

Proposed New Procurement Rules in the EU's Internal Market: Guidance 13.

The European Council at the Lisbon summit of 23rd and 24th March 2000 highlighted the importance of public procurement concluding that it is one of the key areas of the Single Market which remains to be completed and that rapid work is required to improve performance.

Public procurement contracts account for around 14% of Community GDP, in excess of 1,000 billion per year, more than half the GDP of Germany. This point cannot be emphasised enough: to put it simply, the economic importance of the sector is so great and the potential benefits from effective liberalisation so enormous that the Community cannot afford to fail in its task of ensuring effective compliance with the Directives.

Between 1992 and 1998 the total value of published public procurement contracts has doubled, to just below 2% of GDP, while five times as many public administrations and utilities are now advertising their tenders in the Official Journal. Despite this progress it is clear there is still a real issue of non-compliance that has to be addressed. Part of this discrepancy may be explained by a large number of below-threshold contracts and other contracts such as certain defence contracts, which are exempt from the Directives. But it remains clear that not all public contracts are being treated with the degree of openness and non-discrimination which the Internal Market requires. The results so far, whilst showing promising indications, are still below expectations.

But there is clear support from purchasers, economic operators and others for the objectives of Community public procurement policy, namely the opening up of national public procurement markets to Community competition so enhancing competition and improving the quality of public services.

In doing this the public procurement Directives also seek to ensure best value for money procurement allowing the most efficient use of taxpayers' money.

What we can see then is a combination of factors leading to a single conclusion. First, the potential benefits of effective liberalisation of public procurement markets are enormous; second, there is strong support for the objectives of Community public procurement policy.

The inevitable conclusion is that part at least of the problem lies with the complex and sometimes rigid nature of the Directives. The need to simplify and modernise the public procurement Directives to make the rules work in practice therefore goes hand in hand with the need to ensure completion of this key element of the Single Market.

Following the Communication from the Commission, the Commission services have produced draft Directives which aim to capture this need for change. Moreover, this process has taken place in consultation with and with the helpful guidance from national public procurement experts of the Member States represented in the Advisory Committee for Public Contracts.

These draft Directives were adopted by the Commission on 10th May and presented to the Member States in the Internal Market Council.

The Directives will now go through the so-called "Co-Decision" procedure where they will be debated and possibly amended by Council and Parliament. It may take 18 to 24 months and possibly longer before the Directives are finally adopted by Council and Parliament. Once adopted, the Member States will be given a deadline, generally but not necessarily of 12 months, to implement the Directives into national law. The Member States emphasised the importance of early adoption of the legislative package at the Lisbon European Council where they said that work on the package should be concluded in good time to allow the new measures to enter into force by 2002.

Aspects of the Legislative Package

Simplification

There are two aspects to simplification. The first is clarification, by which I mean non-substantive changes designed to make the Directives more easily understandable both for purchasers and economic operators. For example, we have consolidated the three Directives for supplies, works and services to form a single coherent text, the "Consolidated Directive". This streamlined approach has allowed us significantly to reduce the number of Articles (from 117 to only 77) and to eliminate minor inconsistencies between the texts.

It will be much easier to find your way around the new Consolidated and Utilities Directives as they have been reordered to follow the sequential order of an award procedure. And we have taken the unusual step for Commission Directives of inserting a detailed Table of Contents and Chapters and Article headings. It is hoped that this will facilitate application of and compliance with the Directives.

Simplification also implies amending structures which are sometimes seen as too rigid to allow best value for money procurement. The new Consolidated Directive therefore introduces greater flexibility by providing for two new buying techniques.

BiP GUIDANCE 13/2000 Framework Agreements

For the first time in the public sector Directives, the Consolidated Directive brings framework agreements within its scope. The overall intention here is to help contracting authorities to operate procedures under the Directives which allow greater security of supply and flexibility in its long-term procurement.

For example, in markets which are constantly changing, such as the information technology sector, it may not be appropriate for public purchasers to be tied to fixed conditions. Framework agreements allow contracting authorities to manage their procurement requirements, including the conditions on which they buy, more flexibly.

Under the current public sector Directives, any order made pursuant to such a framework agreement would be subject to the advertising and other requirements of the Directive where the threshold is met, but it will be exempt from the normal procedures as proposed by the Consolidated Directive.

Competitive Dialogue

Proposed greater flexibility where the complexity of a given contract means that it is not possible for the contracting authority to specify in advance how its needs can best be achieved.

For example, a contracting authority may be aware of what its information communications requirements are but may be unable to say in advance what the best technical solution is for satisfying its needs. In such circumstances a discussion of the contract between contracting authority and would-be tenderers would allow the authority to specify an appropriate technical solution.

However, the standard procedures under the current public sector Directives leave very little scope for discussion during the award process and therefore lack the necessary flexibility. Moreover, a company which helps a contracting authority to define its specifications cannot participate in the subsequent award procedure based on those specifications where this would be to the detriment of fair competition. The Consolidated Directive therefore contains a new negotiated procedure sometimes referred to as the "competitive dialogue" which allows the contracting authority to request "outline solutions" from candidates.

An outline solution is a preliminary indication of the solution which the candidate in question intends to propose to meet the authority's needs. This may then be used as the basis for discussion between contracting authority and candidate to examine how the authority's needs can best be satisfied. As a result, the contracting authority is able to define the final technical specifications either by retaining one of the solutions presented by a candidate or by combining any number of the solutions presented. Once this stage is complete, the authority invites candidates to submit formal tenders.

To ensure confidentiality, the contracting authority will be prohibited from divulging to any candidate the solutions proposed by, or any confidential information relating to, other candidates. Moreover, intellectual property rights remain unaffected.

Technical Specifications

The Legislative Package also allows greater flexibility in relation to technical specifications.

It is proposed to clarify the Directives by confirming that tenders may not be rejected simply because they do not use the indicated standard, provided they offer an equivalent solution. This change should encourage innovation and broaden the range of potentially interested operators.

These changes will apply to both the Consolidated Directive and the Utilities Directive bringing these more into line with one another and thereby adding to the simplification process.

Thresholds

Another important example of simplification concerns the thresholds under the Directives.

At the moment the thresholds are overly complex. It is often difficult to establish which threshold is applicable to a given public contract. Moreover, some thresholds are expressed in ecu and others in Special Drawing Rights or SDRs (the unit of account used in the Government Procurement Agreement).

We propose therefore to simplify the thresholds and to use the Euro as the only unit of account.

For works a single threshold will apply of 5,300,000.

As regards supplies and services, there will be two thresholds of 200,000 or 130,000 depending on whether the contracting authority is a non-central or central government authority respectively.

The new Utilities Directive will also be significantly simplified in this respect, containing only two thresholds, namely 5,300,000 for works and 400,000 for supplies and services. Unlike the stipulation of the current Directive, these thresholds will apply irrespective of the sector in which the contracting entity operates.

Electronic Procurement

Modernisation is a key element of the Legislative Package. The introduction of information communication technologies is thought to offer important opportunities for efficiency, transparency and opening up of public procurement throughout the Community.

The importance of information communication technologies and procurement was also recognised by the Presidency conclusions of the Lisbon European Council. This called on the Commission, the Council and the Member States to take the necessary steps to ensure that it is possible by 2003 for Community and government procurement to take place online.

The approach taken in the Legislative Package is to allow purchasers in future to decide to use electronic means for their procurement processes to the exclusion of all other means of communication, provided this does not cause discrimination.

Timescales

Purchasers are also encouraged to run procedures electronically in return for which they may benefit from a reduction in the contract award timetable.

Where purchasers choose to use electronic means, the Office of Official Publications will publish notices within 5 days from the date of dispatch. Where non-electronic means are used this period remains 12 days. This provision applies in both the Consolidated and Utilities Directives.

Where, in addition, the contracting authority provides free and direct electronic access to all contract documentation as from the date of dispatch to the Office of Official Publications, the period for receipt of tenders is reduced by 5 days.

A view has been expressed in some quarters that the encouragement of electronic communications could actually discriminate against SMEs as these may be less computer-literate than larger organisations. Procurement processes taking place over the internet should, if anything, help to level the playing field in favour of SMEs and enhance their ability to compete.

Some aspects of the Legislative Package involve changes to both the Consolidated and Utilities Directives while other changes affect only one or the other of these Directives.

Utilities Directive

The proposed new Utilities Directive is amended to take account of the liberalisation of utility sectors and the introduction of competition by allowing purchasers in such sectors to be exempted from the Directive.

Telecommunications

In June of last year the Commission published a Communication indicating the list of telecommunications services which the Commission considers are excluded from the scope of the Directive since they operate in conditions of open competition. However, many telecoms operators wanted greater legal certainty than was provided by this Communication.

The new Utilities Directive will therefore go further by removing in its entirety the telecommunications sector from the scope of the Directive. It is true that some Member States are less advanced in the telecommunications liberalisation process. Nevertheless, according to the proposal, the exemption should take effect at the same time in all Member States. The Commission has adopted this approach since it believes that in the period before the Directive comes into force, the rapid progress

towards liberalisation and effective competition will continue throughout the Community.

Other Utility Sectors

Regarding other sectors (that is to say, water, energy and transport), a new mechanism will be introduced in the Utilities Directive allowing purchases to be exempted as and when it is established that the sector is exposed to competition in markets to which access is not limited.

However, even where liberalisation and the introduction of competition become a reality, exclusion is not automatic. The Member State in question will have to request exemption of the given sector and notify the Commission of all relevant information to allow an appropriate economic assessment to be made. The Commission will have to make its decision within six months of the submission of all relevant information.

Award Criteria

Making the public procurement rules work doesn't just depend on persuading purchasers to apply the Directives. Economic operators also have to be convinced that it is worth their while to bid for contracts outside their home territory. Enhancing transparency is a key element here. In the interest of transparency, it is proposed to amend the current rules on award criteria in both the Consolidated and Utilities Directives.

The Directives currently say that the award criteria should be set out where possible in descending order of importance. This has proved unsatisfactory; first the words 'where possible' are often interpreted by purchasers to mean that there is total discretion as to whether to indicate any order; and second, the order does not necessarily give in advance sufficient indication to tenderers of the degree of importance which purchasers will attach to one criterion as compared to another and may not therefore be of any real help to tenderers in preparing the most competitive bid in terms of price and quality.

The Legislating Package therefore requires purchasers to indicate the "relative weighting" of award criteria. Relative weighting does not necessarily mean that the purchaser is required to attach precise percentage figures to each of the criteria (though of course it can choose to express relative weighting in these terms).

It does, however, require purchasers to indicate at least a minimum and maximum range showing the overall importance attached to each criterion in relation to all other criteria.

Exclusion

A further step towards greater transparency will be achieved by a new provision in the Consolidated Directive which obliges contracting authorities to exclude from a call for tenders any tenderer who has been the subject of a final judgment for membership

of a criminal organisation or corruption. This represents an important step in the fight against organised crime.

Environment

To clarify that environmental criteria may be taken into account where these relate directly to the subject matter of the contract, the Consolidated Directive and new Utilities Directive expressly include 'environmental characteristics' in the (non-exhaustive) list of contract award criteria which purchasers may take into account in order to choose the most economically advantageous tender for them.

Measuring the Impact of Public Procurement Policy - First Indicators

The European Commission is currently discussing with Member States a preliminary set of nine indicators to measure market trends and the impact of public procurement policy over time in fulfilment of its commitment in the communication on public procurement.⁽¹⁾ Public procurement is a key area of the Internal Market, both in terms of its economic importance and as an instrument of direct economic influence for Member States' administrations. It is therefore vital for the functioning of the EU economy that public procurement markets are open to EU-wide competition. This will give taxpayers value for money, improve the quality of the public services they receive and permit the efficient allocation of resources. Public procurement markets can only be efficient if all the parties involved (purchasers, suppliers and public authorities) have good, relevant market information.

These indicators provide annual estimates of total public procurement, the amount covered by the public procurement Directives and the amount actually advertised as well as the number of entities publishing notices, the number of notices published and the amount of cross-procurement within the EU. Additional indicators will measure the quality of published notices and compare prices paid by the public sector for the same or similar goods and services across the EU. The value of these indicators as a measure of market openness can be seen from the initial estimates for the period 1993-1998.

Several Member States have already noticed the positive impact that the EU public procurement rules⁽²⁾ can have, especially by encouraging greater competition through open tendering procedures. Denmark estimates that their local administrations can make savings of up to 14.5% by use of open tendering procedures, while the United Kingdom aims to save over 1.5 billion over the next three years, by adopting best practice for all its procurement activities.

These indicators show that while total public procurement has declined slightly between 1993 and 1998 as a proportion of Gross Domestic Product, it is still over 14% of GDP (over 1,000 billion in 1998 - equivalent to more than half of Germany's GDP) for the EU as a whole.

The number and the total value of tenders advertised according to the rules has doubled over the same period. The number of public authorities and public utilities advertising their tenders over the threshold had grown fivefold over the same period. In 1998 over 13,000 bodies published together more than 73,000 such advertisements,

worth an estimated total of 137 billion. This is clearly the result of the Commission's effort to enforce and monitor the proper implementation and application of Community Law.

Despite this progress, it is clear from these indicators that not all the tenders which should be advertised are yet being published and that many public contracts are still not being treated with the degree of openness and non-discrimination that the Single Market requires. Given the marked increase in transparency, for example, it is remarkable that the value of cross-border procurement as a proportion of all public procurement, at around 10%, has not changed significantly between 1994 and 1998, remaining below that for the economy as a whole.

These indicators have contributed to the analysis of public procurement in the Commission's second annual report on the functioning of Community product and capital markets (see tables). They will continue to provide a consistent measure of the impact of public procurement policy over time.

1. Total Public Procurement (in billion)

	1993	1994	1995	1996	1997	1998
A	26.33	28.26	28.70	29.33	30.30	33.06
B	15.55	16.49	16.41	15.84	17.29	17.82
D	269.81	280.67	293.81	294.06	281.53	282.53
DK	16.86	18.02	19.65	21.31	22.18	23.31
E	55.42	53.55	53.74	52.78	53.29	56.39
EL	9.95	9.98	11.87	12.60	13.47	14.31
F	124.40	124.34	125.10	124.03	123.17	125.41
FIN	9.91	11.32	12.79	13.33	14.66	14.93
I	103.51	99.73	92.55	103.71	107.51	114.12
IRL	4.80	5.38	5.71	6.02	7.01	7.95
L	1.71	1.67	1.80	1.87	1.84	1.94
NL	31.37	32.38	33.87	34.47	34.76	36.94
P	9.22	9.35	10.14	11.53	13.45	13.91

S	25.19	30.46	30.81	35.95	36.60	34.47
UK	178.19	203.62	205.71	214.35	241.08	276.55
Total	882.00	925.00	943.00	971.00	998.00	1054.00

2. Value of Calls for Tenders (in billion) over EC Threshold

	1993	1994	1995	1996	1997	1998
A	0.05	0.58	1.49	2.50	2.40	2.77
B	1.50	1.71	2.10	2.37	3.38	4.43
D	9.29	13.76	17.10	19.08	20.38	21.54
DK	2.28	3.14	3.67	3.13	3.29	3.52
E	4.37	4.38	5.27	6.79	7.25	7.85
EL	2.74	4.45	4.18	4.78	5.83	6.39
F	8.30	8.96	11.18	14.50	18.00	23.54
FIN	0.02	0.78	1.29	1.55	1.47	1.69
I	7.43	9.26	10.31	11.66	13.95	13.92
IRL	0.68	0.64	0.78	1.21	1.65	1.50
L	0.12	0.09	0.11	0.16	0.21	0.35
NL	2.27	2.87	3.15	3.40	3.74	3.69
P	1.25	1.14	1.81	2.27	2.06	2.16
S	0.21	3.38	4.42	4.76	5.02	5.26
UK	18.43	25.94	28.23	30.03	38.28	38.27
Total	59.00	81.00	95.00	108.00	127.00	137.00

3. Number of Calls for Competition over EC Threshold

	1993	1994	1995	1996	1997	1998
A	60	590	1.378	2.231	2.187	2.488
B	553	711	856	1.109	1.594	2.187
D	7.360	10.554	12.543	14.038	15.190	15.939
DK	859	1.180	1.566	1.298	1.294	1.334
E	1.538	1.863	3.093	4.134	3.980	4.156
EL	922	1.128	1.225	1.352	1.534	1.680
F	5.773	7.106	9.329	12.008	14.985	19.691
FIN	16	468	751	851	822	894
I	4.855	6.647	7.533	7.933	8.445	8.068
IRL	278	379	505	652	750	792
L	86	72	86	107	141	199
NL	627	986	1.115	1.281	1.406	1.379
P	474	667	926	1.138	1.167	1.291
S	122	1.664	2.273	2.327	2.372	2.529
UK	7.340	9.692	10.622	10.568	11.377	11.061
Total	30.863	43.707	53.801	61.027	67.244	73.688

Source: Internal Market Directorate General of the European Commission

4. Number of entities publishing over EC Threshold Contracts

	1993	1994	1995	1996	1997	1998
A	45	196	215	236	404	419

B 117 429 623 551 470 527
D 310 2.423 2.727 2.972 2.995 3.114
DK 49 214 338 338 381 396
E 35 264 393 487 547 715
EL 239 1.537 1.988 2.657 3.017 3.186
F 32 114 109 113 123 130
FIN 183 937 1.177 1.229 1.193 1.276
I 13 25 32 34 38 40
IRL 77 331 465 478 509 573
L 64 166 286 373 314 413
NL 148 171 170 203 223 236
P n/a 129 254 236 274 270
S n/a 612 665 596 542 606
UK 802 1.640 1.607 1.702 1.720 1.694
Total 2.115 9.189 11.049 12.203 12.750 13.595

Source: Internal Market Directorate General of the European Commission

(1) Commission Communication of 11.3.1998 (COM(98)143 final) on Public Procurement in the European Union.

(2) Directives 92/50, 93/36, 93/37 and 93/38 co-ordinate procurement procedures for public authorities and Utilities.

I Italy

IRL Ireland

L Luxembourg

NL Netherlands

P Portugal

S Sweden

UK United Kingdom

A Austria

B Belgium

D Germany

DK Denmark

E Spain

EL Greece

F France

FIN Finland

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