interpretation of the law. As the internal market approaches completion and competition within it increases, the less leeway needs to be given to Member States implementing the rules on EU public procurement.

As regards the reference to the "Evans Medical"[70] judgment, it needs to be noted that in order to maintain a clear distinction between selection and award phase, it is not absolutely necessary that selection and award criteria are mutually exclusive and as Timmermans' and Bruyninckx report, the ECJ has so far not set out that "the European procurement directives necessarily imply that selection criteria and award criteria are mutually exclusive."[71] As described in in section II.1 of this essay, experience, normally allocated to selection, may be used in the award phase, where it is used to evaluate the bid and not the bidder. Thus a distinction between selection and award phases

[63] Arrowsmith (n 27), p. 174.
[64] Frister (n 7), para 77.
[65] Case T-4/01 (n 11).
[66] Case C-324/93, Judgment of the Court of 28 March 1995. The Queen v Secretary of State for Home Department, ex parte Evans Medical Ltd and Macfarlan Smith Ltd.
[67] Andersson (n 60), pp. 190-191.
[68] Kotsonis (n 58), p. 132.
[69] Although, Arrowsmith argues that the judgment does not even preclude the tenderer's abilities to be considered „to the extent that these are actually relevant to the quality of the work that will be done under the contract i.e. to determining which offer is the most economically advantageous" – Arrowsmith (n 25), p. 174.
[70] Case C-324/93 (n 66).
[71] Timmermans/Bruyninckx (n 21), p. 137.

does not necessarily entail mutual exclusivity between the criteria.

26 Lastly, regarding the allegation of uncertainty expressed by Andersson, two things have to be noted: First, due to the nature of a preliminary reference ruling, Art. 267 TFEU, the judgments of the ECJ are more or less in the abstract. The procedure is meant to ensure the consistent interpretation of EU law throughout the Union. It is not the ECJ's function to solve a specific case. As the interpretation of the law by the ECJ must serve as guidance for as many cases as possible, the ECJ's ruling will tend more to the abstract, sometimes leading to slight ambiguities. Second, it is for the competent national authorities to give practical guidance to contracting authorities and many have already done so.[72] Thus uncertainties can sufficiently be dealt with on the national level and the ECJ should not hastily be blamed for divergent judgments of national courts.

In conclusion, the points of critique as regards the use of experience are not convincing and it must be held that the ECJ's judgment in "Lianakis" was right.

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27 II. Evaluation of the Rule and Reform Proposals

For the purpose of the evaluation of the rule in general, the essay will turn at first to the arguments against it presented in academic literature and then study arguments in support both from academic literature and own thought before finally considering solutions to the problem. As a preliminary remark, arguments that follow from condemning the rule as a "broad-brush approach"[73] are already taken into account by interpreting the rule flexibly, as it is done in this essay. Also, comparisons to the United Nations Commission on International Trade Law (UNICTRAL) model[74] are not considered as public procurement law in the EU is tightly interwoven with the rules on the internal market, a peculiar and unique feature of the EU, which as such is not comparable to the UNCITRAL model.

28 The remaining arguments against the rule can be arranged into two strands, the first being concerned with the effects on quality, the second with the effect on price.

It is argued that experience may be relevant to determining the quality of a service and thus often is the only way to compare offers. Arrowsmith states: " (T)he qualifications and knowledge from past experience of the personnel involved in delivering professional services may affect not just their ability to deliver the services to the minimum standard required under the contract but the quality of the services they can offer relative to other firms."[75] Andersson also relies on the link between experience and the comparative assessment of the offer's quality: "(M)easuring the quality of a service or works contracts is naturally carried out through comparisons with the manner in which similar services or works have been carried out."[76] The European Commission in its Green Paper also acknowledges that experience could provide useful pointers to the bidder's future work.[77]

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[72] See for instance OGC (n 45).
[73] Kotsonis (n 58), p. 132.
[74] United Nations Commission on International Trade, Model Law on Public Procurement, 2011, in: http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement-2011/2011-Model-Law-on-Public-Procurement-e.pdf, 05.03.2014.
[75] Arrowsmith (n 27), p. 172.
[76] Andersson (n 60), p. 191.
[77] European Commission, 'Green Paper on the modernisation of EU public procurement policy - Towards a more efficient European Procurement Market', COM(2011) 15 Celex No. 511DC0015, in: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0015:FIN:EN:PDF, 05.03.2014, p. 18.

Arrowsmith pursues this idea even further and fears that the rule might result in higher prices, for instance when pricing is by the hour and the economic operator lacks experience thus taking more time to complete the service than an experienced bidder would have.[78] Consequently, had the contracting authority been able to consider experience at the award stage, it would have received more value for money. Likewise, this could be argued for cost arising after the completion of the work for defects and shortcomings due to a lower level of experience. So, the first argument relates to possible negative repercussions on quality, the second to higher prices or less "value for money" as a consequence.

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29 In defence of the rule, at first, the above arguments have to be refuted, then, arguments in favour will be raised.

Opponents of the rule argue that the quality of bids cannot sufficiently be compared if experience of the bidders may not be taken into account at award stage. However, it must be kept in mind that a comparison in the first place is only "appropriate where there is a genuine economic advantage to the contracting authority from employing a tenderer with more experience than the minimum experience requirements the contracting authority set for prequalification and selection."[79] In many cases, a higher level will not necessarily amount to an economic advantage. Furthermore, the argument contains a major flaw: experience by definition is oriented towards the past. In comparing the bidder's experience, contracting authorities evaluate the bidder's past performance but not the proposed future project. The author does not question that there may be a correlation between past performance and future quality. But it is not known how strong this correlation is and to what extends it holds in different sectors and different type of contracts. In the author's view, the general assumption of a correlation does not justify the taking into account of past experience to the detriment of new entrants or smaller or less experienced economic operators.

30 The same is true for the argument relating to higher costs. A lower level of experience will not automatically result in working slowly. The author doubts whether there even is a significant correlation between a lower level of experience and a longer completion time because new entrants may have developed and use new time-saving methods, which the incumbent does not use. After all, the problem of higher cost can be circumvented in most cases simply by not paying the economic operator by the hour but rather agreeing on a lump sum for the desired result. But more importantly, even if the tender documents do not provide for a fixed price, the contracting authority is obliged to estimate the value of the entire contract, Art. 8 para 8 lit b Public Sector Directive. Thus, already at this early stage of the process, it needs to take into account of the different speeds at which tenderers are likely to work. Therefore the arguments against the rule are not convincing.

31 The arguments in support of the rule draw upon the distinction of selection and award criteria, equal treatment, anti-discrimination and the internal market.

Once again, the rule is not only expression of the principle of clear distinction between selection and award phases, it is also a confirmation of that principle embodied in the public procurement directives.[80] According to the European Commission, this distinction ultimately helps to ensure equal treatment since "(a)llowing the inclusion of bidder-

[78] Arrowsmith (n 27), p. 172.
[79] Procurement Lawyers Association (n 28), section 3.1.2.
[80] Hölzl/Friton (n 5), p. 310.

related criteria such as experience and qualification as contract award criteria could undermine the comparability of the factors to be taken into account." [81] Keeping selection and award criteria separate is thus a means of guaranteeing fairness and objectivity.[82]

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32 Although the principle of transparency is not infringed as long as all criteria and their weightings are disclosed at the right time, the possibility of including experience in the range of stand-alone award criteria within the evaluation of the MEAT entails the risk of discriminations between the economic operators.[83] The OGC explains: "This is because the use of selection criteria such as experience at award stage may perpetuate the advantage of an incumbent or previously used supplier, to the detriment of other qualified candidates."[84] And even those in favour of a more flexible approach admit: "Excessive flexibility always poses the risk of establishing a 'favoured supplier' to the detriment of newcomers and, with that, raising market barriers."[85] The author considers that especially smaller suppliers would suffer from the effect. As a result smaller firms may hardly ever be awarded a contract in a public procurement and consequently be deprived of the fair opportunity to sustain and grow in a market. Michael Bowsher QC refuted the suggestion, "that a bar to market entry existed for smaller suppliers, claiming that it was up to smaller suppliers to highlight how experience on smaller projects was transferable to larger ones."[86] The author does not agree with this solution as it puts an unjustified high burden on smaller firms. Having to demonstrate that experience is transferable may be costly. Again, this works to the disadvantage of small firms whose budget is already affected more, relatively in comparison with a large firm, when participating in a tendering procedure.

33 Moreover, one needs to be reminded that one of the ultimate goal of the EU public procurement directives is "to guarantee the opening-up of public procurement to competition," Recital 2 Public Procurement Directive/Recital 9 Utilities Directive. And as Kruger explains: "Fair competition means that the contracting authority may not stick with "old relations" in the private market. This means a fair opportunity for fresh candidates to prove their ability and capacity to meet the contract commitments without risk of prejudice."[87] Thus, if experience were allowed to be used as an award criterion, new entrance to the market would be hindered, leading to a substantial weakening of competition. And since competition is the essence of the internal market, this would eventually entail negative repercussions on the development it and consequently the EU convergence process.

Therefore, the distinction of selection and award criteria, the principles of equal treatment and anti-discrimination and ultimately the prerogative of the internal market provide for the best arguments in favour of the rule. The rule must thus be upheld.

34 Nevertheless, the author also recognises the desire of contracting authorities to include experience at the award stage, although in some cases, it may suffice to define higher and more specific selection criteria. For instance in a complex construction project, which bears concrete risks for neighbouring buildings, the selection could be

[81] EC Green Paper (n 77), p. 17.
[82] EC Green Paper (n 77), p. 17.
[83] EC Green Paper (n 77), p. 18.
[84] OGC (n 45), para 12.
[85] Bundesregierung, Comments of the German Federal Government on the European Commission green paper on the modernisation of public procurement policy, 2011, in: http://www.bmwi.de/BMWi/Redaktion/PDF/E/stellungnahme-der-bundesregierung-zum-gruenbuch-englisch,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf, 05.03.2014, section III.7.
[86] PLC Public Sector (n 46).
[87] Kruger (n 8), p. 140.

conditioned upon the proof that the bidder successfully accomplished comparable projects in the past.[88] It has already been clarified in section II.1 that the current state of the law allows experience to be considered at award stage provided that it is related to the quality of the offer and it "is not precluded by Lianakis and subsequent CJEU case law, which concerned cases in which the assessment was not on the facts directed at assessing the quality of the offer at all."[89] Thus, as explained in section II.2, the contracting authority must demonstrate a strong link between experience and the proposal.

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35 Most preferably, however, is a clarifying change in the text of the directives as it is the most effective way of remedying the apparent uncertainties of contracting authorities and to appease the critics in academic literature.

36 The author does not approve of the solution found under the 2011 UNCITRAL Model Law on Procurement. It allows the use of experience for the award of contracts in some procedures, Art. 11 para 2 lit c, but in that respect abrogates the distinction between selection and award phase (experience is also a valid selection criterion, Art. 9 para 2 lit a) and fails to link the use to the subject-matter of the contract or restrict it to the evaluation of the specific team that will carry out the obligations under the contract to be awarded.

37 Instead the author favours the approach the European Commission has taken. The European Commission in its proposals for a new set of directives on public procurement explicitly recognises the desire of contracting authorities in the field of service contracts and design works to use "experience of the staff assigned to performing the contract in question, as this may affect the quality of contract performance and, as a result, the economic value of the tender."[90] As it was felt that "because of the extent of confusion and the importance of the issue, some clarification along these lines,"[91] is needed, the Commission included in all three proposals clarifying recitals and articles, thereby removing existing "legal uncertainty linked to the consideration of experience and CVs at the award stage by allowing it where the quality of the staff employed is relevant to the performance of the contract and influence the economic value and quality."[92]

38 The proposal for the law that follows from these considerations is as follows:

> "For service contracts and contracts involving the design of works, the organisation, qualification and experience of the staff assigned to performing the contract in question may be taken into consideration, with

[88] Frister (n 7), para 79.
[89] Arrowsmith, Modernising the EU's Public Procurement Regime: a Blueprint for Real Simplicity and Flexibility, Public Procurement Law Review (PPLR), 2012, 71, 80.
[90] European Commission, Proposal for a directive of the European Parliament and of the Council on public procurement, COM(2011) 896 final 2011/0438 (COD), 2011, in: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0896:FIN:EN:PDF, 03.05.2014, "EC Classic Directive Proposal", Recital 41 = European Commission, Proposal for a directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors, COM(2011) 895 final 2011/0439 (COD), 2011, in: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0895:FIN:EN:PDF, 05.03.2014, "EC Utilities Directive Proposal", Recital 48; and similar in wording: European Commission, 'Proposal for a directive of the European Parliament and of the Council on the award of concession contracts', COM(2011) 897 final 2011/0437 (COD), 2011, in: http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/COM2011_897_en.pdf, 05.03.2014, "EC Concession Directive Proposal", Recital 29.
[91] Arrowsmith (n 89), p. 80.
[92] Treumer, Regulation of contract changes leading to a duty to retender the contract: the European Commission's proposals of December 2011, Public Procurement Law Review (PPLR), 2012, 153, 156.

> the consequence that, following the award of the contract, such staff may only be replaced with the consent of the contracting entity which must verify that replacements ensure equivalent organisation and quality"[93]

39 As a consequence of the restriction to only consider experience of the staff assigned to performing the contract, it follows that the use of experience as award criteria must be essentially linked to the subject-matter of the contract itself.

The Commission's proposals, encouraged by the Member States[94] and highly welcomed in academic literature[95] are currently being debated in the European Parliament's Committee on the Internal Market and Consumer Protection (IMCO) and the European Council and therefore, of course, still subject to changes.

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40 D. Conclusion

The rule "experience may not be used as an award criterion" originally derives from the distinction between selection and award phase, has been the subject of various cases in the European Courts and has ever since been debated vividly in the academic literature. However, in order to reflect its more nuanced meaning, it should be reformulated to: "At award stage, experience may only be used for the assessment of lawful award criteria, provided that the consideration of experience is aimed at identifying the MEAT and not essentially linked to the evaluation of the tenderers' ability." Despite some authors arguing the opposite, such a flexible or soft interpretation is not ruled out by the ECJ's judgment in Lianakis.

41 As contracting authorities would like to consider experience at the award stage, especially when dealing with complex service contracts, they must be advised not to rely on experience as a sole basis and if using experience, to indicate that it will be used as one consideration to be taken into account in judging a valid award criterion such as quality. However, it must be noted that such extensive care does not need to be taken for public contracts that are neither covered by the directives nor by the Financial Regulation.

42 Independently of a strict or flexible interpretation, some authors call for an abolition of the rule as a whole because they fear adverse effects on price and quality if contracting authorities may not asses previous experience as such in the award phase. However, the distinction of selection and award criteria as well as the principles of equal treatment and anti-discrimination and ultimately the prerogative of the internal market provide for the best arguments in favour of the rule.

43 In its current proposals for a reform of the procurement directives, the European Commission recognises the desire of contracting authorities in the field of service contracts and design works to consider experience of the staff assigned to performing the contract and therefore allows for its assessment in the award phase. Thus, bold assumptions, written shortly after the judgment in the "Lianakis" case, that impulses from the European legislator were unlikely but clarification was shortly to come from the ECJ,[96] may have proven to be wrong in the end. After all, the European legislator, although maybe acting slowly, proves to be very active in the field of public

[93] EC Classic Directive Proposal (n 90), Art. 66 para 2 subpara 2 lit b = EC Utilities Directive Proposal (n 90), Art. 76 para 2 subpara 2 lit c; and similar in wording: EC Concession Directive Proposal (n 90), Art. 39 para 4 lit b.
[94] Bundesregierung (n 85), section III.7.
[95] Arrowsmith (n 89), p. 80; Neun/Otting (n 39), p. 567; Treumer (n 92), p. 156.
[96] Treumer, The distinction between selection and award criteria in EC public procurement law - a rule without exception?, in: Public Procurement Law Review (PPLR), 2009, 103, 111.

procurement, taking the matters in his own hands.

Zitierempfehlung: Mark Orthmann, HFR 2014, S. 1 ff.