

# Client Alert

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## European Procurement and Government Contracts Digest: New European Procurement Directives *European Union Overhauls the EU Public Contract Procurement Regime*

By Alistair Maughan

On 11 February 2014, the EU took the final step in its latest overhaul of its public procurement regime. As well as a new directive dealing for the first time with the award of concession contracts, the EU has issued new directives that consolidate and update the existing regimes dealing with the award of contracts for supplies, services or works, and the award of contracts in the so-called utilities sectors (water, energy, transport and postal services).

### INTRODUCTION

The new directives have been a long time coming. The Commission originally proposed its changes a couple of years ago but the proposals have been through prolonged consideration under the EU's legislative procedure. The Commission's aim is to modernise the European public contract procurement rules and make them simpler and more flexible. In practice, it is perhaps questionable whether simplification has been achieved, although several aspects are either completely new or have been materially amended from the current regime.

The Council formally adopted the legislative package on 11 February 2014, and the changes are expected to come into force in March 2014. The EU member states have 24 months to implement the changes into national law.

The reforms are contained in three new directives, two of which replace the existing regime and one of which is a partial consolidation and partial extension of the existing European laws on concession contracts. The directives are:

- a replacement of Directive 2004/18 on the procedures for the award of public supply, public service and public works contracts – the **Public Procurement Directive**;
- a replacement of Directive 2004/17 dealing with procurement by entities operating in the water, energy, transport and postal services sectors – the **Utilities Directive**; and
- a directive on the award of concession contracts – the **Concession Contracts Directive**.

We will publish a separate article in the *European Procurement and Government Contracts Digest* about the Concession Contracts Directive. What follows is a summary of the key changes introduced by the Public Procurement Directive and the Utilities Directive. In this article, we focus on the Public Procurement Directive, although the changes are tracked for the utilities sector by the Utilities Directive.

### CONTRACT AWARD CRITERIA

Under the current rules, EU contracting authorities can choose whether to base their proposed contract awards based on the lowest cost or the "most economically advantageous tender" (MEAT). In future, only the second of these tests will be available – best value for money, by any other name. The change to MEAT allows a broader focus on life-cycle costs.

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The Commission believes that this will enable authorities to put more emphasis on quality, environmental considerations, social aspects and innovation, while still taking into account the price and life-cycle costs of what is being procured. The Public Procurement Directive contains a non-exhaustive list of possible award criteria which could be used to determine the best price-quality ratio, together with (interestingly) a provision setting out the approach to life-cycle costing.

According to the Commission, “*The new criteria will put an end to the dictatorship of the lowest price and once again make quality the central issue.*” This seems to be a strange view because MEAT isn’t new – it already existed under the old rules and all the Commission has done is remove “lowest cost” as an alternative. But there’s nothing stopping a public entity assessing the available sub-criteria which together might comprise a MEAT assessment and concluding that price is the dominant factor. Unless the global economy changes dramatically in the near future, social value and environmental considerations will remain minority issues in most EU procurement processes.

So, of course, the real issue will remain how any given public authority plans to assess which bid represents the most economically advantageous tender and how the different aspects of cost, quality and other commercial factors are taken into account and assessed on a transparent basis.

## AWARD PROCEDURES – MORE NEGOTIATION

Under the existing rules, a number of different types of contract award procedures have been allowed, including the open, restricted and negotiated procedures as well as competitive dialogue. Each of these has its own uses and allows for different levels of engagement and discussion with bidders.

Broadly, the existing procedures will remain in place. However, the Commission believes that there is a great need for contracting authorities to have additional flexibility to choose procurement procedures that allow for negotiations. It thinks that a greater use of those procedures is also likely to increase cross-border trade because its analysis has shown that contracts awarded by negotiated procedures have a particularly high success rate for cross-border tenders.

So, in future, the ability to award contracts on the basis of the negotiated procedures will be allowed in a broader range of situations, thus aligning more closely with the competitive dialogue procedure which has been particularly promoted by a number of EU governments, including the United Kingdom.

## NEW AWARD PROCEDURE FOR INNOVATIVE PRODUCTS

The Public Procurement Directive creates a new concept of “innovation partnership procedure” which is intended to allow the development and delivery of an innovative product or service and the subsequent purchase of items that result from that work. This enables contracting authorities to identify the need for a particular type of product that cannot be met at the moment by solutions already available in the market place.

The Commission’s aim is that this specific procedure should allow contracting authorities to establish a long-term innovation partnership for the development and subsequent purchase of new, innovative products or services that can be delivered at agreed performance levels and costs, without the need for separate procurement procedures for the development and subsequent purchase. Contracting authorities may choose to set up innovation partnerships with one partner or with several partners conducting separate research and development activities.

## EUROPEAN SINGLE PROCUREMENT DOCUMENT

The EU proposes a European Single Procurement Document (ESPD) which is intended to simplify procedures for bidders.

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Many bidders, including small and medium-sized enterprises (SMEs), find that a major obstacle to their participation in the EU public procurement process consists of administrative burdens deriving from the need to produce a substantial number of certificates or other documents related to exclusion and selection criteria. Limiting such requirements, for example, through the use of an ESPD consisting of an updated self-declaration, could result in considerable simplification to the benefit of both contracting authorities and bidders.

At the time of submission of requests to participate on tenders, contracting authorities will be required to accept a completed ESPD from each bidder as *prima facie* evidence of satisfaction of the core bidder selection criteria and confirmation they do not fall within any of the mandatory grounds for exclusion. Subsequently, only the winning bidder will have to submit formal evidence to verify the information provided in the ESPD. Obviously, this will reduce bid costs for the majority of the bidders in most procedures.

## TYPES OF SERVICES

The Public Procurement Directive abolishes the current distinction between Part A services (which have hitherto been subject to the full rules) and Part B services (subject to limited procedural requirements).

But the trade-off is that there will be a new simplified light-touch regime for certain types of social, educational, health, legal and other services, which will only be covered by the directive if a higher threshold (€750,000) is met. These services will be subject to limited procedural requirements, including, for example, easier advertisement of planned contracts (through contract notices or prior indicative notices) and simplified processes for announcing award of the contract (possibly in a "grouped" notice published on a quarterly basis). The Commission's rationale here is that these categories of services often have a limited cross-border dimension or vary widely amongst member states due to different cultural traditions.

## SIMPLIFIED PROCEDURES FOR LOCAL AUTHORITIES

The Public Procurement Directive streamlines the procedural requirements for local authorities. Member states are allowed to permit local authorities to advertise contracts using prior information notices rather than a formal contract notice, and may allow them to set reduced time limits.

## CO-OPERATION BETWEEN PUBLIC AUTHORITIES

For the first time, the Public Procurement Directive seeks to harmonise EU law on co-operation between public authorities. We have written extensively elsewhere about the *Teckal* "in-house" exemption<sup>1</sup>. Until now, this area has been addressed through decisions of the courts, especially the European Court of Justice.

In the future, a contract awarded by a contract authority to another legal person governed by public law will fall outside the scale of the directive where specific legislative requirements are met.

Public contracts awarded to controlled legal persons will not be subject to a procurement regime if the contracting authority exercises control over the delivery vehicle which is similar to that which it exercises over its own departments. However, the delivery vehicle must carry out more than 80% of its activities in the performance of tasks entrusted to it by the controlling contracting authority.

<sup>1</sup> See our December 2012 update, [In-house Tender Rules for Mutuals and Shared Services](#).

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The exemption will not apply in situations where there is direct participation by a private sector company in the capital of the delivery vehicle because of the risk of conferring an undue advantage over its competitors.

## ELECTRONIC COMMUNICATIONS AND INVOICING

Member states will be required to ensure that all communications and information exchanged in a procurement process (including submission of tender documents) is done electronically. In addition, member states must move to full e-procurement within 54 months of the adoption of the directives.

Separately, on 24 January 2014, the Commission announced that it had agreed a way forward on a proposed directive on e-invoicing in public procurement. Under the draft directive, contracting authorities will be required to accept e-invoices that comply with a forthcoming European standard. There is no deadline yet agreed upon for the implementation of this proposal, however.

## HELP FOR SMEs

One of the Commission's key goals in revising the directives was to cut red tape and improve market access, especially for SMEs. It wants to adapt public procurement to the needs of SMEs.

One new step is to encourage participation by SMEs in public procurement by encouraging contracting authorities to divide large contracts into lots and requiring them to explain in the procurement documents the main reasons for any decision not to do so. The aim is to make the size of the individual contracts better correspond to the capacity of SMEs.

The size and subject matter of the lots should be determined freely by a contracting authority, which will have a duty to consider the appropriateness of dividing contracts into lots.

Where contracts are divided into lots, contracting authorities will be allowed to limit the number of lots for which any particular bidder may tender, and may limit the number of lots that may be awarded to any one bidder.

Also to encourage participation by SMEs, when specifying minimum financial capacity of bidders, the minimum yearly turnover that bidders are required to have will not exceed twice the estimated contract value, except in justified cases (for example, where there are special risks attached to the nature of the works, services or supplies).

## OTHER MEASURES

The Public Procurement Directive also contains:

- strengthened procedures in relation to sub-contracting;
- clearer rules relating to modifications of contracts, providing safe harbour thresholds for the value of modifications below which modifications may be made without a new procurement – thus avoiding issues with the *presstext* decision<sup>2</sup>;
- revised provisions relating to the way in which authorities deal with abnormally low tenders;
- new measures to avoid conflicts of interest in procurement procedures; and

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<sup>2</sup> See our January 2009 update, [Amending an Existing Contract](#).

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- more rules relating to exclusion from tenders in specific circumstances.

## PRACTICAL CONSEQUENCES

It's hard to say who the winners will be once the changes are introduced by the new directives. The EU Commission and national governments have been quick to highlight many changes that ought to help SMEs compete more effectively for public contracts. Whether that happens in practice depends on how the new regime is applied by public bodies.

There's something for both sides of the procurement fence in the new regime. Authorities will welcome the relaxation of the rules around choice of award procedure and the new simplified light-touch regime for certain services. Bidders – especially in the SME community – will also welcome some of the relaxations and streamlined regime for communications and self-certification of qualifications.

In the short term, expect a generally higher level of uncertainty than normal as both bidders and awarding authorities get used to the new rules.

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