PUBLIC PROCUREMENT CONTRACTS

Public authorities conclude contracts to ensure that works can be performed and services delivered. These contracts account for a trading volume of EUR 2 448 billion, which shows that European public procurement is a major driver for economic growth, job creation and innovation. The public procurement package adopted in 2014 by Parliament and the Council adds EUR 2.88 billion annually to EU GDP. Furthermore, EU directives on public procurement have led to an increase in total award values from less than EUR 200 billion to approximately EUR 525 billion.

LEGAL BASIS

Articles 26, 34, 53(1), 56, 57, 62 and 114 of the Treaty on the Functioning of the European Union (TFEU).

OBJECTIVES

Public procurement contracts play a significant role in the economies of Member States, and are estimated to generate more than 16% of the Union’s GDP. Prior to the implementation of Community legislation, only 2% of public procurement contracts were awarded to non-national undertakings. These contracts play a key role in certain sectors (construction, public works, energy, telecommunications and heavy industry), and are traditionally statutory or administrative rules which have given preference to national suppliers. This lack of open and effective competition was one obstacle to the completion of the single market, pushing up costs for contracting authorities, and inhibiting competitiveness in certain key industries.

The application of internal market principles to these contracts ensures better allocation of economic resources and more rational use of public funds, with public authorities obtaining products and services of the highest available quality at the best price as a result of keener competition. Giving preference to the best-performing undertakings across the European market promotes the competitiveness of European companies, and reinforces respect for the principles of transparency, equal treatment and efficiency, thereby reducing the risk of fraud and corruption.

ACHIEVEMENTS

The Community adopted legislation aimed at coordinating national rules, imposing obligations on the publication of calls for tender and the objective criteria used to examine tenders. Starting in the 1960s several normative acts relating to public procurement were adopted, but later the Community decided to simplify and coordinate
legislation in this field, and adopted four directives[1]. For the purposes of simplification and clarification three of these directives were merged into Directive 2004/18/EC on public works contracts, public supply contracts and public service contracts, and Directive 2004/17/EC on the water, energy, transport and postal services sectors. Directive 2009/81/EC introduced specific rules for defence procurement, which aimed to facilitate access to the defence markets of other Member States.

REFORM


The external aspect of public procurement was also taken into account in the Commission’s 2012 proposal for a regulation establishing rules on the access of third country goods and services to the EU’s internal market in public procurement and procedures supporting negotiations on access of EU goods and services to the public procurement markets of third countries.


On 3 October 2017, the Commission published two communications: ‘Making Public Procurement work in and for Europe’ (COM(2017) 0572) and ‘Helping investment through a voluntary ex-ante assessment of the procurement aspects for large infrastructure projects’ (COM(2017) 0573). With the aim of further improving European public procurement as part of the public procurement strategy package, it also published a recommendation entitled ‘on the professionalisation of public procurement — building an architecture for the professionalisation of public procurement’.

DEFINITIONS

‘Public contracts’ are contracts of pecuniary interest concluded between one or more economic operators and one or more contracting authorities, and having as their object the execution of works, the supply of products or the provision of services.

‘Contracting authorities’ are the state, regional or local authorities, bodies governed by public law, or associations formed by one or more such authorities, or one or more such bodies governed by public law.

‘Concessions’ are contracts of pecuniary interest concluded by means of which one or more contracting authorities or contracting entities entrust the execution of works or the


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provision and management of services to one or more economic operators. Economic operators awarded a concession acquire the exclusive the right to exploit the works or services that are the object of the contract, or that right together with payment.

PUBLIC PROCUREMENT PROCEDURE

All procedures must comply with the principles of EU law, and in particular with the free movement of goods, the freedom of establishment and the freedom to provide services, as well as the principles that derive from them, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. Competition, confidentiality and efficiency must also be respected.

A. Types of procedure

Calls for tender must correspond to different types of procedure, which are used on the basis of a threshold system. The directives also specify the methods for calculating the estimated value of each public contract, and indications for the procedures to be applied. In the ‘open procedure’, any interested economic operator may submit a tender. In the ‘restricted procedure’, only candidates that have been invited may submit a tender. In the ‘competitive procedure with negotiation’, any economic operator may submit a request to participate, but only candidates that have been invited to do so may submit an initial tender after the information provided has been assessed. In the ‘competitive dialogue’ procedure, any economic operator may submit a request to participate, but only the candidates invited to do so may participate in the dialogue. It is used when contracting authorities are unable to define the means of satisfying their needs or of assessing what solution the market can offer. The contract is awarded solely on the basis of the best price-quality ratio. A new procedure, the ‘innovation partnership’, has been created for cases in which there is a need for an innovative solution that is not already available on the market. The contracting authority decides to establish an innovation partnership with one or several partners conducting separate research and development activities in order to negotiate a new and innovative solution during the tendering procedure. Finally, in specific cases and circumstances, contracting authorities can award public contracts through a negotiated procedure without prior publication.

B. Criteria for the award of a contract

Contracting authorities must award public contracts to the most economically advantageous tender. The reform of public procurement rules introduced this new award criterion, the principle of the ‘most economically advantageous tender’ (the ‘MEAT’ criterion), which aims to ensure the best value for money (rather than the lowest price), i.e. it takes into account the quality of the works, good or service in question, as well as the price or life cycle costs. This criterion places greater emphasis on quality, the environment and social considerations, as well as innovation.

C. Rules on publication and transparency

Procurement procedures must ensure the required transparency at all stages. This is achieved in particular through the publication of the essential elements of procurement
procedures, and by publishing information on candidates and tenderers, as well as through the provision of sufficient documentation on all steps of the procedure.

**D. Remedies**

In order to address breaches of public procurement rules by contracting authorities, the Remedies Directive (Directive 2007/66/EC) provides for an effective review system covering both public procurement directives and the concessions directive, and it introduces two important elements, including the ‘standstill’ period. Following the decision to award a contract, the standstill period allows bidders the opportunity to examine the decision and decide whether to initiate a review procedure. During this period of at least 10 days, the contracting authorities cannot sign the contract.

**E. Other aspects of public procurement**

The new rules promote green public procurement through a life cycle costing approach, and allow the possibility of referring to a specific label or eco-label. Social aspects are also important, with the directives including specific provisions for social inclusion, social criteria and subcontracting, and a simplified regime for services contracts. Cutting red tape and enhancing SMEs’ access to public procurement are also central features. The new rules introduce the ‘European single procurement document’ and the use of self-declarations. Access by SMEs to public procurement will be enhanced in particular by the possibility of dividing contracts into lots, and by the limitation of annual turnover requirements. The new directives require the phasing in of e-procurement, and set specific rules on techniques and instruments for electronic and aggregated procurement, such as framework agreements, dynamic purchasing systems, electronic auctions, etc. The directives also incorporate European Union Court of Justice case law on in-house relationships, making it possible, under certain conditions, for contracting authorities to award a contract to an undertaking without a procurement procedure. Finally, the new rules strengthen the legislation in force on conflicts of interest, favouritism and corruption.

**CONCESSIONS**

The new rules on concessions are much more specific than the rules governing general public procurement, and are covered in Directive 2014/23/EU.

The directive applies only to concession contracts with a value equal to or greater than EUR 5.35 million, and certain types of concession are excluded from the scope of the directive, such as concessions relating to drinking water. Unlike in the general public procurement procedures, contracting authorities are free to structure the procedure for concession contracts according to national standards or their own preferences. They have to follow certain basic rules such as: the publication of a concession notice, the provision of information on minimum requirements, the award criteria, compliance with established requirements, the elimination of candidates who do not fulfil them, etc. Furthermore, the object of the concession, the award criteria and the minimum requirements cannot be negotiated in concession award procedures. Concession contracts are limited in time, and their extension must be assessed under the procedure for contract modifications.
ROLE OF THE EUROPEAN PARLIAMENT

Before its adoption of the public procurement package on 15 January 2014, Parliament had adopted several resolutions, including those of 18 May 2010 on new developments in public procurement, of 12 May 2011 on equal access to public sector markets in the EU and in third countries, and of 25 October 2011 on modernisation of public procurement. In these resolutions, Parliament supported simplification measures in particular, and called for greater legal certainty. It took the view that the cheapest price should not be the only criterion considered when awarding contracts, but rather that best value, including sustainability criteria (such as life cycle costs and environmental and social criteria) should also be taken into account.

As part of efforts to further improve European public procurement, Parliament adopted a resolution on the public procurement strategy package on 4 October 2018, calling for improved uptake of digital technologies in public procurement in the Union, facilitation measures for SMEs and social economy enterprises, improved access of EU suppliers to third-country public procurement markets, and professionalisation of buyers.[2]

Research has estimated that Parliament’s recent legislative activity could generate up to EUR 2.88 billion annually. At the same time, EU directives on public procurement led to an increase in total award values from less than EUR 200 billion to approximately EUR 525 billion[3].

In April 2020, a briefing was published on ‘The EU’s Public Procurement Framework’, which examines how the EU’s Public Procurement Framework contributes to the achievement of the objectives in the Paris Agreement and the Circular Economy Strategy. This research paper was requested by the Committee on the Internal Market and Consumer Protection (IMCO) for its future own initiative (INI) report entitled ‘Towards a more sustainable single market for businesses and consumers’. The report is expected to be put to the vote in the IMCO Committee before the 2020 summer break, and in Plenary in September.

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