

New EU rules on public procurement and concession contracts

Gómez-Acebo & Pombo, Brussels

I. Foreword

The new EU public procurement directives were adopted by the European Parliament on 15 January 2014. These new rules shall replace Directive 2004/18/EC on public works, supply and service contracts and Directive 2004/17/EC on procurement in the water, energy, transport and postal services sectors. Three new EU directives were approved, on (i) public sector procurement, (ii) utilities sector procurement and (iii) the procurement of works and services concessions by contracting bodies in the public and utilities sectors.

II. Main goal of the new rules

The new legislation sets for the first time common EU standards on concession contracts to boost fair competition and to ensure better quality and value for money when public authorities purchase or hire works, goods or services. They also intend to make it easier for small and medium-sized firms to bid. Finally, the new rules should allow greater scope for environmental considerations, social aspects and innovation in the award of public contracts.

Due to the international obligations of the EU under the World Trade Organisation Government Procurement Agreement, the thresholds will remain at their current level.

III. Changes introduced by the new rules

III.1. *Electronic communications to become mandatory*

Electronic means of communication exchange between the authority and the bidders will become mandatory in procurement procedures. The agreed e-procurement deadline for full electronic communication is 54 months as from formal adoption date (transposition deadline of 24 months + 30 months).

III.2. *Standardised European Single Procurement Document*

The documentation required for a procurement procedure is reduced through a standardised European Single Procurement Document, based on self-declarations (bidder statements). Consequently, only the winning bidder is obliged to submit formal evidence of what it declared when submitting its bid (original documentation, certificates and attestations). Consequently, the minimum deadlines to submit tenders are shortened.

According to the Commission, this should reduce the administrative burden on companies by over 80%.

III.3. *Access for small and medium sized enterprises (SMEs) to be facilitated*

In order to facilitate the participation of SMEs, the new rules encourage the division of contracts into lots. Therefore, contracting authorities are encouraged to divide large contracts into lots through the 'apply or explain' principle. Accordingly, where the procurement could have been so divided but has not been, the contracting authority will have to explain in the advertisement the main reasons for choosing otherwise.

Concerning the proof of financial capacity of bidders, the turnover requirement will be limited to a maximum of twice the estimated value of the contract. Again, if a wider amount is required, the contracting authority shall explain the reasons for this.

III.4. *The "MEAT" criterion as a reference for awarding*

The new Directives focus on achieving the objectives of the Europe 2020 Strategy for sustainable growth and environmental, social and innovation procurement. Consequently, contracting authorities can now determine the most economically advantageous tender and the lowest cost using a life-cycle costing approach.

Thanks to this new criterion of the "most economically advantageous tender" (MEAT), public authorities should be capable of placing more emphasis on quality, environmental considerations, social aspects or innovation, together with the price and life-cycle-costs of what is procured. The notion of life-cycle cost includes internal costs and cost imputed to environmental externalities (including the CO2 footprint) linked to the product, service or works during its entire life cycle.

Contracting authorities may also require that works, supplies or services bear specific labels certifying environmental, social or other characteristics. They may also take into account criteria linked to the production process of what will be purchased, such as the inclusion of vulnerable and disadvantaged people or the use of non-toxic substances. In other words, price is no longer allowed to be the central determining factor.

III.5. *New procedures*

Competitive Procedure with Negotiation

The new Directives replace the current standard negotiated procedure with a new one called the *Competitive Procedure with Negotiation*. This new procedure may be used when justified by the specific circumstances related to the nature, complexity or the legal and financial make-up of a given project, or by the fact that the needs of the contracting authority cannot be met by an 'off the shelf' type of solution. The main features of the new procedure are: (i) tenders are submitted from the beginning, (ii) they are then subject to negotiation and (iii) finally candidates are invited to resubmit their offer to finalise positions.

Innovation Partnership

The second new procedure is the *Innovation Partnership*, which aims to embrace both the development of an innovative product, service or works and the subsequent purchase of the result, if the resulting supply, service or work conforms to the agreed performance levels and maximum fixed costs. The goal of this new procedure is to allow public authorities to call for tenders for solving a specific problem without pre-empting the

solution, thus leaving room for the authority and the bidder to come up with innovative solutions together.

III.6. *Exclusion of companies*

The new Directives allow public authorities to blacklist companies and prevent them from bidding for public contracts. This would be justified where, for example, those companies have shown significant or persistent deficiencies when performing past public contracts and where those deficiencies led to early termination of a prior contract, compensation or other penalties.

Also, to fight social dumping and ensure that workers' rights are respected, the new laws will include tougher provisions on "abnormally low bids", whereby suppliers may be excluded from competitions for contracts where a bidder falls foul of employment and labour laws.

III.7. *The simplified regime*

The current rules make a distinction between priority (Part A) and non-priority (Part B) services; Part B services being those less amenable to cross-border competition, such as legal services. Whole Part A services must comply with all requirements of the European directives, Part B remain subject to more flexible rules.

This distinction is abolished in the new Directives, which suppress Part B rules. Nevertheless, specific rules for

the awarding of public contracts for health, social, cultural and related services, as well as for education, are provided. This regime will also be applicable to legal, catering and hospitality services. Briefly, all services not explicitly listed as being subject to the simplified rules shall fall under the full regime of the Directives.

Main features of the simplified regime are:

- it benefits from a much higher threshold of € 750,000;
- rules implementing the corresponding national procedures no longer have to respect EU rules on technical specifications that apply to the current "B" ("non-priority") services;
- besides the general EU principles, the only requirements that have to be respected are those related to transparency as well as to ex ante (through prior information notice) and (existing) ex post (contract award notice) publicity.

The Council has now to formally adopt these new Directives. Once done, the new rules will enter into force on the twentieth day following their publication in the Official Journal of the European Union.

Member States shall put in place the national set of rules necessary to comply with the Directives within 24 months after their entry into force.