

MEMO

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Subject Guidance on the new Public Procurement Reform

Background

Public procurement is the process by which Contracting Authorities purchase works, services or supplies from economic operators. The Contracting Authority launches a contract award procedure for the selection of the providers of works, services or supplies. On 26 February 2014 the Directive 2014/24/EU of the European Parliament and of the Council on public procurement was adopted and entered into force on 17 April 2014. Since then, MS had 24 months to transpose the relevant provisions into national law (except for the mandatory application of electronic procurement, for which they have an additional 30 months until September 2018).

Hence, from 18 April 2016, the old Directives will be replaced by Directive 2014/24/EU on public procurement and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors.

Through the transposition of the said Directive, Member States and/or regions, where relevant, are responsible to ensure that public procurement is carried out in line with the applicable EU legal framework as transposed at national level.

New Public Procurement Rules

The new directives modernise the existing tools and instruments by making them simpler, more flexible and easier for companies, particularly SMEs, to bid for public contracts. The new Directives introduce a number of simplified rules and procedures, they broaden the possibilities for negotiation and introduce a new procedure called the 'innovation partnership' that will enable public purchasers to select partners on a competitive basis and have them develop an innovative solution tailored to meet their requirements when the product/service or works is not readily available on the market. The mandatory use of electronic communication in public procurement will increase accessibility to procurement thereby allowing EU companies to exploit the full benefits of the Digital Market whilst also bringing efficiency gains.

As regards subcontractors, in addition of the pre-existing rule that the contracting authority may ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractor, the new rules also bring detailed provisions on subcontracting such as the possibility of the MS to oblige the CAs to issue payments directly to subcontractors (on request or even without). Also, a new obligation is, in the case of works

contracts and in respect of services to be provided at a facility under the direct oversight of the contracting authority, to indicate at the latest by commencement of the contract, to the contracting authority the name, contact details and legal representatives of its subcontractors and any changes of this information. Finally, in view of ensuring observance of applicable obligations in the fields of environmental, social and labour law, appropriate measures as regards joint liability and exclusion criteria are to be taken.

Regarding consortia, the Directive states that groups of economic operators, including temporary associations, may participate in procurement procedures and the contracting authorities may not require of them to have a specific legal form for submitting a tender or a request to participate. CAs may however clarify in the procurement documents how groups of economic operators are to meet the requirements as to economic and financial standing or technical and professional ability or to assume a specific legal form once they have been awarded the contract, if necessary for the satisfactory performance of the contract.

The **thresholds** remain at their current level however as for services the new rules vary between different service categories. It introduces the so called **full** and **light regimes**. The full regime applies to all services except those identified as belonging to the light regime, eg, education, health, culture, social and certain legal services. The light regime applies above the threshold of €750,000 and simplifies prior advertising of contracts and ensures equal treatment of bidders.

The new rules will enter into force as from 18th April 2016 either the national transposition or the rules of the Directives themselves in case of absence or incomplete transposition.

The Procedures of Public Procurement

As a first step, the contracting authority should determine whether they want to carry out the tasks involved by its own service (in house) or prefers to have it done by an economic operator under a public contract. **In case of in house procurement and the award of grants, the public procurement rules do not have to be followed.**

It is possible to make use of the 'in-house' exception when the CA uses its own administrative resources without being obliged to call on outside entities or by contracting an entity legally distinct. All of the following conditions have to be fulfilled in line with *Teckal* case law judgement (where the ECJ ruled that CAs may award a contract to a supplier without recourse to a regulated procurement procedure):

- CA exercises over the legal person a control similar to that over its own departments (the control function)
- Over 80% activities of the legal person carried out in performance of tasks entrusted to it by the controlling CA or other legal persons controlled

As for the award of a public contract, the type of public procurement procedure depends on the value of the contract involved. The current thresholds, above which Directive 2014/24/EU applies, are the following (Updated 1.1.2016):

- a. €5,225,000 for public works contracts;

- b. €135,000 for public supply and service contracts awarded by central government authorities and design contests organised by such authorities
- c. €209,000 for public supply and service contracts awarded by sub-central contracting authorities and design contests organised by such authorities;
- d. €750,000 for public service contracts for social and other specific services;

The national public procurement rules apply when the total value of each individual contract without VAT is **below** aforementioned thresholds.

In order to prevent artificial splitting of contracts to circumvent the EU-wide tendering procedure Art 5 of Directive 2014/24/EU set the rules for the calculation of the estimated value. Particular care should be taken in case of lots or contracts for similar services pertaining to the same project. In practice, this means that, in circumstances where a CA plans to award more than one procurement contract for a single service, the value of these procurements must be added together.

The stages of public procurement procedure

When the thresholds for application of the EU-Directives are exceeded, the rules of the Directives have to be applied, either by means of the national procurement rules transposing the Directives or, in case of absence or incomplete transposition the rules of the Directives themselves. There are 7 stages to be followed:

1. Preparation and Planning – the design of a robust process for the delivery of the required works, services or supplies including identification of needs, setting project organisation and operational requirements, consideration of affordability and evaluation of risks;
2. Publication of a tender notice in the OJEU; in addition, CAs might publish at an earlier stage a so called Prior Information Notice, informing the market on planned procurement;
3. Invitation to bid – choosing the type of procedure as follows:
 - a. Open: where all providers interested can submit tenders without any prior selection process;
 - b. Restricted: a two stage process where only those providers who have been selected may be invited to submit tenders;
 - c. Competitive procedure with negotiation / competitive dialogue – where an organisation may in specific circumstances call for competition via a contract notice or prior information notice, the terms of the contract are negotiated with one or more suppliers of its choice; in the case of the competitive procedure with negotiation, minimum requirements and the award criteria are not subject to negotiations. In the competitive dialogue, all aspects of the procurement may be discussed with the chosen participants during the dialogue, however the award criteria must be clearly laid out and only the best-price quality ratio may be used. This step should also specify the type of contract (works, service, supply), levels of quality, the standards, input, outputs or outcomes required;
4. Submission and opening of bid: the time-limits for submission of tenders have always to be respected;

5. Evaluation of bids: CAs must base the award of public contracts on the most economically advantageous tender (MEAT). MEAT must be identified on the basis of price or cost using a cost-effectiveness approach, or the best price-quality ratio, which in addition to price or cost, must be assessed on the basis of other criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question.
6. Award: not later than 30 days after the conclusion of a contract, following the decision to award or conclude it, CAs send a contract award notice on the results of the procurement procedure.
7. Contract implementation and closure: the contract should be implemented on the basis of the project organisation and operational requirements set during step 1. At the end of the project, it is important to hold a review meeting to demonstrate how the project has performed against the initial expectations.

Appropriate skills are needed to ensure a sound management of the public procurement procedure. Should the contracting authorities lack the needed competencies, training activities or the use of consultants could be considered as well as cross checking verification with the competent national legal services.

A tendering procedure does not imply that there can only be one winner, on the contrary, it is possible to select more than one beneficiary through one call for tender in two different ways:

1. The CA can divide the contract into several lots. In this case, specific lots could for instance cover different geographical areas ensuring proximity and access to the final recipients and offering choice for the services provision to the farmers, young farmers, forest holders, other land managers and SMEs on a competitive basis. In such case the aggregation rules apply namely that the value of these lots must be added to determine if the threshold apply.
2. The CA could conclude, through a regular contract award procedure, a framework agreement with several contractors. In such case, the framework agreement would be performed setting out all the terms governing the provision of the works, services and supplies without reopening competition, or partly with and partly without competition, where this possibility has been stipulated, for clearly indicated terms, pursuant to objective criteria, which must be set out in the procurement documents for the framework agreement.

Calculation of costs and payments to the beneficiary

The simplified costs are not to be used where an operation or a project forming part of an operation is implemented exclusively through the procurement of works, goods or services – in that case, expenditure is considered to be paid based on actual costs incurred by the beneficiary.

As for the payment transaction, the EU public procurement rules do not require that the payment is done by the CA itself. It is perfectly possible to provide for a structure where the contract is awarded and concluded by CA A while the payment is executed by Authority B (Paying agency or another body), as long as the payment made by B is under the applicable civil law rules qualified as performance of the contractual payment obligation of A.

Modification of contracts

In the 2014 Directives, the general rule is that modifications of the contract require a new award procedure. But a number of exceptions apply (which the CA must prove):

- If the CA proves that the modifications are not substantial (does not render the contract materially different in character) in line with detailed provisions; however, a presumption of being non-substantial exists for modifications that are both under the EU threshold and below 10% (15% in case of works contracts) of the original value;
- If there is a revision clause in the initial procurement documents which provides for the modifications in a clear, precise and unequivocal manner, but not to alter the nature.
- Modifications that are due to unforeseen circumstances do not change the overall nature of the contract and are each one of them below 50% of the initial value.
- Modifications that have become necessary for needs in direct relation to the contract, if a change of contractor cannot be made for economic or technical reasons and would cause significant inconvenience or substantial duplication of costs and each of the modifications are below 50% of the initial value

Public procurement – an important source for error rates and financial corrections

MS and/or regions are reminded that compliance with both EU and national procedures shall be ensured at national level. Should audits reveal that methods of procurement have not been compliant, financial corrections are likely to be imposed. Public procurement is becoming a policy strategy instrument. Under the new rules, public procurement procedures will also help public purchasers to implement environmental policies, as well as those governing social integration and innovation. Stronger measures have also been introduced to prevent conflicts of interest, favouritism and corruption. Finally, public purchasers must reject any bid that comes at an abnormally low price because the company concerned is violating EU or international social, environmental and labour laws.