



EUROPEAN COMMISSION

*Brussels, 15.2.2016
C(2016) 829 final*

Dear President,

The Commission would like to thank the Camera Deputaților for its Opinion on the Communication from the Commission to the European Parliament and the Council on Public Procurement rules in connection with the current asylum crisis {COM(2015) 454 final}.

As the Camera Deputaților acknowledges, the Communication provides an overview of the possibilities available under Directives 2004/18/EC and 2014/24/EU (only in those Member States where they are already transposed and applicable) (hereinafter "the public procurement directives") to satisfy the most urgent needs in connection with the management of the sudden influx of asylum seekers in Europe.

The Communication details the tools available to public procurers to cope with the challenge of providing the necessary infrastructure (housing) as well as supplies and services of first necessity to asylum seekers in extreme emergency circumstances. The Communication specifies that it is up to the national contracting authorities themselves to assess on a case-by-case basis which are the most suitable instruments to award contracts aiming at meeting the immediate needs of asylum seekers (housing, supplies or services), in accordance with the options listed in the Communication and detailed in the public procurement directives.

The Commission welcomes the Camera Deputaților's support for the Communication which does not create any new legislative rules but builds upon the provisions of the public procurement directives. The Communication reflects in regard of the specific situation considered, the Commission's understanding of the Treaties, the public procurement directives and the case-law of the Court of Justice of the European Union. It should be noted that it remains ultimately the role of the Court of Justice to provide any binding interpretation of EU law.

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The Commission hopes that the clarifications contained in this letter and the accompanying annex address the issues raised by the Camera Deputaților and looks forward to continuing our political dialogue in the future.

Yours faithfully,

*Frans Timmermans
First Vice-President*

*Elżbieta Bieńkowska
Member of the Commission*

ANNEX

6(a) According to Directive 2014/24, a procurement procedure is not useful if the products are purchased directly from a commodity market, including from trading platforms for commodities, such as the agricultural products, the raw materials and the energy markets, if the multilateral trading structure regulated and supervised naturally guarantees the market prices. This possibility of buying from the markets could be a viable alternative in case that a high demand of various products occurs at the time of a sudden request.

The public procurement directives offer the possibility for contracting authorities to rely on the negotiated procedure without publication if the "supplies are quoted and purchased on a commodity market" (Article 31(2)(c) of Directive 2004/18/EC and Article 32(3)(c) of Directive 2014/24/EU). Indeed, in the case of such supplies, the price is determined worldwide under conditions of open competition and established independently from the procuring needs of any national government. However, this possibility should be restrained solely to raw primary materials normally traded on such commodity markets (e.g. corn, wheat, crude oil, natural gas, etc.) and not artificially extended to other types of goods which do not fall within this category (e.g. pharmaceutical products). Being an exception from the general rule of transparency of the public procurement directives, Article 31 (2) must be interpreted strictly.

6(b) In the application of the incentive regime for small and medium sized enterprises, established both by programmatic documents specific to the Union, and by the Directive, even in cases of emergency or extreme urgency, a number of products, works and services could be grouped to facilitate access thereof. Such an approach of the procurement by lots would lead to both streamlining the deliveries and also to cost-efficiency, at least in the cases where the transport costs are a high proportion of the total cost.

The possibility to group the needs of various administrations for the purposes of public procurement procedures is allowed by the directives. One administration may jointly procure goods, services or works with others, may act on behalf of another, or a central purchasing body may resort to centralised procurement. However, in emergency situations, the reasons used by one administration to use the negotiated procedure without publication to procure goods, services or works, should not be extended to the needs of the other administrations which are not affected by such an emergency.

An increased participation of small and medium sized enterprises ("SMEs") in public procurement is a valuable policy objective which should be pursued both at national and European level.

The directives introduce a considerable simplification of the requirements to participate in the procedures and create a favourable environment for the participation of SMEs. These measures refer to the division of contracts into lots (Article 46 of Directive 24/2014), the reduction of documentation requirements (Article 59, regarding the European Single Procurement Document) and the limitation of the minimum turnover that can be required from economic operators (Article 58 and Recital 83).

The measures adopted by Member States to encourage the participation of SMEs in public procurement must be in line with the applicable EU public procurement legislative framework and the basic Treaty principles of equal treatment and non-discrimination.

6(c) As provided in Directive 2014/24 as well, the electronic auctions are not normally adequate for certain public procurement contracts for works and for certain public procurement contracts for services which have the object of intellectual activities, such as the design of works, because only the elements adequate for the automatic evaluation by electronic means, without any intervention or appreciation by the contracting authority, namely the elements which are quantifiable so that they can be expressed in figures or percentages may be the subject of the electronic auctions. In this respect, the inherent element of subjectivity of the evaluation on the basis of unquantifiable criteria for the cases where this is required by the very nature of the services concerned should not be assimilated with the lack of transparency or with the risk of corruption.

According to Article 35 (1) of Directive 2014/24/EU, certain public service contracts and certain public works contracts having as their subject-matter the provision of intellectual services – such as the design of works – which cannot be ranked using automatic evaluation methods, shall not be the subject of electronic auctions.

When electronic auctions cannot be used, because of the impossibility of ranking tenders using automatic evaluation methods, contracting authorities are nevertheless bound by the general provisions of Article 67 of Directive 2014/24/EU. These provisions include, in order to ensure the possibility of effective competition, the requirement to use contract award criteria that are linked to the subject-matter of the public contract in question and prohibit the use of award criteria that confer unrestricted freedom of choice to the contracting authority.