

The New EU Public Procurement Rules

The EU has adopted new public procurement legislation: a new Concessions Directive and updated Utilities and Public Services Directives. EU countries have until 17 April 2016 to transpose them into national law. The reforms are significant, and should have the practical effect of making the procurement process more flexible and less time consuming. The new directives clarify the rules on whether variations to awarded contracts require a new tendering process, introduce a potentially groundbreaking procedure for "innovation partnerships", and codify an entirely new regime for concessions contracts.

A New Regime

After more than two years of consultation, the Council of the European Union adopted three new directives on public procurement on 11 February 2014.

The new directives will enter into force on 17 April 2014, and must be transposed into national law within two years of that date. The reforms are significant, and should have the practical effect of making the procurement process more flexible and less time consuming. Importantly, the new directives clarify the rules on whether variations to awarded contracts require a new tendering process, introduce a potentially groundbreaking procedure for "innovation partnerships", and codify an entirely new regime for concessions contracts. While there is some concern that, in pursuit of flexibility and openness, the new procurement rules may introduce additional scope to challenge the award of public contracts and concessions, overall the new legislation constitutes a positive step forward.

Background

The current EU public procurement regime is primarily set out in the Utilities Directive (2004/17/EC), the Public Sector Directive (2004/18/EC) and the Remedies Directive (2007/66/EC). The current directives set out specific mandatory procedures for the publication and award of public tenders valued above certain thresholds, as well as the appeal of awarded tenders by parties who believe they have been unfairly passed over. Publication and award criteria are highly prescriptive. Contract notices for most tenders with a value beyond certain set thresholds must be published in the Official Journal of the EU, specifying the weight the public authority ("PA" – also referred to as the "contracting authority") will give to various pre-set, technical and non-discriminatory award criteria. PAs must choose between certain set procedures (open, restricted, negotiated or competitive dialogue) which are restricted to specific circumstances and have clearly defined timelines. Tenders must be awarded on either a lowest-cost or most economically advantageous ("MEAT") basis. Once

Key issues

- Greater clarity on when modifications to awarded contracts will require a new tender
- "Innovation Partnerships" to enable the collaborative development of new products or services to meet public authorities' needs
- Formalisation of the tendering procedure for concessions contracts

awarded, tenders must be suspended for 10-15 days to allow for appeals. The regime was designed to avoid the arbitrary awarding of tenders by PAs by creating a precise and transparent process, but it has come under criticism for being overly rigid and administratively burdensome.

The EU public procurement regime is primarily concerned with tendering for standard contracts (i.e. those where the PA directly pays the party that successfully tenders in compensation for the works, service or supplies that it provides), and is not comprehensive

regarding procurement procedures for concessions contracts (where compensation consists of the successful concessionaire's exclusive right to exploit the project).

In December 2011 the European Commission ("Commission") tabled proposals for an updated Utilities Directive and Public Sector Directive, along with a proposal for a new directive on the award of concessions contracts (the "Concessions Directive"). The Commission cited the need to modernise the nearly decade-old procurement rules to better adapt them as a market-based instrument for achieving its "Europe 2020" objectives, which include improving the conditions for business innovation, encouraging the shift to a resource-efficient and low-carbon economy and ensuring the most efficient use of public funds.

In pursuit of these goals, the new procurement directives include numerous procedural changes, the most commercially relevant of which are discussed below.

Greater post-contract certainty

The current public procurement directives are silent on whether modifications to contracts after they have been formally awarded require the PA to go through the process all over again. This is a serious issue for successful tenderers. Given the time and investment that are typically put into securing contracts and the not-uncommon possibility that the scope of the work originally required by a PA may change over the course of often long-term projects, contractors are eager for greater legal clarity on what types of contractual modification will not necessitate a new procurement.

The new directives draw on recent case law of the Court of Justice of the European Union ("CJEU") to fill the gaps in the current directives by setting out a series of possible scenarios under which a contract modification will not require a new tender. The directives set a *de minimis* threshold for changes to the value of a contract below which none of the other criteria need even be considered, provided the overall nature of the contract is not altered. These thresholds were raised by the Commission over the course of the consultation on the new directives, from an original 5% to the current 10% (services and supply contracts, concessions) and 15% (works contracts).

The new directives also provide that only "substantial" contractual modifications require a new tender, and defines these as those which render the contract materially different by:

- introducing conditions that, had they been part of the initial award procedure, would have broadened the pool of potential tenderers;
- changing the economic balance in favour of the contractor in a manner not provided for in the initial contract;
- extending the contract's scope to encompass services not initially covered; or
- replacing the contractor with a new one (unless this is a "succession" following a restructuring or takeover).

Contracting parties can include review clauses in the initial contract which forecast possible modifications, including price revision clauses. If these clauses are drafted precisely and clearly state the scope and

nature of possible modifications, further procurement can be avoided irrespective of the monetary value of the changes.

While these changes are still open to some interpretation, they provide a great deal more clarity for contractors than was previously the case, and should hopefully result in less effort being expended agonising over the consequences of contractual modifications.

Innovation Partnerships

Of the many procedural changes introduced in the new directives, perhaps the most notable is the introduction of the "innovation partnership". Under this new procedure PAs will publish a notice identifying a need to be met by an innovative product, service or work not currently available on the market, stating minimum qualitative requirements. One or more respondents who are chosen to become the PA's innovation partner(s) will engage with the PA in an effort to develop the product /service that best meets the PA's need (with cost negotiations continuing through the project's various phases). Parties' early engagement with the PA under this new procedure marks a notable change from the current procurement rules which, in order to avoid the perception of favouritism or undue influence, do not allow tenderers to interact with PAs before contract award criteria and technical specifications are prescribed.

If used, innovation partnerships should serve to make the procurement process less rigid for tenderers, open the process up to new companies with innovative ideas and produce better results for PAs.

Concessions

The current procurement directives only partially apply to concessions for works (there are no specific provisions on award criteria), and concessions for services are explicitly excluded from their operation. The award of works concessions (and the publication, award and appeal of services concessions) is therefore currently only governed by the general EU treaty principles of equal treatment, non-discrimination and transparency. This lack of legal clarity has led to numerous disputes which ended up before the CJEU and, in the Commission's view, has created barriers to entry to the tendering process, particularly for small and medium-sized enterprises. The Commission was also concerned by an earlier consultation in which a third of participants knew of cases in which concessions were directly awarded without any process. Its proposal for a new Concessions Directive was motivated by a desire to address these concerns and harmonise the procedures for the creation of public-private partnerships, an ideal means of delivering public services in a time of restrained public spending.

The Concessions Directive provides a definition of "concessions" (codifying existing case law) which is based on the notion that the concessionaire must assume substantial operating risk. It is significantly more streamlined than the other new procurement directives. Though, like the other directives, the Concessions Directive sets out rules for the publication and award of concessions contracts (if valued above EUR 5.186 million), it does not mandate specific procedures or insist on MEAT as an award criteria. Instead PAs are given a degree of flexibility and encouraged

to place value on social and environmental criteria, though they must comply with the general principles of transparency, proportionality and non-discrimination and all award criteria must be linked to the subject matter of the concession. The Commission has explained that a separate, more flexible, set of rules was justified for concessions due to their high-value, complex and long-term nature.

Though designed to be less burdensome procedurally, the Concessions Directive nevertheless constitutes an additional regulatory hurdle that many prospective concessionaires did not formerly have to meet. In addition, the legal certainty that the directive aims to create may be undermined by the Commission's

insistence on limiting the duration of concessions to "the time that a concessionaire could reasonably be expected to take to recoup the investments made in operating the works or services together with a return on invested capital taking into account the investments required to achieve the specific contractual objectives". This attempt at flexibility may have the perverse effect of discouraging substantial investment.

Issues to Consider

Though companies considering whether to tender for public contracts or concessions clearly do not want the process to be overly time consuming or burdensome, they are also understandably concerned that contracts will be awarded fairly, both

Other procedural changes

- PAs will be able to make their intentions of planned procurements known in advance, through a "prior information notice", without further publication of calls for competition.
- As a means of opening up the procurement process to SMEs, PAs are encouraged to divide contracts into lots (by having to explain their reasons for not doing so) and will no longer be allowed to require the turnover of tendering companies to be more than twice the contract's value.
- The former distinction between "part A" and "part B" services contracts (with the latter subject to less onerous reporting requirements) has been abolished. The same procedures will apply to all services contracts (with the exception of certain health, social and legal services for which member states are granted additional discretion).
- Formerly exceptional tendering procedures (competitive dialogue and the competitive procedure with negotiations) will be available for a wider variety of contracts.
- Time limits have been reduced and the introduction of a standard "single procurement document" and mandatory electronic procurement within 30 months should result in less administrative burden.
- The "lowest price" award criterion has been abandoned, and PAs will be able to take a number of additional factors into account in determining MEAT (including a contractor's previous performance, environmental impact and social objectives such as increased employment) and can assess contract costs on a "life-cycle" basis.

as justification of the effort put into tendering and as assurance that, if they are successful, other parties will lack grounds to challenge their award. Viewed in this light there are grounds for concern that the current efforts to create more flexibility in the procurement process may make things harder for contractors rather than easier.

By eliminating the "lowest price" award criteria and introducing a variety of new well-intentioned factors that can be taken into account in determining MEAT, the new Utilities and Public Contracts Directives arguably give PAs a great degree of discretion (and, under the Concessions Directive, even greater discretion). The exercise of this discretion will be open to challenge by unsuccessful tenderers, and potentially by any disgruntled citizen. The new directives address this issue by reiterating the existing position that award criteria must be "linked to the subject-matter" of the contract and further clarifying that PAs shall not have an unrestricted freedom of choice in this regard. Simultaneously, however, the new directives broaden the scope of what can be considered

as linked to a contract's subject matter, and tend to reference concepts developed in case law without further clarifying them. It is likely that, along with their obvious improvements in procedural efficiency, the new directives will open the procurement process up to a greater degree of scrutiny.

Conclusions

The changes introduced by the new procurement directives are fairly sweeping, and largely to be welcomed. When implemented, applying for and awarding tenders should become a less burdensome process that is more open to smaller, innovative companies. The new regime is, however, far from unimpeachable and continued challenges to the awards of contracts and concessions can be expected, with further input from the CJEU. In particular, there are likely to be teething pains in relation to the new concessions regime, whose awards may be for uneconomically short periods. The UK, which has committed

to transposing the new directives into new national regulations in the first six months of the allotted two year period, may provide the first test cases of the new regime.

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