

CORRESPONDENT'S REPORT

NEW PUBLIC PROCUREMENT RULES IN THE EU

HUBERT ANDRÉ-DUMONT

Partner, McGuireWoods LLP, Brussels Bar

STEVEN ONGENA

Partner, McGuireWoods LLP, Brussels Bar

On 11 February 2014, the Council of the European Union adopted a legislative package aimed at modernising public procurement in the EU. The legislative package consists of three directives (collectively the “Directives”):

- Directive 2014/24/EU of 26 February 2014 on public procurement which repeals Directive 2004/18/EC,¹ i.e. a general directive on public procurement for the purchase of goods, works and services;
- Directive 2014/25/EU of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors which repeals Directive 2004/17/EC², i.e. a sector specific directive on procurement by entities operating in the sectors of water, energy, transport or postal services; and
- Directive 2014/23/EU of 26 February 2014 on the award of concession contracts³.

The Directives must be transposed into national legislation by 18 April 2016, although there is a longer period for some aspects of the e-procurement rules. As compared with the existing regime (i.e. Directive 2004/18/EC and Directive 2004/17/EC), the Directives introduce, among others, the following main changes.

¹ OJ L 94/65, 28.3.2014, p. 65.

² OJ L 94/243, 28.3.2014, p. 243.

³ OJ L 94/1, 28.3.2014, p. 1.

THRESHOLD AMOUNTS

The Directives apply to public procurement contracts with a value net of VAT estimated to be equal or greater than the below base amounts, which amounts are subject to review from time to time.

The general directive on public procurement for the purchase of goods, works and services applies to procurements with a value estimated to be equal or greater than:

- (i) €5,186,000 for works contracts;
- (ii) €134,000 for supply and service contracts awarded by central government authorities, as well as for design contests organised by such authorities;
- (iii) €207,000 for supply and service contracts awarded by sub-central government authorities, as well as for design contests organised by such authorities; and
- (iv) €750,000 for service contracts for social and other specific services.

The sector specific directive on procurement by entities operating in the sectors of water, energy, transport or postal services applies to procurements with a value estimated to be equal or greater than:

- (i) €414,000 for supply and service contracts, as well as for design contests;
- (ii) €5,186,000 for works contracts; and
- (iii) €1,000,000 for service contracts for social and other specific services.

The concession directive needs to apply to a concession when the concessionaire's turnover under the concession, as expected by the authorities, meets or exceeds €5,186,000.

SUPPORTING DOCUMENTS

In order to simplify the bidding process and in an effort to reduce overall cost, tenderers are entitled to use a standardised European Single Procurement Document, which is still to be drafted by the European Commission. The European Single Procurement Document will be an electronic document containing a number of self-declarations from tenderers (e.g. statements as to the absence of outstanding social security contributions or taxes and in relation to technical and professional ability). The European Single Procurement Document will replace the need for most tenderers to submit original certificates certifying relevant issues.

Only the selected bidder will be required to submit original certificates before the actual award, although purchasing authorities will remain entitled to require presentation of originals during the procurement proceedings

if deemed appropriate. Tenderers are entitled to reuse a European Single Procurement Document used on a previous occasion provided that the information contained therein continues to be accurate.

MOST ECONOMICALLY ADVANTAGEOUS TENDER

Under the existing regime, contracts are to be awarded either for the tender which is the most economically advantageous for the public authorities or for the tender with the lowest price. In contrast, the new general directive on public procurement states that contracts can only be awarded on the basis of Most Economically Advantageous Tender (“MEAT”). The request for tenders will need to specify through contract award criteria how the MEAT will be determined and such by reference to price or cost and may include the best price/quality ratio.

As far as the contract award criterion “cost” is concerned, public authorities will be able to assess the total cost of the products, services or works by considering the initial acquisition and supply cost, the cost of use, consumption, maintenance, collection and recycling, as well as environmental externalities related to the products, services or works, provided these externalities can be financially quantified (e.g. the cost of the pollution caused by a given product).

In relation to the price/quality ratio, the quality component may include technical merit, functional characteristics, environmental, social and innovative characteristics or the experience and qualifications of staff proposed to perform the work. The price/quality ratio allows purchasers to introduce a non-financial contract award criterion.

INCREASED USE OF THE COMPETITIVE PROCEDURE WITH NEGOTIATION

Purchasing authorities will enjoy greater flexibility in having recourse to the competitive procedure with negotiation as compared to the negotiated procedure described in the current Directive 2004/18/EC. A contracting authority may apply a competitive procedure with negotiation regarding works, supplies or services if one or more of the following criteria are satisfied:

- (i) The needs of the contracting authority cannot be met without adaptation of solutions that already are available;
- (ii) The works, supplies or services include design or innovative solutions;
- (iii) The contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, the

- complexity or the legal and financial make-up or because of the risks attaching to them; or
- (iv) The technical specifications cannot be established with sufficient precision by the contracting authority.

Additionally, under certain circumstances, public authorities can have recourse to the competitive procedure with negotiation where a prior open or restricted procedure only resulted in irregular or unacceptable tenders.

In the framework of a competitive procedure with negotiation, public authorities are entitled to apply the contract award criteria as they see fit (price, cost including price/quality ratio), can restrict the number of suitable tenderers and can hold a number of negotiation rounds as they see fit. However, no negotiation can take place in respect of the final offer submitted.

SPECIFIC MECHANISMS IN FAVOUR OF SMES

Public authorities are required to subdivide public procurement contracts into lots or, if this is not done, explain why a division into lots has not been used. This explanation is to be provided either in the procurement document or in the individual report drawn up at the end of the process. Likewise, public authorities may decide to limit the number of lots to be awarded to one tenderer.

Further, in the event the grant of a contract is made subject to turnover requirements in order to prove a tenderer's financial capacity, such turnover requirements are to be limited to twice the estimated value of the contract concerned *unless* the authorities can justify a derogation from this principle. Again, the authorities will need to explain the use of the derogation either in the procurement document or in the individual report drawn up at the end of the process.

Finally, the mandatory use of electronic communication should further broaden the access of SMEs to public procurement opportunities and facilitate their participation. Member States must implement full e-procurement no later than by 18 October 2018.

SPECIFIC SERVICES SUBJECT TO A NEW SIMPLIFIED REGIME

The distinction between "A Services" and "B Services" is abandoned and services are made subject to the full set of provisions on procurement *unless* they fall under the "exceptions" category (e.g. social services and other specific services such as legal services or restaurant services) where more flexibility is allowed in the selection of the service provider.

The only provisions that will imperatively apply under the simplified regime are the general EU principles (e.g. non-discrimination and proportionality), prior information requirements as to forthcoming contracts and information on the award. Public authorities will be entitled to eliminate price as sole contract award criterion and also take into account quality criteria considered necessary for the provision of the services. These types of services will only be covered at all if the contract meets the threshold value of €750,000 net of VAT.

EXCLUSION GROUNDS

The exclusion grounds have been extended and now allow for the exclusion of a bidder where it has an undue influence on the award process or in case it makes material misrepresentations as to the absence of undue influence. Also, exclusion is possible in case of a tenderer's non-compliance with labour and employment or environmental law at international level, European Union level, national level and/or resulting from collective agreements.

As under the old regime, certain exclusion grounds are automatic (e.g. corruption, financial fraud or money laundering), while other grounds leave room for the exercise of discretion by the authorities. Non-payment of social security contributions or taxes as confirmed by a final and binding judicial or administrative decision will become an automatic exclusion ground whereas it is a discretionary exclusion ground under the current regime.

PROCUREMENT BY ENTITIES OPERATING IN THE SECTORS OF WATER, ENERGY, TRANSPORT OR POSTAL SERVICES

The EU considered it appropriate to maintain separate rules on procurement by entities operating in the water, energy, transport or postal services sectors. This is on the basis that Member State authorities continue to have influence over entities operating in these sectors through e.g. shareholdings or representation in the entities' board of directors.

While the new sector specific directive takes into account the specificity of the given sectors (e.g. intragroup provision of services may be exempted under the directive), as a general rule, the MEAT principle from the new general directive equally applies.

CONCESSION CONTRACTS

The concession directive, which is entirely new, covers both public works concessions and public service concessions (excluding however the water

sector). Public service concessions were previously not governed by specific EU public procurement rules.

The concession directive does not impose an absolute time limit on concessions but, if they exceed five years, the duration thereof cannot exceed the time required for a concessionaire to recoup the investments made for running the concession, including a return on the capital it invested either at the outset of the concession or during its life cycle.

Unlike the general directive on public procurement for the purchase of goods, works and services, the concession directive does not require public authorities to award a concession to the Most Economically and Advantageous Tender. In fact, the concession directive does not set any specific award principles but simply requires that the award criteria are published in advance. The award criteria need to be objective and non-discriminatory and they need to relate to the subject matter of the concession. As a result, the concession directive leaves the public authorities ample room for taking into account considerations of e.g. quality, safety, environment and innovation.