

In two cases the practice was rectified due to PPN intervention, but regrettably, in the other case, the tender was unfairly dismissed because the case was brought to the PPN's attention too late.

**Misunderstanding by suppliers due to language barriers**

A UK company complained about a Danish OJEU tender notice claiming that there had been a breach of the rules due to lack of transparency. A further investigation by the UK contact point showed that the detail of the tender was in fact fully described in the original Danish-language contract notice and that the lack of information in the official OJEU translation was responsible for generating the complaint. The situation was thus clarified and the UK supplier dropped his allegations. This case revealed that the CPV codes used, upon which the succinct translations into English are based, are not always helpful because they do not go into sufficient detail.

**Error of the contracting authority**

A Danish company complained to the Danish Competition Authority (DCA) because the company had been excluded from participation in a Norwegian call for tenders. The CA had informed the Danish company that the reason for the exclusion was the fact that the company had not provided the required documentation for paid taxes and duties.

The company had sent an official certificate issued by the Danish Commerce and Company Agency, which stated that the company had met its obligations concerning the payment of taxes and duties according to Danish law.

The DCA contacted the Norwegian procurement authority, and less than a week later got the response that the CA had acknowledged the mistake and had invited the Danish company to tender. The CA offered the Danish company the same conditions for participation (time limits, etc) as was offered to the other suppliers.

**Information delivery**

An engineering company wanted to apply for prequalification for a tender in another Member State. As part of the conditions for qualification all companies were requested to provide documentation that they fulfilled certain conditions described in a so-called HMS certificate.

The company was not aware of how to fulfil these criteria, not being a resident in the Member State in question, and asked the CA for more information. The CA was not willing to provide this information by itself but actually recommended that the company went via the PPN contact point in its own Member State.

The PPN contact point was able to get the relevant information from the other Member State in just one day and could inform the company that a declaration would be sufficient. In this manner the engineering company was able to apply for prequalification in due time.

**Misunderstanding of the rules**

A UK company complained to the PPN contact point in the UK about a procurement procedure for purchasing an electronic monitoring system, conducted by a Danish CA. The UK PPN contact point forwarded the complaint to the Danish Competition Authority.

In the complainant's view the tender notice was not published correctly, as the English-language version of the notice did not appear in the TED database. Furthermore, the complainant found that the CA had infringed the procurement rules, as the tender material was only available in Danish, and the material contained a requirement that the tenders should be in compliance with specific Danish legislation.

The DCA looked into the case and found no reasons to criticise the CA authority. Firstly, the tender notice was published in the TED database both in Danish and in English. Secondly, the Procurement Directive allows CAs to prepare tender material in their own languages. Furthermore, the Procurement Directive does not prevent CAs from requesting that tenderers comply with the national



legislation related to the subject of the procedure.

The complainant agreed with the DCA's assessment of these points. At the same time the complainant pointed out a new problem. In the complainant's view the time limit for submitting a request for participation was only 29 days, calculated from the date of the publication of the tender notice. Thus the time limit was shorter than the minimum time limit in the Procurement Directive.

The DCA informed the complainant that according to the Procurement Directive the time limit begins from the date of dispatch, and not from the date of the publication of the notice in TED. Thus the time limit given from the CA was 39 days. The DCA found, therefore, that there had been no violation of the rules on minimum time limits.

The complainant acknowledged that the last point of the complaint was based on a misunderstanding of the rules. The complainant therefore chose not to pursue the case further.

*Further information on the PPN and complaints regarding public procurement procedures:*

The European Commission's procurement website [www.simap.eu.int](http://www.simap.eu.int) includes all relevant information on public procurement in the EU, including information about PPN and SOLVIT

**UK point of contact:**

Procurement Policy, OGC, Trevelyan House  
30 Great Peter Street, London SW1P 2TB  
Tel: +44 (0)207 271 1392 Fax: +44 (0)207 271 1344

**Scotland point of contact:**

Scottish Executive, Meridian Court, 5 Cadogan Street, Glasgow G2 6AT  
Tel: +44 (0)141 242 0263 Fax: +44 (0)141 242 5599

The complete list of PPN contacts in all participating countries can be found at: <http://www.simap.eu.int/ppn/ppp15en.html>

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# GUIDANCE 14

## 2005

# COMPLAIN IN GOOD TIME!

This Guidance is designed for companies prevented from competing in foreign markets because of discriminatory public procurement practices. It explains the beginnings of the European Commission's Public Procurement Network (PPN) and advises how it can help a company facing problems with foreign procurement, providing information on how to complain.

**PPN HISTORY**

The Public Procurement Network was established at the initiative of the Danish Competition Authority in 2003 following very positive results from a three-year pilot project. The scheme has now been made permanent. Reflecting this success, the number of participants has risen to include all 25 EU Member States and all EU candidate countries, as well as the EEA countries and Switzerland.

The current participant states are Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey and the United Kingdom.

The PPN's aim is to strengthen the application of the EU procurement rules through a mutual exchange of experience and benchmarking and to promote problem solving in cross-border cases relating to public procurement. The European Commission strongly supports the PPN and is present in the Network as an observer. Also involved as observers are Croatia, Montenegro, Serbia, Kosovo, the European Investment Bank and the OECD.

*The Network has two primary functions:*

- To provide practical assistance to individual companies facing barriers in public procurement procedures abroad.
- To enable countries to exchange experience and best practice in public procurement.

Members of the PPN have agreed a simple set of guidelines on the cooperation process. The environment is practical, efficient, cheap and informal and avoids any time-wasting and red tape. The Network functions with the least possible bureaucracy.

PPN contacts gather once a year at a conference. Dialogue also takes place over the internet or in small working groups on special issues. Most PPN contacts have been working together for many years and know each other very well.



**EUROPEAN RULES**

Public procurement contracts constitute a significant percentage (16%) of the EU's gross domestic product. Therefore, action by the Commission has always been based on the improper application and enforcement of single market legislation.

Of course, the EC Treaty places a general ban on discriminatory measures and unfair treatment but these prohibitions are not sufficient on their own, and have to be completed with specific Directives so that compliance with the principles laid down in the Treaty can be enforced more effectively.

Much as been done and numerous Directives have been issued over the years. The Directives in question are 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public works, supply and service contracts and 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

**A SUPPLEMENT TO THE COURTS**

This Guidance summarises how the PPN can help a company facing problems with a procurement procedure abroad. It is aimed at all suppliers – those familiar with procurement procedures abroad and those about to submit their first cross-border tender.

The total value of the works, services and supplies subject to public procurement procedures in EU Member States now exceeds €1,500 billion per annum. These public procurement procedures are open to all businesses in the EU. However, companies may face barriers when taking part in public procurements abroad. Among other things, these can include illegal requirements in tender documentation which place foreign suppliers at a disadvantage vis-a-vis national suppliers,

whether intentionally or not. Also, barriers can arise over simple misunderstandings in relation to the tender documentation, the forms required, or over the specifics of national regulation.

Suppliers who feel discriminated against may pursue their complaint by mounting a challenge in a national court or any other kind of review body. But such procedures may be protracted and resource-intensive. Moreover, where the courts do find for a complainant, it is often too late to make a difference to the outcome of the procurement, especially where businesses are reluctant to challenge contracting authorities' actions and to ask for compulsory interim measures (suspension of the public procurement procedure) before competent review bodies.

To address these problems, a fast and informal system was needed to clarify misunderstandings and suspicions of infringements of the public procurement rules in the early stages of procurement procedures. The result was a network of central government procurement policy officials in 30 European countries – the PPN. Members have agreed common rules on how to informally pursue suspicions of irregularities before contracts are signed, thereby ensuring that public procurements are properly conducted and saving legal fees.

## A MULTI-FACETED APPROACH

Companies should get in touch with their national PPN contact point as soon as possible if they feel they have been harmed or risk being harmed in a procurement procedure abroad.

The PPN contact will then approach their PPN counterpart in the other participant state on an informal basis who will, in turn, get in touch with the relevant contracting authority to clarify the situation. It should be possible to clarify the matter quickly, and put things right if necessary, within a matter of days.

This system relies on the supplier making contact with his national PPN contact (or with his SOLVIT\* national contact who will swiftly involve the PPN national contact) as soon as he suspects discrimination.

## HOW THE PPN CAN HELP – EXAMPLES

Based on real cases, the following three examples demonstrate some of the problems facing suppliers taking part in public procurement procedures in other countries, which were pursued through the PPN.

### Unreasonable request for documentation

A Danish supplier submits a tender for IT services in another country and, as part of the pre-qualification procedures, sends a completed *serviceattest* (a form containing all information and declarations required from public authorities for a public procurement procedure) from the Danish Commerce and Companies Agency. The *serviceattest* is submitted in English and confirms that the Danish



company has paid all the taxes and charges due. Despite submitting the *serviceattest*, the foreign contracting authority claims that the documentation for tax payments in Denmark is insufficient. This additional request is illegal and must be cancelled.

### Technical obstacles to trade

A company wants to take part in a procurement procedure in another country. It discovers that the tender documentation requires parts to be supplied by a specific manufacturer. This is a discriminatory and illegal practice.

### Obligation to invite tenders

A contracting authority wants to procure maintenance and repair services. The value of these services is above the threshold value in the EU Services Directive. Accordingly there is an obligation to carry out a full public procurement procedure in accordance with the Directive including advertising in the Official Journal of the European Union (OJEU). However, the contracting authority decides to contact a number of companies without issuing an OJEU invitation to tender which excludes an interested foreign company from competing. This is illegal under the public procurement rules.

Action in the PPN can quickly ensure that aggrieved suppliers are not prevented from taking part in procurement procedures on an equal footing. This informal system has been successfully tested for three years and it enjoys the full support of the European Commission. To date, the members of the Network have processed a steadily growing number of cases (around 50 as of March 2005). Momentum is increasing as the system is more widely publicised and becomes better known.

If dialogue within the PPN does not solve the problem, companies may decide to follow more formal complaint procedures or may, for instance, decide to use the SOLVIT system which (unlike PPN) is monitored by the European Commission. The PPN is a wholly informal system and is a mechanism to be used prior to contract conclusion. The PPN supplements the Commission's SOLVIT system and the formal complaint system. The 'How to Complain' process section below explains the procedure.

*Note:* Lodging a complaint with a PPN contact does not have any suspensive effect on award procedures or on time limits for referring cases to formal review bodies. It is important to keep this in mind, especially for any supplier who may want to seek compulsory interim measures from such bodies with the aim of correcting the alleged infringement or preventing further damage to the interests concerned.

## HOW TO COMPLAIN

The service is free of charge. The PPN contact acts on behalf of the supplier company concerned, contacting the national authority responsible for procurement procedures in the contracting authority's country. For example, UK companies should approach the OGC's procurement policy unit.

*In order to assess the case, the PPN contact will require the following specific information:*

- The name, address, telephone number and email address of the complainant company, and a named contact.
- To know whether the complainant wishes to remain anonymous in respect of the contracting authority.
- Detail on the alleged breach of the EU procurement rules.
- If a procurement procedure has commenced, then:
  - The date the procurement procedure was made public (preferably with a copy or reference number of the published contract notice).
  - How far the procurement exercise has progressed.
  - The time limit for submission of tenders.
  - Whether the contract has been signed.
  - The estimated value of the contract.
- If the procurement procedure has not commenced, then:
  - Any details available about the contract.
  - Its estimated value.

\*Since July 2002 the SOLVIT network has operated through SOLVIT Centres based in the administration of the EU Member States, Norway, Liechtenstein and Iceland. It tries to find quick and informal solutions to practical problems when public authorities misapply Internal Market rules including public procurement rules (see <http://europa.eu.int/solvit/site/index.htm>).

- The name of the contracting authority.
- The name and address of any other suppliers/organisations involved.

Many complainants prefer to remain anonymous because of concerns about damaging relationships. Although PPN contacts preserve anonymity where requested, it might still be possible for the procuring authority to guess who the complainant is. The PPN operates an informal and friendly no-blame, no-shame culture. Enquiries and discussions through the PPN do not lead to damaged relationships. PPN dealings are discreet, aimed at clarifying misunderstandings while avoiding exposing complainants or contracting authorities to difficult situations. The PPN seeks firstly to clarify procedures and practices and, where relevant, to informally solve breaches of the EU rules.

## HOW THE NETWORK DEALS WITH COMPLAINTS

When a supplier submits a complaint with the required information, the PPN contact in his home country reviews the case quickly.

In some cases, the PPN contact may realise that the procurement rules have in fact been followed and be in a position to explain why it would be inappropriate to take the case further. However, if there is reason to suspect that the public procurement rules have been breached, the PPN contact will approach their relevant counterpart abroad and send his assessment of the case requesting that it be examined. If it becomes clear that the complaint is justified, the PPN counterpart will endeavour to ensure that the procurement procedure is corrected to allow all companies to compete on an equal footing.

Contact is rapid and informal, usually by phone and email. Problems can be solved through dialogue, in many instances more quickly and flexibly than with traditional case processing with extensive formal correspondence. The PPN has already dealt with a number of cases. It has often been possible to correct procurement procedures quickly, to ensure that foreign suppliers are fairly treated.

Where the PPN does not deliver a satisfactory outcome, suppliers may choose to bring their complaints before the courts in the country concerned, or take cases directly to the European Commission. PPN contacts will advise about these procedures, but they are not in a position to provide legal support in such cases. Companies must seek their own legal advice.

## SOME EXAMPLES OF PROBLEM-SOLVING SUCCESS STORIES

The following case studies illustrate the PPN's cooperation on informal cross-border dispute settlement, which takes place at the pre-contract award stage.

### Removal of an unfair, post-award delivery criterion

A given Contracting Authority (CA) carried out a call for tenders for the supply of electrical equipment under the Utilities Directive. In the contract documents sent to a candidate from another Member State who had been selected, the CA's award criteria required that tenderers had to be represented in the CA's Member State for the previous two years. The candidate had no fixed representation there and considered it inappropriate to apply such a criterion, especially after the candidates had been selected. The candidate asked their national contact point for assistance to ask for the withdrawal of this requirement by the CA.

The contact point in the complainant's Member State approached their counterpart in the CA's Member State, who in turn immediately approached the CA. The CA admitted a lack of expert knowledge on the rules of the Utilities Directive. A meeting between the CA and their contact point was held to sort out the misunderstandings. An amendment to the contract documents was sent to all the selected candidates stating the withdrawal of the illegal criterion. Additionally, the deadline for the receipt of tenders was postponed by two weeks. With this, a complaint through the formal channels was avoided.



### Correction of errors in a call for tenders (Open Procedure)

A company complained to its national contact point about the requirements set out in an Open Procedure call for tenders under the Supplies Directive. The complainant explained that the CA, who was based in another Member State, required all products to be delivered from the same factory during the entire three or four years contract period. The tender documents also failed to specify the exact quality required and degree of product completion, although the complainant believed that one of the potential suppliers did have access to this more detailed information.

The contact point agreed that requiring deliveries from the same factory during the whole contract period appeared to be discriminatory and that the specification must be complete in the tender notice to put all interested suppliers on an equal footing. He subsequently contacted his counterpart in the CA's Member State who agreed that some errors had been made in the call for tenders; some additional errors were also identified in the process. The CA and his home contact point resolved these problems and a decision to launch a new call for tenders was made.

### Misapplication of the rules

In a procurement procedure for specialist supplies, a German company approached its PPN contact point as the UK CA had incorrectly completed the OJEU notice. The contract notice featured a genuine mistake – an incorrect deadline date which led to confusion. Interested parties could not understand whether they should submit an expression of interest or a completed tender. Following PPN intervention, all interested parties were informed of the required amendment to relevant deadlines, which gave the German plaintiff company an opportunity to bid.

### Certification – application of Article 45 of Directive 2004/18/EC

Three UK companies brought cases on other EU Member States. These cases were related to Article 45 of Directive 2004/18/EC on the coordination of procedures for the award of public works, supply and service contracts. Article 45 deals with the personal criteria of the candidates or tenderers for qualitative selection. The CAs in question had, in all cases, asked that certificates of judicial and fiscal legitimacy be produced by a single UK government department. Moreover, in one case where the CA understood this was not possible, they requested that a confirmation be sent that such an authority did not exist in the UK.

However, the Directive does provide that a certification on oath by a notary is sufficient where such certificates do not cover all the conditions laid down in Article 45, and where the country in question does not issue such documents, as is the case in the UK. The CAs were clearly not familiar with this provision in the rules. Lack of attention to these details is not a grave mistake but it can become unfortunate when it leads to the disqualification of bids.