

# Going, Going, Gone! E-Procurement in the EU

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**Abstract:** *The use of information technology has made purchasing easier, cheaper, and more accountable through electronic procurement, at every level of the transaction, but government agencies have been slow to implement technology to improve the procurement process. In order to ensure that EU suppliers are given an equal opportunity to contract with public bodies and utilities within the Member States, the European Union has adopted two new Directives which replaces and consolidates the existing Directives on Procurement. The new Directives adopt innovative new technologies including e-auctions, and advanced e-signatures; embedding sustainability, environmental considerations, and social responsibility into procurement practice. This article analyses the key amendments, in particular, the use of electronic procurement to further European integration.*

**Keywords:** *e-Procurement, Transparency, e-Auction, Directives, Dynamic purchasing systems, Bidding.*

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## 1. Introduction

Information Technology has radically changed the way government and private sector has operated. By implementing an e-business solution to handle the e-procurement process, the business can increase efficiencies and maximize savings on purchases and internal purchasing processes, and making better use of resources and capital.

The use of information technology has made purchasing easier, cheaper, and more accountable through electronic procurement, at every level of the transaction, but government agencies have been slow to implement technology to improve the procurement process. For the most part, governments have not yet grasped this phenomenon. Many government purchases still use traditional purchase order. For instance, although the Agreement on Government Procurement (GPA) entered into force in 1981, it is still a *plurilateral* agreement where only 28 member countries of the WTO are parties to the agreement.

The European Union has been quick to recognize the importance of information technology for public procurement. Electronic procurement, after all, is one area where governments can reduce inefficiencies in their service provision and make government procurement more transparent. Using information

technology appropriately can contribute to reducing costs, improving efficiency and removing barriers to trade, which will ultimately result in savings for taxpayers.

Public procurement, or 16.3% of the Community GDP, and for 1,500 billions Euros, is an important sector of the European economy but only 10% of public contracts go to companies from other member states. This is half the amount found in the private sector (Internal Market Strategy Priorities, 2003). The EU believes that providing an environment where EU firms can develop cross border competence in the field of public procurement will help European firms establish a lead in terms of global competition. In order to ensure that EU suppliers are given an equal opportunity to contract with public bodies and utilities within the Member ion has adopted two new Directives as part of the legislative procurement package.

The Directives adopted in March 2004 as part of the public procurement legislative package provide a legal framework aimed at boosting the development and use of electronic procurement. This paper gives an overview of the new procurement Directives, and discusses the key amendments, in particular the use of electronic procurement to further European e-integration.

## 2 Public Procurement

Public Procurement refers to the purchases of goods and services, as well as the order for public works, by public services or other bodies. E-procurement is simply aspects of the procurement function support by various forms of electronic communication (Knudsen, 2002) and its use in both the public and private sectors takes many forms including electronic data interchange, e-sourcing, e-tendering, e-reverse auctioning (using Internet technologies bidders usually bid down the price of their offer against those of other bidders until no further down-ward bids are received), e-auction for disposals, enterprise resource planning (automation of procurement related workflows including auto-faxing, auto-emailing or other forms of messaging directly with suppliers) , e-collaboration, e-MRO or mechanism for ordering indirect items from an on-line catalogue, and web based resource planning etc. E-procurement means that all purchasing is done through electronic channels. Tenders are run electronically so that the maximum number of suppliers can compete. This will make it easier for enterprises to identify contract opportunities and to supply their goods and services across Europe's Internal Market.

Nevertheless, e-procurement is still at an experimental stage and under development. In many Member States, e-procurement refers to the availability of web pages directed at both potential buyers and suppliers, e.g. providing information about tender notices. In some other countries, it refers to the use of the Internet and other information technologies to find suppliers of both products and services and includes electronic purchase card/electronic payment schemes, prequalification systems, e-catalogues and electronic market places, among others.

Three stages can be distinguished in e-procurement.

- Stage 1 Tender Notice via the Internet
- Stage 2 Electronic Provision of the Tender
- Stage 3 Electronic Transmissions of the Proposal.

## 3 Agreement On Public Procurement

Government procurement is the term used for the purchasing activities of governmental authorities and covers purchases of everything from pencils and paper clips to computer systems and telecommunications equipment, ship building .In most countries the government, and the agencies it controls, are together the biggest purchasers of goods of all kinds and government procurement tends to favour domestic suppliers over their foreign

competitors. Government procurement is specifically exempted from the most basic of World Trade Organisation (WTO) disciplines (GATT Articles III:8 and XIII:1), in particular that of national treatment. Since it accounts for up to 15% of GDP, this significantly distorts trade and reduces potential growth.

In order to open the businesses to international competition, an Agreement on Government Procurement was first negotiated during the Tokyo Round and entered into force on 1 January 1981. But apart from this plurilateral agreement, there is no other international regime on public procurement. Participation in this agreement is limited to 28 countries. Its purpose is to make laws, regulations, procedures and practices regarding government procurement more transparent and to ensure they do not protect domestic products or suppliers, or discriminate against foreign products or suppliers.

It has two elements- general rules and obligations, and schedules of national entities in each member country whose procurement is subject to the agreement. A large part of the general rules and obligations concern tendering procedures. A new agreement was negotiated in the Uruguay round and took effect in 1996. The agreement extends coverage to services (including construction services), procurement at the sub-central level (for example, states, provinces, departments and prefectures), and procurement by public utilities It also reinforces rules guaranteeing fair and non-discriminatory conditions of international competition. For example, governments will be required to put in place domestic procedures by which aggrieved private bidders can challenge procurement decisions and obtain redress in the event such decisions were made inconsistently with the rules of the agreement. The agreement applies to contracts worth more than specified threshold values (Understanding the WTO, 2005).

Outside the Agreement on Government Procurement (GPA), e-companies are often either *de facto* or *de jure* excluded from foreign procurement markets. The European Union remains committed to the Government Procurement Agreement and has continued to play an active role in persuading other countries of the advantages of Agreement on Government Procurement membership. As of 1 May 2004, the WTO Agreement on Government Procurement (GPA) also applies to the new EU Member States. Suppliers from the new countries (Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia) have full access to the public procurement markets of

the other GPA Parties (e.g. USA, Japan, Canada) under the same conditions as other Member States. The European Union's own procurement market is effectively open to foreign competition and to support its commitment to the GPA, the European Union has adopted various legislations.

#### 4 Existing Directives

A genuinely open single market will be achieved only when all firms can compete for contracts on an equal footing. The European Union (EU) has, in the last two decades, issued legislation in this area in order to build an internal market (prior to community legislation only 2% of the contracts were awarded to non nationals) and ensure competition. The EU Public procurement law was, until very recently, largely contained in four EU Directives:

- Directive 93/36/EEC coordinating procedures for the award of public supply contracts and consolidating Directives 80/767/EEC and 88/295/EEC;
- Directive 93/37/EEC coordinating the procedures for the award of public works contracts, Directives 71/305/EEC and 89/440/EEC;
- Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts entered into force on 1st July 1993; and
- Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

These four Directives are complemented by two Remedies Directives. The Public Sector Remedies Directive (89/665/EEC) harmonizes review procedures for public supply, public works and public service contracts. Directive 92/13/EEC harmonises review procedures for contracts in the water, energy, transport and telecommunications sectors.

The Public Works Directive 93/37/EEC applies to contracts which have as their object either the execution, or both the execution and design, of works involving certain professional activities (building, civil engineering, installation or building completion work), or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority. It applies when a Contracting Authority seeks offers in relation to a proposed contract for building works where the total value of the contract exceeds (or may exceed) 5,923,624 Euro. These figures apply to central

government bodies which are subject to the World Trade Organization (WTO) General Procurement Agreement (GPA) under the Public Supply Contracts Regulations 1995 and applicable from the 1<sup>st</sup> of January, 2004. The threshold values are revised every two years. The Supplies Directive 93/36/EEC applies when a Contracting Authority seeks offers in relation to a proposed contract for the purchase (or hire purchase, lease or rental) of goods where the total value of the contract exceeds (or may exceed) 154,014 Euro.

The Services Directive 92/50/EEC applies when a Contracting Authority seeks offers in relation to a proposed contract for the provision of a service (or services), or for design contests, where the total value of the contract, or the prize, exceeds 154,014 Euro. For public contracts with an estimated value above certain thresholds, European directives establish common rules for advertising procurement needs, invitations to tender and contract award. These notices have to be published in the Supplement of the Official Journal of the European Communities, available on the Tenders Electronic Daily database. The three main principles associated with the EU Procurement Directives are as follow:

1) All potential contracts, the values of which singularly or cumulatively exceed the financial thresholds, must be advertised throughout the European Union, so that all interested parties in all member states have an equal opportunity to submit tenders. Contract Notices, in essence, advertise the fact that tenders will be sought and ask potential suppliers to express their interest. The Directives forbid the placing of a contract advertisement in the press or similar publications before the date on which the Notice is dispatched to the Official Journal (OJEC). If an advertisement is placed elsewhere it must not contain any information which was not included in the OJEC.

2) All enquiries must receive equal treatment in order to eliminate discrimination on the grounds of the nationality of the contractor or the origin of goods/services.

3) All tendering and award procedures must involve the application of objective criteria. Under these rules public sector procurement must follow transparent open procedures ensuring fair conditions of competition for suppliers.

The Directives set out detailed criteria for the selection or rejection of tenderers based on the evidence of their economic and financial standing, their technical capacity and for services, their ability. Contracts may be awarded on the basis of either lowest price or the most economically advantageous

offer. Various criteria may be applied to determine which offer is the most economically advantageous including price, delivery, technical merit, technical support, aesthetic and functional characteristics and operating costs. The criteria must be given in the invitation to tender and should also be given in the contract notice, preferably in descending order of importance. The Contract Notice must make it clear which of the three different kinds of procedure will be followed for the tendering process. These are: Open Procedure under which all potential suppliers who express an interest must be invited to tender; Restricted Procedure, under which the Contracting Authority may restrict the number of interested suppliers to which it sends Invitations to Tender, and Negotiated procedure under which the contracting authority may negotiate the terms of the contract with one or more potential suppliers. There are very strict rules concerning the use of the Negotiated Procedure and extremely few contracts qualify. Moreover, every time this Procedure is applied, a full report justifying its use must be prepared for examination by the EU Commissioners. The Directives lay down minimum time requirements to allow potential suppliers to express their interest and put in their tenders.

The principal means of enforcement for a breach of the Regulations (under Remedies Directives 89/665 and 92/13) are: action by suppliers or contractors against individual purchasers in the national courts and action by the Commission against the member state in the European Court of Justice. In either event, the result may be: a suspension of an incomplete contract award procedure, the setting aside of a decision in an incomplete contract award procedure and an award of damages by the High Court/ Court of Session where a contract has already been entered into. Under the Remedies Directive, Member States must have bodies which are empowered to review the application of public procurement procedures, to administer quick and effective interim measures to suspend such procedures or decisions, to prevent and correct infringements, and, ultimately, to declare decisions unlawful and award damages. These bodies can be judicial or administrative in nature and member States have a certain amount of flexibility in how they choose to administer their domestic review proceedings.

## 5 Need For Greater Efficiency

A recent study by the European Commission considers that the existing public procurement directives have indeed increased cross border

competition and reduced by around 30% the prices paid by public authorities for goods and services (EC 2004 Report, 2004). However, the economic results of the liberalization drive still fell short of expectations and the markets are not yet sufficiently open and competitive. Although small and medium-sized enterprises (SMEs) are a unique source of innovation and competition in the internal market and account for 99.8% of the total number of EU enterprises, yet Europe's smaller companies are getting a raw deal in access both to public procurement contracts and to publicly funded R&D. SMEs get only five percent of European public procurement contracts, and only 14 per cent of publicly funded microelectronics R&D, while providing 66 per cent of Europe's high-tech employment ( Electronic Weekly, 2003).

In 1996, the Commission published the Green Paper, *Public Procurement in the European Union: Exploring the way forward*. The Green paper highlighted the need to simplify the existing legal framework. This marked the beginning of the overhaul of the procurement directives. The European Commission made proposals in May 2000 for a new legislative package that aimed at making the existing texts clearer and simpler and at adapting them to modern administrative needs and to the new economy (IP/00/461). This was followed by the *eEurope Action Plan* which targeted that by the end of 2005, Member States should carry out a significant part of electronic procurement electronically, cutting costs and raising efficiency in government procurement by adopting the legislative package on procurement.

## 6 Legislative Package

Concerns that the existing Directives on Public Procurement were complex and unclear led to the adoption of two new Directives designed to simplify and modernize EU public procurement rules. The new Directives entered into force on 30 April 2004. Member States have until 31 January 2006 to implement the Directives.

The Utilities Directive (93/38/EEC) has been replaced by Directive 2004/17/EC. Directive 2004/18/EC replaces and consolidates the three existing Directives for works (93/37/EEC), Services (92/50/EEC) and Supplies (93/36/EEC) into a single text.

The aim of the Directives is not to re-invent e-procurement for the public sector but rather to make sure that any business with a PC, internet connection

and some basic knowledge of public procurement can tender for contracts across Europe.

## 7 Key Amendments

Directive 2004/18/EC is consolidated for public supply, public works contracts and public services contracts and Directive 2004/17/EC is for the same activities within the utilities sector (water, energy, transport and postal services). Transportation at sea belongs to the consolidated directive, and telecommunication has been excluded from the utilities directive and public procurement regulations due to liberalization although Member States have until 1 January 2009 to effect this change. The new amending Directives are a direct consequence of the Government Procurement Agreement (GPA), reached in the Uruguay Round multilateral negotiations. Within the Community, the GPA creates rights for suppliers, contractors and service providers established in the third countries, which have signed the Agreement. As the GPA is already in force, the new Directives change nothing in the relations with third country companies.

Many of the basic provisions remain the same as in the existing Directives and both the two new Directives contain the same rules and procedures. However, new provisions have been added to take account of modern procurement methods and developments as follow:

Environmental Requirements. Governments and local authorities are allowed to take environmental considerations into account when they award public contracts. (Recital 1, Articles 38 and 55 (Utilities) and Article 26 (Consolidated) Directives. The Directives are based on Court of Justice case-law, in particular the case-law on award criteria (*Concordia Bus Finland Oy Ab: Case C-513/99*) which clarifies the possibilities for the contracting authorities to meet the needs of the public concerned, including in the environmental and/or social area, provided that such criteria are linked subject-matter of the contract, do not confer an unrestricted freedom of choice on the contracting authority, are expressly mentioned and comply with the fundamental principles. As to scope and definition of environmental requirements Recital 29 (Consolidated) and Recital 42 (Utilities) outline that contracting authorities that wish to define environmental requirements for the technical specifications of a given contract may lay down the environmental characteristics such as a given production method, and/or specific environmental effects of product groups or services. For example, when defining the subject matter of a contract, public

purchasers can, like private purchasers, decide to purchase environment-friendly products or services, defined according to their environmental performance and the production process used. A description of the measures implemented by the economic operator to ensure the same level of environmental protection should be accepted as an alternative to environmental management registration schemes as a form of evidence (Recital 44 Consolidated and Recital 53 Utilities).

Use of Social Clauses. For the first time, provisions on accessibility and employment of disabled people have been introduced. It provides clearer rules for the use of social considerations, such as possibility to employ a certain number of disabled people for the performance of a contract and a set-aside system for sheltered employment, and provisions for accessibility of works, supplies, and services for disabled people to be included in tendering documents (Recital 39 Utilities, Recital 28 Consolidated).

Reserved Contracts. Member states may reserve right to participate in contract award procedures to sheltered workshops or provide for such contracts to be executed in certain specified circumstances where most of the employees are handicapped (Art.28 Utilities and Art.19 Consolidated).

Performance and Function Requirements. Technical specifications can be formulated in terms of performance or functional requirements (Article 34 (3) Utilities and Article 23 (3) Consolidated).

Competitive Dialogue. A new procedure, the Competitive Dialogue, has also been introduced to complement the existing open, restricted and negotiated procedures. It is intended to be used for large, complex projects in circumstances where negotiated procedure might currently be used, and where it necessitates a dialogue to identify and define the best solutions. It is open to all enterprises and only applicable to the Utilities Directive (Article 29). During the dialogue, authorities are prohibited from disclosing confidential information to other participants. Authorities may provide for the procedure to take place in successive stages to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria in the contract notice. Participants will be asked to submit their tenders on the basis of the solutions presented during the dialogue. The tenderer identified as having submitted the most economically advantageous tender may be asked to clarify aspects of the tender.

Normative Product /Service Nomenclature The CPV (Common Procurement Vocabulary) codification system shall specify the reference nomenclature for public contracts as adopted by Regulation 2195/2002 and Regulation 2151/2003 (Recital 36 Consolidated). This classification standardise the references used by contracting authorities to describe the subject matter of their contracts.

Anti-Corruption. Article 45 (2) Consolidated and Article 54(4) Utilities introduce a new obligation to exclude any tenderer who has been the subject of a final judgment for participation in criminal organisations, corruption, fraud and money laundering.

Contract Award Criteria. When the award is based on the economically advantageous tender, authorities shall publish the relative weighing which it gives to each criterion. Where weighing is not possible for demonstrable reasons, the contracting authority shall indicate in the contract notice or contract documents or in the case of a competitive dialogue, the criteria in descending order of importance (Article 53 Consolidated and Article 55 Utilities).

Certification of enterprises. Contracting entities shall recognize equivalent certificates from bodies established in other Member States (Article 52 Consolidated and Article 52 Utilities).

Information about special national conditions. Article 39 (Utilities) and Article 27 (Consolidated) provide that contracting entities may state in the contract documents the body or bodies from which a tenderer may obtain the appropriate information on obligations relating to taxes, to environmental protection, to the employment protection provisions and to the working conditions which are in force in the area where the contract is to be carried out.. This Article also provides that should the contracting entity supply such information, they should require tenderers during the contract award procedure to indicate that they have taken account of such obligations.

Central Purchase Bodies. Member States may provide in their implementing legislation that contracting entities may purchase works, supplies and/or services from or through a central purchasing body. Where contracting entities do purchase from or through such a body, they will be deemed to have complied with the requirements in the Directive where the central purchasing body provided the latter is a public body governed by the Remedies Directive A central purchasing body is defined as a body which purchases works, supplies or services on behalf of or

for direct sale to contracting entities. This body must be a contracting authority. It resolves the doubt which was cast on the use of central purchasing bodies by the judgment of the European Court of Justice in *Teckal* (Case C-107/98). It was held in that case that contracts concluded between legally distinct public bodies one of which was controlled by the other were subject to the Directives unless the control was similar to that exercised over internal departments and the controlled body carried out the essential part of its activities with the controlling body. The advantage of using a central purchasing body is that, provided it followed the provisions set out in the Directive initially, other contracting entities that it supplies or for whom it contracts do not have to follow the rules a second time. (Article 29 Utilities and Article 11 Consolidated) Although contracting entities covered by the Utilities Directive may use a central purchasing body.

Thresholds. The five thresholds are to be reduced to three and will be expressed in euros rather than special drawing rights. Directive applies to new amounts for contracts subsidized by more than 50% by contracting authorities (Article 8).

Framework Agreement. A framework agreement is an agreement with suppliers, which set out terms and conditions governing contracts to be awarded during a given period, in particular with regard to price and quantity (Article 1(4) Utilities).

Article 14 (2) & (3) Utilities , in conjunction with point (i) of Article 40 (3), and Article 32 Consolidated explain that if the Directive's rules on advertising, selection and award procedures have been followed for the framework agreement, then there does not have to be a call for competition for the subsequent call-offs. Framework agreement can be concluded with several economic operators, at least three in number, to satisfy the selection criteria. There exists also a possibility of opening the framework agreement to new offers from the chosen suppliers if not all the necessary terms were specified in the original framework agreement.

Exclusions. Article 30 Utilities is new and provides that contracts for activities which are directly exposed to competition on markets to which access is not restricted can be removed from the application of the Directive.

Choice. There are a limited number of provisions where the Directive gives Member States the discretion to choose whether or not to transpose them. Many of the new provisions are permissive. They allow contracting entities the choice to make

use of them. These are: Article 15 (Dynamic Purchasing Systems), Article 28 (Reserved Contracts), Article 29 (Central Purchasing Bodies) and Article 39 (Obligations relating to taxes, environmental protection etc.) .

Joint Venture. Art 23 (4) is new and excludes from the Directive contracts awarded by a joint venture comprising utilities to one of those utilities and contracts awarded by a utility to a joint venture of which it is a part, provided that the joint venture will operate for at least three years.

## 8 Electronic Procurement

Among other things, the Directives encourage the electronic procurement- electronic tenders and the use of certain electronic purchasing techniques such as dynamic purchasing systems, electronic auctions, electronic framework agreements and e-catalogues. Electronic means is put on equal level with traditional means of communication (Recital 35 Consolidated and Recital 46 Utilities). Member States may require the use of advanced electronic signatures in the tendering process provided these comply with Directive 1999/93/EC on digital signatures. The procurement directives are complemented by the E Commerce Directive (2000/31/EC and the Data Protection Directive (95/46/EC). The key changes in the new Directives are intended to improve effectiveness and non-discrimination in public procurement. The following are the most salient provisions on electronic procurement:

Electronic Auctions. Member States may provide that contracting authorities use electronic auctions (Article 56 Utilities and Article 54 Consolidated). It is not compulsory for contracting entities to use certain procedures, such as those relating to electronic auctions, but if they do choose to do so, they must follow the rules set out in the Directive. An electronic auction is defined as a repetitive process involving an electronic device for the presentation of new prices, revised downwards, and/or new values concerning certain elements of tenders, which is held after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods.” Certain service and work contracts involving design or intellectual performances cannot be awarded by means of electronic auction. Article 54 Consolidated and Article 56 Utilities provide that the award of a public contract can be preceded by an e-auction when the contract specifications can be established with precision. The electronic auction is performed after

EU publication of all necessary information to potential bidders. Contracting authorities which decide to hold an electronic auction shall state that fact in the contract notice. It lays out what information about the e-auction needs to be included in the contract notice and specifications. The specifications shall include the following details:

- (a) The features, the values for which will be the subject of electronic auction;
- (b) Any limits on the values which may be submitted;
- (c) The information which will be made available to tenderers in the course of the electronic auction;
- (d) The relevant information concerning the electronic auction process;
- (e) The conditions under which the tenderers will be able to bid and, in particular, the minimum differences which will be required when bidding;
- (f) The relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection.

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 electronic auction may not start sooner than two working days after the date on which invitations are sent out to 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. 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 Directive also lays down the manners on how contracting authorities shall close an electronic auction. Contracting authorities may not have improper recourse to electronic auctions nor may they use them in such a way as to prevent, restrict or distort competition or to change the subject-matter of the contract, as put up for tender in the published contract notice and defined in the specification. Otherwise the usual Directive rules apply to the running of the procurement process depending on whether an open, negotiated or restricted procedure

has been followed, or whether a mini competition under a framework is being conducted.

Although e-auction is a new provision, e-auctions are already being used in public procurement in many of the EU countries and Article 54 Consolidated and Article 56 Utilities are therefore helpful in clarifying their use. 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 (Article 38). If a tender notice is submitted electronically the award timescale may be reduced by 7 days from 52 down to 45 and a further 5 days can be saved if the tender documents are available online i.e. it removes the time allowed for postal delivery allowed for in the original timescales. The move to e-auction means that auctions are advertised online and eventually print advertising will be phased out completely in a drive to reduce costs. It is anticipated that the whole process from tender formulation to contract signing will be carried out electronically.

## 9 Dynamic Purchasing System

Article 33 Consolidated and Article 15 Utilities state that Member States 'may provide' that contracting entities may use dynamic purchasing systems. Where contracting entities are allowed to use dynamic purchasing systems, they must abide by the provisions laid out in Articles 15 and 33. A dynamic purchasing system is defined as a completely electronic process for making commonly used purchases. Dynamic purchasing systems are limited in duration to four years, except in exceptional cases (see Article 15(7)). They are essentially a completely electronic version of a framework agreement but unlike a framework agreement, dynamic purchasing systems are open throughout their period of operation to any economic operator which satisfies the selection criteria and has submitted an indicative tender that complies with the specification. Dynamic purchasing systems can also be used for: renewed calls for bids on a framework agreement and establishment of a list of pre-qualified enterprises.

The open procedure must be applied when using electronic purchasing systems. The Directive provides the requirements which contracting entities must follow in setting up the dynamic purchasing system such as: publication that a dynamic purchasing system is involved, indication in the specification the nature of the purchases envisaged under that system, as well as all the necessary information concerning the purchasing system, the electronic equipment used and the technical connection arrangements and

specifications; (c) offer by electronic means, on publication of the notice and until the system expires, unrestricted, direct and full access to the specification and to any additional documents and shall indicate in the notice the internet address at which such documents may be consulted. 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. They shall award the contract to the tenderer which submitted the best tender on the basis of the award criteria set out in the contract notice for the establishment of the dynamic purchasing system.

No charges may be billed to the interested economic operators or to parties to the system. (Article 33 (7) Consolidated and Article 15 Utilities).

## 10 Some Issues

The majority of the provisions in the Directive are straightforward. However there are several specific issues relating to the words used in the articles of the Directives which need clarifications: such as "amount payable, as this is strictly monetary in nature and would exclude payments by "exchange of services or goods." The words "cost "and "value" are used interchangeably (Article 17 (4) Utilities) which can be confusing.

The E-Commerce Directive 2000/31/EC and E-Signature Directive 1999/93/EC will apply to the Procurement Directives, with regards to the transmission of information by electronic means. However, most provisions on the E-Commerce Directive are applicable only to B2C transactions. The Directive does not address the issue of correcting mistakes.

The issue of when the order or the acknowledgment of receipt" is accessed is not clear. As public procurement procedures and the rules applicable to service contest require a higher level of security and confidentiality than that required by the E-Signature Directive, the use of electronic signature would not satisfy the requirements of confidentiality, integrity,

authenticity, non-repudiability and security. The challenge is to ensure that it must be clear who sent and signed the bid and when it is accessed. There must be provisions that the bid must not be opened before the submission date.

The Directives allow the possibility that specification can contain a mixture of functional requirements and standards. Mandatory standards, such as safety considerations, must be identified in the call for tenders. While the Directive provides for the exclusion of tenderer convicted of fraud or illegal activity, no similar provision is made for the sub-contractors.

For electronic procurement to succeed in integrating the market, the mutual compatibility and interoperability of electronic procurement systems which Member States might establish must be guaranteed. The Commission previously indicated that the new Directive would tighten up compliance with the legislation; however, there are no proposals for any action in this area.

## Conclusion

There has already been considerable effort made to clarify and simplify the Directive in a succinct fashion at the European level. The consolidation of the Directives in a single text offers real advantages to users. There will no longer be a need to refer to three Directives largely dealing with the same questions. The Directives adopt innovative new technologies including e-auctions and advanced electronic signatures; embedding sustainability, environmental considerations, and social responsibility into procurement practice. As far as electronic procurement is concerned the new provisions merely acknowledge the existence of e-procurement systems, which many European member states are already using. Nevertheless, the inclusion of e-procurement increase transparency and proportionality as it would allow suppliers, especially SMEs, to place their invitations to tender by these means only. This would encourage the SMEs to modernise and apply new technologies. The use of e-procurement is expected to improve efficiency and lower costs. However, the financial impact of e-procurement will be minimal. The connection between procurement strategy and the use of electronic commerce remains a grey area which demands further studies. There is a need for better understanding about the efficiency of e-procurement through further comparative research, tests and analysis in the public sector.

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