



New Public Procurement Directives

Public Procurement Working Group, **BUSINESSEUROPE**

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Scope of proposals

*International context: Compliance with **GPA***

Proposals replace Directives 2004/18/EC and 2004/17/EC

Proposal for a Concessions Directive

No changes to the Directives on Defence procurement (2009/81/EC) nor on Remedies (89/665/EEC and 92/13/EC)

Other parallel proposals

- International trade instrument
- Proposal for a Directive on electronic invoicing in Public Procurement



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Timing: what remains to be done – and by when?

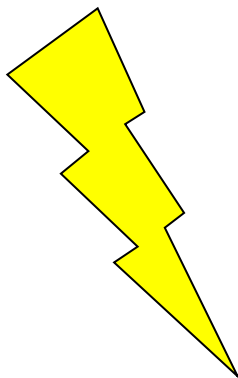
- **Formal adoption by European Parliament: January plenary (13–16 January 2014)**
- **Formal adoption by the Council: approx. 10 working days later (end of January)**
- **Formal signature by Presidents of Council and EP: February Plenary (3–6 or 24–27 February 2014)**
- **Entry into force: 20 days after publication in OJEU (~ March 2014)**



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Objectives for the reform

1. Simpler/ more flexible procedures



2. Strategic use

4. Sound procedures

3. Better access (SMEs, cross-border trade)

5. Governance, professionalization of procurement



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Main changes to the procedures

- ***Competitive procedures with negotiation:***
 - Replaces current negotiated procedure with publication
 - Extended scope of application
 - Procedural guarantees
- ***Competitive dialogue:***
 - slightly broader scope for negotiations in the final stages
- ***Innovation partnership:***
 - **Combined contract** award with full competition right at the beginning
 - **Research** services for the development of an innovative product by one or more providers **plus supply** contract
 - **Procedure** follows model for competitive procedures with negotiation; **contract performance** in phases with intermediate targets and payments and cut-off options
- ***Negotiations without publication:***
 - no substantial changes



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Sub-central (& smaller) contracting authorities

- **Discrete operational units** (calculation of thresholds)
 - *independently responsible for own procurement*
 - *run procedures and take procurement decisions*
 - *separate budget for procurements concerned*
 - *conclude and finance the contract*
- **Easier recourse to central purchasing bodies**
- Possibility for sub-centrals to **use prior information notices as a call for competition**
- Possibility for sub-centrals to **agree deadline for tendering with participants**



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e-communication / e-procurement

- **Means of communication:** must be **generally available; otherwise, alternative means of access must be ensured;**
- **Dynamic Purchasing System:** Restricted procedure and **permanent publication** => no indicative tenders, no simplified notices, no "blocking period"; no max. duration; evaluation: 10-15 working days.
 - **e-auction:** essentially unchanged;
 - **e-catalogue:** standardised presentation of tenders; specific for a given procedure; useful in particular for framework agreements/DPS



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Principles of procurement – Horizontal clause

Appropriate measures by Member States to ensure that economic operators comply with applicable obligations in the field of environmental, social and labour law

Referred to under:

- *Non award*
- *Exclusion grounds*
- *Abnormally low tenders*
 - Obligation to ask for **explanations** where tender appears abnormally low, **and** to **reject** a tender where it is abnormally low because it does not comply with the horizontal clause
- *Subcontracting*

SME-friendly measures

- **Division into lots:**
 - *"apply or explain" principle;*
 - *flexibility: limitation of lots tendered for or awarded; possibility to compare outcomes;*
- **Turnover cap:**
 - *limited to at the most twice contract value except duly justified cases (risks)*
- **Documentary requirements:**
 - *Self-declarations & European Single Procurement Document;*
 - *Up-dated documents already available;*
 - *Real-time access via databases;*



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Technical specifications & labels

- **Technical specifications:** Mainly unchanged, but clarified OK production process or other stage of life cycle if linked;
- **Labels:**
 - possible require label as such where label defined in transparent, objective process **and** all its requirements suitable;
 - recognition equivalent labels and other means of proof where no access
 - Where **all** requirements are **not** suitable: as now, i. e. underlying requirements
- **Third party certification**
 - may be required (tech. spec, award criteria and/or contract performance);
 - mutual recognition re equivalent certificates;
 - Other means where no access



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Exclusion grounds – self cleaning

- *New exclusion grounds*
 - **Violation of social/labour law obligations**
 - **Significant/persistent deficiencies in a prior public contract**
 - **Unduly influencing decisionmaking**
 - **Tax/social security: mandatory/optional exclusion**
- *Self-cleaning*
 - **Compliance measures to re-establish reliability**
- *Maximum duration of exclusion:*
 - **Established by Court or max. 5 or 3 years**



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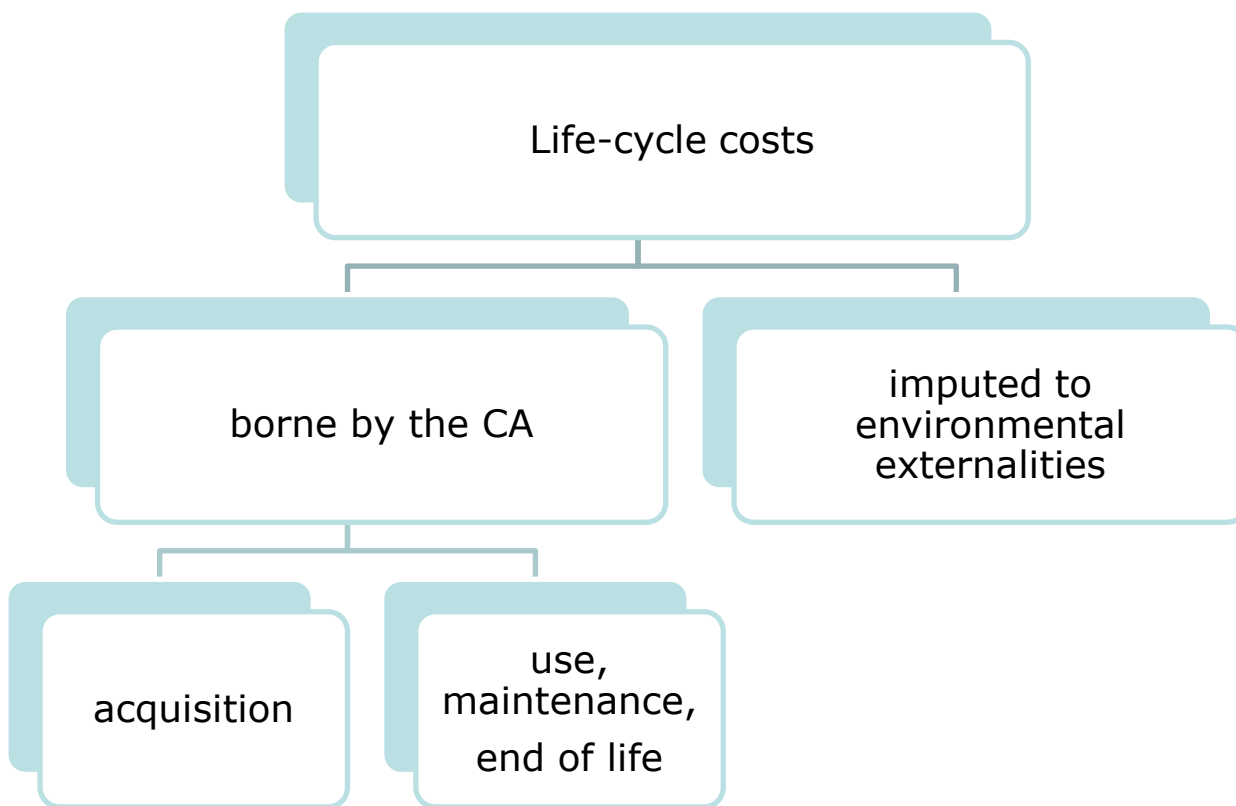
Contract award criteria

- ***Sole award criterion: MEAT – most economically advantageous tender -***
to be assessed on the basis of
 - **price, or**
 - **cost**, using a cost-effectiveness approach such as life-cycle costing, **or**
 - **the best price-quality ratio (BPQR)** *to be assessed on the basis of award criteria linked to the subject-matter of the contract.*
 - organisation, qualification and experience of the **staff delivering the contract** where this can significantly impact the level of performance of the contract
- *MS can exclude or restrict the use of price or cost only as sole criterion.*



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Life-cycle costing





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Subcontracting

- Observance of the obligations of the horizontal clause by subcontractors is ensured through **appropriate action**
- Where there is **joint liability** the relevant rules must be applied in compliance with the conditions set out in the horizontal clause
- **Substitution of a subcontractor** (excl. grounds)
- **Transparency of the subcontracting chain** (works and services at the facilities – no suppliers)
- **Direct payments** (Member States MAY provide)



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Contract modifications

- *Court of Justice*
 - **New tender required for significant changes**
- *Exceptions*
 - **Low value (threshold and: works 15%, services, supplies 10%)**
 - **Transparency about possible changes**
 - **Change of contractor causing significant inconveniences**
 - **Unforeseen circumstances (50% limit in classic directive)**



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Contract termination

- *Court of Justice (C-503/04, Commission v Germany)*
 - **Implied obligation to terminate the contract awarded in breach of European law**
- *MS obligation to allow for early termination of contracts*
- *Situations (non-exhaustive list)*
 - **Substantial modification**
 - **Contract awarded despite existence of exclusion grounds**
 - **Serious infringement of Treaty or Directive declared by Court ruling (Art 258 TFEU)**



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Light regime

- *New specific simplified rules for social, health, cultural and other services:*
 - **higher threshold – EUR 750 000;**
 - **below threshold: typically no-cross-border interest (except if EU funding)**
 - **only requirements: ex-ante (and ex-post) publicity + non-discrimination principle; for the rest national rules**
 - **MS may impose traditional MEAT (= BPQR) criterion only**
- *Other services covered*
 - **Hotel and restaurant services**
 - **Certain legal services**
 - **Rescue, fire fighting and prison services**
 - **Government services and services to the community**



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Timeline for e-communication

03.2014

Directive enters into force

+ 24 months

03.2016

Period for transposition expires

+ 36 months

03.2017

Mandatory for Central
Purchasing Bodies

+ 54 months

09.2018

Generally mandatory



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Utilities

- *Essentially same changes proposed for the Utilities as for the Classic Directive (CD) -*
- *With due regard to the different field of application and the ensuing need to conserve a more flexible regime.*
- *Only few changes on issues specific to the Utilities Directive:*
 - **Explicit clarification of the notion of "special and exclusive rights";**
 - **Central purchasing bodies: all types of contracting entities;**
 - **Threshold for light regime: 1 million (otherwise = CD);**
 - **Competitive dialogue & innovation partnership introduced (=CD);**
 - **Framework agreements: limited duration (8 years); objective rules and criteria; no alignment on Classic Directive**



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Concessions

- *New Directive for:*
 - **Works concessions >5 million Euros**
 - **Service concessions >5 million Euros**
- *covers:*
 - **Contracting authorities (public sector)**
 - **Contracting entities (utilities sectors)**
- *Remedies Directives cover concessions*



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Distinction contracts – concessions

- *Contract:*
 - **Remuneration**
- *Concession:*
 - **Right of exploitation of works/services**
 - **Operating risk**
 - **Duration linked to possibility to recuperate investments**



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Concessions: procedural rules

- *Few procedural rules, in particular*
 - **Ex-ante & ex-post publicity**
 - **Procedural guarantees, not defined procedures**
 - **Exclusion (=), selection criteria (light)**
 - **Objective award criteria**
 - **Minimum time-limits**
 - **Transparency (availability of concessions doc; informing participants)**



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<http://www.europarl.europa.eu/committees/en/imco/subject-files.html?id=20120214CDT38033#menuzone> (Classic & Utilities)

<http://www.europarl.europa.eu/committees/en/imco/subject-files.html?id=20120214CDT38041#menuzone> (Concessions)



Contact

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http://ec.europa.eu/internal_market/publicprocurement/index_en.htm