

EC Public Procurement Directives: Changes Arising from the New Public Sector and Utilities Directives

Background

The European Union's Council of Ministers and the European Parliament adopted the Public Sector and Utilities Consolidated Procurement Directives on 3 February 2004. They came into force on 30 April 2004, the day they were published in the Official Journal of the European Union, and must be implemented within 21 months of the publication date - i.e. 31 January 2006.

Public Sector Directive

The Public Sector Consolidated Procurement Directive is a single Directive, which replaces three EC directives covering the procurement of works, supplies and services. It aims to clarify, modernise and simplify the provisions of the existing directives and specifically, it consolidates the three directives, relating to the award of public works, supplies and services contracts respectively, into a single text.

Utilities Directive

The majority of categories of entities and activities are covered in the new Utilities Directive as before. The key changes are that the Telecommunications sector has been removed following introduction of effective competition within this sector while the postal services sector, previously covered by the public sector rules, has been included, although Member States have until 1 January 2009 to effect this change.

Main Changes in the New Directives

Many of the basic provisions remain the same as in the existing directives. There are some refinements, however, in terms of:

- simplified EU thresholds expressed in Euros (the sterling equivalent will continue to be fixed at two yearly intervals for use in the UK);
- encouragement to use performance specifications and more emphasis on "equivalence";
- requirement to publish contract award criteria;

- addressing of sustainability issues; and
- greater emphasis placed on electronic means of communication.

There are also a number of significant additions to the existing public sector Directives as follows:

1. **Framework Agreements**

Under the existing public sector directives, the legality of framework agreements is unclear. The new Directive gives legal certainty to the use of framework agreements under EC rules. This is the first time that a provision on framework agreements has been explicitly included in a public sector directive. However, the use of framework agreements is already well established in the UK and has long been recognised by the Commission and has been a feature of the Utilities Directive.

2. **E-Procurement**

The Directives put electronic means of communication and information exchange on a par with more traditional means. They mark a change from the existing public procurement directives that allow electronic means only to be used to submit tenders under certain conditions. To promote the use of e-procurement, the new Directives provide for shorter time scales where electronic means of communication and information exchange are employed. They also introduce and regulate the use of electronic auctions and dynamic purchasing systems.

a. ***E-Auctions***

The Directives provide Member States with the explicit option of allowing contracting authorities to use reverse electronic auctions and provide that the award of a public contract can be preceded by an e-auction when the contract specifications can be established with precision. They lay out what information about the e-auction needs to be included in the contract notice and specifications.

Although this is a new provision, e-auctions are already being used in public procurement and therefore the relevant Articles are helpful in clarifying their use, and may have the effect of widening take-up. The text is fully consistent with the NI public sector procurement policy of basing award on best value for money (whole life cost and quality) rather than lowest price alone. It allows for an initial paper assessment of bids on the basis of all of the required criteria before the quantifiable aspects of bids, such as price, are updated in the e-auction itself.

b. *Dynamic Purchasing Systems*

The new Directives state that Member States ‘may provide’ that contracting authorities may use dynamic purchasing systems. A dynamic purchasing system is defined and is a completely electronic process for making commonly used purchases. Dynamic purchasing systems are limited in duration to four years, except in exceptional cases, and are essentially a completely electronic version of a framework agreement. Unlike a framework agreement, however, dynamic purchasing systems are open throughout their period of operation to any economic operator that satisfies the selection criteria and has submits an indicative tender compliant with the specification.

3. Competitive Dialogue

The Directives introduce a new procedure, the competitive dialogue. Similar to the negotiated procedure, it specifically permits dialogue between the contracting authority and contractors during the stages of the procurement process. This new procedure is aimed at large, complex contracts such as PFIs and PPPs (the Commission is to issue guidance on this before the Directives’ implementation date). It enables contracting authorities to develop specifications with the input of contractors, and to assist contractors in developing tenders that are responsive to the specifications.

4. Social and Environmental Issues

There is also greater clarity in the new Directives on the extent to which social and environmental issues can be given consideration during the procurement

process, e.g. by using “green” specifications, production process standards and variants and by taking account of relevant quality and whole life cost issues at the award stage.

Summary

Overall, the new Directives aim to clarify existing procurement rules rather than to enact a major overhaul. They do not depart from the existing Directives, which NI public sector’s best value for money procurement policy is based on. While the extent of the impact of the Directives is yet to be seen, they will certainly not work against it. Provisions, which are currently used, and where such use has been accepted by the European Commission, can now follow the procedure set out in the new Directives such as frameworks and electronic auctions, contract award criteria and sustainability issues. The competitive dialogue provision must await publication of new UK regulations before coming into force.

The introduction of dynamic purchasing systems, and the specific references to e-auctions and framework agreements in the Directives will reduce confusion as to their legal status, and clarify how they can be used in line with EU rules. In this way, the Directives should serve to widen the use of modern procurement tools, promote best practice and ultimately deliver long-term gains.

Procurement Policy and Performance Branch

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