EUROPEAN PROCUREMENT LAW SERIES

MODERNISING PUBLIC PROCUREMENT: THE NEW DIRECTIVE

Francois Lichère,
Roberto Caranta &
Steen Treumer (Eds.)

DJØF PUBLISHING

Modernising Public Procurement

The New Directive

François Lichère, Roberto Caranta
and Steen Treumer (eds.)

Modernising Public Procurement

The New Directive

DJØF Publishing
2014

François Lichère, Roberto Caranta and Steen Treumer (eds.)
Modernising Public Procurement. The New Directive

1. edition

Cover: Bo Helsted
Print: Ecograf, Højbjerg

Printed in Denmark 2014
ISBN 978-87-574-3385-2

Sold and distributed in Scandinavia by:
DJØF Publishing
Copenhagen, Denmark
Email: forlag@djoef.dk
www.djoef-forlag.dk

Sold and distributed in North America by:
International Specialized Book Services (ISBS)
Portland, USA
Email: orders@isbs.com
www.isbs.com

Sold in all other countries by:
The Oxford Publicity Partnership Ltd
Towcester, UK
Email: djof@oppuk.co.uk
www.oppuk.co.uk

Distributed in all other countries by:
Marston Book Services
Abingdon, Oxon, UK
Email: trade.orders@marston.co.uk
www.marston.co.uk

Foreword

Foreword by the Editors of the European Procurement Law Series

The sixth volume in the Series has not the usual format made of country reports and comparative analysis. The approval of the new public contracts directives including the Public Procurement Directive 2014/24/EU was just too relevant an opportunity to be missed. In the same go, Directive 2014/23/EU on concession contracts and 2014/25/EU on utilities procurement have also been approved, often reproducing the main novelties found in the Public Procurement Directive.

The primary objective of the revision of the EU public procurement regime has been simplification and so-called flexibilisation. The intention was to give the regime an overhaul and to make significant changes of existing obligations and to introduce important new requirements. This book focuses on the essence of these changes, starting from the same definition of public procurement contract to end with changes to concluded contracts. In between, many very important aspects of the reform are analysed, such as the new rules on in house and public-public partnerships, on qualification, on the new and more flexible award procedures, including those aimed at fostering innovation. The new procedural rules allow an unprecedented wide scope for negotiation and dialogue which presents both risks and opportunities. Specific attention is also paid to the new emphasis on strategic procurement, including to the benefit of SMEs, and to the renewed efforts to exploit e-procurement and aggregated purchasing.

The book provides answers to the questions whether the objectives of the reform have been attained in the main areas covered by it? Did the European legislator succeed in making the rules simpler and more flexible and has the reform led to more than just a fine-tuning of the EU public procurement regime?

The answers to these questions are obviously of utmost importance for the evolution of EU public procurement law. The different contributions provide an in-depth analysis of most of the new provisions in Directive 2014/24/EU and so we think the book will be very valuable to academics and practitioners

called to apply the new provisions. It is submitted that in some cases these provisions have immediate relevance, since some of them to a large extent are codifying the case law (such as for instance with Article 12 on in-house providing and on horizontal cooperation/"public public partnerships" and Article 72 on contract changes and the duty to retendering). Guidance in understanding how these provisions relate with the case law is therefore necessary and we hope welcome.

The value added of having contributors from many jurisdictions is not lost in this new book, since it brings together different sensibilities to the central topics of the reform (just one instance: the merits of widening the discretion of contracting authorities) while at the same time making the results of the analysis immediately accessible to practitioners having more experience in domestic than in EU law.

The next volume will follow again our usual format, with even more emphasis on comparative analysis. It will focus on qualification.

We would finally like to thank François Lichère for hosting us in Aix-en-Provence to discuss the modernisation of EU public procurement law and for co-editing the present volume, and Annalisa Aschieri and Romain Micalef for preparing the tables and the index. More thanks are due to our most helpful publisher, Jeppe Markers, who has now taken the lead in helping us producing the books of the Series.

Roberto Caranta – Steen Treumer

University of Turin – University of Copenhagen

Contents

Evolution of the EU Public Procurement Regime: The New Public Procurement Directive

Steen Treumer

1. Introduction

The primary objective of the revision of the EU public procurement regime including the new Public Procurement Directive[1] has been simplification and so-called flexibilisation of the regime.[2] The intention has been to give the regime an overhaul and to make significant changes of existing obligations and to introduce important new requirements. This book focuses on the essence of these changes. It is considered whether the objectives have been reached in the main areas covered by the reform: Did the European legislator succeed in making the rules simpler and more flexible and has the reform led to more than just a fine-tuning of the EU public procurement regime? The answer to these questions is of utmost importance for the evolution of EU public procurement law.

The analysis in this chapter starts with an assessment in sections 2 and 3 of whether the legislator generally realised the objectives of simplification and flexibilisation and thereby managed to significantly develop the EU public procurement regime. Subsequently follows a brief account of the correlation between the new Directive and the case law of the Court of Justice of the European Union (hereafter the Court of Justice) in section 4. It is important to be aware that the new Public Procurement Directive not only codifies the case

1. Directive 2014/24/EU of 26 February 2014.
2. See COM(2011)896 final, 2011/0438 (COD). Proposed procurement directive. Explanatory Memorandum section 1.

law as there is at least one important example of "overruling" of the case law of the Court of Justice. The reader should also be aware that the Court of Justice in a few instances recently has developed the state of law even further than what follows from the newly adopted Directive. Then follows an analysis in section 5 of some of the shortcomings and their likely consequences: The unfortunate tendency to regulate in the Preamble instead of in the substantive provisions and deliberately unclear provisions inserted in order to reach a compromise. Finally, this chapter ends with concluding remarks in section 6.

2. Simplification?

It was predicted that simplification was a highly unlikely outcome of the legislative process leading to the new Public Procurement Directive.[3] This part of the reform is therefore not surprisingly the easiest part to assess. The European legislator did essentially not succeed in simplifying the regime.[4] The complexity and volume of the regulation have increased once again and the new Public Procurement Directive remains a lawyer's paradise.

The number of Recitals has increased to 138 that take up numerous pages in the Official Journal of the European Union. To make things even worse the European Legislator has consistently inserted statements in the Recitals that ought to have been a part of the substantive provisions because they contain obligations, consider concepts or other issues of essence for the interpretation of the new public procurement regime. This tendency, its background and likely consequences are considered in further detail in section 5 of this chapter.

Then there are various novelties that add to the degree of complexity as for instance the new regulation intended to promote the competitiveness of SMEs and namely the division into lots, the limitation of participation re-

3. See S. Treumer, "Flexible Procedures or Ban on Negotiations? Will More Negotiation Limit the Access to the Procurement Market?" 135 (at p. 147) in G.S. Ølykke, C.R. Hansen and C.D. Tvarnø (eds.), EU Public Procurement – Modernisation, Growth and Innovation, Jurist – og Økonomforbundets Forlag 2012.
4. See also S. Arrowsmith, "Special Issue- The New EU procurement Directives: Part I; Editors Note", Public Procurement Law Review 2014 p. 81 that emphasise that the European legislator introduces many significant changes and many new requirements thereby again greatly complicating the system, despite the stated aim of simplification.

quirements and direct payments to subcontractors.[5] The degree of complexity is further increased when it comes to the so-called sustainable procurement that in the 2004 reform only was labelled as secondary considerations.[6]

However, the objective of simplification was absolutely unrealistic to achieve unless the approach of the legislator had been completely changed. The background for this is that a regulation of a field tends to reflect its level of complexity. In a situation where the legislator has to balance fundamental and conflicting interests this will typically call for a complex solution with a substantial number of provisions outlining numerous main rules and most likely a plethora of exceptions. This is not per se to be considered a problem as long as the regulation creates legal certainty and balances the involved interest in a reasonable manner. So a better objective would be to ensure legal certainty while at the same time doing justice to the involved interests at stake.

As an alternative the European legislator could instead have chosen to limit itself to outlining the essential concepts, procurement principles and their main consequences thereby leaving the Member States a wide discretion as to how these principles should be interpreted at national level.[7] The obvious disadvantage of this approach would be that it would lead to significant variations in the level of protection in the Member States. A homogeneous understanding of the consequences of the principles of equal treatment and of transparency would be very remote if this approach was followed and such a state of law would be highly unlikely to increase cross-border bidding. However, it would probably be possible to create systems at national level that were just as efficient as the current for the competition between tenderers established in a given Member State as the increased margin of discretion would make it easier for the national legislator to take into account the different challenges at national level. It is for instance relevant to adapt a system to the level of corruption and to the level of professionalism and education of those that are in charge of public procurement.

5. See M. Trybus, "The Promotion of Small and Medium Sized Enterprises in Public Procurement: A Strategic Objective of the New Public Sector Directive?" in the current publication.
6. See D.C. Dragos and B. Neamtu, "Sustainable Public Procurement in the EU: Experiences and Prospects" in the current publication.
7. Cf. S. Arrowsmith, "Modernising the European Union's public procurement regime: A blueprint for real simplicity and flexibility", Public Procurement Law Review 2012 p. 71.

3. Flexibilisation

The current regime takes the considerations of equal treatment and of transparency extremely far and can be characterized as a system based on a fundamental distrust to the contracting entities covered by the rules. The system does not give much credit to the many contracting entities that actually have the best intentions of getting value for money and that have an in-depth knowledge of the rules. The current rules are so rigid that they to a very large extent rule out a pragmatic and flexible approach. In other words there appears to be a clear need of increased flexibility.

The essential news is that the new Public Procurement Directive in many respects clearly ensures a much more flexible approach. Some of the most important changes of the public procurement regime ensure increased access to negotiations and dialogue before, during and after the tender procedure as will be further outlined below in section 3.1. A range of additional topics is considered in section 3.2.

3.1. Negotiations and dialogue before, during and after the tender procedure

One of the most heavily criticized features of the EU public procurement regime has been "the ban on negotiation". It is necessary briefly to outline the current state of law and the notion of the concept. The EU Public Procurement Directives establish certain procedures which must be followed when a contracting entity wants to conclude a contract covered by the rules. It follows from the Public Sector Directive that contracting authorities as a main rule must apply the open procedure and the restricted procedure. The most important common feature between the open and restricted procedure is that negotiation between the contracting entity and the economic operators about changes of the future contracts is excluded as a main rule. This feature is normally referred to as the ban on negotiations. It should be added that there is a limited access to dialogue for the purpose of clarifying or supplementing the content of the tenders or the requirements of the contracting entity.[8]

The new Public Procurement Directive does not remove the ban on negotiation or soften up its consequences when a contracting authority applies the

8. See section 6 of the chapters on the state of law in selected Member States in M. Comba & S. Treumer (eds.), Award of Contracts in EU Procurements, DJØF Publishing 2013. The case law of the Court of Justice on the issue is extremely limited. See judgment of 29 March 2012 in C-599/10, SAG ELV Slovensko and Others [2012] E.C.R. I-10873.

open procedure or the restricted procedure. The increased flexibility is instead ensured through the introduction of the new procedure "innovation partnership" and more importantly by a truly remarkable widening of the scope of the flexible tender procedures, the negotiated procedure and competitive dialogue.[9] It is apparent that contracting authorities after the implementation of the new Public Procurement Directive frequently will have access to the flexible tender procedures contrary to the current state of law. This entails a fundamental change in approach with far-reaching implications. The most important consequence is that it to a higher degree will be possible to obtain an economically more efficient outcome than under the current regime. However, the increased flexibility will surely also make it easier for contracting authorities to discriminate some tenderers and/or favor others. Another obvious disadvantage closely linked to the first mentioned is that increased flexibility to some extent will scare off potential tenderers as they might fear that contracting authorities will take advantage of the increased lack of transparency by discrimination of tenderers.

Contracting authorities are also not free to negotiate with potential tenderers prior to the start of the procedure or free to agree on changes with its contractual partner after the conclusion of the contract.

The typical problem linked to dialogue prior to the start of the tender procedure relates to the so-called technical dialogue between the contracting authority and one or more of the tenderers. Such a dialogue can lead to a violation of the principle of equal treatment, and a tenderer that has been involved in technical dialogue may, or in some cases, shall be excluded as a consequence. This follows from the fact that the technical dialogue might have given these firms a clear advantage in the competition for the public contract as they can have obtained additional information concerning the contract in question and an advantage in time compared to the competitors. The technical dialogue also implies an apparent risk of distortion of competition as the firm can seek to influence/affect the elaboration of the tender specification and arrangement of the tender procedures to its own advantage.

The Public Sector Directive explicitly lists a number of reasons for exclusion of tenderers and due to the practical relevance and fundamental importance of the issue in public procurement practice it could have been expected that technical dialogue was considered in the substantive provisions of

9. See P. Telles and L.R.A. Butler, "Public Procurement Award Procedures in Directive 2014/24/EU" in the current publication. See also J. Davey, "Procedures Involving Negotiation in the New Public Procurement Directive: Key Reforms to the Grounds for Use and the Procedural Rules", Public Procurement Law Review 2014 p. 103.