



PUBLIC PROCUREMENT DIRECTIVES

RESUME

EuDA has a number of positions on the proposed revision to the Directives on public procurement. These comments address the area of works contracts in general and the place of more comprehensive contracts in particular.

PUBLIC PROCUREMENT DIRECTIVES

The European Commission has in 2000 introduced proposals to modernise the directives on public procurement of products, works and services as well as the one imposing procurement obligations on the “utility” sector (energy, transport, water). These proposals have been sent to the Council and the Parliament. Discussions in the EP have led to some important corrections, many of which were inspired by the parties that use these directives.

EuDA’s position on significant issues in the revised directives follows.

A. Procurement by public entities

- 1) The public procurement directives prescribe as the standard procedure the preparation of detailed tender documents, on the basis of which the bidders submit a priced offer. This procedure is not very flexible as it leaves little room for discussions between procurement entity and bidder on the specific details of their bids. This procedure is suitable for standard products, standard services or smaller works, but it is not optimal for more complex works projects.

The directive should give more room to use of alternative procedures (negotiated, variants, dialogue).

- 2) EuDA thus welcomes in particular the procedure proposed to deal with “complex contracts”, which would include a round of technical discussions with prospective bidders prior to submitting technical and commercial bids.

Such a dialogue is absolutely necessary in cases where the technology evolves fast, in situations where the contracting authority cannot define the optimal solution and in cases where the contractor is expected to perform (part of) the detailed design work.

- 3) For larger works contracts the procurement practice evolves to more frequent use of ‘design + construct’ type of contracts. The directives should leave ample room for this development and not impose a split between the design work and the construction of the projects.
- 4) When technical discussions take place between contracting authority and bidders, the confidentiality of such discussions must be guaranteed as well as the intellectual property rights associated with design solutions proposed by individual bidders. In



these cases the contract should always be awarded on the basis of the most economically advantageous tender.

- 5) EuDA in general strongly favours that works contracts are awarded on the basis of “most economically advantageous bid” rather than on “lowest price” only.
- 6) EuDA is of the opinion that public tender procedures which require extensive proposal engineering work by the selected bidders, must foresee cost compensation for all selected bidders. This requirement should be spelled out in the directive.
- 7) The existing directive on public procurement of works as well as the proposed revision both include contracts designated as “works concessions”. These are defined in the following manner :

‘Public works concession’ means a public works contract except for the fact that the consideration for the works to be carried out consists either solely in the right to exploit the construction or in this right together with payment.

EuDA is of the opinion that this definition is not adequate to characterise the nature of a concession. It covers only a limited part of those contracts under which the private party assumes broader responsibilities.

The definition does not at all consider concession agreements where no “works” are involved, and which are presumably seen as services contracts.

Apparently the whole range of public-private partnership contracts does not fall under the terms of the proposed directive. Separate guidance will have to be developed. It is advisable that the limits of applicability of the directive for certain “works” contracts is clarified.

B. Procurement by entities in the water, energy and transport sector

- 1) EuDA fully supports the Commission’s intent to prescribe procurement transparency for those utility sectors where competition is restricted and / or where liberalisation processes have not been completed. In this respect the ports sector, as part of the transport sector, is of particular interest to the dredging industry.

There are many management models around for ports, ranging from fully publicly owned and administered to full private ownership and management. The fact that ports have certain statutory rights and obligations keeps them in the domain of the utilities and leads to the imposition of procurement obligations also for private ports.

- 2) EuDA members are particularly concerned about the situation in some private ports. These ports tend to evolve towards vertical integration and to become providers of comprehensive services packages. This trend may easily lead to distortive practices which result in market access limitations and cross-subsidisation.



The utility directive is a valuable instrument to maintain market access to the utility segment. The revisions to the directive cover new developments in procurement practice.