



New Directives for supply, services and works

Since 2000 the “classic” Directives for supply, services and works and the “Utilities” Directive have been under revision in the EU Parliament and the Council of Ministers. During this process there have been disagreements about a number of provisions in the Commission’s proposals for revision which lately have been the object of a special conciliation procedure.

On the 2nd of January 2004 this conciliation procedure finished with the adoption of the two Directives. The Directives took effect by announcement in The Official Journal (OJ) on the 30th of April 2004 and shall be implemented in the Member States within 21 months.

Directive 2004/18/EC of the European Parliament and of the Council of 31 march 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. (OJ L 134/114)

Directive 2004/17/EC of the European Parliament and of the Council of 31 march 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sector. (OJ L 134/1)

The purpose of this revision is a modernisation and simplification of the directives.

This will be done by:

- combining and consolidating the three classical Directives into one Directive with identical rules and procedures for all three areas.
- adjusting the Directives to existing practices in the Member States and judgments of the European Court of Justice.
- allowing the use of electronic communication and new electronic purchase technology and more flexible procedures.


After final implementation, the public procurement market will be regulated by two Directives: one consolidated for supply, services and works within national, regional and local activities and the other for the same activities within the Utilities sector (water, heating, electricity, gas, transportation and postal services (Transportation at sea belongs to the consolidated directive and telecommunication has been excluded from public procurement due to liberalisation).

With a few exceptions, both new Directives contain the same rules and procedures, so this paper will shortly concentrate on the most important new provisions, rules and possibilities.

Whenever reference is made to articles, they refer to the new consolidated Directive. Reference to the new Utility Directive is also provided.

New possibilities:

1. Based on the EU Treaty, established practices in the Member States and judgments of the European Court of Justice, the Directive add the following possibilities:

- a.  **use of social clauses** in the awarding of contracts (employment and education of unemployed people, handicapped, ethnic groups).

Including reserved contracts

Member States can reserve jobs where the bidder can only be sheltered workshops or sheltered job creation programmes with a majority of handicapped people (art. 19, Utilities Directive art. 28).

- b. **Environmental requirements** to products, services and works are allowed to the extent that these demands are linked to the subject-matter of the contract or the performance of the contract.

From the very beginning of the tender procedure these environmental requirements must be outlined in the tender notice or in the tender documents as technical specifications or in the performance / functional requirements as well as in the award criteria.

Environmental labels and environmental management systems (eg. The EU Flower, the Nordic Swan, the German Blaue Engel, EMAS, ISO 14001) can be used as technical specifications in the tender document and certifications as documentation in the bidding document provided that they are available to all bidders. Please note that environmental management systems are only applicable for services and works. (art. 23,3 (b), 23, 6 and 50, Utilities Directive art. 34)

- c. **Performance and functional description.**

To encourage enterprises to use their technical know-how and skills to offer the best technical solution, contracting authorities can refrain from using detailed technical specifications and instead specify their requirements in terms of performance and function. (art. 23, Utilities Directive art. 34)

New procedures and techniques:

Note that the individual Member States can decide if they will use the following options: competitive dialogue, framework agreements, central purchasing bodies, electronic purchasing systems or electronic auction.

1. The competitive dialogue

The competitive dialogue is an innovation within the classic Directive, where negotiation of contract conditions is only allowed under quite special circumstances.

The competitive dialogue is not applicable to the new Utilities Directive, although the option to use a “technical dialogue” to clarify final specifications is mentioned in the preamble of the Directive (15)

The competitive dialogue can be used in complex contracts where technical solutions are difficult to define or where development of the best solution is wanted.

To obtain the know-how and technical solutions of enterprises, they can now be involved at an early stage before the drawing up of the final tender document.

The competitive dialogue must be open to all enterprises. Based on the selection criteria, the most qualified are chosen to participate in the development of one or several suitable solutions according to the requirements. All conditions, including prices and payment terms, can be discussed and the contracting authority must protect confidential material/information submitted by bidders. (art. 29)

Using the competitive dialogue and negotiated procedures it is possible to gradually **reduce the number of solutions or bidders** with whom the contracting authority is in dialogue/negotiation. In this way, contracting authorities can organise the entire tendering procedure in stages, under which bidders can be reduced to a minimum of 3, based on pre-announced award criteria.

The contracting authority can ask bidders for further definitions and specifications without changing the basic conditions of the supply. When the final technical solution is chosen, the remaining bidders will be invited to tender. (art. 29, 30 and 44)

2. Framework agreements

Framework agreements are defined as a general agreement between contracting authority(ies) and one or more suppliers outlining the terms governing contracts to be awarded during a given period, normally no more than 4 years.

Framework agreements are concluded according to the normal provisions of the Directive. Based on the award criteria, an agreement can be concluded with one or with more suppliers (minimum 3).

Furthermore a new possibility is added: it is possible to reopen the framework agreement to new offers from the chosen suppliers on the grounds that not all the necessary terms were stipulated in the original framework agreement. They must be notified in writing with a suitable deadline for submission of bids. (art. 32, the utilities Directive art. 14)

3. Central purchase bodies

A central purchase body conducting public procurement on behalf of other contracting authorities or public bodies are now included in the Directive provided that this body is a public body governed by the Remedies Directive.

4. New electronic purchasing systems

Besides giving electronic communication and traditional written communication the same force, the Directives introduce the use of electronic purchasing systems to handle procurements by awarding authorities. Special fees can not be required from companies using these systems. (art. 1, 12-13 and art. 33, utilities Directive art. 1, 11-12 and art.15)

The open procedure must be applied when using electronic purchasing systems. Bidding companies which fulfil the selection criteria and which have submitted an “indicative” or provisional offer according to the specifications for the relevant goods or services are admitted to the electronic purchasing system and can improve their offers continuously. These offers should be evaluated within 15 days.

Each specific tender must be advertised in advance and be open to indicative offers from all interested enterprises. The tender deadline is a minimum of 15 days, thereafter all enterprises admitted to the electronic purchasing system are invited to make new offers for the contract.

Electronic purchasing systems can also be used for:

- a. renewed calls for bids on a framework agreement.
- b. establishment of a list of pre-qualified enterprises.

5. Electronic auction

The Directives introduce the use of electronic auctions by tenders where specifications can be made sufficiently accurate and where it is possible to automatically rank the bidders' offers during the whole auction procedure according to quantifiable criteria such as price or delivery time.

The electronic auction is performed after EU publication of all necessary information to potential bidders. The submitted bids are evaluated according to the award criteria and bidding companies with acceptable offers are invited to participate in the ongoing electronic auction, which can run over several rounds with new offers.

The auction can start 2 days at the earliest after the notification of the chosen participants, who must be kept continuously informed about the progress of the auction, number of participants and the prices offered without revealing the identity of the other bidders.

Certain service and works contracts involving design or intellectual performances cannot be awarded by means of electronic auction. (art. 54, utilities Directive art. 56)

6. Reduced deadlines for bids

The use of electronic means allows shorter bid deadlines. Tender notices and tender documents available via electronic media allow a reduction in the deadline by 5-7 days. (art. 38)

7. Publication of contracts

Framework agreements must be published in the OJ within 48 days after award at the latest. Renewed calls for tender within the framework agreement should not be published. When electronic purchasing systems are used, contracts must be published either after 48 days or grouped and published quarterly 48 days after the end of the quarter. (art. 35)

New general provisions:

8. Normative product/service nomenclature

The CPV (Common Procurement Vocabulary) codification system shall specify the reference nomenclature for public contracts.

9. Additional selection criteria

The exclusion criteria have been added provisions for exclusion for organised crime, corruption, fraud and money laundering. (art. 45, utilities Directive art. 54)

10. Specification of award criteria

Contracting authorities are now bound to inform and publish the chosen award criteria for the most economically advantageous tender. At the same time they must notify the relative weighting given to each of the criteria. If this is not possible, the award criteria must be indicated in descending order. (art. 45, utilities Directive art. 54)

11. National certification of enterprises

Member States can set up a national self-certification system in order to reduce the trouble caused to enterprises presenting documentation for the exclusion criteria and for quality assurance systems as well as environmental management systems. (art. 52)

12. Information about special national conditions

Contracting authorities may be required to give bidding companies details of national authorities from which information can be obtained concerning national tax rules, environmental protection, occupational health in relation to the performance of the contract. (art. 27, utilities Directive art. 39)

13. Minor adjustments of the threshold values

In the future, threshold values will only be fixed in € Please note that the following thresholds are not the final ones. The value of the thresholds should be revised in accordance with the GPA – Government Procurement Agreement – . The final revision should be published soon.

State, county and municipalities

- a. Supply and services respectively 162,000 €for national and 249,000 €for others.

Utilities 499,000 €

b. Construction 6,242,000 € (Including Utilities).

14. Design and works for construction contracts can be issued separately or as one tender.

15. Services concerning building administration may include construction, but must as main rule be issued as a service contract

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