

# New public procurement legislation and EAFRD

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# Legislation

Internal market legislation, not AGRI law, not competition law, not financial management

- 1) Sector Directive –Water, energy, transport and postal services: **Directive 2014/25/EU** (former Directive 2004/17/EC)
- 2) Classical Directive –Contracts for public works, public supply and public service: **Directive 2014/24/EU** (former Directive 2004/18/EC)
- 3) New Concessions **Directive 2014/23/EU** (formerly small part of Directive 2004/18/EC)

# Legislation – objectives and reform

Principal legislation objectives: further free movement of goods and services (opening-up markets) and consequences:

- increased competition - (better) value for money
- more transparency: fight corruption

## Reform goals:

- To simplify public procurement procedures; more flexible, shorter deadlines (around 1/3)
- Public procurement as a policy strategy instrument (green, social, innovative)
- Easier access for SMEs
- Development of e-Procurement
- Prevent conflicts of interest (definition in new Directive), favouritism and corruption
- Governance, professionalization of procurement

# Categories of contracting authorities (CA)

- **Central Government Authorities:** Listed in Annex I of Directive 2014/24/EU
- **Sub-central contracting authorities:**  
All contracting authorities which are not central government authorities; they benefit from somewhat higher thresholds

# Categories of contracting authorities – "in house" I

It is possible to make use of the "**in-house**" **exception** when the contracting authority uses its own administrative resources –without being obliged to call on outside entities-or by contracting an entity legally distinct.

- New provisions based on ECJ case-law ("Teckal" case)
- Three possible situations:

# Categories of contracting authorities – "in house" II

- 1) All of the following conditions are fulfilled:
  - CA exercises over the legal person a control similar to that over its own departments
  - Over 80 % activities of the legal person carried out in performance of tasks entrusted to it by the controlling contracting authority or other legal persons controlled

## **Categories of contracting authorities – "in house" II**

- No direct private capital participation in the legal person with the exception of non-controlling and non-blocking forms of private capital, which do not exert a decisive influence on the legal person

2) Conditions as in 1), however a CA does not exercise control as in 1, but has control jointly with another CA(s) + no conflicting interests

## **Categories of contracting authorities – "in house" III**

3) Contract is between two or more CA ("horizontal cooperation") with the conditions:

- Contract establishes/implements a cooperation between the CAs to ensure provision of public services for achieving common objectives
- Cooperation is governed by public interest
- The CAs perform on the open market less than 20% of the activities concerned by the cooperation



# Directive 2014/25/EU: Sectors covered/relevant activities

- **Energy** (electricity, gas, heat -Art. 8-9; extracting oil or gas; exploring for, or extracting, coal or other solid fuels. – Art. 14)
- **Drinking water** (Art. 10)(NB. Art. 10.2 hydraulic engineering projects, irrigation or land drainage and sewage)
- **Transports** (railway, automated systems, tramway, trolley bus, bus or cable - Art.11)
- **Postal services** (Art. 13)
- **Transport terminals** (ports, airports –Art. 12)

# Which contracts?

- All **works** contracts;
- All **supplies** contracts (but thresholds);
- **Services** contracts:
  - In full to contracts for services which are not "light regime" – listed in Annex XIV
  - Very partially for "light regime" special services
  - Not applicable to certain specific types of services.

# Thresholds (updated 1. 1. 2016)

***EUR 5 225 000*** for public works contracts;

***EUR 135 000*** for public supply and service contracts/design contests (central government authorities);

***EUR 209 000*** for public supply and service contracts/design contests (sub-central contracting authorities)

***EUR 750 000*** for public service contracts for social and other specific services (light regime).

# Overview of procedures I

## Open & Restricted

### **Open procedure:**

- Notice - tenders - evaluation (exclusion, selection, award criteria) - award decision - stand-still - award/signature - contract award notice;

### **Restricted procedure:**

- Notice - request for participation - selection (exclusion, selection criteria) [+ limitation of participants] - invitations to tender - tenders - award criteria - award decision - stand-still - award/signature - contract award notice;

# Overview of procedures II

## Negotiated procedures

- Require special circumstances justifying their use

**Competitive procedure with negotiation** (formerly:  
Negotiated with prior publication):

- Notice - request for participation - selection (exclusion, selection criteria) [+ limitation of participants] - invitations to negotiate - negotiations - tenders - award criteria - award decision - stand-still - award/signature - contract award notice;
- New in Directive 2014/24/EU: minimum requirements which are non-negotiable (including award criteria and weighting)

**Negotiated without prior publication:**

- [selection] - negotiations - award/signature - contract award notice

# Overview of procedures III

## Competitive dialogue

**Competitive dialogue** (new Directive - reasons same as negotiate with publication):

- Notice - request for participation - selection (exclusion, selection criteria) [+ limitation of participants] - invitations to dialogue - dialogue - tenders [+ limitation of solutions] - closure of dialogue - tenders ("best and final") - award criteria - award decision - stand-still - award/signature - contract award notice.
- **Individual contracts** or **framework agreement** with several contractors.

# Overview of procedures IV

## NEW procedure: Innovation partnership

- The development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works
- **Combined contract** (research and supply) which ensures full competition from the beginning
- **Negotiations with one or several partners** in successive **phases** which set **intermediate targets** to be attained
- **Award criterion:** only **best price-quality ratio**

# Small and medium enterprises/ SMEs

Goal of new Directives – to enable easier participation of SMEs in public procurement:

1) Division into lots is encouraged (not mandatory) through the provision that the CAs must "provide an indication of the main reasons for their decision not to subdivide into lots", if they choose not to divide.

Possibility to: limit number of tenders; number of contracts (=lots) that may be awarded; compare outcomes (individual contracts for each lot or grouping several lots under one single contract)



## **Small and medium enterprises/ SMEs**

2) Turnover cap - required annual turnover should normally not be higher than twice the contract value.

In the past, smaller bidders were often excluded because the contracting authorities asked for high annual turnover figures even for contracts of a low monetary value.

# European Single Procurement Document (ESPD)

ESPD: a document (in exclusively electronic form, when fully implemented) which is a:

- formal statement by the economic operator that the relevant ground for exclusion does not apply
- may be reused if the information contained therein continues to be correct
- documentary proof to be submitted only by the winner

# eCERTIS

Online repository of certificates.

Helps identify the certificates and attestations that are most commonly requested in procurement procedures in Member States.

Information in the database is provided and regularly updated by national authorities

# Exclusion criteria

New reasons for mandatory exclusion: terrorist financing, child labour, other forms of trafficking, operator in breach of its obligations relating to the payment of taxes or social security contributions – now mandatory, not optional.

Several new reasons for optional exclusion

NEW: "Self-cleaning": evidence that measures taken by the economic operator demonstrate its reliability despite relevant grounds for exclusion

# Contract award criteria

Now only one criterion: **most economically advantageous tender**

**However**, there is a new definition: identified on the basis of **the price or cost, using a cost-effectiveness approach**, such as **life-cycle costing**, and **may** include the **best price-quality ratio**

Therefore, lowest price still possible.

# e-Procurement

= means to conduct public procurement electronically

Involves: publishing contract notices online (**e-notification**), publishing all documents for a call for tenders online (**e-access** to tender documents), suppliers submitting offers to public buyers/contracting authorities electronically (**e-submission**)

# e-Procurement

Why? To simplify, increase speed, increase competition, create savings (reports: 5-20%).

Deadlines for **mandatory** e-Procurement:

**April 2016:** e-Notification and e-Access

**April 2017:** e-Submission for CPBs (Central Purchasing Bodies)

**October 2018:** e-Submission for all contracting authorities

# Modifications of contracts I

In the 2014 directives, the **general rule is:** modifications of the contract require a **new award procedure.**

But, a number of exceptions (which the CA must prove):

1) if the CA proves that the modifications are **not substantial** ("*does not render the contract materially different in character*") in line with detailed provisions



## Modifications of contracts II

- however, a **presumption of being non-substantial** exists for modifications that are both under the EU threshold and below 10% (15% in case of works contracts) of the original value.

2) If there is a **revision clause in** the initial procurement documents, which provides for the modifications in a clear, precise and unequivocal manner, but not to alter the nature.

## Modifications of contracts III

- 3) Modifications that are due to **unforeseen circumstances**, do not change the overall nature of the contract and are (each one of them) below 50% of the initial value.
- 4) Modifications that have **become necessary**, for needs in direct relation to the contract, if a change of contractor cannot be made for economic or technical reasons and would cause significant inconvenience or substantial duplication of costs and each of the modifications are below 50% of the initial value

## DG AGRI findings 2007-13

- The management system is some MS weak. Weaknesses in the design of the **award criteria, inadequate assessment of bids, direct attributions, etc;**
- The control system at national level is weak. The Paying Agency **does not feel responsible** for the detailed verification of the public procurement procedure (*"No complaints means all is fine"*);
- **Ex-ante conditionalities and Action Plans for 11 MS regarding PP during 2014-20 ;**

# Public Procurement Guidance

## Stages:

- 1.Preparation and planning
- 2.Invitation to bid
- 3.Submission of bids
- 4.Evaluation of bids
- 5.Award
- 6.Contract implementation

# Conclusions

- The award criteria shall adequately take into consideration **the interests** of the contracting authority as well as those of the EU;
- The contracting authority as well as the Member State shall ensure that the award criteria and their weight lead to the “**best offer**”;
- The award criteria shall not lead to **ineligible expenditure**;
- The Managing Authority should give and/or fix in advance **specific conditions** for the procurement and assist pro-actively weak implementing bodies not possessing related experience. **Technical Assistance** can be used. This also facilitates the checks later on.

# EU Guidance Dissemination

- **Translation** of a Guidance doc on PP and how to avoid errors in all EU member state languages
- **Web-based** documents by DG GROW and DG REGIO
- Classic Guidance Document by DG GROW available for printing
- Infographic poster

# Information

Further information:

[http://ec.europa.eu/internal  
market/publicprocurement/index\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/index_en.htm)