



## **PUBLIC PROCUREMENT CONTRACTS**

Public authorities conclude contracts to ensure the supply of works and delivery of services. These contracts, concluded in exchange for remuneration with one or more operators, are called public contracts and represent an important part of the EU's GDP. However, only a small percentage of public procurement contracts have been awarded to non-national undertakings. The application of the principles of the internal market to these contracts ensures better allocation of economic resources and more rational use of public funds. A new public procurement package was adopted in 2014 by Parliament and the Council with the aim of simplifying procedures and making them more flexible in order to encourage access to public procurement for SMEs, and to ensure that greater consideration is given to social and environmental criteria.

### **LEGAL BASIS**

Articles 26, 34, 53(1), 56, 57, 62 and 114 of the Treaty on the Functioning of the European Union (TFEU).

### **OBJECTIVES**

Public procurement contracts play a significant role in the economies of Member States, estimated at more than 16% of the Union's GDP. Prior to the implementation of Community legislation, only 2% of public procurement contracts were awarded to non-national undertakings. These contracts play a key role in certain sectors (such as construction and public works, energy, telecommunications and heavy industry) and are traditionally characterised by a preference for national suppliers, based on statutory or administrative rules. This lack of open and effective competition was one obstacle to the completion of the single market — pushing up costs for contracting authorities and inhibiting, in certain key industries, the development of competitiveness.

The application of the principles of the internal market (in particular the freedom to provide services and freedom of competition) to these contracts ensures better allocation of economic resources and more rational use of public funds, with public authorities obtaining products and services of the highest available quality at the best price under keener competition. Giving preference to the best-performing undertakings across the European market encourages the competitiveness of European companies (which are then able to increase in size and develop their markets) and reinforces respect for the principles of transparency, equal treatment, genuine competition, and efficiency, thereby reducing the risk of fraud and corruption. A genuinely open single market can only be achieved when all companies are able to compete for these contracts on an equal footing.

## **ACHIEVEMENTS**

The Community equipped itself with legislation aimed at coordinating national rules, imposing obligations as regards the advertising of calls for tender and the objective criteria used to scrutinise tenders. Following the adoption of various normative acts since the 1960s, the Community decided to simplify and coordinate public procurement legislation and adopted four directives to this end (92/50/EEC, 93/36/EEC, 93/37/EEC and 93/38/EEC). Three of these directives were merged, with the aim of simplification and clarification, into Directive 2004/18/EC on public works contracts, public supply contracts and public service contracts (corrected by Directive 2005/75/EC) and Directive 2004/17/EC on the water, energy, transport and postal services sectors. Some annexes to both directives were amended by Directive 2005/51/EC. Directive 2009/81/EC introduced specific rules for defence procurement, aimed at facilitating access to the defence markets of other Member States.

## **REFORM**

A new public procurement package was adopted in 2014 by Parliament and the Council with the aim of simplifying procedures and making them more flexible in order to encourage access to public procurement for SMEs, and to ensure that greater consideration is given to social and environmental criteria. The legislative framework includes Directive 2014/24/EU of 26 February 2014 on public procurement (repealing Directive 2004/18/EC) and Directive 2014/25/EU of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors (repealing Directive 2004/17/EC). The new public procurement package is completed by a new directive on concessions (Directive 2014/23/EU of 26 February 2014 on the award of concession contracts), which sets up an appropriate legal framework for the award of concessions, ensuring that all EU economic actors have effective and non-discriminatory access to the EU market, and provides greater certainty as to the law in place.

The external component of public procurement is also taken into account with the Commission proposal for a regulation of 21 March 2012 establishing rules on the access of third-country goods and services to the EU's internal market in public procurement and procedures supporting negotiations on access of EU goods and services to the public procurement markets of third countries.

In April 2012, the Commission adopted a strategy for e-procurement<sup>[1]</sup> with the aim of reaching full e-procurement by mid-2016, and on 26 June 2013 it issued a proposal for a directive on electronic invoicing in public procurement. On 16 April 2014 Parliament and the Council adopted Directive 2014/55/EU on electronic invoicing in public procurement<sup>[2]</sup>. The deadline for transposition in the Member States is set for 27 November 2018.

## **DEFINITIONS**

'Public contracts' are contracts of pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities, and having as their object the execution of works, the supply of products or the provision of services.

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[1][COM\(2012\) 0179](#).

[2] Directive 2014/55/EU of the European Parliament and of the Council of 16 April 2014 on electronic invoicing in public procurement, OJ L 133, 6.5.2014, p. 1.

‘Contracting authorities’ are the state, regional or local authorities, bodies governed by public law, or associations formed by one or more such authorities or one or more such bodies governed by public law.

‘Concessions’ are contracts of pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the execution of works (in the case of works concessions) or the provision and management of services (in the case of services concessions) to one or more economic operators, the consideration of which consists either solely in the right to exploit the works or the services that are the object of the contract or in that right together with payment. The award of a concession involves the transfer to the concessionaire of an operating risk.

## **PUBLIC PROCUREMENT PROCEDURE**

All procedures must comply with the principles of EU law, and in particular with the free movement of goods, the freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. Competition, confidentiality and efficiency must also be respected.

### **A. Types of procedure**

Calls for tender must correspond to different types of procedure, to be used on the basis of a threshold system, combined with the methods for calculating the estimated value of each public contract and the indications for the procedures to be used — compulsory or indicative — as stated in the directives. In the ‘open procedure’, any interested economic operator may submit a tender. In the ‘restricted procedure’, only invited candidates may submit a tender. In the ‘competitive procedure with negotiation’, any economic operator may submit a request to participate, but only invited candidates, following the assessment of the information provided, may submit an initial tender which serves as a basis for the subsequent negotiations. In the ‘competitive dialogue’ procedure, any economic operator may submit a request to participate, but only the invited candidates may participate in the dialogue. It is used when contracting authorities are unable to define the means of satisfying their needs or of assessing what solution the market can offer. The contract is awarded on the sole basis of the award criterion of the best price-quality ratio. A new procedure, the ‘innovation partnership’, has been created for cases in which there is a need for an innovative solution that is not already available on the market. The contracting authority decides to set up the innovation partnership with one or several partners conducting separate research and development activities, in order to negotiate a new innovative solution during the tendering procedure. Finally, in specific cases and circumstances, contracting authorities can award public contracts through a negotiated procedure without prior publication.

### **B. Criteria for the award of a contract**

Contracting authorities must base the award of public contracts on the most economically advantageous tender. The reform of public procurement rules introduced this new award criterion based on the principle of the ‘most economically advantageous tender’ (the ‘MEAT’ criterion), which aims to ensure the best value for money (rather than the lowest price), i.e. it takes into account the quality, as well as the price or life-cycle costs, of the work, good or service in question. This criterion places greater emphasis on quality, the environment and social considerations, as well as innovation.

### C. Rules on publication and transparency

The procurement procedures must ensure the necessary transparency at all stages. This is achieved in particular through the publication of the essential elements of procurement procedures and through the dissemination of information on candidates and tenderers (e.g. the criteria and arrangements to be applied in the contract award decision, information on the conduct and progress of the procedure, and information on the reasons for rejection), as well as through the provision of sufficient documentation regarding all steps of the procedure.

### D. Remedies

In order to address cases of breaches of the public procurement rules by contracting authorities, the Remedies Directive (Directive 2007/66/EC) provides for an effective review system covering both public procurement directives and the concessions directive, and it introduces two important elements. The ‘standstill’ period offers — following the award decision — the opportunity for bidders to examine the decision and decide whether to initiate a review procedure. During this period of at least 10 days, the contracting authorities cannot sign the contract. The Remedies Directive also establishes more stringent rules protecting against the illegal direct award of public contracts.

### E. Other aspects of public procurement

The new rules promote green public procurement through a life-cycle costing approach and the possibility of referring to a specific label or eco-label. Social aspects are also important, with specific provisions for social inclusion, social criteria and subcontracting, and a simplified regime for services contracts, being included in the directives. Cutting red tape and enhancing SMEs’ access to public procurement are also central features. The new rules introduce the ‘European single procurement document’ and the use of self-declarations. Access by SMEs to public procurement will be enhanced in particular by the possibility of dividing contracts into lots and by the limitation of annual turnover requirements. The new directives make the progressive use of e-procurement mandatory and set specific rules concerning techniques and instruments for electronic and aggregated procurement, such as framework agreements, dynamic purchasing systems, electronic auctions, electronic catalogues, centralised purchasing activities, and cross-border joint procurement. The directives include European Court of Justice case-law on in-house relationships, making it possible, under conditions, for contracting authorities to award a contract to an undertaking without applying the procurement procedure. Finally, the new rules strengthen the legislation in force as regards conflicts of interest, favouritism and corruption, providing enhanced guarantees for sound procedures as regards grounds for exclusion, prior consultation, modification of contracts, and transparency.

## **CONCESSIONS**

While the revision of the rules for the utilities sector is more or less in line with the revision of the rules governing general public procurement (albeit adjusted to safeguard the option of greater flexibility in practices for entities engaged in commercial or industrial activity), the new rules on concessions are much more specific.

The directive applies only to concession contracts with a value equal to or greater than EUR 5 million, and certain types of concession are excluded from the scope of the directive, including concessions relating to drinking water. Unlike the general public procurement procedures, contracting authorities are free to structure the procedure for concessions contracts according to national standards or their own preferences, as long as they follow certain basic rules in order to provide for the following: the publication of a concession notice;

the provision of information on minimum requirements and the award criteria; respect for established requirements and the elimination of candidates who do not fulfil them; the exclusion of candidates who have been convicted of certain crimes, such as fraud and money laundering; and the provision of information to participants on how the procedure is to be organised, together with an indicative timetable. Furthermore, the subject matter of the concession, the award criteria and the minimum requirements cannot be subject to negotiations in concession award procedures. Concession contracts are limited in time and the question of whether or not they can be extended must be assessed under the procedure for contract modifications.

## **ROLE OF THE EUROPEAN PARLIAMENT**

Before its adoption of the public procurement package on 15 January 2014, Parliament had adopted several resolutions, including those of 18 May 2010 on new developments in public procurement, of 12 May 2011 on equal access to public sector markets in the EU and in third countries, and of 25 October 2011 on modernisation of public procurement. In these resolutions, Parliament supported, in particular, simplification measures (e.g. flexible procedures) and called for enhanced legal certainty. It took the view that the cheapest price should not be the only criterion considered when awarding contracts, but rather that best value, including sustainability criteria (such as life-cycle costs and environmental and social criteria) should also be taken into account.

Recent research indicates that the ongoing Brexit process will generate significant uncertainties and impacts on the single market and on the rights of European citizens in the area of public procurement<sup>[3]</sup>. Parliament will need to play a significant role in ascertaining if democratic legitimacy and respect for citizens' rights are present in this process<sup>[4]</sup>.

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[3]Arrowsmith S., Consequences of Brexit in the area of public procurement, 2017, [http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/602054/IPOL\\_IDA\(2017\)602054\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/602054/IPOL_IDA(2017)602054_EN.pdf)

[4]Stoll P.T., The Role and Powers of the European Parliament in the Brexit Process, 2017, [http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/602054/IPOL\\_IDA\(2017\)602054\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/602054/IPOL_IDA(2017)602054_EN.pdf)