

Expert public procurement consultancy for Buyers and Suppliers at your service



PASS CONSULTANCY

BiP's *Procurement Advice and Support Service (PASS)* provides organisations with access to experts in public procurement practices and procedures, thus helping you develop and deliver effective and efficient procurement. Our team offers a range of services to meet your specific needs. Whichever area you wish evaluated and improved, we have the experts to help.

The *PASS* consultancy's mission is to help you deliver the best in government procurement through:

- Practical solutions to improve procurement performance
- Innovative approaches to knowledge transfer within government
- Joined-up government
- Improved performance indicators
- Strategic direction and performance
- Opportunities offered by e-government
- Capacity to deliver change to meet identified needs
- Continuous improvement of services and challenging poor performance
- Sustainable development within decision-making processes and delivery of services
- EU-compliant processes
- Best practice procurement training

PASS HEALTH CHECK

The *PASS* service can help your organisation examine its current procurement organisational structures, strategies, processes, practices and related strengths and weaknesses. It delivers a detailed *PASS Mark Health Check Outcome Highlight Report (OHR)* that outlines areas of strength as well as those requiring further attention, and provides an outline *Project Initiation Document (PID)* designed to deliver a more effective and efficient tendering process that will help you achieve optimum performance and better value-for-money procurement.

PASS – HELPING YOU MEET KEY OBJECTIVES

The key objective of public procurement professionals is to ensure that the most suitable supplier is selected to provide goods and services on terms which are likely to offer the best value for money. The *PASS* service helps you meet this requirement and deliver contracts that offer best value-for-money terms with suppliers who will execute them efficiently.

PASS TRAINING

Our consultants can provide you with bespoke training packages to suit your needs. Consultancy and training is available for the following: environmental purchasing, partnering, evaluation, e-government, supplier debriefing, UK legal processes and precedents, contract management, EU-compliant tendering and much more.

PASS ONLINE GUIDANCE

The *PASS* service provides online guidances on all aspects of the public procurement process and legal requirements: www.bipsolutions.com/html/briefing.php

PASS – CAPS SERVICE

Introducing *CAPS* – the public sector's guardian through the EU public procurement process, helping you to quickly access in-depth, authoritative EU public procurement procedure assistance. We are now pleased to offer your organisation access to this vast knowledge base as and when required, through subscription to BiP's new *Contract Administration & Process Support (CAPS)* helpline service. The *CAPS* service level agreement aims to answer 99% of your enquiries within one working day and 85% of these within one working hour.

PASS IN-HOUSE PRESENTATIONS

PASS consultancy can provide you with in-house presentations directed to buyer or supplier. Each presentation will be bespoke to your requirements, whether they be with regards to improving your tendering practices or your procurement strategy or processes. Contact: pass@bipsolutions.com



The *PASS Mark Health Check* is a process-based evaluation technique that helps identify how your company can develop more effective processes when tendering for public sector contracts.

For further information on the *PASS* service, contact our **PASS Team** on 0845 270 7055, email pass@bipsolutions.com or visit www.bipsolutions.com/pass/



GUIDANCE 12a

2005

E-PROCUREMENT UNDER THE NEW EU PUBLIC PROCUREMENT DIRECTIVES

PART ONE OF TWO



The introduction of electronic means in the public procurement process raises a number of legal questions. However, few of these are new or specific to the use of electronic means: most deal with the issue of how to organise electronically procedures initially designed for paper. Electronic public procurement (hereafter e-procurement) is therefore firmly rooted in a well understood legal framework which provides the principles and rules which regulate the awarding process. The basic guiding principle is that in the absence of specific provisions to the contrary the use of electronic means does not change any of the steps of the relevant procedure.

The rationale for the legal provisions specifically devoted to e-procurement in the new public procurement Directives (Directives 2004/18/EC and 2004/17/EC), is that each and every economic operator across the Union should be able to participate, with simple and commonly used equipment and basic technical know-how, in a public procurement process which takes place partially or entirely by electronic means.

The aim of this document is to present the rules and principles governing e-procurement under the new public procurement Directives. First, the general rules and principles and the features that are relevant to all communications in an e-procurement process will be examined. Second, the rules governing notices and access to contract documents will be presented. Third, the rules related to the reception of requests to participate and tenders will be analysed in relation to both individual 'one-off' purchases and to repetitive purchases under framework

agreements and dynamic purchasing systems. Finally, the new purchasing technique of electronic auctions will be examined more closely, followed by a consideration of the main features of the electronic dynamic systems.

This analysis will cover those aspects of a procurement procedure that are regulated by the Directives, ie from the publication of the contract notice to the receipt of tenders, and the re-opening of competition. Other aspects of the procurement cycle that may also impact on e-procurement (eg electronic invoicing, electronic payments etc) are addressed by other relevant Community policies and legislation and discussed in the Commission Action Plan on e-procurement (COM 2004/841/EC).

As electronic procurement processes and methods are under constant development, the Directives do not pretend to regulate in detail the use of all such methods. Other electronic purchasing techniques may be used, "providing such use complies with the rules drawn up under this Directive and the principles of equal treatment, non-discrimination and transparency" (cf Recitals 12 and 20).

RULES APPLICABLE TO COMMUNICATIONS

Electronic means of communication and their use in the procurement process

Electronic means of communication

The new public procurement Directives define electronic means as those using electronic equipment for the processing (including digital

compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means (Article 1(13) of Directive 2004/18/EC and Article 1(12) of Directive 2004/17/EC).

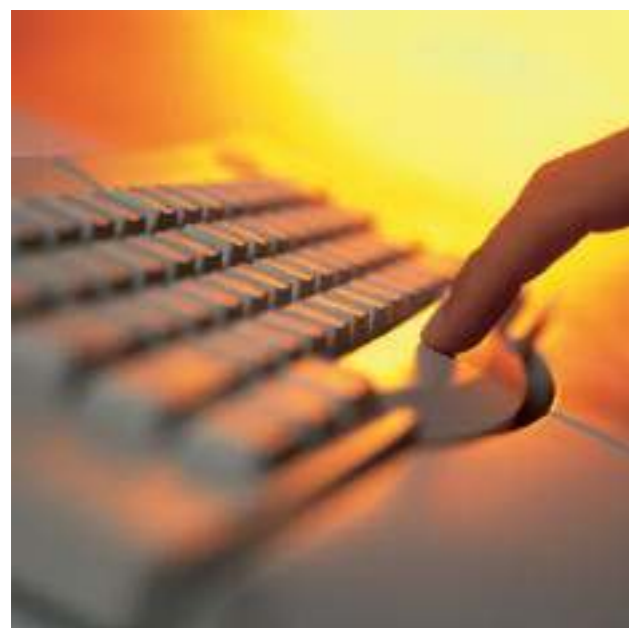
Electronic means of communication typically rely upon a network which is able to handle and transmit digital signals. According to Articles 42(2) and 48(2) the chosen means must be generally available and thus not restrict access to the tendering procedure. This means that the network in question must be open and everybody must be able to connect to it.

Today such generally available electronic means of communication would include internet and email. However, technology is constantly and rapidly evolving. In order to define generally available means, it is preferable therefore not to interpret the provision restrictively in terms of a specific standard but rather to try to identify the relevant criteria. These are most obviously the geographic coverage, the terminal equipment and the formalities/procedures needed for connection to the network, the level of ICT literacy required and the costs involved. If a means of communication implies a connection to a network which is not available everywhere and to everybody and/or the use of equipment which is not in common use (eg satellite communication today) and/or the costs of which are unreasonably high for the use to which it is destined, the means cannot be deemed to satisfy the requirement of general availability.

Therefore, only a pragmatic approach focusing on the obligation not to restrict operators' access to the tendering procedures will help contracting authorities to determine if the chosen means of communication is indeed generally available and thus satisfies the first requirement of the Directives.

Freely available and reliable access to the contracting authority's connection to an open network is another important factor needed to guarantee that access to the tendering procedure is not restricted and to ensure equal treatment and effective competition.

Since the internet is available 24 hours a day, access to most operations (browsing, registration, downloading of documents, submission of requests to participate or tenders) should in principle be available round the clock. Reasonable access limitations can be envisaged, mainly for maintenance reasons; however, they should never extend into normal business hours. In contrast, those operations that require interaction (eg e-auctions) may only be accessible during normal business hours. Only if tenders are to be collected in real time, as in some e-auctions, might it be necessary to modify opening hours in order to allow all tenderers to participate.



To avoid any ambiguity the deadline for submitting offers should be clearly specified, eg with reference to Coordinated Universal Time (UTC) or by adding 'local time'.

The contracting authority's system should also be set up so as to provide adequate protection against unauthorised actions aimed at disrupting its normal operation and so as to provide a reasonable level of protection and guarantee of security to economic operators.

Technical problems within the contracting authority's network, service disruptions and system failures may impede access to contract documents, or may disrupt the procurement process at a critical moment (eg during the transmission of requests for clarification or the corresponding answers, during receipt of tenders or requests to participate, or during auctions). Problems within the public or open network and problems specific to the device or the platform of the contracting authority should be distinguished: only in the latter case must the contracting authority remedy the failure by, for example, extending the deadlines and providing the relevant information to all interested parties. The contracting authority is not responsible for the open network failure and is not obliged to take any remedial actions, even though it may do so where this seems appropriate (respective disclaimers may be included in an appropriate location).

The new provisions on e-procurement do not address the issue of charges for accessing the contracting authority's system. It is reasonable to envisage that each party covers its own costs. Economic operators would bear the communication costs to access the procurement system or the costs of obtaining a digital signature.

Contracting authorities would bear the cost of the system for receiving tenders and for making available the contract documents. Depending on the services offered by the system (eg alert mechanisms, database management, etc) certain fees could be charged to economic operators, except where dynamic purchasing systems are involved, provided that such fees are justified, proportionate and do not discriminate or restrict access to the procurement procedure.

The use of electronic means in the procurement process

Electronic means are for the first time put on par with traditional means of communication (Recitals 35 and 46; Articles 1(12) and 1(11)). Contracting authorities may decide that all communications and exchanges of information with economic operators will be performed exclusively by electronic means (Articles 42(1) and 48(1)) or by a combination of electronic means and paper. If a combination is chosen it may continue in parallel at every stage of the procedure, or in successive stages in which only one or the other is used (eg only electronic means for the request of contract documents and only traditional means for the submission of tenders). Contracting authorities can also leave the choice of means up to economic operators.

The right of contracting authorities to choose the means of communication is nonetheless limited by the Directives:

- The receipt of documents, certificates and declarations that do not exist in electronic format must be organised following the traditional procedures on paper (Articles 42(5)(d) and 48(5)(d));
- Some procuring methods/instruments such as auctions and dynamic purchasing systems may only be conducted by electronic means (Articles 1(7) second indent and 1(6));
- When there are reasons to believe that, due to the volume and/or complexity of the data to be submitted, the communication, exchange and storage of it cannot be properly handled by electronic means, and therefore the requirements of Articles 42(3) and 48(3) are not satisfied, they should be handled by traditional means of communication. In such cases data shall be exchanged on physical supports such as paper or generally used supports for electronic storage of data such as floppy disks, CD-ROMs or memory sticks.

Tools for communicating by electronic means

Articles 42(4) and 48(4) provide that the tools for communicating by electronic means, as well as their technical characteristics, must be non-discriminatory, generally available and interoperable with

the information and communication technology products in general use.

General availability and non-discrimination

The pragmatic approach described above for determining the general availability of the chosen means of communication also applies to the tools to be used for communicating by electronic means.

In contrast to electronic means, electronic tools do not imply the presence of a network. The term refers to products, mainly software products, which are used by contracting authorities and economic operators in order to communicate effectively. The requirement for electronic tools to be generally available is therefore slightly different.

Bearing in mind that the guiding principle is always that whoever can have access to the internet via a normal computer with standard applications and programs shall be able to participate in the public procurement procedure, two different cases may occur:

- *The tool for communicating has to be owned by the economic operator:* in this scenario the necessary tool must be off-the-shelf software which is easy to buy (available everywhere at a cost which is proportionate to the use to which it is destined), easy to install if need be, and reasonably easy to use. The general principle of proportionality can be used to assess the level of technical knowledge the tool requires (eg when procuring computer services or products, the contracting authority may probably require a higher level of ICT literacy from potential suppliers).
- *The tool is made available by the contracting authority to the interested economic operators:* this is mainly where the chosen tool would not be 'easy to buy' for economic operators. However, this apart, the same requirements of general availability and non-discrimination will apply as for a tool owned by economic operators. This is also the case where the requirement of interoperability is more important.

The level of ICT literacy required for using the tool should be considered. If the contracting authority can choose between two families of software for presenting drawings and plans, the exclusive choice of one of them could benefit some operators to the detriment of others. In such cases, in order to comply with the requirement of non-discrimination, if the contracting authority really cannot accept both tools it should consider providing longer time limits to allow economic operators to get acquainted with the tool.

Finally, and without prejudice to the right of the contracting authority to require tenders to be drafted in its own language (Annexes VII A (12)(d) and XIII A (10)(c)), the issue of the language of the tool should be taken into account by the contracting authority. Software in or at least the presence of some minimum indications in another language may be advisable to facilitate the installation and use of the tool made available by the contracting authority, to facilitate access to contract documents or uploading of tenders especially when complex instructions are needed.

DISCLAIMER

This Guidance has been produced by BiP Solutions Ltd to provide assistance to those engaged in public procurement. The Guidance has been published in good faith by BiP and BiP shall not incur any liability for any action or omission arising out of any reliance being placed on the Guidance by any organisation or other person. Any organisation or other person in receipt of this Guidance should take their own legal, financial and other relevant professional advice when considering what action (if any) to take in respect of any initiative, proposal, or other involvement with public procurement, or before placing any reliance on anything contained therein.



TRAINING MATTERS

Whatever your training needs, PASS can develop and deliver a programme tailored to fit.

For further information on the PASS service, contact our PASS Team on 0845 270 7055 email pass@bipsolutions.com or visit www.bipsolutions.com/pass/