New Directives from the European Union on Public Procurement

AIJA 52ND ANNUAL CONGRESS

Prague, August 29th 2014
1) Introduction of the unholy trinity

2) Novelties of the new directive 2014/24/EU

   a. Definitions
   b. Mixed procurement
   c. Exclusions
   d. Rules on public contracts
   e. Particular procurement regimes
   f. Governance
Public procurement is key instrument to achieve the Europe 2020 strategy

Public procurement expenditures account for approximately 20% of the EU’s GDP\(^1\)

New Directives on public procurement have to ensure the most efficient use of public funds

\(^1\)Las nuevas directivas sobre contratación pública. Apuntes para su aplicación directa y para su transposición. Jose Manuel Martínez Fernández
DIRECTIVES ON PUBLIC PROCUREMENT

Directive 2004/18/EC
on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts

Directive 2004/17/EC
coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors

Approval 26th February 2014
Publication OJEU 28th March 2014
Transposition & repealing 18th April 2016

Directive 2014/23/EU
on the award of concessions contracts

Directive 2014/24/EU
on Public Procurement and repealing Directive 2004/18/EC

Directive 2014/25/EU
on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC

Directive 2009/81/EC on the awarding of certain contracts in the fields of defense and security
Directive 2007/66/EC improving the effectiveness of review procedures concerning the award of public contracts
CONTRACTS COVERED BY DIRECTIVES ON PUBLIC PROCUREMENT

Subject-matter covered by Directive

Pecuniary interest

=> Thresholds Directives
Rules on the procedures for procurement by contracting authorities and contracting entities:

- Contracting authorities and contracting entities (activities Annex II)
- Concessions:
  - Works
  - Services
- Estimated value ≥ thresholds: €5.186.000 net VAT

The award of a works or services contract shall involve the transfer to the concessionaire of an **operating risk**:
- demand risk:
- or a supply risk: risk that the provision of the services will not match demand
Not affected by the Directive:

- The freedom of Member States to define services of economic interest, its organization and finance and obligations they should be subject too;
- The organization of social security systems;
- Agreements, decisions and other legal instruments that organize the transfer of powers and responsibilities for the performance of public tasks between public authorities without any remuneration;
- Free administration by public authorities;
- Systems of property ownership. It does not require the privatization of public enterprises providing services to the public;
- Non economic services of general interest.
Rules on the procedures for procurement by contracting authorities:

<table>
<thead>
<tr>
<th>Type of contract</th>
<th>Threshold¹</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public contracts (works, provision of services, supply of products)</td>
<td>≥ €5.186.000</td>
</tr>
<tr>
<td>- public supply and services contracts, design contests awarded by central government authorities.</td>
<td></td>
</tr>
<tr>
<td>- supply contracts awarded by contracting authorities operating in field of defense for products covered by annex III</td>
<td>≥ €134.000</td>
</tr>
<tr>
<td>- public supply and services contracts, design contests awarded by sub-central government authorities.</td>
<td></td>
</tr>
<tr>
<td>- supply contracts awarded by central government authorities operating in field of defense for products not listed in annex III</td>
<td>≥ €207.000</td>
</tr>
<tr>
<td>Public service contracts for social and other specific services listed in Annex XIV</td>
<td>≥ €750.000</td>
</tr>
</tbody>
</table>

¹Net VAT
Not affected by the new Directive:

- The freedom of Member States to define services of economic interest, its organization and finance and obligations they should be subject too.
- The organization of Social security systems
- Agreements, decisions and other legal instruments that organize the transfer of powers and responsibilities for the performance of public tasks between public authorities without any remuneration.
SUBJECT – MATTER – SCOPE

Rules on the procedures for procurement by contracting entities:

Contracts and design contest

Works, supply and services contracts

Thresholds =>

€414.000 services and supply
€5.186.000 works

€1.000.000 social and services annex XVII

Activities

Gas and heat, electricity, water, oil and gas, coal and solid fuels

ports and airports, transport and postal services
1. **Contracting authorities**
   - State, regional and local
   - Bodies Governed by public law

2. **Contracting entities:**
   - Contracting authorities and public undertakings
   - Entities that operate one or more activities referred in articles 14 to 18 on the basis of a special or exclusive right granted by a competent authority.

**SPECIAL OR EXCLUSIVE RIGHT:** not when it is granted by a procedure based on objective criteria and adequate publicity.
OBJECTIVES OF THE NEW DIRECTIVES

- More flexibility in the procedures
- Incorporating certain aspects of related well established case law of the ECJ
- Better use of PP in support of common societal goals
- Increase efficiency of public spending
- Innovation
- Clarifying basic notions and concepts to ensure legal certainty
- Better access for SME’s
- Promote electronic procurement
COMMON PRINCIPLES OF PROCUREMENT

1. Equal treatment
2. Non discrimination
3. Transparency
4. Proportionate manner
5. Competition
6. Efficiency
7. Environmental and economic sustainability
1) Introduction of the unholy trinity

2) Novelties of the new directive 2014/24/EU

a. Definitions
b. Mixed procurement
c. Exclusions
d. Rules on public contracts
e. Particular procurement regimes
f. Governance
## DEFINITIONS (I)

| Contracting authorities (CA) | New category: sub-central contracting authorities  
|                             | • all CA that are not central Government authorities  
|                             | • more flexibility on public procurement procedures  |
| Ancillary purchasing activities | Activities consisting in the provision of support to purchasing activities:  
|                             | • Technical Infrastructure  
|                             | • Advice on the conduct of design of public procurement procedures  
|                             | • Preparation and management of public proc procedure  |
| Procurement service provider (PSP) | Public or private body which offers ancillary purchasing activities on the market  |
| Life cycle | All consecutive or interlinked stages through the existence of a product, works or provision of services. |
## DEFINITIONS (II)

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>innovation</td>
<td>Implementation of a new or significantly improved product, process or service</td>
</tr>
<tr>
<td>label</td>
<td>Document confirming that works, processes, services and products meet certain requirements</td>
</tr>
<tr>
<td>irregular offer</td>
<td>• Tenders which do not comply with procurement documents</td>
</tr>
<tr>
<td></td>
<td>• Which were received late</td>
</tr>
<tr>
<td></td>
<td>• Where there is evidence of collusion or corruption</td>
</tr>
<tr>
<td></td>
<td>• Abnormally low</td>
</tr>
<tr>
<td>unacceptable offer</td>
<td>• Tenders submitted by tenderers without the required qualification</td>
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<tr>
<td></td>
<td>• Whose price exceeds the contracting authority’s budget</td>
</tr>
<tr>
<td>provision of services</td>
<td>No distinction between prioritary services and non prioritary services as in Annex II A and B of Directive 2004/18/CE</td>
</tr>
</tbody>
</table>
I. SUBJECT-MATTER WITH DIFFERENT TYPES OF PROCUREMENT COVERED BY DIRECTIVE 2014/24/EU

2 or more types of procurement (works, services and supplies)

- awarded according to provisions applicable to the type of procurement that characterises the main subject of the contract
- Services
  - Chapter I Title III
  - + Other services
- Supplies
  - + Supplies

the main subject will be determined in accordance with the highest estimated value of the respective services or supplies

MIXED PROCUREMENT (I)
(article. 3)
## MIXED PROCUREMENT (II)
(article 3)

### II.- SUBJECT-MATTER WITH DIFFERENT TYPES OF PROCUREMENT COVERED BY DIRECTIVE 2014/24/EU AS WELL AS NOT COVERED BY THE DIRECTIVE

| SEPARATE OR SINGLE CONTRACT | MIXED CONTRACTS containing elements of supply, works and service and of concessions shall be awarded according to Directive 2014/24/EU if estimated value of part of the contract is => than thresholds | Procurement covered by Directives 2014/24 and 2014/25 applicable rules determined according to:
| --- | --- | --- |
| • separate contracts: legal regime determined by characteristics of the separate part concerned. | • Single contract: Directive 24 applies irrespective the value and regime that non covered procurement would otherwise have been subject to. EXCEPTION article 16: defence or security | 1) Rules applicable to main activity.  
2) When impossible to determine, according to Directive 2014/24. |
## NOVELTIES ON EXCLUSIONS (I)
### (article 10)

| Legal services | • Legal representation of a client by a lawyer in a Member State, a third country of before international institutions in:  
|               |   • arbitration or conciliation  
|               |   • judicial proceedings before the Courts, Tribunals or public authorities  
|               |   • Legal advice given in preparation of any of the previous proceedings  
|               |   • document certification and authentication services which must be provided by notaries  
|               |   • Legal services provided by trustees, appointed guardians or others designated by Court  
|               |   • Other connected even with the exercise of official authority  
| Loans         | whether or not in connection with the issue, sale, purchase or transfer or securities of other financial instruments  
| Civil defense services | Civil defence and protection and danger prevention services provided by non profit organizations or associations except patient transport ambulance services  
| transport services | public passenger transport services by rail or metro  
| political campaign services | when awarded by a political party in the context of an election campaign  

NOVELTIES ON EXCLUSIONS (II)
(article 12)

PUBLIC CONTRACTS BETWEEN ENTITIES WITHIN THE PUBLIC SECTOR

- Necessary to clarify in which cases contracts concluded within the public sector are not subject to the application of public procurement rules due to different interpretation between Member States and Contracting authorities.

- Excluded when conditions referred in article 12 are fulfilled. (control by the contracting authority over a legal person governed by public or private law. Exception: when a private operator participates in the capital of the legal person)
RULES ON PUBLIC CONTRACTS
Rules applicable to communications
(article 22)

1. Member States should ensure that all communications and information exchanged under this Directive are performed using electronic means of communication in accordance with the requirements of article 22. (exceptions article 22 a) to c))

Member States may postpone this obligation for central purchasing bodies until April 2017 and for the rest of contracting authorities until October 18th 2018, with some exceptions.

2. Possibility of using oral communication:
   - in communications other than those concerning essential elements of a procurement procedure;
   - if they are documented to a sufficient degree (written or audio records or summaries of the main elements of the communication)
RULES ON PUBLIC CONTRACTS
Measures to guarantee integrity in the Public Procurement Procedures

1. CONFLICT OF INTEREST (Art 24): member states have to ensure that CA:
   – take effective measures to prevent, identify and remedy conflicts of interest
   – avoid distortion of competition and ensure equal treatment to all tenderers.
   Conflict of interest: staff members of CA or PSP have directly or indirectly, financial, economic or other personal interest which might be perceived to compromise the impartiality and independence.

2. PRELIMINARY MARKET CONSULTATIONS AND ENSURING THAT COMPETITION IS NOT DISTORTED BY PRIOR INVOLVEMENT OF CANDIDATES OR TENDERERS. (arts 40 ad 41) communication to all tenderers of the information exchanged in preparation of the procedure and fixing adequate time limits for the receipt of the tenders.

3. EXCLUSION GROUNDS (art 57)

4. ABNORMAL LOW TENDERS (article 69) two new criteria to consider abnormal low tenders: non compliance with (i) obligations referred to subcontracting and (ii) obligations established in fields of environmental, social and labour law.

5. MODIFICATIONS OF THE CONTRACT DURING ITS TERM (art 72)
RULES ON PUBLIC CONTRACTS: Facilitate the participation of SME’s

- Simplification of the means of proof obligation (art 59)
- Division of contracts into lots (art 46)
- Limitation in the proof of economical and financial standing (art 58)
- Possible direct payments to subcontractors (art 71)

**European Single Procurement Document (ESPD)**
updated self-declaration as preliminary evidence in replacement of certificates issued by CA and other parties in proof of being eligible for awarding a contract.

- Obligation to justify when a contract is not subdivided in lots
- Possibility to limit the number of lots (to be submitted and to be awarded)
- MS can determine contracts which subdivision in lots will be mandatory.

The minimum yearly turnover required shall not exceed two times the estimated contract value

When contract allows it, at the request of subcontractor and possibility for contractor to object.
RULES ON PUBLIC CONTRACTS:
Public Procurement procedures (I)

- OPEN (article 27)
- RESTRICTED (article 28)
- NEGOTIATED (article 29 and 32)
- COMPETITIVE DIALOGUE (article 30)
- INNOVATION PARTNERSHIP (article 31)

Existing procedures

New procedure
RULES ON PUBLIC CONTRACTS:
Public Procurement procedures (II)

- **REDUCTION OF DEADLINES TO SUBMIT** (articles 27 and 28):
  - a tender (open procedure)
  - a request of participation (restricted procedure)

- **Sub-central CA may make the call for competition** in restricted procedure or competitive procedure with negotiation by means of a prior information notice (article 26.5)

- **Restricted procedures**: Possibility to agree with selected candidates the time limit to receive tenders (article 28.4):
  - only sub-central CA
  - Same deadlines for all candidates
  - No agreement: at least 10 days

- **Possibility to award contracts without negotiation** in a competitive procedure with negotiation (article 29.4)
RULES ON PUBLIC CONTRACTS: Innovation partnerships (I)

Object

Development of Products, Services and Works that are not already in the market

Purchase without a new procedure, if they comply with performance levels and costs

Characteristics of the procedure (art. 31)

1. Any economic operator may submit a request to participate.
2. Selection criteria according to capacity in R+D and in developing and implementing innovative solutions.
3. Procurement documents shall indicate:
   - the needs that can not be met by already existing products, works and services.
   - minimum requirements to be met by all tenders.
   - define arrangements related to IP rights.
4. It can be set up with 1 partner or with several partners conducting separate research and development activities.
RULES ON PUBLIC CONTRACTS: Innovation partnerships (II)

Development of the procedure (article 31)

- Structured in successive phases following the sequence of steps in the research and development. May include the manufacturing of products, provision of services and completion of works.
- Intermediate targets to be attained by the partners and provision of payment of the remuneration in appropriate instalments can be established.
- Based on the targets, the CA can decide:
  - to terminate the innovation partnership
  - to reduce the number of partners by terminating individual contracts
- Procurement documents have to indicate possibilities and terms

<table>
<thead>
<tr>
<th>NEGOTIABLE</th>
<th>NON NEGOTIABLE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Initial and subsequent tenders to improve the content</td>
<td>- Minimum requirements</td>
</tr>
<tr>
<td></td>
<td>- Award criteria</td>
</tr>
<tr>
<td></td>
<td>- The final tender</td>
</tr>
</tbody>
</table>

Common principles of the procurement must be followed
RULES ON PUBLIC CONTRACTS: Award criteria (art. 67)

Most economically advantageous tender → Price or cost. Cost-effectiveness approach, E.G. Life-cycle → It may include the best price-quality

Best price-quality shall be assessed on criteria including qualitative, environmental and/or social aspects linked to the subject-matter of the contract, e.g.:

a) **QUALITY**, including technical merit, aesthetic, functional characteristics, accessibility design for all users, social environmental, innovative.

b) **ORGANIZATION, QUALIFICATION AND EXPERIENCE** of staff assigned to performing the contract, where those aspects have a significant impact on the level of performance of the contract.

c) **AFTER-SALES SERVICE AND TECHNICAL ASSISTANCE, DELIVERY CONDITIONS.**
RULES ON PUBLIC CONTRACTS: Award criteria – life-cycle (art 68)

Procurement documents shall indicate:
- Data to be provided by tenderers
- Method to be used by CA to determine life-cycle costs on the basis of those data
## RULES ON PUBLIC CONTRACTS: Contract performance (I) Subcontracting

### MORE CONTROL IN THE SUBCONTRACTOR CHAIN
- In works contracts and related to services to be provided in the facility controlled by CA: obligation to provide information of the subcontractors and substitutions.
- Extension to further down the subcontracting chain.

### DIRECT PAYMENTS TO SUBCONTRACTORS
- At the request of the subcontractor and when the contract allows it.
- Mechanisms permitting main contractor to undue payments.

### COMPLIANCE OF ENVIRONMENTAL, SOCIAL AND LABOUR OBLIGATIONS
- Mechanism of joint liability between contractor and subcontractor.
- Grounds for exclusion of subcontractors and replacement.
RULES ON PUBLIC CONTRACTS: Contract performance (II) Modifications (article 72)

MODIFICATION OF CONTRACTS AND FRAMEWORK AGREEMENTS DURING ITS TERM

- Without a new procurement procedure
  - Not substantial modifications and if requirements of article 72 are met
- Termination of the contract and new procurement procedure required
  - Substantial changes where they render the contract or framework agreement materially different in character from the one initially concluded
RULES ON PUBLIC CONTRACTS:
Contract performance (III)
Modifications allowed (article 72)

1. Modifications foreseen in the initial procurement documents
2. Additional works, services and supplies that have become necessary and were not included in the initial procurement, where a change of contractor cannot be made for economical and technical reasons or would cause significant inconvenience or double costs for the CA.
3. Circumstances that a diligent CA could not foresee
4. Replacement of a contractor
5. Not substantial modifications irrespective of the value.
6. Where the value of the modification is below both:
   • the thresholds set out in article 4
   • 10% of the initial contract value for service and supply contracts and below 15% of the initial contract value for works contracts
**RULES ON PUBLIC CONTRACTS:**

**Contract performance (IV) Termination of the contract** (article 73)

<table>
<thead>
<tr>
<th>SUBSTANTIAL MODIFICATION</th>
<th>• Which would have required a new procurement procedure (art 72).</th>
</tr>
</thead>
<tbody>
<tr>
<td>SITUATION OF EXCLUSION GROUND AT THE TIME OF THE CONTRACT AWARD</td>
<td>• The contractor has at the time of the contract award been in one of the situations referred to in article 57 and should therefore have been excluded from the procurement procedure.</td>
</tr>
<tr>
<td>SERIOUS INFRINGEMENT OF THE OBLIGATIONS BY CONTRACTOR</td>
<td>• Serious infringement of obligations under the Treaties and Directive 2014/24/EU declared by the Court of Justice of EU in procedure pursuant article 258 TFEU.</td>
</tr>
</tbody>
</table>
PARTICULAR PROCUREMENT REGIMES
(articles 74 to 82)

- Services to the person: health, social and education
- Hotel and restaurant services
- Rescue, fire fighting and prison services
- Certain legal services

Limited cross-border dimension ≥ €750,000
Light regime

Observance of basic principles

Design contests: also to obtain plans for financial engineering that would optimise SME support. Possibility to award the service contract to the winner of the contest by a negotiated procedure without publication.
Member States

- Ensure that information and guidance on interpretation and application of the public procurement is available and free.
- Support to CA with regard to planning and carrying out procurement procedures
- By April 18th 2017 and every 3 thereafter shall submit to the Commission

a) the monitoring reports covering:
   - Most frequent sources of wrong application or legal uncertainty
   - Possible structural or recurring problems in the application of the rules
   - Level of SME participation in public procurement
   - Prevention, detention and adequate reporting of cases of procurement fraud,
   - Corruption, conflict of interest and other serious irregularities

b) National and statistical report
Contracting authorities:

- Obligation of keeping copies of all concluding contracts which value is equal or greater than:
  
  - €1.000.000 for supply and services contracts
  
  - €10.000.000 public works contracts

- Written report with the content foreseen in article 84 for each contract and framework agreement covered by the Directive as well as dynamic purchasing agreement
Thank you for your attention!

Rosa Isabel Peña Sastre
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