

20 September 2017

TF50 (2017) 12/2 – Commission to UK

Subject: Position paper on **On-going Public Procurement Procedures**

Origin: European Commission, Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU

Remarks: The attached position paper on **On-going Public Procurement Procedures** contains the main principles of the EU position in this regard

Published on Thursday 21 September on the website as EU position in view of the 4th negotiation round with the UK

Essential principles on On-going Public Procurement Procedures

The withdrawal of the United Kingdom from the European Union will create uncertainty in relation to administrative procedures in the area of public procurement on-going on the withdrawal date, as to which law should govern the completion of those procedures and how tenderers and contractors from the EU27 or the United Kingdom should be treated by contracting authorities from, respectively, the United Kingdom or the EU27 Member States.

The Withdrawal Agreement should ensure that administrative procedures in the area of public procurement on-going on the withdrawal date continue to be carried out in accordance with the relevant provisions of Union law until their completion, and in accordance with the principle of non-discrimination.

I. General Principles and material scope

The following general principles should apply in accordance with Union law, as interpreted by the Court of Justice of the European Union on the date of entry into force of the Withdrawal Agreement:

- (1) The following administrative procedures should continue to be carried out, until their completion, under the relevant provisions of national law applicable at the moment of launching the procedure at stake, in accordance with Union law governing public procurement procedures:
 - i. on-going public procurement procedures launched by contracting authorities;
 - ii. procedures in relation to the performance of on-going framework agreements concluded by contracting authorities, including the award of contracts based on such framework agreements.
- (2) The non-discrimination principle should be complied with by contracting authorities from the United Kingdom or the EU27 Member States with regard to tenderers and contractors from the EU27 Member States or the United Kingdom, respectively, in relation to the administrative procedures referred to in point (1). This is without prejudice to the application of any relevant restriction in the applicable legal framework.
- (3) Review procedures and legal remedies in relation to the administrative procedures referred to in point (1) should continue to be carried out in accordance with the relevant provisions of Union law applicable on the withdrawal date¹.

¹ I.e. in particular Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

II. Definitions

'*Union law governing public procurement procedures*' means the Treaty rules applicable to public procurement procedures as well as the Union secondary legislation in the area of public procurement, including in particular² Directive 2014/24/EU³; Directive 2014/25/EU⁴; Directive 2014/23/EU⁵; and Directive 2009/81/EC⁶.

'*On-going public procurement procedure*' means any procurement procedure⁷ launched before the withdrawal date, which has not been finalised on that date and which is subject, at the moment of being launched, to Union law governing public procurement procedures, irrespective of whether the procedure falls below or above the thresholds provided for in, in particular, Directive 2014/24/EU; Directive 2014/25/EU; Directive 2014/23/EU or Directive 2009/81/EC⁸.

'*On-going framework agreement*' means any framework agreement concluded, pursuant to Union law governing public procurement procedures, before the withdrawal date and which has neither expired nor been terminated on that date.

'*Contracting authority*' means any contracting authority or any contracting entity established in the United Kingdom or in the EU27 Member States and subject before the withdrawal date to the obligations of Union law governing public procurement procedures.

A public procurement procedure should be considered '*launched*' when a call for competition is made: this should normally be upon transmission of the call for competition for publication to the Publications Office of the European Union. Under the conditions set out in Union law governing public procurement procedures, the call for competition may take the form of a contract notice, a

² Any other Union instrument containing specific rules governing public procurement procedures are also concerned. This is in particular the case, in the field of transport, of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road, Regulation (EC) 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community, Directive 96/67/EC of the European Parliament and of the Council of 15 October 1996 on access to the groundhandling market at Community airports, Regulation (EEC) No 3577/92 of the European Parliament and of the Council of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage), or Regulation (EU) 2017/352 of the European Parliament and of the Council of 15 February 2017 establishing a framework for the provision of port services and common rules on the financial transparency of ports.

³ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement.

⁴ Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors.

⁵ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts.

⁶ Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security.

⁷ Including procedures using dynamic purchasing systems as well as procedures for which the call for competition takes the form of a prior information notice/periodic indicative notice or a notice on the existence of a qualification system.

⁸ This is without prejudice to the steps that contracting authorities may take – in applying their discretion and where legally possible – to prevent uncertainty by reducing to the minimum the stock of on-going procedures.

concession notice, and, where it is used as a means of calling for competition, a prior information notice, a periodic indicative notice or a notice on the existence of a qualification system⁹.

A public procurement procedure should be considered '*finalised*' when the contracting authority has published the contract award notice. In the event that the contracting authority is not obliged to publish a contract award notice, a procedure should be considered finalised upon conclusion of the relevant contract. In the event that the contracting authority takes the decision not to award a contract pursuant to a public procurement procedure, that procedure should also be considered 'finalised' once the contracting authority has informed tenderers of the reasons why the contract was not awarded.

III. Cooperation

Contracting authorities from the United Kingdom entitled to use e-Certis¹⁰ before the withdrawal date should continue to be entitled to use it after the withdrawal date in relation to the public procurement procedures referred to above. The Publications Office of the European Union should publish the contract award notices sent by the contracting authorities from the United Kingdom in relation to the administrative procedures referred to in principle (1), above.

* * *

⁹ Where Union law governing public procurement procedures allows for the use of procedures that do not require the use of a call for competition (e.g. negotiated procedure without prior publication), the procedure should be considered launched when the contracting authority commences it, for instance, where appropriate, by contacting economic operators in relation to the procurement.

¹⁰ e-Certis is a tool for mapping of certificates issued as evidences in public procurement procedures across the Union.