

# *Basic Principles of the Public Procurement Procedure in France and the Influence of the EU Law*

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The paper deals with the public procurement procedure in France under the Public Procurement Code. It deals with the basic principles of the procedure, such as equal access, equal treatment and transparency as well as with distinction between the contracting authority and the contracting entity in public procurement. It also presents the influence of the EU legislation on the French public procurement law and especially the complexity of the public procurement procedure. Unlawful practices are presented in the final part of the paper with the emphasis on the irregularities that may be ascribed either to contracting authorities or to economic operators or to both.

*Key words:* public contract, public procurement procedure, EU law, Public Procurement Code – France

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## 1. Introduction – Competition and Access to Public Procurement

According to the definition given by the Economic Observatory for Public Procurement (a statutory body answerable to the Minister for the Economy), »public procurement is a generic term relating to all contracts entered into by public persons to meet their needs«. This expression has been very frequently used over the last ten years to cover:

- public contracts subject to the public procurement code,
- contracts not covered by this code, but by an ordinance of June 6, 2005,
- delegations of public services,
- partnership contracts.

The economic importance of public procurement is significant because it represents approximately 9% of the French GDP. This paper will devote most of remarks to the »public purchasing« that is to say to public procurement contracts. Those identified by the Observatory in 2008 amounted to €68.5 billion (35.8 for State contracts and 32.7 for those awarded by local authorities).

According to Article 1/I, paragraph 1, of the Public Procurement Code (PPC),<sup>1</sup> »public contracts are contracts for pecuniary interest between the contracting authorities defined in Article 2 and the economic operators, public and private, to meet their requirements for works, supplies or services«. A law called »MURCEF« (Emergency Reform Measures of Economic and Financial nature) of 11 December 2001 stipulates that »contracts awarded under the Public Procurement Code are in the nature of administrative contracts« (Art. 2). Their litigation is therefore within the jurisdiction of the Administrative Court.

While the conclusion of a public service concession was traditionally dominated by the freedom of the parties due to particularly marked *intuitu*

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<sup>1</sup> The first PPC, which brought together the rules applicable to this subject matter, dates back to a decree of July 17, 1964. The Code in force today is that deriving from Decree n° 2006-975 of August 1, 2005. By tradition, the Code has a regulatory nature and is therefore drafted by the Prime Minister. The lawmaker only plays a small role in setting down of the rules applicable to public purchasing (whereas he has a wide jurisdiction with respect to public services delegations). The PPC is available online on [www.legifrance.gouv.fr](http://www.legifrance.gouv.fr) and is published by the *Éditions des Journaux officiels* (without commentaries) and by the *Éditions Dalloz* (with commentaries under the supervision of A. Ménéménis).

*personae*, the call for tenders to appoint the firm with which the contract will be concluded is an ancient concern of the French law, specifically with respect to the tendering procedure. It was present under the *Ancien Régime* (before the Revolution of 1789) and has consistently been reaffirmed subsequently. Thus, a Royal Ordinance of December 4, 1836 provided that »all contracts on behalf of the State will be made with competition and advertising«. This rule was extended to municipalities by an Ordinance of November 14, 1837.

The competition between businesses is based on a threefold assumption:

- It is the most economically efficient process to provide public bodies with the best services at the best price;
- It guarantees equal access for businesses to public purchasing and protects free enterprise and the effectiveness of competition;
- The transparency of proceedings is a good way to prevent collusion between buyers and suppliers and to combat corruption.

Based on the same premise, the action of the European Union (EU) has progressively extended<sup>2</sup> the principles of advertising and equal access at the Community level in view of the creation of the European internal market. Transposed into the French law and incorporated into the PPC, they have profoundly changed the French law as well as the practices of administrations and businesses involved. It follows that in describing the French law, the European framework in this area is also described.

It is impossible to describe in detail or even summarize a subtle system to which entire books are devoted.<sup>3</sup> Therefore, this paper will merely brush the broad outlines. Although the principles are simple (Part 2), their implementation is complex (Part 3) and does not prevent all deviant practices (Part 4).

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<sup>2</sup> Specifically to public service delegations, which has strongly reduced the historical difference just mentioned between the latter and public contracts without completely suppressing it.

<sup>3</sup> Although they do not amount to a complete bibliography, the books the reader should consider are Braconnier, 2007; Richer, 2010; Linditch, 2009 and Févrot, 2010.

## 2. Simple Principles

### 2.1. Equal Access, Equal Treatment and Transparency

Entrepreneurial freedom prohibits public authorities from organizing competition: except in regulated industries, businesses are created freely and decide alone of their purpose. However, this freedom imposes on public authorities to respect competition when acquiring goods or services from businesses.

Article 1/II, paragraph 1 of the PPC stipulates more particularly that »public procurement and framework agreements<sup>4</sup> subject to this code observe the principles of freedom of access to public procurement, equal treatment of candidates and transparency of procedures. These principles ensure the effectiveness of public procurement and proper use of public funds ...«

Public authorities considering a purchase are required to inform the public. All the businesses wishing to provide the service requested and fulfilling the conditions laid out should be able to try their luck freely and be assured that the same criteria, known to them and applied without unlawful discrimination, will preside over the selection of the business that will be awarded the contract.

These principles have constitutional standing. The Constitutional Council makes them derive from Articles 6 (equality) and 14 (right of citizens with respect to public contribution) of the Declaration of Human Rights and Citizens of 26 August 1789 (spec. Decision No. 2003-473 DC June 26, 2003). This anchoring of the principles at the top of the hierarchy of the French legal standards imposes compliance by legislative and regulatory authorities and ensures an effective protection by all French courts.

Nevertheless, they must be balanced with other constitutional principles: public bodies' freedom to contract and local authorities' freedom of administration. Public bodies remain free to determine the needs they want met by contract and to define the purpose and main provisions of the

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<sup>4</sup> Framework agreements are defined by Art 1/I, 2<sup>nd</sup> par. as »contracts concluded between one of the contracting authorities defined by Article 2 and economic operators, whether public or private, the object of which is to establish the terms and conditions governing the contracts to be awarded over a given period of time, specifically with respect to prices and, as the case made be, of the quantities considered«.

contract.<sup>5</sup> In many cases, they have some latitude to choose their partners and to negotiate with them. The implementation of the basic principles of public contracts rests more on the rules of procedure than on substantive rules.

## 2.2. Contracting Authority and Contracting Entity

In accordance with EU directives that set them apart, the PPC has a first part that contains »provisions applicable to contracting authorities« and a second, which deals with »provisions for contracting entities«. However, the general principles are common to both.

Both expressions include on the one hand the State and its public institutions other than those of industrial and commercial nature, and on the other local authorities and local public institutions (including, this time, those of industrial and commercial nature). This derives from Articles 2 and 134 PPC, which thus define the institutional scope of the Code (i.e., the public law bodies to whose contracts it applies).

When do such public bodies cease to be called contracting authorities to become contracting entities? The change in classification is not based on their legal status but on the material activity they carry out; this is »one of the activities of network operators listed in Article 135«. This provision contains a long list of networks in which we find, for example:

- Direct operation or making available to an operator of distribution networks (gas, electricity, heat, water and wastewater);
- Operation in a geographical area of extraction sites for fossil fuels (oil, gas, coal) and of transport terminals (airport, ports, etc.);
- Operation or making available to an operator of public transport networks (rail, buses ...) etc.

We see that areas of considerable economic and social importance are concerned. The distinction between contracting authority and contracting entity was not familiar to the French law:<sup>6</sup> it derives from the transposition of EU directives (especially Directive 2004/17). It is based on tech-

<sup>5</sup> It will be observed that the provisions quoted often state that the contracting authority decides »freely« about this or that topic.

<sup>6</sup> The network activities concerned were for the greater part monopolistic public services. Before their opening to competition, the concept of contracting entity would have been useless.

nical and economic characteristics that are specific to network activities and induces specific rules for the play of fundamental principles of public procurement.

### 2.3. The Procedure

Greatly varied (see below Section 2.3.), the procedures for concluding public procurement contracts are based on a common model, the one of the call for tender, which puts into practice the principles outlined in Section 2.1.

The contracting authority / entity defines «precisely» (Art. 5 PPC) the nature and extent of its needs before any invitation to tender. This seems an obvious requirement of good management, but it is also essential to the fairness of the procedure: the competition would indeed be distorted if the local authority waited to have chosen a company to determine the exact composition of the services it intended to entrust to it.

It also determines the main features of the service, particularly the technical specifications «that cannot entail the creation of unjustified obstacles to the opening up of public contracts to competition» (Art. 6). Social and environmental clauses may also be provided.

This information is subject to a public notice calling for competition, the dissemination of which (local, national or EU level) depends on the size of the market (Article 57). Businesses that are interested submit their tenders in the form of a commitment document. They must provide all the documents requested of them; public administration cannot vary its requirements on this point according to the businesses.

On the appointed day, the «envelopes» (the businesses' tenders) are open and applications are discussed during a closed session<sup>7</sup> at which candidates are not admitted, so as to protect agents from any interference from them (Art. 58).

The contracting authority shall award the contract »to the candidate who submitted the most economically advantageous tender« (Art. 53). It will base its decision either on a »plurality of non-discriminatory criteria related to the object of the contract« or »given the object of the contract,

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<sup>7</sup> For local authorities, a tender committee (regulated in minute detail by Articles 22 and 23 of the PPC) has jurisdiction. It was abolished for the State and public health institutions by a decree of December 19, 2008.

on the single criterion of which is the best tenderer.«<sup>8</sup> It is therefore not always required to choose the »lowest tenderer« (the one who offers the lowest price). Abnormally low tenders can be rejected (Art. 55).

This system aims at »performance«, a word devoid of legal meaning but which describes an economic objective: that a good operation of the procedure makes the most efficient businesses emerge, to the best satisfaction of the public interest. It combines the powers that public administration needs to fulfil, its mission with the freedom of enterprise and equal treatment of candidates, ensuring the transparency of the procedure and the dose of secrecy that is necessary for its impartiality.

### 3. A Very Complex System

On the foundation of these simple principles, the EU and French legislators have built a nuanced system that gives the call for competition changing contours. Its complexity is such that only specialists can really master it. It is based on at least three sets of considerations.

#### 3.1. Complexity Related to the Scope of the Procurement Code

The European directives include in the concepts of contracting authority and contracting entity, the »public bodies« other than public legal persons listed in Articles 2 and 134 PPC (see above 2.2.), at least when such bodies »created to satisfy specifically public interest needs which are other than industrial or commercial in nature«. Among these »public bodies« are entities that, according to the French law, have either the status of a public law legal person<sup>9</sup> or that of a private law legal person (such are the companies financed mostly or controlled by public entities or managed by bodies mostly appointed by them). To resolve this discrepancy of qualifications between the Community law and French law, and in order to

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<sup>8</sup> In the event of equivalent tenders, Article 53 nevertheless grants a "preference right" within a strictly regulated framework to co-operatives and craftsmen.

<sup>9</sup> For instance, the *Banque de France*, the *Académie française*, the *Caisse des dépôts et consignations* or the universities for their purchases linked to their specific needs in the field of research.

have the latter comply with the former, it would theoretically be possible to amend the scope of the PPC. However, this would be in conflict with the fact that the contracts concerned are, in France, private law contracts (over the disputes of which judicial courts hold jurisdiction). The Government chose to enact specific provisions, Ordinance No. 2005-649 of June 6, 2005 concerning contracts awarded by certain public and private entities not subject to the Public Procurement Code and its implementing decrees. Nevertheless, deep down, the rules of competition take their inspiration from the PPC.<sup>10</sup>

More significantly still, contracts falling under public procurement but which are not, legally speaking, public contracts, escape the grasp of the PPC and the 2005 ordinance. There are many categories. I will only mention the partnership contracts<sup>11</sup> and especially public service delegations.<sup>12</sup> Since the so-called »Sapin« act of January 29, 1993 on the prevention of corruption and the transparency of economic life and public proceedings, and according to its Article 38,<sup>13</sup> public services delegations »are subject to an advertising procedure enabling the presentation of several competing tenders«, and multiple precautions are taken to ensure that the terms of the delegations do not grant the incumbent delegatee an unfair advantage over his competitors. However, »the tenders are freely negotiated by the authority in charge of the delegating public body which, at the close of

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<sup>10</sup> One can say just the same with respect to the contracts awarded by social security bodies »where the awarding process and performance terms [must abide by] the safeguards set out in respect of State public contracts« (Art. L 124-4 of the Social Security Code).

<sup>11</sup> Pursuant to Article 3 of the Ordinance no. 2004-559 of June 17, 2004 on partnership contracts their »awarding is made subject to the principles of freedom of access, equal treatment of applicants and transparency of proceedings«, just like public contracts. It is also »preceded by an advertising allowing for the submission of several competing tenders«, but proceedings are far less demanding than is the case with public contracts.

<sup>12</sup> Once simple, the distinction between public procurement contracts for services and public service delegations today creates many difficulties in its application as both contracts can be so close in practice. One could say that with the public procurement contract, the local authority buys and pays for services to be provided to users, and that they buy and pay for themselves (at least in part) the services offered by the delegatee. Nevertheless, this brief presentation, historically accurate, would no longer fully reflect the reality. The »Sapin« act takes as the criterion of a delegation the fact that the remuneration of the delegatee is »substantially related to the results of the operation of the service (while a contractor is paid a price). This vague term has proven difficult to use, and today case law asks itself mainly who bears the heaviest operational risk: if it is on the operator, it is a delegation; if it is on the public body, it is a procurement contract.

<sup>13</sup> The provisions of which concerning local authorities have been integrated into the Local Authorities' General Code (Art. L 1411-1 and ff).



these negotiations, chooses the delegatee». The public authority therefore enjoys a freedom to choose between candidates and that freedom is far greater than what it has in public procurement contracts (where it is held to observe selection criteria).

### 3.2. Complexity Related to Exemptions from the Scope of the PPC

Pursuant to Article 3 PPC, fifteen categories of contracts and framework agreements are exempt from the provisions of the Code.

Among them, the »*in-house* contracts« (also called quasi-direct operation or integrated provision contracts), which derive from the EU case law that inspired the French regulations, should be mentioned. It is important to understand that a public authority is not obliged to call upon a co-contractor to meet its needs for works, supplies or services: it can take charge if it has the relevant means. In this case, this »self-provision« logically avoids the requirements of advertising and competition since no business is called upon to intervene. The *in house* exception extends this situation to cases where the authority acting as a contracting power concludes a contract with a legal person over which it »exercises a supervision comparable to that exercised over its own departments and which exercises of its activities for that authority«, for example, one of its public institutions without any autonomy vis-à-vis the authority, a transparent association or a corporation of which it owns all the equity (Article 3, 1). However, this is legally possible only if the *in house* contractor applies to its own contracts the contract awarding rules of the PPC or of the 2005 ordinance. Set apart from the relationship between the authority and its *in-house* partner, competition thus reappears in the relationship it has with its suppliers.

Other exclusions listed in Article 3 relate to public procurement contracts that cannot reasonably be subject to competition because of their content, their international nature, or of the secrecy they require.

### 3.3. Complexity Related to the Procedure

The tender procedure summarized in Section 2.3. could be called the common law of invitations to tender, but the EU and French provisions

provide for a number of specific procedures applicable to all types of contracts, or specific to some of them only.

To stick to the basics, Article 26 PPC stipulates that several »formal procedures« can be used by the contracting authority.<sup>14</sup> Some moderate the requirements set out by the basic principles discussed in Section 2.1., while others provide for straightforward exceptions. These modulations vary the freedom of choice of the administration and the ability of firms to obtain the contract. They do not however go as far as to allow to select a firm and to dismiss others for unlawful reasons.

Thus, if the normal procedure is the call for tender,<sup>15</sup> the contracting authority chooses freely between open tendering (»any economic operator may submit a tender«) and restricted tendering (»only those economic operators who have been so authorized after selection may submit tenders«) (Art. 33 CPC). In addition, there are cases (many but precisely outlined) for resorting to a negotiated procedure,<sup>16</sup> sometimes even without prior advertising and without competition, for example in the event of an emergency (Art. 35 CPC). This is one of the most notable exceptions to principles.

One should also consider »thresholds«: the scope of the rules is based on the financial importance of the contracts. Below a certain amount,<sup>17</sup> it is possible to use an »adapted procedure« whose terms are freely determined by the contracting authority which may negotiate with candidates having submitted a tender (Article 28, PPC). Another threshold effect concerns the organization of advertising (Article 39, PPC): the more the market is financially important, the wider it must be (eventually up to the EU level). In practice, these thresholds are low,<sup>18</sup> which reduces the scope of exceptions and ensures the proper dissemination of information.

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<sup>14</sup> Open or restricted tendering, negotiated procedure, competitive dialogue, contributions, dynamic purchasing system.

<sup>15</sup> »The call for tenders is the procedure through which the contracting authority chooses the contractor, without negotiation, on the basis of objective criteria brought to the prospective tenderers' attention beforehand« (Art. 33, al. 1 PPC).

<sup>16</sup> »A negotiated procedure is a procedure through which the contracting authority negotiates the conditions of the contract with one or more of economic operators« (Art. 34, al. 1 PPC).

<sup>17</sup> The amounts are set by Article 26 PPC. They rank from €133,000 net of VAT for supplies and services for the State (€206,000 for those of local authorities which therefore enjoy a greater measure of freedom than the State) to €5,150,000 net of VAT for works.

<sup>18</sup> Only the contracts below €20,000 before VAT can dispense with advertising.

## 4. Unlawful Practices

The minute detail of the provisions and the complexity of the system do not prevent their imperfect application. They even generate it as this gives rise to interpretation and induces application errors either in good or bad faith: this is one of the negative side effects of the system. Yet it is very much kept under control<sup>19</sup> and supervised not only by national authorities and the EU Commission but also by unsuccessful tenderers who are quick to call upon the judge. Litigation is plentiful, as the administrative judges were granted by the legislature or gave themselves new and important powers to punish improper procedures. However, it is common knowledge that, on the one hand, a good proportion of irregular procedures do not give rise to amendment or sanction because nobody complains about them, and on the other hand, that the legality review exercised by the *préfet* over local authorities suffers of a level of laxity often encouraged by the government.

Unlawful practices may be ascribed either to contracting authorities or to economic operators, or to both.

### 4.1. Unlawful Practices of Contracting Authorities

Inevitably, it happens that public officials distort competition by favouring businesses out of personal dishonesty. Such behaviour amounts to criminal offenses which are severely punished: corruption and influence peddling (Article 432-11 penal code), unlawful conflict of interest (Art. 432-12 and -13) or specifically, violation of the freedom of access and equality of candidates in public procurement contracts and public service delegations («misdemeanour of favouritism» punishable under article 432-14 of the penal code: two years of imprisonment of two years and a €30,000 fine). Such serious offenses are rare.

Most frequently, malpractices affecting competition in public procurement contracts and which may render it void are due to errors which, however serious, are not ascribable to dishonesty. They can be explained by the poor knowledge of procedures, the need to correct errors in the project during proceedings design, the desire to use less cumbersome pro-

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<sup>19</sup> These are mainly external controls. Through a lack of skills, organization or will-power, the internal controls of local authorities are often insufficient and of little efficiency.

cedures, to prefer – for reasons that may be respectable – the businesses with which one is used to work (that already hold contracts or delegations) or that employ the local workforce, and so on.

They are listed on official websites (those of the Ministry of Economy or of the Central Service for Corruption Prevention) to help public purchasers to avoid them: artificial division of lots,<sup>20</sup> use of inappropriate criteria or non-compliance with the selection criteria announced, void advertising and the call for tenders, excessive use of negotiated or adapted procedures, abuse of regularization contracts and (frequently!) of amendments, irregular examination of tenders. They are quite varied!

## 4.2. Unlawful Practices Committed by Economic Operators

Unlawful practices are not committed only by the contracting authorities. They are also inherent to the candidates for public procurement who are desperate to win the contract. This paper does not deal with criminally punishable practices but rather with anti-competitive practices.

Under the French law (independently from EU sanctions), they are set out by Articles L 420-1 and sub. of the Commercial Code: cartels, abuse of dominant market position or abusive exploitation of a client's or supplier's situation of economic dependency. The Competition Authority (an independent administrative authority) has competence to sanction such behaviour, including the imposition of financial penalties that can amount to 10 per cent of the worldwide pre-tax turnover of the company (Art. L 464-2 Commercial Code).

The list of illegal practices sanctioned makes for a rich and varied anthology<sup>21</sup> in which the construction and public works industry has contributed

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<sup>20</sup> The allotment of the contract is normally the rule and global contracts are the exception. »To encourage the widest competition, and unless the object of the contract does not allow for the identification of distinct services, the contracting authority awards the contract in separate lots ... To this end, it chooses freely the number of lots [taking into account a certain number of features]. Applications and lots are examined lot by lot ...« (Art. 10, par. 1, PPC). »Contracting authorities may decide to implement either a common competition procedure for all the lots or a competitive tendering process for each lot« (Art. 27 III, par. 2 PPC).

<sup>21</sup> Here is a recent example among many: different businesses submitted tenders for the supply of operating tables without imparting clear information to the purchasing public hospitals that they had become subsidiaries of the same company. Believing that they agreed

more than any other, most notably through the exchange of information on their tenders, in order to share contracts between themselves.

## 5. Conclusion

One may consider that competition and access to public procurement are adequately ensured in France. The system achieves a good balance between the freedom of public purchasers and the rights of candidates. However, its effectiveness is affected by its complexity and the instability of its rules, one and the other mostly due to EU directives. This is the price to pay for the effectiveness of the internal market of which French firms benefit greatly, particularly in the construction, public works and utilities sectors.

This paper has left out something of increasing importance, which derives far more from administrative case law than from the law. In all its activities, public administration must take into account competition law in its decisions which are likely to affect a competitive market. In terms of public procurement (especially for public service delegations), it must not provide an unfair competitive advantage to its co-contractor, for example by placing it in position of »automatic abuse«.

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to send tenders that were notionally independent of each other and that they simulated a competition so as to deceive buyers, the Competition Authority has sentenced each one to a fine of €750,000 (Decision No. 10-D-04 of January 26, 2010, available at [www.autorite-de-la-concurrence.fr/](http://www.autorite-de-la-concurrence.fr/)).

BASIC PRINCIPLES OF THE PUBLIC PROCUREMENT  
PROCEDURE IN FRANCE AND THE INFLUENCE  
OF THE EU LAW

*Summary*

*The paper deals with the public procurement procedure in France under the Public Procurement Code. It deals with the basic principles of the procedure, such as equal access, equal treatment and transparency as well as with distinction between the contracting authority and the contracting entity in public procurement. It also presents the influence of the EU legislation on the French public procurement law and especially the complexity of the public procurement procedure. Unlawful practices are presented in the final part of the paper with the emphasis on the irregularities that may be ascribed either to contracting authorities or to economic operators or to both at once.*

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TEMELJNA NAČELA POSTUPKA JAVNE NABAVE  
U FRANCUSKOJ I UTJECAJ PRAVA EU

*Sažetak*

Rad se bavi postupkom javne nabave u Francuskoj koji se provodi prema Zakonu o javnoj nabavi. Govori se o temeljnim načelima postupka, poput načela jednake dostupnosti te načela jednakog postupanja i transparentnosti. Naglašava se razlika između tijela javne vlasti koje sklapa ugovor i pravne osobe koja sklapa ugovor u javnoj nabavi. Također se pokazuje utjecaj zakonodavstva Europske unije na francuske propise o javnoj nabavi i posebno se naglašava složenost postupka javne nabave. Na kraju rada govori se o nezakonitim radnjama, s naglaskom na nepravilnostima koje se mogu pripisati ili tijelu javne vlasti koje sklapa ugovor ili pružatelju usluge, ili pak objema stranama.

Ključne riječi: *javni ugovor, postupak javne nabave, pravo EU, Zakon o javnoj nabavi – Francuska*