



Oifig um Sholáthar Rialtais
Office of Government Procurement

Reform of the EU procurement rules – public sector

Briefing for Procurement Practitioners

Outline

1. Introduction
2. Does the Public Sector Directive apply to the contract?
3. Encouraging greater access to contracts
4. Streamlining the EU procurement process
5. Selection and exclusion of suppliers
6. Tender assessment and contract award
7. Other Notable Provisions



Introduction

- Legislative proposals to change the EU directives by European Commission in Dec 2011
- Detailed negotiations between the European Parliament, the Commission and Council on legislative proposals covering the public sector, the utilities sector and concession contracts
- Three new directives were adopted on 28 March 2014 and must be transposed into national law by 18 April 2016
- These briefing materials aim to assist contracting authorities (**authorities**) to prepare for the changes



Three New Directives

- Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (**Public Sector Directive**)
- Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (**Utilities Directive**)
- Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (**Concessions Directive**)



- These briefing materials primarily relate to the implications of the Public Sector Directive primarily
- Focus is on the incremental changes
- These materials summarise the new rules and do not refer to every relevant requirement
- You should refer to the new directives and implementing regulations for a fuller understanding of the new rules



The benefits of the new regime

- New rules are aimed at facilitating:
 - shorter, less burdensome, procurement processes reducing costs to business and barriers to competition
 - more flexibility for authorities to follow best commercial practice to achieve the best procurement outcomes
 - better access to public procurement for SMEs, consistent with non-discrimination and a value for money approach



What does not change?

- No change in the bodies covered by the public sector regulations - “contracting authorities”
- Authorities must continue to comply with general principles of EU law i.e. transparency, non-discrimination, equal treatment and proportionality
- Procurement regime will continue to provide a transparent process aimed at maximising opportunity for suppliers across the EU whilst allowing authorities to achieve value for money in their procurement activities



Electronic Procurement

- The new Directives make the use of e- procurement mandatory on a phased basis
- By April 2016, electronic notification and electronic access to tender documents will become mandatory
- By April 2017, electronic submission of tenders and requests to participate will become mandatory for central purchasing bodies
- By October 2018, electronic submission of tenders and requests to participate will become mandatory for all contracting authorities
- By October 2018, ESPD must be provided exclusively in electronic form
- By October 2018, authorities must have recourse to e-Certis





Questions





Does the Public Sector Directive apply to the contract?

Thresholds

A. 4 - 6

- No immediate change to the methodology underpinning the calculation of thresholds (but Commission has committed to review by 2019 the economic effects on the internal market as a result of the application of the thresholds which could lead to an increase in the thresholds)
- Aggregation – separate operational units
 - Where a separate operational unit in an authority is independently responsible for its procurement or certain categories thereof, the values may be estimated at the level of the unit in question.



Principles of Procurement

A.18

- Authorities must comply with equal treatment, non-discrimination, transparency and proportionality principles
- The design of the procurement shall not be made with the intention of excluding it from the scope of the Directive or of artificially narrowing competition: the design of the procurement should not intentionally unduly favour or disadvantage certain economic operators
- Must take appropriate measures to ensure contract performance is in accordance with applicable obligations under environmental, social and labour law and collective agreements



Exemptions for ‘public-public’ contracts: Vertical control – A.12 and Recital 31 & 32

- A number of judgments by the Court of Justice of the European Union in the series of cases following the ‘Teckal’ case (C-107/98) have identified circumstances where a contract between two public bodies can be exempted from the EU rules
- The Public Sector Directive clarifies these conditions, which must all be met
 - where the authority exerts on the ‘supplying authority’ a control similar to that which it exercises over its own departments *and*
 - where 80% of the activities of the ‘supplying authority’ are for the ‘buying authority’ or other bodies controlled by it *and*
 - where there is no direct private capital participation in the ‘supplying authority’



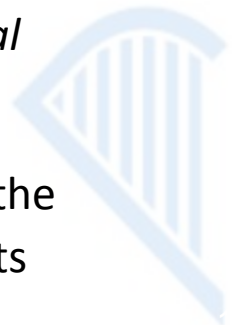
Exemptions for ‘public-public’ contracts: Horizontal Control

- A judgment by the Court of Justice of the European Union in the ‘Hamburg’ case (C-480/06) identified other circumstances where a contract between two public bodies can be exempted from the EU rules
- The Public Sector Directive also clarifies these conditions, which must all be met
 - the participating authorities co-operate to perform public services they must provide, meeting common objectives *and*
 - the co-operation is for public interest reasons only *and*
 - the participating authorities perform less than 20% of the activities on the open market



Contracts with defence/security implications: A.15

- The Public Sector Directive does not apply to contracts in the field of defence and security which fall within the scope of Directive 2009/81/EC (implemented in Ireland by the European Union (Award of Contracts relating to Defence and Security) Regulations 2012) or are excluded by that Directive
- Even where the Defence & Security Public Contracts Regulations do not apply, the Public Contracts Directive does not apply to contracts
 - where essential security interests cannot be protected by less intrusive measures than exemption; or
 - for *contracts that are declared secret or must be accompanied by special security measures; or*
 - where application would oblige a Member State to supply information the disclosure of which it considers contrary to its essential security interests



Concession contracts: Directive 2014/23/EU

- The Directive excludes works and services concession contracts i.e. where the consideration consists in the right of exploitation or that right together with payment and operating risk is transferred to the supplier
- New Directive covering concession contracts (2014/23/EU) provides a relatively light touch regime which will apply to both works and services concessions
- Threshold for both works *and services* concessions contracts will be identical to that for works contracts (i.e. currently €5,225,000)
- Duration of concession must be limited - if more than 5 years, maximum duration shall not exceed the time that could reasonably be expected to recoup investments together with a return on invested capital



Reservation of certain contracts for sheltered workshops A.20 and Recital 36

- *Any* contract may be reserved to organisations that provide sheltered workshops or to suppliers who's main aim is the social and professional integration of disabled or disadvantaged persons
- 'Disadvantaged' includes the unemployed, members of disadvantages minorities or otherwise socially marginalised groups
- Percentage of workforce represented by those persons is reduced to 30%
- Such contracts could also be required "to be performed in the context of sheltered employment programmes"
- Such 'reserved' contracts must be open to all relevant suppliers and must be awarded using the procedures in the Directive

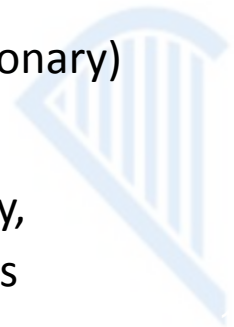


The new light touch regime (social, health and other services) A. 74 - 76

- The distinction between Part A and Part B services will be abolished which means that the normal rules will apply to many former Part B services contracts, previously subject to a very light regime
- *Services defined by CPV codes in Annex XIV* (mainly social and health services but also includes hotel and restaurant services, legal services not already excluded, security services, etc.)
- These contracts will only be covered by the Directive if their value exceeds €750,000 (a much higher threshold than for other services)
- Contracts below this threshold are assumed to be of no cross border interest, so no OJEU advertising is necessary under the Directive although authorities should consider the applicability of general principles of EU law including transparency
- Subject to a new ‘light touch’ regime to reflect their limited cross-border interest (e.g. they relate to legal services in the context of national law) or are sensitive (e.g. services to the person)

The new light touch regime in Ireland (social, health and other services)

- The Directive requires that authorities award contracts for these services by publishing an OJEU Notice either a contract notice or PIN and publish a contract award notice (or quarterly submission of batches of contract award notices)
- The Directive also requires Member States to establish their own rules for the award of these contracts, within the framework of Treaty obligations
- Regulations adopt a minimalistic approach to the new light regime - beyond the new OJEU advertising requirements, the regime will be flexible
- Authorities will be able to use procedures and tools that correspond to those in the main rules, or use simpler or otherwise modified techniques, provided they comply with the general principles of EU law
- Regulations include 'exclusion' provisions under A.57 (mandatory & discretionary)
- Imposition of time limits that are proportionate and reasonable
- Inclusion of all aspects of A.76(2): Authorities shall ensure quality, continuity, accessibility, affordability, availability and comprehensiveness of the services



Reservation of certain contracts for mutuals and social enterprises - A.77

- Certain services contracts (CPV codes in A.77 refers) can be reserved to organisations that:
 - have as their objective the pursuit of a public service mission linked to the delivery of the services *and*
 - reinvest profits to meet this objective (where profits are distributed this should be based on participatory considerations) *and*
 - are owned/managed on the basis of employee ownership/participatory principles or the active participation of employees, users or stakeholders *and*
 - have not have been awarded a contract for the services concerned by the contracting authority within the past 3 years
- Duration of contract to be reserved must not exceed 3 years
- Contracts must be open to all relevant suppliers and must be awarded using the procedures in the Directive
- The contracts will be awarded using the 'light touch' regime – contract notice must refer to the relevant article of the Directive (i.e. A. 77)





Questions





Encouraging greater access to contracts

Preliminary market consultations and prior involvement

A.40 - 41

- Pre-market engagement can assist authorities in developing their tender specifications and documents while providing an opportunity to inform suppliers of procurement plans and requirements which can facilitate an increase in the number of SMEs applying for contracts, a widening of competition and better value for money
- The new rules explicitly allow prior discussions with suppliers and independent experts or bodies prior to starting a procurement procedure both to inform suppliers and to allow the authority to seek advice in the planning and conduct of the procurement procedure
- Care must however be taken to ensure such contact does not distort competition or violate the transparency and non-discrimination principles
- Where a supplier is involved at an earlier stage, appropriate measures must be taken to ensure no distortion of competition i.e. communication to tenderers of relevant information exchanged and adequate time limits; exclusion of bidder is a last resort

Setting appropriate scope and specification

A.42, Recital 74

- The new Directive includes an obligation to include accessibility criteria for persons with disabilities or design for all users where the outcome of the contract is to be used by natural persons (except where duly justified)
- There is greater flexibility to include in the specification requirements that are related to methods of production/provision of the contract outcome in any stage of the life cycle (provided linked to subject matter and proportionate to value/objectives)



Using environmental and social labels

A.43

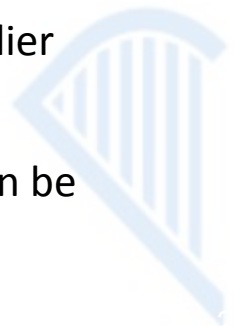
- Social/environmental labels are permitted as part of specification, award criteria or terms and conditions as proof of compliance with a requirement with specific characteristics that are *linked to the subject matter of the contract* (e.g. working conditions of the employees producing coffee to be supplied to the authority)
- However, suppliers must be allowed to offer compliance with equivalent labels or offer other proofs (e.g. technical dossiers) where the label cannot be obtained within the relevant time limits
- Labels must also, as now, meet certain conditions such as being based on transparent and non-discriminatory criteria and awarded by a body independent of the supplier applying for the label



Division of contracts into lots

A.46

- The Directive recognises the potential benefits of dividing contracts into lots, in order to assist access by SMEs
- Irish Regulations will not require authorities to divide contracts into lots
- Where contract not divided into lots, authority must indicate the main reasons in the contract notice or in its report on each contract (which can be requested by the Commission or by national monitoring authorities) i.e. so-called “comply or explain” principle (no similar obligation in the Utilities Directive)
- Authorities will be given flexibility to award more than one lot to the same supplier
- Authorities must indicate whether there are limits on the number of lots that can be tendered for or awarded – must indicate rules that will apply for allocating lots



Use of electronic procurement A.22

- Current EU rules already allow/encourage electronic communication: the new Directive *mandates* electronic methods in parts of the award process (and mandates safeguards on interoperability and data integrity)
- Electronic versions OJEU notification and electronic availability of procurement documents to suppliers must be made available through an internet URL from date of publication the OJEU contract notice from when the Regulations come into force
- Authorities must in due course allow electronic submission of tenders and requests to participate but to allow authorities and suppliers to adapt to the new requirements this will be deferred
 - for Central Purchasing Bodies until April 2017
 - for contracting authorities until October 2018



Use of electronic procurement

- The Directive does not require electronic processing of tenders or electronic evaluation or electronic means of communication post award period
- Oral communication is permitted other than for the essential elements of a procurement procedure e.g. procurement documents, requests for participation, confirmation of interests and tenders - a record must be kept of any oral communications with tenderers which could substantially impact the content and assessment of tenders
- Other methods of communication are permitted for particularly sensitive information where a information is so confidential that generally available tools cannot be used or where special equipment/file formats are required



Electronic catalogues

A.36

- Tenders can be sought by authorities in catalogue form provided the OJEU call for competition makes this clear and also specifies the required technical format, equipment, connection requirements etc.
- Regulations do not make use of electronic catalogues mandatory
- Where multi-supplier frameworks have been concluded on the basis of catalogues the reopening of competition for a particular contract may be achieved by seeking resubmission of the catalogues
- Alternatively the framework might allow the award of the contract by comparing the information already submitted - suppliers must be allowed each time to verify that the information used for the comparison is accurate

Setting up a dynamic purchasing system (DPS) A.34

- For commonly used purchases – completely electronic process
- Requires an OJEU notice advertising a DPS setting out nature and scope
- Like an electronic framework in that an authority may use it to award contracts by competition between suppliers on the DPS - unlike a framework in that appointment to DPS is on the basis of pre-qualification criteria and new suppliers can be added over its duration
- The restricted procedure must be used and all suppliers meeting selection criteria are admitted (no limit on number that may be admitted)
- The duration of the DPS should be indicated in the OJEU notice – no time limit on duration



Setting up a dynamic purchasing system (DPS)

A.34

- When establishing a DPS, the minimum time limit for receipt of requests to participate is 30 days from despatch of the OJEU contract notice – note that tenders are not sought for admission to the DPS
- New rules simplify and streamline the process - once a DPS is established the authority must allow a supplier to apply to join it at any time - a decision to admit a supplier must generally be made within 10 working days (or within 15 working days where verification is needed or additional documentation needs to be assessed)



Making call-off contracts from a DPS

A.34

- To award a contract the authority must seek tenders from all suppliers admitted to the DPS (or to an appropriate category within it) - minimum time limit for receipt of tenders is 10 days
- The contract must be awarded on the basis of the award criteria in the OJEU notice, where appropriate formulated more precisely in the invitation to tender
- No 'award notice' is needed for establishment of a DPS (the notice will continue to be available in OJEU during the lifetime of the DPS) - authority must however notify OJEU if the DPS has been terminated or its duration altered
- Award notices for each contract *awarded under* the DPS must be sent to OJEU within 30 days (although these can be grouped in quarterly batches)



Central purchasing bodies (CPBs) A.37; A.2(1),(14)-(17), Recital 69

- The Regulations give flexibility to authorities to award supplies and services contracts to CPBs acting as wholesalers
- Authorities may continue to award supplies, services or works contracts using dynamic purchasing systems (DPS) or frameworks *operated by* a CPB
- Authorities must comply with the Directive when awarding a contract under a DPS operated by a CPB, or determining which supplier should perform a task under a framework
- Recourse to CPB for certain procurements may be mandated



Minor changes to rules for frameworks

A.33

- The new Directive makes it explicit that only authorities clearly identified in the OJEU notice may use a framework to award contracts and that contracts awarded under frameworks may, where justified, exceed the length of the framework itself
- Where a framework allows the authority a choice between applying the terms of the framework or re-opening competition within the framework the choice must be made by applying objective criteria set out in the procurement documents for the framework (e.g. quantity, value or characteristics of the works/supplies/services involved)
- The new Directive makes it clear that authorities take legal responsibility for applying the rules set by a CPB when using their frameworks to award contracts





Questions





Streamlining the EU procurement process

Changes to procedures A.26-32

- Five main procedures involving competition rather than four:
 - The open procedure
 - The restricted procedure
 - The competitive procedure with negotiation (similar to the existing negotiated procedure with prior call for competition)
 - The competitive dialogue procedure *and*
 - The innovation partnerships procedure (a new procedure)
- Note that the Directive makes no significant changes to the circumstances where contracts may be negotiated without competition which are deliberately very limited and interpreted restrictively

Choice of procedures

A.26

- The Directive recognises the contribution that negotiation can make to the achievement of value for money in certain circumstances
- It also provides a greater opportunity for authorities to seek better value through negotiation, by setting out broader justifications for its use
- These justifications apply equally to competitive dialogue and the competitive procedure with negotiation



Choosing a procedure with negotiation A.26(4)(a) & (b)

- Where needs cannot be met without adaptation of readily available solutions (new justification)
- Where the contract includes design or innovative solutions (new justification)
- Where prior negotiations needed because of the nature of the requirement, the complexity or the legal and financial make-up or because of its risks (extended version of the current justification for competitive dialogue)
- Where the technical specifications cannot be established with sufficient precision (as current negotiated procedure with a call for competition)
- In the case of unacceptable/irregular tenders (as current negotiated procedure with a call for competition)



Changes to existing procedures

- No changes to open and restricted procedures (except in respect of time limits, see later)
- Competitive dialogue explicitly allows negotiation with the preferred bidder (provided changes not material) - **A.30**
- Competitive procedure with negotiation now described more clearly: - **A.29**
 - authority must indicate (and cannot change) minimum requirements and award criteria
 - authority must negotiate with those suppliers submitting initial offers (unless it reserves the right to accept tenders without further negotiation)
 - authority must seek a final tender from suppliers following completion of the negotiations

Innovation partnerships

A.31

- New procedure allowing authorities to encourage suppliers to develop works, supplies or services not currently available on the market – partnership covers subsequent purchase of the outcome of the R&D provided it corresponds to performance levels and maximum costs agreed
- Awarded to one or more suppliers using a procedure which is similar to the competitive procedure with negotiation – authority must disclose selection information, minimum requirements for tenders as well as award criteria
- Procedure may be conducted in phases to match the research/innovation process – authority may reserve right to terminate process or reduce the number of partners
- Authority must make clear the position on intellectual property rights and must not disclose suppliers' confidential information without agreement

Revised OJEU notices

- The new Directive introduces some new forms (e.g. PIN as a call for competition), all of which must be sent electronically
- It also requires some additional information to be provided on existing forms such as the contract award notice, where statistics on the number of SMEs tendering, number of tenders received electronically etc. will be gathered



Notices - Publication at national level A.52

- Notices (i.e. PIN, contract notices and contract award notices) must not be published at national level before publication in the OJEU
- However, where authorities have not been notified of the publication in the OJEU within 48 hours following receipt of confirmation of the receipt of the notice, publication may take place at national level
- Notices published at national level and OJEU level must contain the same information
- PINs must not be published on a buyer profile before dispatch to the OJEU



Negotiation without prior OJEU publication

A.32

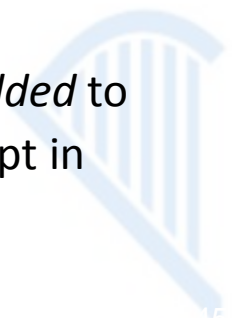
- As is currently the case, negotiation without prior call for competition is allowed only in certain limited circumstances:
 - no tenders/suitable tenders or requests to participate
 - only one supplier could apply for artistic/technical/exclusive rights reasons (in the last two cases provided no reasonable alternative exists and that the absence of competition is not the result of an artificial narrowing of the requirement)
 - extreme urgency from events *unforeseeable* by the authority, mean the time limits for competitive procedures cannot be complied with. The extreme urgency of the need must not be attributable to the authority
 - products involved are manufactured purely for the purpose of research, experimentation, study or development



Availability of procurement documents

A.53

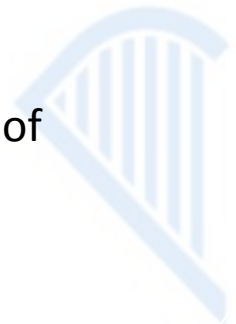
- New requirement that all procurement documentation *must* be available via Internet from date of publication of the contract notice (date of invitation to confirm interest where PIN is used as call for competition)
- Exceptions only for:
 - substantiated urgency (accelerated procedures) – **A.27(3)**
 - where practical limitations arise from specific file formats, tools, equipment or the need for physical/scale models – **A. 22(1) (a-d)**
 - where the authority needs to protect confidential information involved – **A. 22(1)**
 - If the documentation is not available electronically five days must be *added* to the minimum response times for suppliers set out in the directive (except in the case of ‘substantiated’ urgency)



Shorter minimum time limits for responses to adverts/tenders

A.47

- Unnecessarily long time limits can increase the costs of procurement and deter suppliers from taking part
- The new rules include *minimum* time limits around 30% shorter than at present - these can be shortened further in certain cases (see later)
- *However* when setting time limits authorities must as now take into account the complexity of the contract and the time required for suppliers, (particularly SME's) to respond
- In all cases, a notice of contract award must be sent to OJEU within 30 days of conclusion of the framework or contract



The Prior Information Notice and time limits

- In some procedures it is possible for authorities to reduce the minimum time limits where a suitable PIN has been published
- A PIN would be 'suitable' where all the following apply:
 - The PIN was not itself intended to represent a call for competition (see later)
 - The PIN was published no more than 12 months and no less than 35 days before the date of dispatch to OJEU of the contract notice
 - The PIN includes certain brief information about the type and value of the contract, to the extent that it was available to the authority at the time of its dispatch to OJEU



Minimum time limits – open procedure A.27

- Normally a minimum of 35 days for receipt of tenders (30 days if electronic tenders permitted)
- If preceded by suitable Prior Information Notice (PIN) minimum 15 days
- New accelerated open procedure - if urgent (whether or not suitable PIN published) minimum 15 days



Minimum time limits – restricted procedure A.28

- Minimum of 30 days for requests to participate
- Minimum of 30 days to submit tenders (25 days if electronic tendering permitted)
- If preceded by suitable Prior Information Notice (PIN) minimum time to submit tenders is 10 days
- Accelerated restricted procedure - if urgent (whether or not suitable PIN published) minimum time to submit requests is 15 days, minimum time to submit tenders is 10 days

Minimum time limits – competitive procedure with negotiation and innovation partnerships

A.29

- Minimum of 30 days for requests to participate
- If preceded by suitable Prior Information Notice (PIN) minimum time to submit requests is 15 days
- Minimum of 30 days to submit initial tenders (25 days where electronic tendering permitted)
- If preceded by suitable Prior Information Notice (PIN) minimum time to submit initial tenders is 10 days
- Accelerated - if urgent (whether or not suitable PIN published) minimum time to submit requests is 15 days, minimum time to submit initial tenders is 10 days

Minimum time limits – competitive dialogue

A.30

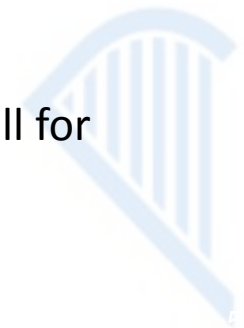
- Minimum of 30 days for requests to participate
- No provision for time reduction following Prior Information Notice (PIN)
- No explicit time limits for submission of initial/subsequent tenders or time limit implications of PIN publication
- No provision for acceleration



Urgency

- Accelerated time limits are permitted where the requirement is ‘urgent’
- “Where a state of urgency duly substantiated by the contracting authorities renders impracticable the [normal] time limit...”
- The reason for urgency must be disclosed in the contract notice
- Note that the Directive makes it clear that the urgency must be brought about by events unforeseeable by and circumstances not attributable to the authority

This is the stricter test for justification of the use of negotiation without any call for competition in OJEU



Additional flexibility for sub-central authorities

- The Regulations will allow authorities other than central government authorities set out in the schedule to the Regulation (so-called sub-central authorities) to:
 - vary, in agreement with tenderers, the standard minimum time limit for tendering in the restricted procedure only to allow shorter times where appropriate (in the absence of agreement the time limit must be no less than 10 days)
 - use the PIN notice itself as a call for competition (removing the need for a contract notice)
 - suppliers must express their interest in one or a number of contracts referred to in the PIN and the authority must subsequently invite those operators to confirm their interest

PIN as a call for competition (sub-central authorities only)

PIN must:

- refer specifically to the supplies, works or services that will be the subject of the contract(s) to be awarded
- indicate that the contract will be awarded by restricted or competitive procedure with negotiation without further publication of a contract notice and invite interested suppliers to express their interest in writing
- contain specific information about the contract, similar to that required in the standard contract notice form
- have been sent for publication between 35 days and 12 months prior to the date on which the authority subsequently invites responders to the PIN to confirm their continuing interest



Questions

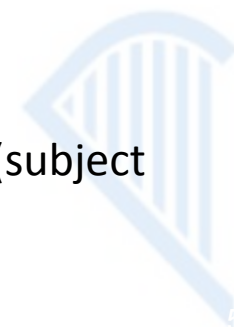




Selection and exclusion of suppliers

Selecting suppliers and seeking tenders - principles

- As now the Directive provides a number of stages in assessing whether a supplier should be allowed to tender for a contract
 - Reasons for exclusion - mandatory (e.g. criminal conviction for certain offences) and those at authority's discretion (e.g. bankruptcy) - **A.57**
 - Minimum capacity levels (financial and technical) - **A.58**
 - Criteria for reducing the number of suppliers to be invited to tender (not permitted in open procedures)
- In open procedures, authorities may assess tenders in advance of checking capability (only the 'winning' supplier need supply proofs)
- Authorities may allow suppliers to supplement or clarify their submissions (subject to preserving equal treatment in order to allow correction of errors etc.)



Mandatory exclusions - **A.57**

- As now suppliers *must* be excluded from contracts if convicted of offences related to organised crime, corruption, fraud, money laundering
- New obligations will be introduced to exclude suppliers for convictions for terrorist, child labour and human trafficking related offences
- Conviction relates to candidate, any member of the administrative, management or supervisory body of the candidate and any person with powers of 'representation, decision or control' over the candidate



Tax and social security exclusions - **A.57(2)**

- There will be new obligation to exclude a supplier which has been subject of a *binding legal decision* which found a breach of legal obligations to pay tax or social security obligations – **A.57(2)1st paragraph** (except where disproportionate under **A.57(3)**, e.g. only minor amounts involved)
- Note however that an authority may also *use its discretion* to exclude a supplier where it can demonstrate the supplier's non-payment of taxes/social security contributions where *no* binding legal decision has been taken - **A.57(2) 2nd paragraph**



Discretionary exclusions - **A.57(4)**

- Supplier *may* be excluded if grave professional misconduct can be demonstrated **which affects the supplier's integrity**
- Supplier *may* be excluded where it is guilty of serious misrepresentation regarding selection criteria, has withheld information or cannot provide supporting documents
- There are also a number of new exclusions, e.g. where:
 - the authority can demonstrate violations of applicable obligations in the field of environmental, social and labour law **-A.57(4)(a)**
 - there are 'plausible indications' of agreements aimed at distorting competition- **A.57(4)(d)**
 - there is a conflict of interest, including conflicts arising from prior involvement of the supplier in preparation of the procedure (e.g. specifications) that cannot be remedied by less intrusive measures **-A.57(4)(e)**

Discretionary exclusions - **A.57(4)** *continued*

- A supplier *may* also be excluded where
 - there are ‘significant or persistent’ deficiencies in performance of a substantive requirement under a prior contract or concession for an authority or utility that led to early termination, damages or other comparable sanctions – **A.57(4)(g)** and **recital 101**
 - supplier has tried to unduly influence the decision-making process of the authority or seek confidential information to obtain an unfair advantage - **A.57(4)(i)**
 - supplier has negligently provided misleading information materially impacting on exclusion, selection or award -**A.57(4)(i)**
- Authority may include a supplier who is bankrupt or in similar situation where it can be established that the supplier can perform the contract - **A.57(4) last para**

Application of mandatory and discretionary exclusions

- Suppliers *must not* be excluded if they have provided sufficient evidence of reform (i.e. payment of compensation, cooperated with investigating authorities and changes in organisation/personnel) – ‘self cleaning’ - **A.57(6)**
- The maximum period of exclusion allowed is 5 years from the exclusion event in the case of mandatory exclusions or 3 years if exclusion is discretionary - **A.57(7)**
- Mandatory exclusions apply throughout procedure (e.g. immediately prior to award of contract) – discretionary exclusion can apply throughout procedure - **A.57(5)**



Conflicts of interest

A.24

- The Directive requires that Member States take ‘appropriate measures’ to prevent, identify and remedy conflicts of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all suppliers
- Requirements to furnish Annual Statement of Interest under the Ethics and Public Office Acts 1995-2001
- Currently, officials involved in procurement competitions are required to sign a Conflict of Interest declaration



Improving suppliers' access to contracts

- Authorities must ensure that minimum requirements for economic and technical capacity are related and proportionate to the contract - **A.58(1)**
- Where annual turnover used as a measure of financial capacity, this *must not* exceed twice the value of the contract except in justified cases (e.g. where high risk) - reasons must be declared in procurement documents or authority's reports - **A.58(3)**
- Authorities must disclose in notice or invitation to confirm interest (where PIN is call for competition) the objective rules and criteria to be used to determine whether suppliers meet minimum capacity and to be used to reduce further the number to be invited to tender. Minimum/maximum numbers to be invited to tender must be disclosed - minimum 5 (restricted) and 3 for competitive procedure with negotiation and competitive dialogue



Collecting information for selection - **A.59**

- Suppliers may submit and authorities must accept (from 18 April 2016) new ‘self-declarations’ (European Single Procurement Document) in relation to capacity/exclusion requirements (proof to be provided by the winning tenderer only) - **A.59** – electronic form deferred until October 2018
- Some of these proofs are available in national databases, which are linked to the EU database ‘e-Certis’. This will in due course be EU authorities’ primary source of certain forms of documentary evidence of capacity (e.g. certificates)
- It is proposed to defer compulsory use by authorities of e-Certis until October 2018
- Regulations will not contain the option to establish standard terms for determining whether groups of suppliers meet various selection criteria - **A.19(2)**

Collecting information for selection - **A.59**

- The ESPD is a formal statement (self declaration) by the economic operator intended to provide preliminary evidence that the supplier/economic operator:
 - is not in one of the situations that would result in mandatory (A.57(1) & (2)) or discretionary exclusions (A.57(4)(a) to (i))
 - Meets the selection criteria (A.58)
 - Fulfils the objective rules and criteria that have been set out under A.65. The objective in the document is to reduce the administrative burden associated with supply certification or other documentation related to exclusion or selection criteria.





Questions





Tender assessment and contract award

Award Criteria - **A.67**

- Criterion for contract award is the most economically advantageous tender
- **Must** include price or cost using a cost-effectiveness approach, such as life cycle costing (e.g. environmental externalities provided their monetary value can be determined and verified)
- **May** include best price-quality ratio assessed on the basis of criteria including qualitative, environmental and/or social aspects linked to the subject matter of the contract

NOTE: The Regulations do not prohibit authorities from using cost only or price only as the sole award criteria (**A.67(2)** last paragraph)



Award Criteria

- Award criteria are considered to be ‘linked to the subject matter’ of a contract where they relate in any respect to the works/supplies/services in question at any stage of their life cycle including
 - the process of production of goods (e.g. no toxic chemicals)
 - the provision of services (e.g. energy efficiency of machines)
 - trading (e.g. the use of ‘fair trade’ products in the contract)
- Note: award criteria must be contract-specific rather than aimed at assessing the *corporate policy* of the tenderer (e.g. It would be wrong to award extra points to a supplier that supplied fair trade products to *all* its customers)



Award Criteria

- The new Directive confirms that award criteria can include the organisation, qualification and experience of staff to perform the contract (where this significantly impacts the supplier's level of performance) - **A.67(2)(b)**
- Criteria should be structured such that the information in tenders can be verified effectively against the criteria
- As now the contract notice or invitation to tender must disclose the relative weighting of each of the award criteria (including the use weighting or range of weighting or, exceptionally, ranking)



Challenging abnormally low tenders

- Authorities will be *required* to seek explanations from suppliers that submit a tender which ‘appears’ to be abnormally low
- Examples of ‘explanations’ that could be accepted include the economics of the method of construction to be used and the technical solutions chosen. The authority may reject the tender where the evidence supplied is not satisfactory
- If the authority has established that the low price is the result of a breach of social and environmental law listed in Annex X the authority *shall* reject the tender
- If it is discovered that the low price is the result of State Aid the authority *may* reject the tender if the supplier is unable to prove that the aid is compatible with Treaty rules





Other notable provisions

Contract conditions

- Greater clarity that conditions for performing contracts can include ‘special’ conditions in particular those relating to innovation, or environmental, social or employment related considerations
- The Regulation will allow authorities to ensure that suppliers comply with international legal obligations in relation to social/environmental/labour laws established by Union law, national law, collective agreements and relevant obligations via contract clauses and supported, in time, by guidance
- The Directive makes it clear that all conditions must be linked to the subject matter of the contract (as is the case with criteria for contract award)
- The conditions could therefore not relate to actions by the supplier unrelated to that contract (e.g. employment conditions of the supplier’s workforce on contracts for other customers)



Sub-contractors

- Where it has verified that one of the conditions of mandatory exclusion applies to a sub-contractor (e.g. breach of labour laws) the authority shall require its substitution - **A.71(6)(b)**



Modification of contracts/frameworks - A.72

- A contract/framework will be substantially modified and require re-advertisement in the OJEU where the modification:
 - would have led to other suppliers participating, becoming qualified or having an offer accepted if known initially
 - changes the economic balance in favour of the supplier
 - extends the scope of the contract/framework 'considerably'
- A contract/framework will also be substantially modified
 - where a new contractor replaces the one to which the authority had awarded the initial contract other than for corporate restructuring or under a variation clause



Modification of contracts/frameworks- A.72

- A contract/framework *may* change without re-advertisement in OJEU where:-
A.72(2)
 - minor changes that do not affect its nature *and* do not exceed the relevant EU threshold *and* do not exceed 10% (services/supplies) or 15% (works) of the initial value
 - minor changes that do not affect its nature and are explicitly provided for in review or option clauses in the procurement documents
- A contract/framework *may* change without re-advertisement in OJEU where a new supplier replaces the original supplier as a result of corporate restructuring, merger, acquisition or insolvency provided this does not involve other ‘substantial’ modifications’ – **A.72(1)(d)**



Modification of contracts/frameworks - A.72

- A contract/framework *may* be modified without re-advertisement in the OJEU where:
 - additional works, services or supplies that ‘have become necessary’ where a change of supplier would not be practicable (for economic, technical or interoperability reasons) and would involve significant inconvenience or substantial duplication of costs
 - The change/modifications of the contract must be limited to 50% of the original contract, but the sum total of all successive modifications do not have to be kept within 50% limit
 - the change that arises is unforeseeable by a ‘diligent’ authority, provided these changes do not affect its nature and value is less than 50%
 - in these two cases the authority must publish in OJEU a ‘Notice of modifications of a contract during its term’



Termination of contracts

- Authorities must include in contracts a condition that allows, but does not require, termination where
 - the contract has been ‘substantially’ modified, constituting a new award *or*
 - the Court of Justice of the European Union has decided that the contract should not have been awarded because the authority committed a serious breach of its obligations *or*
 - the supplier should have been excluded on mandatory exclusion grounds (e.g. as a result of conviction for corruption)



Debriefing – A.55

- Authorities must as soon as possible inform each candidate and tenderer of decisions reached
- On request from the candidate or tenderer, authority must as soon as possible and in any event within 15 days from receipt of a written request inform:
- Any unsuccessful candidate of the reasons for the rejection of its request to participate
 - Any unsuccessful tenderer of the reasons for rejection of its tender including reasons for non-equivalence or failure to meet performance or functional requirements
 - Any tenderer that has made an admissible tender of the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer or the parties to the framework agreement
 - Any tenderer that has made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers

Record Keeping

A. 83(6) & A. 84

- Authorities obliged to grant access to contracts with a value above €1m for supplies and services and €10m for works contracts; however, access to specific documents or items of information may be denied to the extent and on the conditions provided for in the applicable Union or national rules on access to documents and data protection
- Authorities must document progress of procedure and keep sufficient documents to justify decisions taken in all stages of the procedure such as documentation on communications with economic operators and internal deliberations, preparation of the procurement documents, dialogue or negotiations, selection and award of the contract
- Documentation to be kept for at least **three years** from date of award of contract



Questions and feedback

