Public Procurement in the European Union: Principles and Policy Priorities

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Public procurement in the European Union

1. Principles
2. Regulatory Framework
3. Policy Priorities

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Key elements of a public procurement system

- Stable legal framework
- Adequate institutional set-up
- Professional staff
- Transparency
- Independent remedies system
- Increasing efficiency

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Principles of EU public procurement legislation

- Non-discrimination: no direct or indirect discrimination on geographical/national basis; other restrictions must be justified and proportionate
- Equal treatment: impartiality of process - all tenderers are to be treated in the same manner and provided the same opportunities
- Transparency: sufficient degree of advertising to the market

+ "Horizontal clause"

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EU legislative framework for public procurement

New framework since 2014

*International context: Compliance with **GPA***

Directive 2014/24/EU "classical" Directive (CD)
Directive 2014/25/EU "utilities" Directive (UD)
Directive 2014/23/EU "concessions" Directive

+ E-Invoicing Directive: 2014/55/EU
+ PP Remedies Directives: 89/665/EEC and 92/13/EEC
+ Defense and security Directive 2009/81/CE

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Procedures

Member States have a wide spectrum of options – fit for purpose:

- open procedure (free)
- restricted procedure (free)
- competitive procedure with negotiation (under conditions)
- competitive dialogue (under conditions)
- innovation partnership (subject to the need of an innovative product, service or works)
- competitive procedure without negotiation

Principle: less open → more conditions

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Cooperative procurement

Central purchasing bodies

- Member States may oblige contracting authorities to procure by having recourse to Central Purchasing Bodies (CPBs).

- Service contracts awarded by contracting authorities to a CPB for the provision of centralised purchasing activities are excluded from the obligation to apply the procedures provided for in the Directive.

- Member States cannot prevent their contracting authorities from using CPB in other Member States. Procurement rules of the Purchasing Body's Member State apply.

Utilities Directive 2014/25/EU

Why a "utilities" directive?

Because…

- … the entities operating in the utilities sectors are in some cases governed by public law and in others by private law.

- … of the various ways, in which national authorities can influence the behaviour of these entities, including participations in their capital and representation in the entities administrative, managerial or supervisory bodies.

- … of the existence of special or exclusive rights granted by national authorities, concerning the supply to, provision or operation of, networks for providing the service concerned, the exploitation of a given geographical area for a particular purpose.

Utilities Directive 2014/25/EU

Procurement for services, supplies or works

By utilities (public or private)

Utility activity (water, energy, transport, postal)

Private entities subject to procurement rules if "operating on the basis of special and exclusive rights"

More flexible regime for utilities

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Concessions Directive 2014/23/EU

Works and service concessions ≥ € 5 million

Classical and utilities sector

Not:

- Drinking water (supply or distribution)
- Exclusive rights
- Lotteries
- Public passenger transport services

Definition of concession contracts based on the transfer of an operating risk

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EU Remedies Directives

Directives 89/665/EEC and 92/13/EEC,
as amended by Directive 2007/66/EC

- Ensure that in the area of public procurement, effective and rapid remedies are in place and available national level
- Require that decisions on contracts falling within the scope of the Procurement Directives taken by contracting authorities/entities may be reviewed effectively and as quickly as possible.
- Enable economic operators to enforce the rights conferred by Public Procurement Directives everywhere in the EU.
- Establish minimum EU review standards.

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Types of remedies

- Pre-contractual remedies:
  - **Interim measures**
  - **Setting aside of decisions taken unlawfully by CA/CE**
  - **Standstill period**
  - **Automatic suspension**

- Post-contractual remedies:
  - **Ineffectiveness**
  - **Alternative penalties**
  - **Compensation/damages**

- *Additional elements:*
  - **Automatic debrief**
  - **Time limits for bringing an action**

2014 Reform of EU Public Procurement Directives

1. Simpler, more flexible procedures / e-procurement

2. Strategic use

4. Transparent procedures

3. Better access (SMEs, cross-border trade)

5. Professionalization of procurement

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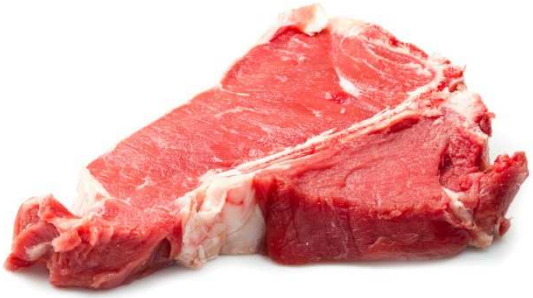
Contract award criteria

Sole award criterion:

MEAT –
Most Economically Advantageous Tender
to be assessed on the basis of

- **price, or**
- **cost**, using a cost-effectiveness approach such as life-cycle costing, **or**
- **the best price-quality ratio** (BPQR) to be assessed on the basis of award criteria linked to the subject-matter of the contract.
- organisation, qualification and experience of the **staff delivering the contract** where this can significantly impact the level of performance of the contract



MS can exclude or restrict the use of price or cost only as sole criterion.

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Facilitation of access for SMEs

Division into lots
"Apply or explain" principle

Proportionate criteria for financial standing
Limited to twice contract value

Reduced documentary requirements
"European Single Procurement Document"
(once-only principle)

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European Single Procurement Document (ESPD)

- Objective: decrease administrative burden
- Mandatory for all PP > EU thresholds (concessions excluded)
- Electronic format mandatory since April 2018

Updated self-declaration as preliminary evidence in replacement of certificates issued by public authorities or third parties confirming that the relevant economic operator fulfils the required conditions (suitability, financial status and abilities.)

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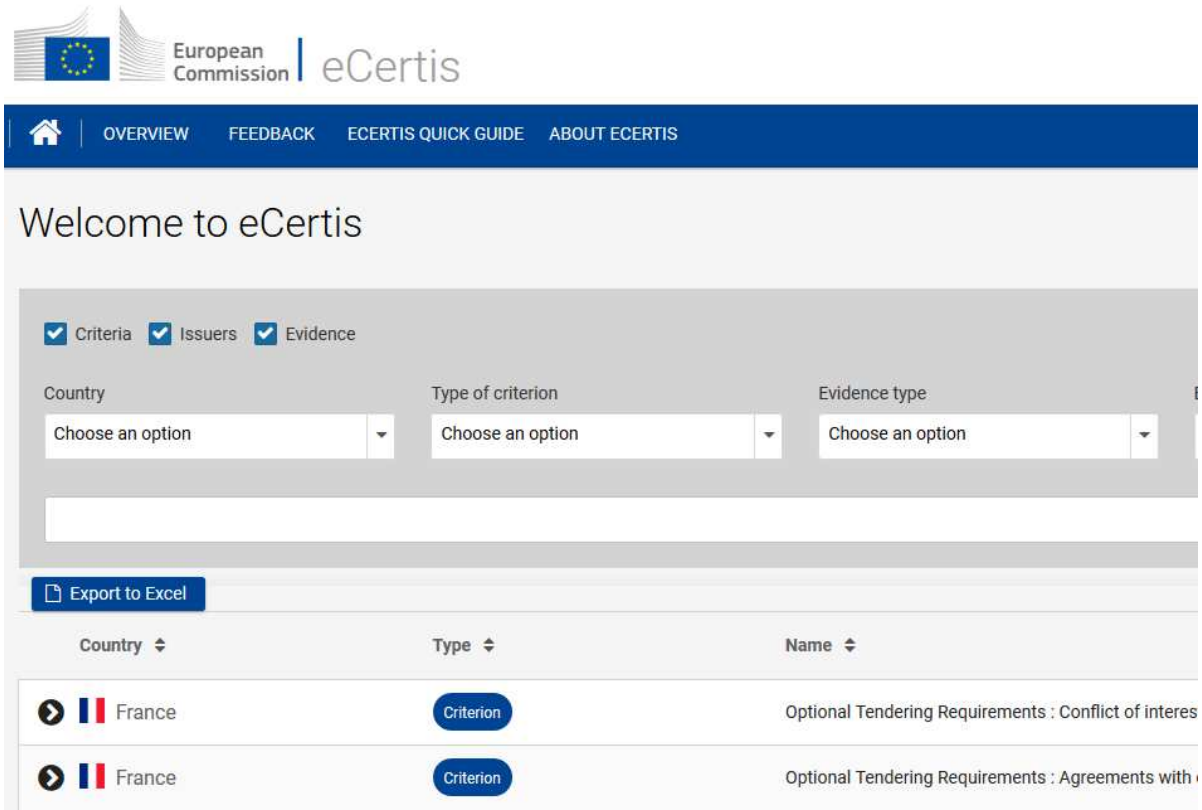
eCertis

Online database with the characteristics of the documents requested in the Member States of the European Union during the formation and performance phases of public contracts.



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Ted · tenders electronic daily

Supplement to the Official Journal of the EU

169 2017 OJ S current issue

Next update 06/09/2017

Release calendar

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text e.g. pipe* resp. "filling station"

Country **Type of document** **Contract**

Edition number

number/year e.g. 123/2009

Document number

No-year e.g. 135336-2005 or year/S ojs-no e.g. 2014/S 175-309694

Publication date **from** **to**

date e.g. 13/10/2016

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2017 EU Public Procurement Package

1) ***Communication on Public Procurement*** *- Commission strategy for improving PP*
2) ***Communication on a voluntary ex-ante mechanism*** *for large infrastructure projects*
3) ***Recommendation on professionalisation*** *of public procurement to Member States*
4) *Draft* ***guidance document on procurement of innovation*** *– launch of targeted consultation*

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Priority areas for improving PP (I)

1. Wider uptake of strategic procurement

- 55% of tenders use lowest price only
- Boost green, social and innovative procurement through guidance and best practices
- Support for strategic sectors (IT, health, construction)

2. *Professionalise public buyers*

- Encourage Member States to develop professionalisation strategies
- Ensure buyers have the needed skills and competences
- Provide necessary tools and support

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Priority areas for improving PP (II)

3. Increase opportunities for all

- SMEs win only 45% of contracts
- Make PP more atttractive for companies, also cross-border

4. Improve transparency, integrity, data

- Enable reporting of corruption
- Protect whistleblowers against retaliation
- More and better data, setting-up contract registers

Priority areas for improving PP (III)

5. Boost the digital transformation of PP

- Legal obligation in October 2018, but real benefits if all steps of PP process are digitalised
- Roll-out of eProcurement is slow
- Continue to provide technical & financial support to MS

6. Cooperate to procure together

- Only 11% of procedures through cooperative PP
- More cooperation leads to better outcomes
- Joint procurement by multiple MS facilitated

Thank you!

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Head of Unit "Access to Procurement Markets"

European Commission

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ANNEX

Thresholds

Current thresholds (Directive 2014/24/EU)

Works contracts: €5,548,000

All services concerning social and other specific services listed in Annex XIV: €750,000

Service and supplies contracts and design contests:

- **awarded by Central Government authorities: €144,000**
- **awarded by Sub-central contracting authorities: €221,000**

Thresholds

The directive provides for the methods for calculating the estimated value of the contract, but <u>in all cases:</u>

"The choice of the method used to calculate the estimated value of a procurement shall not be made with the intention of excluding it from the scope of this Directive. A procurement shall not be subdivided with the effect of preventing it from falling within the scope of this Directive, unless justified by objective reasons."

Thresholds

Reminder:

And for contracts below the thresholds (i.e., which are excluded from the scope of the Directive) obligation to comply with the basic standards (Treaty principles):

- Transparency and non-discrimination, meaning:

- Sufficient degree of advertising

- Impartial award of contracts

- Judicial protection

Negotiated procedure without prior publication (Direct award)

- Only possible in the specific cases and circumstances established by the Directive

- Examples:
  - where the works, supplies or services can be supplied only by a particular economic operator for technical reasons (e.g. spare parts for a plane)
  - for reasons of extreme urgency brought about by events unforeseeable by the contracting authority. The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority (e.g. needs resulting from a natural disaster)

Techniques and instruments for electronic and aggregated procurement (1)

•Most common techniques and instruments

- **Framework agreements:**

a) a "closed system" to *"be applied only between those contracting authorities clearly identified for this purpose in the call for competition (…) and those economic operators party to the framework agreement as concluded"*

b) in principle, the term can not exceed 4 years

c) *"Contracts based on a framework agreement may under no circunstances entail substantial modifications to the terms laid down in that framework agreement."*

Techniques and instruments for electronic and aggregated procurement (2)

- **Central purchasing bodies:**

a) **Member States may oblige contracting authorities to procure by having recourse to central purchasing bodies**

b) **Service contracts awarded by contracting authorities to a central purchasing body for the provision of centralised purchasing activities are excluded from the obligation to apply the procedures provided for in the Directive.**

- **Other techniques and instruments for electronic and aggregated procurement: dynamic purchasing systems (=« open » systems), electronic autions, electronic catalogues….**

Conduct of the procedure (1)

- **Technical specifications:**

a) "shall afford equal access of economic operators to the procurement procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition"

b) unless justified by the subject-matter of the contract, technical specifications shall not refer, namely, to a specific make or source, to trade marks, patents, types or a specific origin of production. Such reference shall only be permitted on an exceptional basis. In this case, such reference shall be accompanied by the words "or equivalent".

Conduct of the procedure (2)

- **Division of contracts into lots:**

a) **A SME friendly provision**

b) **« apply or explain »: contracting authorities are not obliged to subdivide contracts into lots, but they shall *"provide an indication of the main reasons for their decision"* for not doing so:**

c) **Possibility for contracting authorities to limit the number of lots that may be awarded to one tenderer**

d) **Member States may render obligatory to award contracts in the form of separate lots**

Conduct of the procedure (3)

- **Setting time limits:**

- ***"When fixing the time limits for the receipt of tenders and requests to participate, contracting authorities shall take into account of the complexity of the contract and the time required for drawing up tenders, without prejudice to the minimum time limits set out in"*** **the Directive**

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Minimum time limits: 2014/24/EU

Procedure	Normal / e-tenders	No e-documents
Open	35 / 30	40
Open with PIN	15 / -	20
Open accelerated	15 / -	-
Requests for particip. (R, CPWN, CD, IP)	30 / -	-
Request for participation, accelerated (R, CPWN)	15 /-	-
Receipt of tenders (R, CPWN)	30 / 25 Subcentral: agree/10	35 Subcentral: agree/15
Receipt of tenders (R, CPWN) - PIN	10 / -	15
Receipt of tenders (R, CPWN) - accelerated	10 / -	-

Utilities Directive

(2014/25/EU)

Utilities Directive 2014/25/EU

- ***Why an "utilities" Directive? Because…***

- the entities operating in the utilities sectors are in some cases governed by public law and in others by private law

- the various ways in which national authorities can influence the behaviour of these entities, including participations in their capital and representation in the entities administrative, managerial or supervisory bodies

- the existence of special or exclusive rights granted by the national authorities, concerning the supply to, provision or operation of, networks for providing the service concerned, the exploitation of a given geographical area for a particular purpose

Utilities Directive I

- Procurement for services, supplies or works
- By utilities (public or private)
- Utility activity (water, energy, transport, postal)

➢ *Private entities subject to procurement rules if "operating on the basis of special and exclusive rights"*

➢ *More flexible regime for utilities*

Utilities Directive II

- Essentially same changes for the Utilities as for the Classic Directive

•**<u>Differences</u>**

- **Framework contracts:**
  - max 8 years (classic 5 years)
- **Contract modifications**
  - Unforeseen circumstances: unlimited (classic: max 50%)
- **Definition of special or exclusive rights**

Utilities Directive III

•Definition of special & exclusive rights

- Rights granted by a competent authority of a MS
- by way of any legislative regulatory or administrative provision
- the effect of which is to limit the exercise of activities to one or more entities and
- which substantially affects the ability of other entities to carry out such activity.

•<u>No</u> special or exclusive rights where

- rights granted following procedures ensuring <u>adequate transparency</u>, and
- based on <u>objective criteria</u>

Exemption where sufficient level of competition

➢ *Burden of proof on requesting Member State or contracting entity*

New Concessions Directive

(2014/23/EU)

New Directive on Concessions

- **Works & service concessions ≥ € 5 million**
- **Classical & utilities sector**

Not:

- Drinking Water (supply or distribution)
- Exclusive rights
- Lotteries
- Public passenger transport services

Definition of concession contracts based on the transfer of an operating risk

➢ Distinction contracts – concessions

<u>Right to exploit</u> the work or services (sometimes with payment)

- transfer of operating risk
- no guarantee to recoup the investments and costs.
- risk can be limited by regulation, but always real exposure to possible loss, not merely nominal or negligible
- demand or supply risk or both

Clear delimitation from situations such as licenses, authorizations

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➢Duration of Concessions

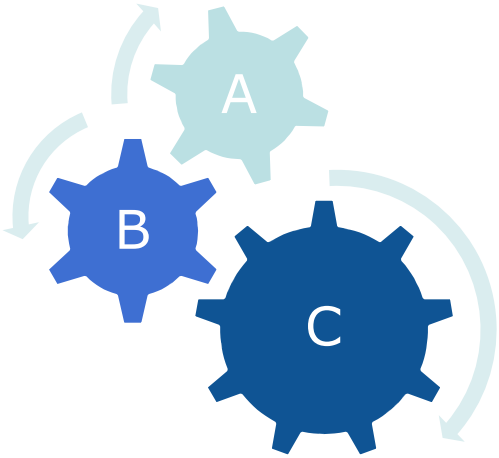
The duration of concessions shall be limited

General principle for concessions lasting more than 5 years:

- Shall not exceed time necessary to recoup investments made for operating works/services with return on invested capital
- Possibility to take into account investments at beginning and during life of concession and those necessary to achieve specific contractual objectives.

➢Procedural rules: overview

- Publication of notices in OJEU (ex post & ex ante)
- Electronic notification and availability of concession documents
- No specific procedures – negotiations always possible
- Qualitative selection and exclusion grounds
- Award Criteria
- Rules on communication
- Minimal time limits



Introduction

Concessions:

- constitute a form of collaboration between the public and private sector (public-private partnership) and a key tool for a wide range of economic activities

- high economic value

- unlike public contracts, at EU level they were previously only partially regulated (works concessions) or completely excluded from secondary legislation (service concessions)

Introduction (II)

- have specificities, like operating risk and extent of the required investments, that justify separate regulation

- suffered from lack of legal certainty, which gave rise to serious distortions of internal market (such as widespread direct awards)

- are now regulated in a comprehensive framework, under Directive 2014/23/EU on the award of concession contracts

Objectifs of Concessions Directive

- to establish a clear legal framework enabling contracting authorities and entities to accomplish their missions

- to ensure access by economic operators to concessions across the EU, as part of the freedoms of the internal market

"Privatisation"/externalisation is *not* the objective: public authorities remain free to carry out public task by using their own means

Concept of concession

Contract in writing for pecuniary interest by means of which:

- one or more economic operators are entrusted execution of works or provision and management of services
- consideration (remuneration) consists in right to exploit work or services (sometimes also with payment)
- there is an **operating risk**

Concept of concession (II)

Operating risk:

- involves possibility of not recouping investments made or the costs incurred (no guarantee)
- involves real exposure to vagaries of the market
- it can consist of either a demand risk, a supply risk or both
- it can be limited but it cannot be merely nominal or negligible (real exposure to possible loss)
- it stems from factors (foreseeable but uncertain) outside the control of the parties
- it is different from bad management, contractual defaults and force majeure (inherent to every contract)

Distinction from other legal setups

- In a **public contract**, an economic operator receives a fixed amount for completing a work or providing a service and is not subject to an operating risk

- In an **authorisation or licence**, an economic operator has to comply with legal conditions for carrying out an economic activity

Terminology under national law might be misleading!

Scope of application

- Both works and service concessions with a value of 5 468 000 € or higher
- Both public sector and utilities are covered
- "Light" regime for social and other services, requiring only *ex ante* and *ex post* publication
- Concessions not covered by Directive but having cross-border interest are still subject to fundamental principles under the Treaties

Exclusions

- Drinking water (supply or distribution)
- Certain concessions awarded to holders of exclusive rights
- Certain lotteries
- Public passenger transport services (Reg. 1370/2007)
- Other exclusions similar to those in Directives 2014/24/EU and 2014/25/EU

Calculation of value

- Based on total turnover of concessionaire (generated over the duration of the contract), net of VAT, as estimated by contracting authority/entity, in consideration for works and services and supplies incidental to them

- Contracting authority must provide most accurate estimated value, using an objective method specified in concession documents

- If actual value at moment of award is more than 20% higher than estimate, actual value is used for determining whether the threshold is attained

Duration

- Duration must be limited
- For concessions lasting more than 5 years, duration must not exceed the time in which a concessionaire could reasonably be expected to recoup investments made together with return on invested capital
- Member States must be able to prove link between duration and recoup of investment
- Extension of initial duration must comply with Directive's rules concerning both duration and modifications

Procedural rules and guarantees

- No obligation to follow a specific procedure – possibility for negotiation
- Obligation to respect general principles of equal treatment, non-discrimination and transparency
- Publication of notices in EU Official Journal
- Minimum time limits for receipt of tenders
- Information to interested parties on the envisaged procedure and recording of procedure
- Reduction of the number of candidates in a transparent manner and using objective criteria
- Qualitative selection and exclusion grounds

Procedural rules and guarantees (II)

Award criteria

- Compliant with general principles
- Objective, linked to the subject matter, must permit to identify the overall economic advantage and do not confer unrestricted freedom of choice
- Compulsory ranking in descending order of importance
- Possibility of including social, environmental and innovation-related aspects

Remedies Directives

- Applicable to concessions covered by Concessions Directive

Modifications and public-public cooperation

Virtually same rules as for public contracts

(but percentage for modifying concession under safe harbour is always 10%)

Public-private partnership (PPP)

- no simple definition: covers various types of contracts or other delivery models
- any form of cooperation between contracting authorities and private sector economic operators to ensure funding/construction/management/maintenence of infrastructure (works) and/or provision of services
- key features: sharing or transfer of risk to the private sector partner; usually long duration
- structure: contractual or institutional (IPPP)

Public-private partnership (PPP) II

- no legal definition in EU public procurement directives, but EU public procurement rules apply to the procedures for the award of PPPs

- PPPs can be (i) public/utility contracts; (ii) concession contracts (works or services); (iii) contracts excluded from the scope of the directives (those of cross-border interest are subject to fundamental Treaty principles: transparency, equal treatment, non-discrimination, proportionality, mutual recognition…)