

SIEMENS



Preliminary Study on the electronic provision of certificates and attestations usually required in public procurement procedures

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eProcurement - national reports

National Country Profiles

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European Commission
Internal Market and Services DG

Brussels

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SUMMARY:

The Preliminary Study on the electronic provision of certificates and attestations in public procurement procedures aims to examine how different European countries (EU, candidate countries and EEA) currently manage the use of certificates and attestations in procurement procedures, particularly in a eProcurement context. The goal of the study is to identify if and how electronic certificates and attestations are currently issued, accepted and validated in public procurement procedures across these countries, and if and how their eProcurement systems could be modified or amended to support non-national electronic certificates and attestations, thus facilitating cross border economic activities in these countries and contributing to the creation of an internal market for electronic procurements.

The project should conclude with several different proposals how to build interoperability.

KEYWORDS:

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1 Documents

1.1 Reference Documents

[RD1]	eGovernment in the Member States of the European Union – 5th Edition – May 2006 http://ec.europa.eu/idabc/servlets/Doc?id=24769
[RD2]	Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (30.04.2004) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0017:EN:NOT
[RD3]	Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (30.04.2004) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0018:EN:NOT
[RD4]	Impact Assessment: Action Plan on electronic Public Procurement - Part 1: Baseline Analysis (December 2004) http://ec.europa.eu/internal_market/publicprocurement/docs/eprocurement/2004-12-impact-external-vol1_en.pdf
[RD5]	Impact Assessment Action Plan on electronic Public Procurement - Part 2: Baseline Scenario (December 2004) http://ec.europa.eu/internal_market/publicprocurement/docs/eprocurement/2004-12-impact-external-vol2_en.pdf
[RD6]	Draft Questionnaire - Application of Art. 45(1) of directive 2004/18/EC (CC/2006/07_rev1 EN)
[RD7]	Action plan for the implementation of the legal framework for electronic public Procurement http://ec.europa.eu/internal_market/publicprocurement/docs/eprocurement/actionplan/actionplan_en.pdf
[RD8]	Requirements for conducting public procurement using electronic means under the new public procurement Directives 2004/18/EC and 2004/17/EC http://europa.eu/rapid/pressReleasesAction.do?reference=IP/05/948&format=HTML&aged=0&language=EN&quiLanguage=en
[RD9]	Report on Functional Requirements for conducting e-procurement under the EU framework - external study for the Commission (IDABC programme) http://ec.europa.eu/internal_market/publicprocurement/docs/eprocurement/functional-requirements-vol1_en.pdf http://ec.europa.eu/internal_market/publicprocurement/docs/eprocurement/function

	al-requirements-vol2_en.pdf
[RD10]	Impact Assessment of the Commission on an Action Plan on electronic public procurement http://ec.europa.eu/internal_market/publicprocurement/docs/eprocurement/2004-12-impact-assessment_en.pdf
[RD11]	State of the Art report - external study for the Commission http://ec.europa.eu/internal_market/publicprocurement/docs/eprocurement/study_vol1_en.pdf http://ec.europa.eu/internal_market/publicprocurement/docs/eprocurement/study_vol2_en.pdf

2 Glossary

2.1 Definitions

In the course of this report, a number of key notions are frequently referred to. To avoid any ambiguity, the following definitions apply to these notions and should also be used by the correspondents.

- *Public procurement*: a procedure initiated by a government, public authority or public sector body with a view of acquiring goods, services or public works for the fulfilment of its tasks. For the purposes of this Study, the emphasis is on national procedures and practices in the field of public procurement, focusing specifically on public procurement on the national/federal level.
- *e-Procurement*: public procurements initiated, negotiated and/or concluded using electronic means, i.e. using electronic equipment for the processing and storage of data, in particular through the Internet. For the purposes of this Study, the emphasis is on public procurements where candidates may submit (part of) their offer electronically through the internet. E-Procurement systems which only allow the on-line consultation by candidates of calls are of lesser interest.
- *Tenderer*: an economic operator (contractor, supplier or service provider) who has submitted a tender, or who has sought an invitation to take part in a restricted or negotiated procedure or a competitive dialogue¹.
- *Certificate*: any document originating from a party other than the candidate intending to demonstrate a quality or fact pertaining to the candidate. This includes inter alia documents traditionally referred to as certificates, attestations, or declarations.
- *Statement*: any document originating from the candidate intending to demonstrate a quality or fact pertaining to the candidate. This includes inter alia documents traditionally referred to as statements of compliance, declarations under oath, and solemn declarations.
- *Official registers*: data collections held and maintained by public authorities, in which the identity attributes of a clearly defined subset of entities is managed, and to which a particular legal of factual trust is attached (i.e. which are generally assumed to be correct). This includes National Registers, tax registers, company registers, etc.
- *eGovernment application*: any interactive public service using electronic means which is offered entirely or partially by or on the authority of a public administration, for the mutual benefit of the end user (which may include citizens, legal persons and/or other administrations) and the public administration. Any form of electronic service (including stand-alone software, web applications, and proprietary interfaces offered locally (e.g. at a local office counter using an electronic device)) can be considered an eGovernment application, provided that a certain degree of interactivity is included. Interactivity requires that a transaction between the parties

¹ For reasons of simplicity, the Profiles will only use the notion of “tenderer”, rather than distinguishing between tenderers and candidates, as the e-Procurement Directives do.

must be involved; one-way communication by a public administration (such as the publication of standardised forms on a website) does not suffice.

- *eSignature*: data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication with regard to this data. Note that this also includes non-PKI solutions.

- *Advanced electronic signature*: an electronic signature which meets the following requirements:
 - (a) it is uniquely linked to the signatory;
 - (b) it is capable of identifying the signatory;
 - (c) it is created using means that the signatory can maintain under his sole control; and
 - (d) it is linked to the data to which it relates in such a manner that any subsequent change of the data is detectable;Again, this definition may cover non-PKI solutions.

- *Qualified electronic signature*: advanced electronic signatures which are based on a qualified certificate and which are created by a secure-signature-creation device, as defined in the eSignatures Directive².

- *Validation*: the corroboration of whether an eSignature was valid at the time of signing.

² See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31999L0093:EN:HTML>

2.2 Acronyms

A2A	Administration to Administration
A2B	Administration to Businesses
A2C	Administration to Citizens
CA	Certification Authority
CRL	Certificate Revocation Lists
CSP	Certificate Service Provider
eID	Electronic Identity
eIDM	Electronic Identity Management
IAM	Identity and Authentication Management
IDM	Identity Management
OCSP	Online Certificate Status Protocol
OTP	One-Time Password
PKCS	Public-Key Cryptography Standards
PKI	Public Key Infrastructure
SA	Supervision Authority
SOAP	Simple Object Access Protocol
SCVP	Server-based Certificate Validation Protocol
SSCD	Secure Signature Creation Device
USB	Universal Serial Bus
TTP	Trusted Third Party
XAdES	XML Advanced Electronic Signature
XML	eXtensible Markup Language
XML-DSIG	XML Digital Signature

3 Introduction

3.1 Scope and objectives of the project

Preliminary Study on the electronic provision of certificates and attestations in public procurement procedures ('eProcurement Study') aims to examine how different European countries (EU, candidate countries and EEA) currently manage the use of certificates and attestations in procurement procedures, particularly in a eProcurement context. The goal of the study is to identify if and how electronic certificates and attestations are currently issued, accepted and validated in public procurement procedures across these countries, and if and how their eProcurement systems could be modified or amended to support non-national electronic certificates and attestations, thus facilitating cross border economic activities in these countries and contributing to the creation of an internal market for electronic procurements.

The project should conclude with several different proposals how to build interoperability between the eProcurement systems in the examined countries.

3.2 Structure of the project

The eProcurement Study consists of 4 different phases. In a first phase, accurate and up-to-date country reports need to be built for each participating country (27 Member States, 2 Candidate Countries, and 3 EEA Countries). For each of these countries, the national report needs to describe the status of eProcurement in general, the use of certificates and attestations in eProcurement procedures in general, and if/how such certificates and attestations are available in electronic form for use in eProcurement processes.

In a second phase, this information will be analysed and assessed in order to identify any common patterns or general trends.

In the third stage, the analysed information will be used as a building block to create a series of high level scenarios for the cross border exchange and validation of such electronic certificates and attestations.

Finally, a fourth report will provide a more detailed proposal and implementation roadmap for the most viable scenarios identified in stage three.

3.3 Goal of this document

This document ('First interim report – National reports') concerns the first phase outlined above: it will provide a full description of the main eProcurement solutions employed in each of the surveyed countries, and will describe which certificates and attestations are in common use. It is thus one of the main inputs to the Study, as it describes the constraints to be handled by any propose interoperability infrastructure.

For each of the surveyed countries, the reports will describe:

- What kind of certificates/attestations/other supporting documents are typically required in public procurements in that country;
- How such documents are typically delivered (by whom, at what costs, how,...);
- What kind of eProcurement platform exists (if any);
- If any of the certificates can be delivered in an electronic form, and if so, how this is done in practice.

More specifically, the reports contain the following sections:

- Public procurement framework: a high level description of how public procurement (in general, not specific to e-Procurement, which will be handled separately below) is dealt with from a policy perspective.
- E-Procurement initiatives and status: a description of how e-Procurement is handled from a policy perspective (what are the national strategies, frameworks and infrastructure).
- Certificates, attestations and declarations: this is the main section of the report, in which the correspondent must describe what documents are typically used in his/her country to demonstrate that a candidate meets certain requirements defined in a call for offers.
This section will describe for each of these requirements what certificate/attestation/declaration is used in the country, if it is commonly asked for or required, and if there is any electronic version.
- Interoperability: a description of whether or not the main eProcurement systems in the surveyed country are accessible to non-nationals (or which are, and which aren't).
- Future trends/expectations: an indication of likely future developments (e.g. modifications of the authentication system, use of electronic certificates and/or attestations, extension to non-nationals, etc.)
- Assessment: correspondent's personal appreciation of his/her national situation.

3.4 Credits and contributors

Of course, reports such as these are only possible through the assistance of local experts who are capable and willing of providing information with regard to their legal frameworks and administrative practices. The Study team especially wants to acknowledge the contributions of the following authors for each of the country profiles:

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4 Austria

4.1 Public procurement framework

4.1.1 General framework

Like the European e-Procurement Directives, the Austrian public procurement entails two separate frameworks: one for utility services (*Sektorenbereich*) and one for traditional sectors (*klassischer Bereich*), with the former being somewhat more flexible.

The basic applicable law on public procurement is the Austrian Act on the award of purchase contracts (*Bundesvergabegesetz 2006*) (*hereinafter: BVergG 2006*)³, which entered into force on February 1, 2006⁴. This Act regulates the awarding of certain contracts for public works, supplies and services in both of the above mentioned sectors. The BVergG 2006 therefore implements the EC Directives 2004/17/EC and 2004/18/EC. It contains the substantive procurement law applicable to the Austrian provinces (*bundeslaender*) and the Austrian federal government ("Bund") as well as legal protection for public procurement for the Austrian federal government ("Bund").⁵ Additionally there are nine public procurement Acts⁶ regarding legal protection on regional and local public procurement in the nine Austrian federal provinces⁷.

In general, this legal framework applies to all public procurements, including the federal government, regions (*bundeslaender*), communities, and any entities established by them. Thus local administrations have no regulatory competence concerning substantive procurement law; any contracting authority wishing to organise a public procurement must adhere to the given federal framework.

³ BGBl. I Nr.17/2006.

⁴ An amendment of the Austrian BVergG 2006 is discussed at present but has not yet been adopted or entered into force.

⁵ Legal protection for issues concerning the federal government is granted by the Federal Bureau for the Award of Contracts („Bundesvergabeamt, BVA”).

⁶ Burgenländisches Vergaberechtsschutzgesetz - Bgld. VergRSG (LGBl.Nr. 66/2006); Kärntner Vergaberechtsschutzgesetz - K-VergRG (LGBl.Nr. 17/2003); NÖ Vergabe -Nachprüfungsgesetz (LGBl. Nr. 7200-0); Oö. Vergaberechtsschutzgesetz 2006 (LGBl.Nr. 130/2006); Salzburger Vergabekontrollgesetz 2007 - S.VKG 2007 (LGBl Nr 28/2007); Steiermärkisches Vergaberechtsschutzgesetz – StVergRG (LGBl Nr. 154/2006); Tiroler Vergabenachprüfungsgesetz 2006 (LGBl.Nr. 70/2006); Vergabenachprüfungsgesetz Vorarlberg (LGBl.Nr. 1/2003, 53/2006); Wiener Vergaberechtsschutzgesetz 2007- WVRG 2007(LGBl. Nr. 65/2006).

⁷ Legal protection for issues concerning the *bundeslaender* (regions) is locally granted by the Local Bureaus for the Award of Contracts („Unabhängiger Vergabesenat in den Ländern”, „Vergabekontrollsenat” established in Vorarlberg, Tirol, Kärnten, Salzburg, Oberösterreich, Niederösterreich, Steiermark, Wien, Burgenland).

The relevant changes in the BVerG 2006 compared to the BVerG 2002 are the following: For particularly complex contracts the “competitive dialogue” has been introduced. The aim of this procedure is to identify and define the means best suited to satisfy the needs/requirements of the awarding authority. Of higher interest in the present context is the fact that a new procedure using solely electronic means has been introduced in the form of dynamic purchasing systems. Under this new procedure the rules of the open procedure are followed in all phases up to the awarding of the contracts to be concluded under this system. All tenderers satisfying the selection criteria and having submitted an indicative tender which complies with the set out specifications and any additional (required) documents shall be admitted to the system. Indicative tenders may be improved at any time provided that they continue to comply with the specifications (see also below).

The exemption for the in-house awarding of purchase contracts regulated by law now contains the exact wording of the *Teckal* ruling of the ECJ⁸. In addition new exemptions (e.g. for acquisitions via central purchasing bodies) and new thresholds have been established.

An important procedural innovation is the additional possibility to appeal separately against cancellation decisions (*Widerrufsentscheidungen*) and the elimination of an offer (*Ausscheiden eines Angebotes*).

One of the basic principles of the legal framework is to establish a competitive environment, including a system of prior publication of procurement opportunities. This typically means that an announcement must be published nationwide (see on-line version <http://www.lieferanzeiger.at>).⁹ In compliance with European obligations, procurements with a value exceeding a certain threshold (established in Regulation (EC) 2083/2005) also have to be published in the Supplement to the Official Journal of the European Union (see Tenders Electronic Daily, <http://ted.publications.eu.int>).

Notwithstanding this obligation, contracting authorities are of course allowed to publish the procurement through other channels to increase response rates, including by directly contacting potential tenderers, although such announcements may not take place before the legally required publication or contain more/other information, to ensure fair competition.

Under certain circumstances prior publication is not required, and the so called ‘negotiation procedure without prior publication’ can be followed. This procedure can only be applied in a limited number of situations indicated in the Act, e.g. in procurements beneath a certain threshold value, set out in the BVerG 2006, urgent procurements which could not have been foreseen or if only invalid offers have been submitted in a prior procurement procedure.

In any case, the publication will indicate the administrative requirements to be met, including, naming certificates and statements to be provided by prospective tenderers, and by indicating the specific administrative authority and/or contact person to whom the finalised offer should be conveyed.

⁸ Case C-197/98, ECR [1999] I-8121.

⁹ Also see <http://www.bva.gv.at/BVA/Rechtsgrundlagen/Formulare> for the necessary standard forms in compliance with European obligations (reg. (EC) 1564/2005).

4.1.2 Certificates and statements

The administrative requirements to be met are defined in the BVergG 2006 (sec. 68 sqq.). While these vary depending on the type of procurement (works, supplies or services), the tenderer is commonly required to provide the following documents with regard to the exclusion criteria (which establish a tenderer's eligibility to participate in a procurement procedure):

- An extract from a penal register (or similar), demonstrating that the tenderer/chief operating officer
 - is not in a state of bankruptcy, of being wound up or in a similar status;
 - has not filed for a state of bankruptcy, being wound up or similar status;
 - has not been convicted by a definitive ruling of a crime impairing his professional integrity.
- Statement that the tenderer has not made serious errors in the performance of its professional obligations, or has made serious false statements when providing information.
- Attestation of compliance with obligations under social law;
- Attestation of compliance with obligations under fiscal law;
- Deposit, if demanded;
- Admission/acceptance of authorisation regarding sec. 373c sqq. Austrian Trade, Commerce and Industry Regulation Act (Gewerbeordnung - GewO)

(sec. 68, 129, in particular para. 1 no 5 and 11 of the BVergG 2006).

It is worth noting that the contracting authority is free to indicate that it is willing to accept less formal documents as evidence, including statutory declarations.

A lack of a requested attestation or certificate must by necessity lead to exclusion from the tender.

For foreign tenderers, the BVergG 2006 provides that equivalent documents issued by the relevant judiciary or governmental authorities from the tenderer's country of origin will also be accepted if they adequately demonstrate that the objective of the Act was met. When the tenderer's country of origin does not issue such documents, in some cases an attestation of a relevant court or administrative body, a public notary or a competent professional organisation will also be deemed acceptable, if it is properly given before placing the bid.

With regard to selection criteria (which establish the financial and technical suitability of the tenderer) a different set of supporting documents is typically required. These include most notably:

- Balance sheets of the tenderer, if the publication of balance sheets is mandatory in the tenderer's country of origin;
- Global revenue statements for the last three accounting years;
- Credit information done by the "Austrian institution for monitoring the solvency of companies since 1870" (*KSV 1870*) or a similar rating agency;
- Bank statement issued by the main bank;
- Attestation of a professional indemnity insurance;

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- Statements containing references to works/supplies/services provided in the last three years, as evidenced by attestations of acceptance;
- Statements detailing the working equipment to be used by the tenderer;
- Statements detailing the average staffing of the tenderer in the last three years;
- Statements detailing technicians or technical services at the tenderer's disposal.

(sec. 74 and 75 of the BVergG 2006).

If the tenderer cannot present the required documentation with regard to the economical and/or financial suitability for valid reasons, this suitability may be demonstrated through any other documents which the contracting authority deemed suitable in the procurement documentation.

It is worth noting that the documents pertaining to selection criteria mentioned above are usually¹⁰ not originals in the sense that they carry no original signature or seal demonstrating their authenticity. Copies of such documents (which carry no original signature or seal themselves) are often submitted in procurement proceedings, and such copies are typically accepted by the contracting authority according to sec. 70 para. 3 BVergG 2006.

This is relevant because there is no reason in principle why an electronic copy would not be equally acceptable as a paper copy. From a legal perspective, problems with electronic documents can only arise if the required document has to be an original.

Thus the BVergG 2006 (sec. 70 para. 4) stipulates that the documents pertaining to selection criteria mentioned above can be verified electronically by submission and registration of these in the tender register "Auftragnehmerkataster Österreich-ANKÖ" (see on-line version <http://www.ankoe.at>). To provide this special support in procurement proceedings for contracting authorities, tenderers and candidates, ANKÖ offers a "list of appropriate entrepreneurs" (*Liste der geeigneten Unternehmer*).

Austrian and foreign tenderers can register with ANKÖ in order to get included in this list of appropriate entrepreneurs. To do so, the tenderers have to sign a special "Declaration of consent" (*Zustimmungserklärung*) and a special authorization (both can be found under https://www.ankoe.at/ANBOT_INL.pdf) and by submitting the documents and certificates pertaining to selection criteria (see <https://www.ankoe.at/downloads.asp>). The documents must be delivered electronically. The documents delivered are saved by ANKÖ, thus contracting authorities are able to contact ANKÖ directly to obtain confirmation of compliance of the tenderer with Austrian procurement law. The tenderer enables this procedure by submitting his ANKÖ-membership number in his offer.

Although ANKÖ acts as a repository for procurement certificates, the certificates are updated by ANKÖ at least once a year and on special occasions, e.g. an incipient procurement procedure. Accordingly ANKÖ informs the concerned entrepreneur of the certificates/documents that have to be updated (see e.g. https://www.ankoe.at/RBP2007_AUS.pdf). The entrepreneur has to submit the updated documents to ANKÖ. Documents to which ANKÖ has direct access online (e.g. dates from commercial register or from trade register or monitoring of the creditworthiness) are updated by ANKÖ automatically.

¹⁰ Notwithstanding the contracting authority's right to request original documents, e.g. balance sheets or revenue statements which have been certified by an independent auditor.

With regard to verification and language issues, there are no formal rules for verifying the validity of an offer. Hence the contracting authority is relatively free to assess the validity and value of the provided evidence if they comply with the procurement documentation.

However, as for all decisions, the authority must respect the basic principles of good administrative governance. In practice, that means that any decision to reject certain evidentiary documents must be reasonable and transparent. Additionally, the decision must be proportionate. When a contracting authority considers that the provided certificates are incomplete, ambiguous or unclear, it may request clarification from the tenderer rather than rejecting an offer outright. In this way, arbitrary decision making is avoided.

4.2 E-Procurement initiatives and status

4.2.1 General e-Procurement framework and initiatives

Already in the year 2002 the Austrian Act on the award of purchase contracts (BVerG 2002) has, for certain areas, established the possibility of e-procurement on the European and national level. This included provisions for e-procurement, electronic auctions and legal frameworks.

As stated before, the act currently in force is the *Austrian Act on the award of purchase contracts (BVerG 2006)*, which fully implements EC Directives 2004/17/EC and 2004/18/EC. Concerning E-procurement, Austrian law generally differentiates between the possibilities to use

- electronic means within any given public procurement procedure, such as electronic publication, filing of questions or electronic auctions (see below) and
- a purely electronic system, the dynamic purchasing system (see below).

4.2.1.1 Public e-procurement:

Sec. 2 no. 15 BVerG 2006 defines “electronic” as a procedure, *where electronic equipment for data processing (...) and data storage is used and with which information can be distributed, forwarded and received by cable, radio, optic or other electromagnetic means.*

Furthermore, the BVerG 2006 (sec. 43) establishes the opening of public procurement in relation to electronic means. It states that *the transmission of procurement documents, messages, applications, invitations and notifications as well as any other information exchange between the contracting authority and the tenderer (...) can be in writing (postal), by fax or electronic as long as the concession grantor has not, by way of exception, declared otherwise.* Therefore, electronic communication in public procurement has not only been declared acceptable but has also been given the same legal status as written (postal) submissions in these cases.

The possibility to submit electronic tenders has to be announced at the latest in the procurement documents. If there are no provisions in the procurement specifications about the possibility of submitting electronic tenders, they are deemed to be unacceptable (sec. 91 para. 1 BVerG 2006; sec. 43 para. 3 BVerG 2006). In the case that electronic submissions are allowed, it must be made clear in the procurement specifications whether written submissions are permissible as well. In the absence of such a specification both forms (written and electronic submission) are deemed to be acceptable (see sec. 91 para. 2 BVerG 2006).

The most important documents exchanged between the contracting authority and the tenderer are procurement documents, tenders and related attachments. The BVerG 2006 (sec. 43 para. 4) envisages a secure digital signature for all documents relevant for the evaluation of the tender. Additionally, the contracting authority and the tenderer must be able to exchange questions and answers, upon which the authority might amend the procurement. An adequate electronic access to this procedure must be provided to all tenderers.

A critical issue is to assure that the tenders are kept secret and therefore cannot be opened prior to the date of tender opening (*Angebotsöffnung*), that has to be published in the procurement documentation. This can be achieved by either ensuring that access to the documents is only granted after the end of the tender period or by encrypting the documents and then submitting the encryption key after the tender period.

Electronic Auction

As mentioned earlier the electronic auction has already been implemented in the BVerG 2002, however only with a limited field of application; electronic auctions were only available for contracts for supplies and services with an estimated maximum value of € 40.000,--.

Under the new Austrian BVerG 2006, the electronic auction does no longer constitute an independent procedure, moreover it now represents only a segment of certain public procurement procedures, namely of evaluating the best or cheapest offer as postulated in the procurement documentation. The BVerG 2006 defines the electronic auction as an iterative procedure to determine the offer that shall be awarded with the tender. To be able to execute an electronic auction the content of the contract (*Auftragsgegenstand*) must be described clearly and completely.

The key element of the electronic auction regarding the BVerG 2006 is the automated process by which all tenders, after an initial complete evaluation, are assessed and new prices and/or new tender components can be submitted and then be evaluated by an electronic appliance. Traditionally an electronic auction is conducted via the Internet, where individual tenderers underbid each other.

The awarding authority can choose freely between two kinds of electronic auction procedures: In the so called "simple electronic auction (*einfache elektronische Auktion*)" the award will be granted to the tender offering the cheapest price. In the "other electronic auction (*sonstige elektronische Auktion*)" the award will be granted to the tender offering the most advantageous technical and economical bid.

However, due to the automatic evaluation of the tenders the application of electronic auctions is somewhat limited. Works and Service contracts involving intellectual performances (*geistige*

Leistungen) are by law (sec. 31 para. 2 sentence 3 BVergG 2006) excluded from electronic auctions. This is due to the fact that many tenders differ in various contexts which cannot be electronically measured.

In general it can be said that electronic auctions will only be available for highly standardized services, where the content of the contract can be exactly determined and the offered services are in principal identical, e.g. office articles or computers.

4.2.1.2 Dynamic purchasing system

As mentioned initially another new procedure using solely electronic means has been introduced by the BVergG 2006 (sec. 33, sec. 156) in the form of dynamic purchasing systems.

Under this new fully electronic procedure common services of the marketplace can be procured. The procedure may only be established electronically, all notices and announcements have to be made by electronic means. This procurement system can last up to four years, except in duly justified, exceptional cases, and shall be open - like a virtual marketplace - to all interested and adequate bidders, who may issue a non-binding declaration to provide the required services in accordance with the procurement documents.

Throughout the duration of the dynamic purchasing system any entrepreneur, satisfying the selection criteria and having issued a non-binding declaration to provide the services, can apply for participation in the system and has to be granted access. The rules of the open procedure are followed in all phases up to the award of the contracts to be concluded under this system. This is done by either using an electronic auction or by using the procurement procedure in sec. 158 para. 5, no. 1 and 2 BVergG 2006.

All the tenderers satisfying the selection criteria and having submitted an indicative tender which complies with the specifications and any possible additional documents shall be admitted to the system. Indicative tenders may be improved at any time provided that they continue to comply with the specifications.

4.2.2 E-Procurement in practice

Overview of the procurement platforms in Austria

As in several other EU countries, the implementation process is divided into several modules:

- e-notification;
- e-tendering (questions and answers session, submission and opening of proposals);
- e-awarding (evaluation of proposals and granting);
- e-auctions;

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- e-catalogues;
- e-invoicing and e-payment.

A series of initiatives have been taken to create full e-procurement platforms in compliance with the EU-Directives.

<http://www.pep-online.at>

This platform should provide all different modules of e-government. At the moment, only e-notification (<http://www.lieferanzeiger.at>, <http://www.auftrag.at>) are implemented.

The other modules have not yet become operational:

- e-tendering
- e-awarding
- e-auctions
- e-catalogues
- e-invoicing and e-payment

<http://www.lieferanzeiger.at>

This public platform has been established to provide public procurement bodies and companies commissioned by them with the possibility to publish, manage and communicate their public procurements. So this platform only offers a possibility for the contracting authorities to insert their procurements (e-notification).

- e-notification: The current registration process (which is a low security username/password system) allows public procurement bodies to publish, manage and communicate their public procurements.

<http://www.auftrag.at>

This platform provides all interested entrepreneurs and future tenderers with the ability to search for public procurements on the national and on the European level.

- e-notification: a simple search function has currently been integrated in the platform. The current registration process (which is a low security username/password system) allows tenderers to register their contact details (name, address, phone, e-mail, etc.) and indicate specific fields of interest, including e.g. by category of procurement (works, supplies or services), or in more detail by CPV codes or by NUTS codes. The platform can then automatically notify the tenderer when a new procurement of potential interest becomes available. As this registration does not require information which is specific to Austrian entities, registration is open to foreigners.

Regions, communities, public agencies or companies may offer their own public procurement platforms, like that of the regional government of Salzburg (free of charge): <http://www.salzburg.gv.at/aktuell/ausschreibungen.htm>.

The electronic means for e-procurement must at least guarantee that:

- the “secure electronic signature” used conforms to the rules of European and national law on advanced electronic signatures, is generated on the basis of a qualified certificate and is validated by using a secure signature creation device (i.e., a so called signature viewer) (sec. 43 para. 4 BVerG 2006, Sig-V, sec. 2 no. 3 Signaturgesetz);
- the precise time of receipt by the addressee can automatically be determined by an acknowledgment of receipt sent by electronic means (sec. 119 BVerG 2006);
- the integrity and authenticity of the communication and data exchanges and of their storage is ensured; (sec. 41 para. 4, sec. 43 para. 4 BVerG 2006)
- it can be reasonably ensured that nobody can access any transmitted requests for participation or proposals before the chosen publication time; and that any violation of this access limitation can be reasonably detected; (sec. 121 para. 3 BVerG 2006)
- only authorised persons can determine or change the exact moment of opening of the produced data (i.e. the offer);
- access to the produced data at any stage of the procurement process is only possible if all authorised persons act jointly, and at the time that has been chosen (sec. 120 BVerG 2006);
- the supporting tools and technical characteristics thereof, including any encryption, are not discriminatory and available for all concerned parties.

Electronic Signatures

All offers without a valid signature are not binding and must be excluded from a public procurement procedure. Hence, sec. 43 para. 4 BVerG 2006 constitutes, that any electronic tender has to be submitted using a secure electronic signature (sec. 2 no.3 Signaturgesetz, technical details: Signature Regulation (Signaturverordnung - SigV)) or has to use means which guaranteed that the review of the integrity, authenticity and the originality of the submitted data is of the same quality as of a secure electronic signature. Additionally, sec. 114 para. 3 BVerG 2006 demands that tenders, which are prepared in one single document, have to be signed with a secure electronic signature.

In Austria the secure electronic signature is basically the only valid way to ensure an authentic and awardable electronically submitted tender. A secure electronic signature complying with sec. 43 para. 4 and 5 in connection with Annex XVII BVerG 2006 must:

- a) be assigned only to the signatory,
- b) be able to identify the signatory,
- c) be established solely by means under the supreme influence of the signatory, d) be linked to the data in a way that any subsequent alteration of the data can be detected, and
- e) be based upon a qualified certificate and be established by using technical components and procedures conforming to this law and any regulations based upon it.

Furthermore, a secure electronic signature has to be based upon a specific signature construction software, a so called secure viewer and a chipcard.

Problems concerning the secure electronic signature may arise due to the fact that several software-providers offer a secure electronic signature, which conforms to the requirements of the law but lacks interoperability.

To provide uncomplicated electronic communication between the awarding authority and the tenderers, the awarding authority might want to make sure that the software used by the tenderers is sufficiently interoperable.

4.3 Certificates, attestations and declarations

In this section, a closer look will be taken at how the common requirements defined by the e-Procurement Directives are typically met in Austria.

4.3.1 Requirements with regard to the personal situation of the candidate or tenderer – absence of conviction (sec. 45 §1 and §2 (c-d) of Directive 2004/18/EC)

Prevalence/actual use in calls

As indicated above, this is a common (though not mandatory) requirement in Austrian procurements.

What document (if any) is used?

Austrian tenderers are usually required to submit an extract from the register of conviction (*Strafregisterbescheinigung*). Instead of that tenderers can submit an alternative attestation of a court or an administrative agency which shows the absence of conviction.

For natural persons, the certificate is provided by the federal police authority (*Bundespolizeidirektion*). In cities or local communities without a federal police authority the mayor is competent to provide this certificate. From abroad the Austrian representations (*österreichische Vertretungsbehörde*) are responsible to issue the certificate. Delivery can vary from instantaneous to one or two weeks (depending on the commune¹¹). The due amounts to 26 EUR plus 2.10 EUR administration charge¹².

¹¹ The waiting time is briefer, when the local commune of domicile has direct access to the dates of the criminal record.

¹² In some cases the requesting party will be partly exempt from payment, e.g. when the certificate is intended for use in job applications or when it has to be submitted to a authority.

Traditionally, the delivery of such a certificate required the requesting party to present himself physically before the issuing authority. However, the certificate can be requested and obtained electronically using the citizen card (*Bürgerkarte*¹³). As not everybody has a citizen card respectively has activated his e-card for this function, it depends on the person if an electronic request is possible.

When the tenderer is a legal person, its chief executive officers have to deliver their certificates to proof absence of conviction. The legal person itself does not have to provide such a certificate. As the Austrian Act on responsibilities of associations for criminal offenses (*Verbandsverantwortlichkeitsgesetz*) entered into force as from 1.1.2006 legal persons can now be accused and sentenced for criminal offenses. A registration in the register of conviction is not foreseen.

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The certificate identifies the issuing authority, the requesting party, date and place of issuance, and relevant decisions. The latter includes criminal convictions (which have not been revoked through grace, pardon or rehabilitation), internments, and dispossession of parental authority (by date, jurisdiction, description of facts and final decision). The document is signed by the public official and stamped.

There is no formal validation procedure of the certificate after receipt by the contracting authority. In case of ambiguity, the contracting authority is free to request additional information from the tenderer. The contracting authority may not directly contact the central service of the Penal Register to obtain this certificate without the tenderer's intervention.

Electronic certificates

With the Citizen Card the extract from the register of conviction (*Strafregisterbescheinigung*) can be obtained electronically. The electronic certificate can be requested through a web portal (see e.g. <http://www.help.gv.at>)

Requirements for the issuance of the electronic certificate of the register of conviction:

- An Austrian Citizen Card
- Possibility to pay electronically (e.g. by creditcard or by "eps-Online-transfer")

¹³ Citizen Cards (sec. 4 E-Government Act [E-Government-Gesetz]) provide proof of unique identification of a natural person (using source identification numbers (Stammzahlen)) and authenticity of the submission (using a secure electronic signature). The concept "Austrian Citizen Card" does not stand for a specific card provided to each citizen (such as, e.g. a passport). Required information can be stored at any chip card: private bank cards (e.g. ATM bank-cards), signature cards (e.g. A-Trust), membership cards (e.g. OCG card Austrian Computer Society or the Vienna University for Business Administration student card) or the Austrian health insurance "e-card". The latter has the widest spread in the Austrian population, but the citizen card function has to be activated by the card holder.

- When an electronic delivery is requested, the party must be registered in a special delivery service offered by the Austrian Federal Chancellery. This service enables everybody to register online under <https://www.zustellung.gv.at/Zustellservice/processor>. The electronic delivery is free of charge. At the moment only negative certifications (certifications which do not contain any previous conviction) of the criminal record can be delivered electronically. An electronically delivered extract is a legal official notification of the relevant authority in electronic form with a digital signature according to the Austrian Electronic Signatures Act (*Bundesgesetz über elektronische Signaturen*, BGBl I Nr. 190/1999).

4.3.2 Requirements with regard to the personal situation of the candidate or tenderer – non-bankruptcy and financial status (sec. 45 §2 (a-b) of Directive 2004/18/EC)

Prevalence/actual use in calls

As indicated above, this is a common (though not mandatory) requirement in Austrian procurements.

What document (if any) is used?

Austrian tenderers usually have to prove that there is no bankruptcy or clearing proceeding in force against them nor that it has entered into arrangements with the creditors.

Therefore the tenderers have to submit a certificate of registration (*Firmenbuchauszug*) as bankruptcy procedures are registered in the Business Register in Austria. Thus, a certificate of registration shows also the initiation of bankruptcy as well as clearing proceedings. The charges for such a certificate vary from EUR 2.40 to EUR 4.30. In practise, some delay of registration exists.

Further, contracting authorities often demand a statement of the “Austrian institution for monitoring the solvency of companies since 1870” (*KSV 1870*) or similar establishments that also provide information about the financial situation and the payment history of undertakings or give written confirmation that the tenderer is not or was not involved in bankruptcy. The average costs for such a confirmation is 22 EUR. Average waiting time for the confirmation is one week.

Bankruptcies are published in the access-free Austrian databank for edicts (“*Ediktsdatei*” - see: <http://www.edikte.justiz.gv.at/edikte/id/idedi8.nsf/pge>). The contracting authority may use this possibility for relevant information.

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The certificate of registration (*Firmenbuchauszug*) contains among other things the registration number, the commercial name, the legal form, seat and business address, the branch, details about a subsidiary, date of the conclusion of the articles of association, name and birth date of the

entrepreneur respectively the representatives, opening of a bankruptcy or a clearing proceeding; the name and birth date of the liquidators, dismissal or refusal of a bankruptcy petition; etc.

Electronic certificates

The certificate of registration (*Firmenbuchauszug*) can be retrieved online from a database (see e.g. <http://www.jusline.at>) and is issued in electronic form. However, this request cannot be done by the tenderer himself, but only by the Austrian Courts, Austrian notaries and Austrian lawyers. They have to create the technical conditions for the electronic interrogation of certificates at the business register via electronic data processing.

4.3.3 Requirements with regard to the personal situation of the candidate or tenderer – compliance with fiscal and social obligations (sec. 45 §2 (e-f) of Directive 2004/18/EC)

Prevalence/actual use in calls

Attestations demonstrating compliance with fiscal and social obligations are common requirements in Austrian procurements.

What document (if any) is used?

For both requirements (social and fiscal obligations) an attestation exists.

For compliance with social law, Austrian tenderers are usually required to submit the latest extract of account (*letztgültiger Kontoauszug*) of the competent Austrian Social Security Agency (*Sozialversicherungsanstalt*). Upon a request of a party at the Social Security Agency to provide an attestation demonstrating compliance with financial obligations, the agency normally confirms this with a Certificate of Clearance (*Unbedenklichkeitsbescheinigung*). Furthermore it is possible to render equal documents of the competent authorities of the resident country of the tenderer.

For applying this Certificate of Clearance, it is necessary to get in contact with the Regional Health Social Security Agency (*Gebietskrankenkasse*) (via telephone: (+43 1) 60 122-0, fax: (+43 1) 60246-13 or e-mail: office@wgkk.sozvers.at). The precondition for the issuing of this certification is to pay and having paid continuously the social insurance contribution (*Sozialversicherungsbeitrag*) to the Regional Health Social Security Agency (*Gebietskrankenkasse*).

Social security certificates are only available on paper, stamped and carrying a hand written signature. The delivery can take several (2 – 5) days. This depends on the chosen medium of communication. The certificates are free of charge.

With regard to fiscal obligations, the latest debit note (*letztgültige Lastschriftanzeige*) respectively a tax clearance certificate (*steuerliche Unbedenklichkeitsbescheinigung*) of the competent tax authorities can be required, both of which must be requested at the local tax office of the tenderer's jurisdiction, and which have largely the same characteristics as the social security attestation: the document can only be provided in a paper form, stamped and carrying a hand written signature. Foreign tenderers are allowed to provide equivalent documents of the competent authorities of their resident country (also in paper form).

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The certificates identify the issuing authority (including the specific public official), the requesting party, (tax clearance certificate: including Tax Identification number) date and place of issuance, and the requested information (i.e. compliance with fiscal or social obligations). The document is signed by the public official and stamped.

Electronic certificates

The Certificate of Clearance (*Unbedenklichkeitsbescheinigung*) of the Social Security Agency cannot be obtained online.

In contract, the tax clearance certificate can be obtained via „Finanz Online“, the electronic portal of the Austrian Fiscal Authority (*Finanzverwaltung*). Besides professional representatives all citizens as well as businesses and local communities have an access to this online service.

The tax clearance certificate can be filled in and sent to the local fiscal authority via Finance-Online (see <https://finanzonline.bmf.gv.at>; Hotline: 0810 / 22 11 00). The official tax clearance certificate, containing the local fiscal authorities confirmation of the compliance with fiscal obligations can only be provided in paper form. It has to be stamped and carry a hand written signature and can only be sent by mail, which commonly takes 2-5 days.

4.3.4 Requirements with regard to the suitability to pursue the professional activity

Prevalence/actual use in calls

The suitability to pursue a professional activity as indicated through enrolment in a trade/professional register is often asked for in Austrian procurements.

In case of an offer of a foreign tenderer following procedure is requested: A citizen of a member state of the EU or a contracting state of the EEA who exercises activities in this member state of the EU (or the contracting state of the EEA) can obtain acceptance (*Anerkennung*) from the Austrian federal

minister of Economics and Labour to adduce as evidence that these activities are sufficient prove of qualification (sec. 373c GewO) under specific circumstances.

In the case of sec. 373c GewO not being applicable the Austrian Federal Minister of Economics and Labour has to declare the equivalence (*Gleichhaltung*) of the professional qualification of a citizen of a member state of the EU or a contracting state of the EEA with the certificate of competence of the relevant business under specific circumstances (sec. 373d GewO).

What document (if any) is used?

Austrian tenderers regularly have to provide a certificate of registration from the commercial register (*Gewerberegisterauszug*). This certificate costs between EUR 0.58 und 1.45.

For foreign tenderers possibly the notice of acceptance (*Anerkennungsbescheid*) in terms of sec. 373c GewO or the notice of equivalence according to sec. 373d GewO (*Gleichhaltungsbescheid*) has to be provided.

Contents

A certificate of registration of the commercial register includes the person who conducts the trade, the company, the chief executive officer, data of trade licence, data of location, further places of business (*weitere Betriebsstätten*), chief executive officer of a branch, integrated businesses (*integrierte Betriebe*) and qualified employees.

The content of a written notices on acceptance or equivalence are: (1) identification of the issuing authority, (2) date of approval, (3) name of recipient, (4) the judgement of the official notification, (5) name and (6) signature of the civil servant, and (7) the instruction about the person's right to appeal (*Rechtsmittelbelehrung*).

Electronic certificates

The certificate of registration of the commercial register (*Gewerberegisterauszug*) can be issued online from a database (see e.g. <http://www.jusline.at>) and is issued in electronic form.

4.3.5 Requirements with regard to economic and financial standing

Prevalence/actual use in calls

Evidence with regard to economic or financial standing is commonly asked for, in particular by requesting a summary of the turnover (possibly limited to relevant assignments only) or by requesting a copy of the balance sheets, both usually for a period of e.g. the most recent three years. Another possibility for the contracting authority is the demand for bank statements.

What document (if any) is used?

The most commonly requested documents are balance sheets of the tenderer, bank statements (*Bonitätsauskunft*) and a statement of global turnover over the last three accounting years and a certificate of a professional liability insurance. These are documents that the tenderer is typically required to keep at any rate, and are therefore available easily.

The Austrian Business Code (*Unternehmensgesetzbuch; hereinafter: UGB*) contains several disclosure requirements regarding annual accounts, comprising also balance sheets.

The disclosure requirements are:

- In general joint stock companies (*Kapitalgesellschaften*) have to determine the publication of the annual accounts not later than 9 months after the balance sheet date in the commercial register (*Firmenbuch*).
- In addition a public limited company has to determine the publication of the annual accounts not later than 9 months after the balance sheet date in the "*Amtsblatt zur Wiener Zeitung*" (official website for bid invitation: <http://wienerzeitung.at>).
- In small¹⁴ joint stock companies, the legal representatives only have to submit balance sheet and the annex in the business register.

It should be noted that both paper and electronic (available: dataweb.telekom.at) annual accounts are considered as copies, i.e. they are unsigned and unstamped. Thus, an implicit guarantee from the tenderer with regard to their accuracy seems to be presumed.

Contents

The contents vary according to the requested certificate.

Electronic certificates

Lawyers, notaries and courts can – using their access to the business register – retrieve annual accounts via internet and provide electronic documents.

¹⁴ Pursuant to sec. 221 Para 1 UGB, so called "small stock companies" are joint stock companies, which must not exceed two of the three criteria, which are named as follows:

1. 3,65 Mill EUR balance sheet total
2. 7,3 Mill EUR sales revenue in the last 12 months after the balance sheet date
3. in the yearly average 50 employees

Bank statements: “@rating” is a new service to check the creditworthiness of corporations to more secure e-commerce businesses in the internet. Under <http://www.cofacerating.at>, entrepreneurs have the possibility to interrogate for information about other entrepreneurs’ reliability and liquidity worldwide. The data base for this service is provided by the Austrian institution for monitoring the solvency of companies since 1870 (KSV 1870).

4.3.6 Requirements with regard to technical and/or professional ability

Prevalence/actual use in calls

The requirement to demonstrate technical and/or professional ability is a common requirement in Austrian procurements. However, specific certificates are rarely required.

What document (if any) is used?

The documents vary with a view to the content of the award (service; supply; building). sec. 75 Para 5 to 7 BVergG 2006 governs the possible proofs. The contracting authorities cannot demand other documents or proofs as those mentioned in this regulation.

Typically, tenderers are required to demonstrate technical and/or professional ability (among other statements) by rendering a list with the performances of the last three years, details of the technical personnel, certifications about their professional qualification including the qualification of the management and a statement about their technical equipment. However, this information is usually integrated into the main body of the offer in the form of resumes and/or project references. Authentic documents (such as certified diplomas, certified descriptions of products/service or certified references) are usually not requested. Therefore a paper copy is usually sufficient; additionally the contracting authority may require the tenderer to sign/initialise to warrant the certificates authenticity.

The acquisition time and costs of any required document of course varies as the requirement arises.

Contents

Contents vary depending on the requirements. As noted above, typical examples include qualifications, diplomas, product/service descriptions and past realisations.

Electronic certificates

Since there is no systematic practice of requesting certain certificates, it is not possible to assess on a general point of view whether electronic certificates are legally acceptable.

However, it should be noted that in most cases paper copies of the original certificates or statements are sufficient. There seems to be no reason why electronic copies of such documents would not be equally acceptable. If the contracting authority requires the certificates or attestations to be signed, the general principles of the Austrian legal framework for e-procurement and e-signatures should be followed. Thus, a qualified signature seems most suitable to ensure this functionality.

As stated above, in practice this information is usually integrated into the main body of the offer in the form of resumes and/or project references rather than separate authentic documents, and no separate signature is thus required.

4.3.7 Requirements with regard to quality assurance standards

Prevalence/actual use in calls

The requirement to demonstrate compliance with quality assurance standards is an uncommon requirement in Austrian procurements, being mostly limited to procurement with a higher value and/or specific technical nature.

What document (if any) is used?

If included in the call, tenderers are usually required to provide a certificate from an independent accreditation authority. The most common requirement is that the tenderer demonstrates the compliance of his/her products or services with certain standards, typically originating from the Austrian Standards Institute (*Österreichisches Normungsinstitut*; see <http://www.on-norm.at>). Compliance with other standards (specifically ISO standards) might also be required. ISO 9001 is an international reference for quality management requirements in business-to-business dealings. ISO 14000 is enabling organisations to meet their environmental challenges. The accordance of products or services with the standardized norms (ÖNORM; ISO-NORM) can only be confirmed by accredited authorities. The accreditation has to be issued by the Austrian Federal Ministry of Economic and Labour. Examples for such accredited authorities are: TÜV (*Technischer Überwachungsverein*; technical supervisory association), Quality Austria.

The certification confirms the accordance of the product/service with standardised norms.

A certification at the Austrian Standards Institute, which confirms the accordance with ÖNORMs can take several weeks, and costs (depending on the product or service) EUR 520 for the first certification.

A certification of the accordance with ISO-Norms can be gained e.g. at the TÜV¹⁵, Quality Austria. The costs for ISO-Certifications (at each of the institutes) depend on the structure of the enterprise and the

¹⁵ TÜV Süd is an additionally accredited authority for ISO 14000.

labour time of the auditor¹⁶ of the accredited authority. In the average the costs amount to EUR 1.400.- for 8 labour hours of the auditor in an enterprise with 10 employees.

Contents

The ÖNORM-certificate as well as the ISO-certificate is a paper document identifying the origin, the recipient, the nature of the certificate (including the assessed standard), date of testing and issuance, duration of the accreditation, and finally the identification (with signature) of the manager of the certification body.

Electronic certificates

The application for certification can easily be made via internet on <http://www.on-norm.at/publish/41.html>. The provided certificates are usually delivered on paper (with signature) by mail.

The products and services which have already been certified by the Austrian Standards System can be retrieved via internet under http://www.on-norm.at/publish/zert_db_abfrage.html.

4.3.8 Requirements with regard to environmental management standards

Prevalence/actual use in calls

The requirement to demonstrate compliance with environmental management standards is an uncommon requirement in Austrian procurements, being mostly limited to procurement with a higher value and/or specific technical nature.

What document (if any) is used?

If included in the call, tenderers are usually required to provide a certificate from an independent accreditation authority. In such cases the contracting authority has to refer to the Community Eco-Management and Audit Scheme (EMAS) or to environmental management standards based on the relevant European or international standards certified by bodies conforming to Community law or the relevant European or international standards concerning certification. Equal certifications from bodies established in other contracting states of the EEA have to be accepted. The contracting authority also has to accept certifications for equivalent environmental management measures, especially, when the entrepreneur attests to be unable to apply for the certifications requested or to get them within the relevant period.

¹⁶ The auditor checks the conformity of the enterprise with the ISO-Norms. He is delegated by the accredited authority.

In order to comply to the demand of the contracting authority, the tenderer has to prove its compliance with the environmental guidelines either with the ISO-Certification (see above: ISO 14 000), or with an EMAS-Certification. The legal base for EMAS are the EMAS ordinances and its national Austrian implementation, the “*Umweltmanagementgesetz*” (UMG).

If an entrepreneur wants to participate to the EMAS, the following steps are obligatory: Firstly the company has to prepare a declaration, which proves the compliance with environmental guidelines (*Umwelterklärung*). An independent assessor, which is accredited by the Austrian Ministry of Agriculture, Forestry, Environment and Water Management (*Umweltministerium*) is entitled to audit this declaration. He has to declare the validity of the declaration. Secondly the company has to forward the declaration to the expert authority of the federal government in Austria for environmental protection and environmental control (*Umweltbundesamt*), which has to enregister the headquarter of the enterprise in the “EMAS-Register”¹⁷. At last the Certificate as a rule is delivered to the company by mail.

Certification duration and cost depend on the structure of the company.

Contents

The resulting certificate is typically a paper document identifying the origin (the accreditation agency), the recipient, the nature of the certificate (including the assessed standard), date of testing and issuance, duration of the accreditation, and finally the signature on behalf of the accreditation bureau.

Electronic certificates

The application to register the company in the EMAS can be made via internet¹⁸. The European Commission publishes the current version of the “EMAS-Register” once a year in the Official Journal of the European Union. A list for the environment assessors is published twice a year in the OJ. Certificates are delivered in paper form.

4.4 Interoperability

The Austrian e-procurement applications are accessible to foreign and Austrian bidders on equal terms. However it is worth noting that foreign tenderers should acquire adequate bank securities timely. Further, it is important for foreign tenderers to get notices on acceptance or equivalence in accordance to art 373c sqq Austrian Trade, Commerce and Industry Regulation Act (GewO).

¹⁷ The registration in the EMAS-Register is a formal procedure; unlike the ISO 14000 certification, for which the issuing of the certification is sufficient.

¹⁸ http://www.umweltbundesamt.at/fileadmin/site/leistungen/emas/form_Neuangtrag.pdf

In Austria the secure electronic signature (sec. 2 no.3 Signaturgesetz) is basically the only valid way to ensure an authentic and awardable electronically submitted tender.

Problems concerning the secure electronic signature may arise due to the fact that several software-providers offer a secure electronic signature, which conforms to the requirements of the law but may not be sufficiently interoperable. Thus, for uncomplicated electronic communications between the awarding authority and the tenderers, the awarding authority should make sure that the software used by the tenderers provides the required interoperability.

The proposed electronic platform www.pep-online.at might be fully functional in the near future. Full functionality depends on secure electronic signatures and on the provision of electronic certificates, but no formal obstacles exist for foreigners.

4.5 Future trends/expectations

Undoubtedly e-procurement will be enhanced by the continued introduction and use of electronic certificates within the framework of e-government¹⁹ like the projects regarding the use of electronic extracts from penal registers in Austria. Thus, existing practical obstacles to e-procurement might cease to exist quite soon.

An amendment to the BVergG 2006 is envisaged in 2007 but should not contain substantial changes.

The availability of the proposed electronic platform for e-procurement but also other platforms would be a major step for broader use of e-procurement.

4.6 Assessment

In the end, the use of electronic procurement forms is still a rarely utilized opportunity for an affordable, swift and efficient procurement.

Whereas procurement law (BVergG 2006) provides the legal framework for e-procurement, technological and practical obstacles (secure electronic signature, hard- and software adjustments etc.) still hinder a broader acceptance.

In the intermediate-term, a better acceptance of e-procurement in Austria can be envisaged, even if the expected cost reductions will not be apparent in the foreseeable future.

¹⁹ E.g. electronic civil service signature. „Verwaltungssignatur“.

Some encouragement might be the authorisation of using a more cost-efficient signature procedures like the "electronic civil service signature" (*Verwaltungssignatur*) also for the public procurement sector.

5 Belgium

5.1 Public procurement framework

5.1.1 General framework

Like the European e-Procurement Directives, the Belgian public procurement entails two separate frameworks: one for utility services, and one for traditional sectors, with the former being somewhat more flexible.

The basic applicable law is the Act of 24 December 1993 regarding public procurement and certain contracts for works, supplies and services²⁰, which regulates both of these frameworks and contains the general public procurement principles. A new Act of 15 June 2006 carrying the same title will transpose the older Act of 1993. This newer has been adopted and published, but has not yet entered into force.

The law of 24 December 1993 was detailed and executed through a number of Royal Decrees, including in particular:

- the Royal Decree of 8 January 1996 regarding public procurement of works, supplies and services and concessions for public works; this contains specific procedures and regulations for the granting of procurements in the traditional sectors;
- the Royal Decree of 10 January 1996 regarding public procurement of works, supplies and services in the water, energy, transport, mail and communications sectors; this contains specific procedures and regulations for the granting of procurements in the utilities sectors;
- The Royal Decree of 26 September 1996 determining the general rules of execution of public procurements and of concessions for public works; this contains specific rules of execution and general conditions of public procurement.

This legal framework is in principle applicable to all public procurements, including the federal government, communities, regions, provinces, communes, and any associations established by these. Local administrations thus have no regulatory autonomy; any contracting authority wishing to organise a public procurement must adhere to the federal framework.

One of the basic principles of the legal framework is the organisation of a competitive environment, including through a prior publication of procurement opportunities. This typically means that an

²⁰ Wet betreffende de overheidsopdrachten en sommige opdrachten voor aanneming van werken, leveringen en diensten / Loi relative aux marchés publics et à certains marchés de travaux, de fourniture et de services, *Moniteur belge* 22 January 1994

announcement must be published in the Journal of Procurements²¹, which is published on a daily basis (on-line version: see www.just.fgov.be). In compliance with European obligations, procurements with a value exceeding certain thresholds established by Royal Decree are also published in the Official Journal of the European Communities (on-line version: see Tenders Electronic Daily, <http://ted.publications.eu.int>). Notwithstanding this obligation, contracting authorities are of course allowed to publish the procurement through other channels to increase response rates, including by directly contacting potential tenderers, although such announcements may not take place before the legally required information is sent to the legal publication office (*Bulletin des Adjudications/Bulletin der Aanbestedingen - BDA*) or contain more/other information, to ensure fair competition.

In exceptional circumstances prior publication is not required, and the so called 'negotiation procedure without prior publication' can be followed. This can only be done in a limited number of situations indicated in the law, e.g. in procurements beneath a threshold value set by Royal Decree, urgent procurements which could not have been foreseen, or when only invalid offers have been presented in a prior procurement procedure.

In either case, the publication will indicate the administrative requirements to be met, including by naming certificates and statements to be provided by prospective tenderers, and by indicating the specific administration and/or contact person to whom the finalised offer should be provided.

5.1.2 Certificates and statements

The administrative requirements to be met are defined in the Royal Decree of 8 January 1996 and the Royal Decree of 10 January 1996. While these vary depending on the type of procurement (works, supplies or services), the tenderer is commonly required to provide the following documents with regard to the exclusion criteria (which establish a tenderer's eligibility to participate in a call):

- An extract from a penal register, demonstrating that the tenderer:
 - is not in a state of bankruptcy, being wound up or similar status;
 - has not filed for a state of bankruptcy, being wound up or similar status;
 - has not been convicted by a definitive ruling of a crime impairing his professional integrity.
- Statement that the tenderer has not made serious errors in the performance of its professional obligations, or has made serious false statements when providing information.
- Attestation of compliance with obligations under social law;
- Attestation of compliance with obligations under fiscal law;

(art. 17 – 43 – 69) of the Royal Decree of 8 January 1996).

It is worth noting that the contracting authority is free to indicate that it is willing to accept less formal documents as evidence, including declarations on honour.

²¹ Bulletin der Aanbestedingen

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Additionally only a lack of a social security attestation (if requested) must by necessity lead to exclusion; the other requirements only allow (but don't require) the contracting authority to exclude a tenderer.

For foreign tenderers, the Royal Decree provides that equivalent documents delivered by the competent judiciary or governmental body from the country of origin will also be accepted if they adequately demonstrate that the goal of the Decree was met. When the tenderer's country of origin does not deliver such documents, a declaration under oath or a solemn declaration before a judiciary or governmental body, a public notary or a competent professional organisation will also be deemed acceptable.

With regard to selection criteria (which establish the financial and technical suitability of the tenderer), a different set of supporting documents is typically required. These include most notably²²:

- Bank statements, balance sheets and annual accounts of the tenderer, if the publication of balance sheets is mandatory in the tenderer's country of origin;
- Global revenue over the last three accounting years;
- Professional and educational qualifications;
- Statements containing references to works/supplies/services provided in the most recent five years, as evidenced by attestations of acceptance;
- Statements detailing the working equipment to be used by the tenderer;
- Statements detailing the average staffing of the tenderer in the last three years;
- Statement detailing technicians or technical services at the tenderer's disposal.

(art. 18/19 – 44/45 – 70/71) of the Royal Decree of 8 January 1996).

When the tenderer cannot present the required documentation with regards to economical and financial suitability for valid reasons, this may be demonstrated through any other documents which the contracting authority deems suitable.

It is worth noting that the documents pertaining to selection criteria mentioned above are usually²³ not originals in the sense that they carry no signature or seal demonstrating their authenticity. Copies of such documents (which carry no signature or seal themselves) are often submitted in procurement proceedings, and such copies are typically accepted by the contracting authority. This situation is different from most of the exclusion criteria documents (most notably the attestations from penal registers, social security and fiscal documents), which are typically required to be originals, i.e. signed and/or stamped.

This is relevant because there is no reason in principle why an electronic copy would not be equally acceptable as a paper copy. From a legal perspective, problems with electronic documents can only arise if the document is required to be an original.

²² The enumeration is legally binding only for procurements in traditional sectors, but not for procurements in the utilities sectors, where contracting authorities have more liberty to determine suitable evidentiary documents.

²³ Notwithstanding the contracting authority's right to request original documents, e.g. balance sheets or revenue statements which have been certified by an independent auditor.

With regard to verification and language issues, there are no formal rules for verifying the validity of an offer. The contracting authority is thus relatively free to assess the validity and value of the provided evidence. In case of foreign offers or certificates, art. 92 of the Royal Decree of 8 January 1996 allows the contracting authority to demand at any point of the procedure to produce a copy of the tenderer's bylaws, if desired accompanied by a translation by a certified interpreter.

However, as for all decisions, the authority must respect the basic principles of good administrative governance. In practice, that means that any decision to reject certain evidentiary documents must be motivated and transparent. Additionally, the decision must be proportionate. When a contracting authority considers that the provided certificates are incomplete, ambiguous or unclear, it may request clarification from the tenderer rather than rejecting an offer outright. In this way, arbitrary decision making is avoided.

5.2 E-Procurement initiatives and status

5.2.1 General e-Procurement framework and initiatives

As stated above, the act currently in force is the Act of 24 December 1993, as detailed and executed through a series of Royal Decrees.

While part of the Public Procurement Directives have been transposed through these Decrees, full transposition is set to be achieved through the Act of 15 June 2006. However, while this law has been approved and published, it will not enter into force until a time determined by Royal Decree. As a result, the Belgian legal framework has not fully adopted the European Directives.

None the less, a series of initiatives have been taken to create a full e-Procurement platform in compliance with the Directives and the Belgian transposition, in particular through the federal JEPP-platform (<http://www.jepp.be/>), but also on a regional level such as through the PAM platform of the Walloon region (*Publications des Avis de Marches* - <http://avis.marchespublics.wallonie.be/avis.marches.publics/avis.do?action=initIndex>).

JEPP (Joint Electronic Public Procurement) was originally conceived as a public procurement platform for the defence sector only, but has since its conception expanded to include a large number of federal and regional services, allowing public procurement announcements to be published using the standard XML format. Any contracting authority can accede to the JEPP platform voluntarily, which brings the direct benefit for them of cost free publication of procurements. A full list of acceded authorities (including federal and regional public bodies, communes, non profit organisations such as hospitals and universities, and local organisations established by these) can be consulted on-line: <http://www.jepp.be/departement/participatingdepts.aspx>

PAM is a platform functionally comparable to JEPP and is in the process to become available to all the contracting authorities of the Walloon region.

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As in several other EU countries, the implementation process is divided into several modules, to be implemented in stages:

- e-notification: the simple publication and search functionality has currently been integrated in the JEPP-platform. However, the official journal (Bulletin des adjudications) remains the only official publication. The current registration process (which is a low security username/password system) allows tenderers to register their contact details (name, address, phone, e-mail, etc.) and indicate specific fields of interest, including e.g. by category of procurement (works, supplies or services), or in more detail by CPC code (services), by CPA code (supplies) or by NACE code (works). The JEPP platform can then automatically notify the tenderer when a new procurement of potential interest becomes available. As this registration does not require information which is specific to Belgian entities, registration is open to foreigners.
- e-tendering (questions and answers session, submission and opening of proposals) is presently in a pilot phase – see (<https://eten.publicprocurement.be/>) and will be full available by the end of 2007.

The other modules have not yet become operational, and include:

- e-awarding (evaluation of proposals and granting);
- e-auctions: reverse electronic auctions, although a sub-process of e-awarding, are considered a separate module because of their technical complexity;
- e-catalogues (will be operational by the end of 2007);
- e-invoicing and e-payment: these modules will be inserted in the Fedcom project.

The Federal Public Service 'Personnel and Organisation' is responsible for the implementation of the federal project, in close collaboration with Fedict, the Federal Public Service for ICT. A roadmap for the realisation of the aforementioned modules has been written.

The implementation process thus far resulted in a Royal Decree of 18 February 2004 on electronic public procurement, which entered into force on 1 May 2004. This Royal Decree sets the parameters to be used in the finalised e-procurement portal. Interestingly, it also establishes the basic principle that tenderers can never be required to file an offer electronically (art.4); although this is expected to change in some cases after the entry into force of the new law of 15 June 2006 and the related Royal Decrees.

It defines the concepts 'written document' and 'electronic means'. A written document is defined as a series of alphanumeric characters that can be read, reproduced and subsequently communicated. An electronic means is defined as a means using electronic equipment for data processing (including digital compression) and data storage, as well as distribution, transmission and receipt by cable, radio, optic or other electromagnetic means.

The electronic means must at least guarantee that:

- the electronic signature used conforms to the rules of Community and national law on advanced electronic signatures generated on the basis of a qualified certificate and using a secure signature creation device (i.e., a so called qualified signature);
- the precise time of receipt by the addressee can automatically be determined by an acknowledgment of receipt sent by electronic means;
- the integrity of the communication exchanges and of their storage is ensured;
- it can be reasonably ensured that nobody can access any sent requests for participation or proposals before the chosen publication time; and that any violation of this access limitation can be reasonably detected;
- only authorised persons can determine or change the exact moment of opening of the produced data (i.e. the offer);
- access to the produced data at any stage of the procurement process is only possible if all authorised persons act jointly, and at the time that has been chosen;
- the supporting tools and technical characteristics thereof, including any encryption, are not discriminatory and available for all concerned parties; such tools and characteristics must be clearly identified in the call;
- each written document created with electronic means and found to contain a computer virus or other damaging instructions will be put in a security archive without reading the document and will be considered as not having been sent (art. 3).

The legal framework for e-tendering has thus been put into place, and at the federal level a module for the electronic submission of offers has entered the pilot stage. While this functionality is not publicly usable yet²⁴, the pilot has been announced to rely on the e-signature capabilities of the Belgian eID card and on other certificates (PKCS#12) for foreign companies. Thus, foreign entities (which have no realistic manner of acquiring a Belgian eID card) would also be able to electronically file a tender.

JEPP will thus allow fully electronic tendering from late 2007.

On the Walloon PAM platform, the functionality of electronic submission and opening is similarly implemented, but only uses of the e-signature capabilities of the Belgian eID card.

It is however possible (and this frequently occurs in practice, especially for very small procurements) that a call for offers indicates that offers may be submitted electronically, e.g. via e-mail, without implicating the JEPP portal, and without a specific electronic signature being required. As noted above, this can present a problem for the delivery of certain certificates required for exclusion criteria. This issue will be discussed further below.

5.2.2 Administrative simplification for Belgian tenderers

A noteworthy initiative in the field of (e-)Procurement is the Royal Decree of 20 July 2005 modifying the three aforementioned Royal Decrees with regard to public procurement. This Royal Decree aimed at

²⁴ At the time of writing (31/07/2007), <https://eten.publicprocurement.be> allows the user to register using a simple web form. It should be noted that the registration procedure of legal entities currently requires a national register number (*KBO-nummer/numéro BCE*), which requires prior registration in Belgium.

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simplifying administrative procedures in public procurements, by requiring contracting authorities to electronically obtain the commonly required certificates itself, if it is possible to do so without expense.

The Decree inserts a blanket obligation in the affected procedural decrees, and states that when a contracting authority can access electronically and without expense the information or documents required to determine the personal situation and capability of the tenderers, then it must exempt tenderers of presenting such information or documents and acquire them itself. In this case, the contracting authority must also notify the tenderers of this exemption in the original call.

In practice, this means that Belgian tenderers (national and legal persons) are exempt from providing a number of documents, including:

- Social security attestations;
- VAT-registration;
- Annual accounts;
- Global revenue over the last three accounting years.

This is a requirement incumbent on all contracting authorities, both on a federal and on a regional level. Through this Decree, the practical problem surrounding the delivery of those 4 authentic certificates and attestations is solved for Belgian tenderers.

However, while this system eliminates the issue of providing electronic certificates and attestations for most offers submitted by Belgian tenderers, the system is unlikely to have any significant effect for non-Belgian tenderers. After all, the required information will usually be out of the contracting authority's reach for non-national entities (foreign tenderers), so that only Belgian candidates benefit from it.

To partially resolve these issues, the Limosa project²⁵ was recently initiated, aiming to register foreign companies, organisations or self-employed persons wishing to employ someone in Belgium, or wishing to establish themselves in Belgium in order to pursue a temporary or partial activity as a self-employed person. The Limosa application requires temporary/partial employees to register electronically before they can begin any professional activities²⁶. After an electronic registration process, the person receives a username and password which can be used to electronically declare the activity, after which a so called Limosa-1-certificate is issued electronically. This certificate must be printed out and carried at all times by the foreign worker in Belgium.

Limosa is the first electronic registration system for foreign workers in Europe, and it is hoped that the system could serve as a model for a pan-European solution. The system shows potential for extension to other application fields, including e-procurement, as it allows non-national entities to easily register electronically in Belgium, and electronically authenticate themselves thereafter.

²⁵ See www.limosabe.be

²⁶ See also <http://www.law.kuleuven.ac.be/icri/frobben/presentations/20070212.pdf>

5.3 Certificates, attestations and declarations

In this section, we will take a closer look at how the common requirements defined by the e-Procurement Directives are typically met in Belgium.

It should be reiterated that it is a general principle that the contracting authority may only request information of the tenderer insofar as this is useful for the purposes of this tender. To ensure that this principle is observed in practice, a ministerial circular letter²⁷ was issued on 14 April 2007. This letter stated that:

1. The call to tender should state in its invitation that a submission of an offer constitutes an implicit declaration on honour confirming compliance with the exclusion criteria of art. 17 – 43 – 69 of the Royal Decree of 8 January 1996. Thus, no further warranties would be required in this regard.
2. After choosing the best candidate for the procurement, the contracting authority examines the implicit declaration, either by requesting the necessary information itself (if this information is available electronically and free of charge, cf. above) or by inviting the tenderer to submit evidence in whatever form the contracting authority deems suitable.
3. If the results of this examination are negative (i.e. the best candidate does not comply with the exclusion criteria at the time of verification), then the candidate is excluded (no regularisation is possible) and the next best candidate is selected for examination of the exclusion criteria.

Thus, the requirements with regard to exclusion criteria are substantially moderated through this circular letter: in principle only the best candidate needs to provide any information. In this way electronic tendering becomes substantially easier, including for foreign tenderers.

5.3.1 Requirements with regard to the personal situation of the candidate or tenderer – absence of conviction (art. 45 §1 and §2 (c-d) of Directive 2004/18/EC)

Prevalence/actual use in calls

As indicated above, this is a common (though not mandatory) requirement in Belgian procurements. However, in compliance with the circular letter of 14 April 2007, only the best candidate tenderer can be asked to supply specific evidence; other candidates are exempt, as their offer will be considered an implicit declaration on honour of compliance.

²⁷ See <http://www.belgium.be/eportal/application?pageid=contentPage&docId=45838> (Dutch) or <http://www.belgium.be/eportal/application?pageid=contentPage&docId=45840> (French)

What document (if any) is used?

Belgian tenderers are usually required to submit a so called 'proof of sound behaviour and mores' (*bewijs van goed gedrag en zeden / certificat de bonnes conduite, vie et moeurs*), also referred to as an extract from the penal register.

Apart from procurements, the certificate is often requested during job application procedures, specifically when applying for a public function or for a position involving contact with minors.

For natural persons, the certificate is provided by the local commune of domicile. Delivery can vary from instantaneous to 21 days (depending on the commune and certificate type²⁸), and a cost of 5-15 EUR is typically²⁹ charged.

For legal persons, the certificate is delivered by the Attorney-General in Brussels (Federal Public Service Justice, Central Penal Register, Hallepoort 5-8, 1060 Brussel). Delivery is instantaneous and free of charge.

Traditionally, the delivery of such a certificate required the requesting party to present himself physically before the issuing authority. However, natural persons are now often granted the possibility of requesting the certificate electronically, using their eID card. Whether this is possible depends on the person (roll-out of the Belgian eID card is not yet complete), on the commune (not all communes have implemented such a portal), and on the legal status of the requesting party (only natural persons, not legal persons can request the certificate on-line). However, even when the certificate is requested electronically, a paper certificate is delivered.

Contents

The certificate identifies the issuing authority, the requesting party, date and place of issuance, and relevant decisions. The latter includes criminal convictions (which have not been revoked through grace, pardon or rehabilitation), internments, and dispossession of parental authority (by date, jurisdiction, description of facts and final decision). The document is signed by the public official and stamped.

There is no formal validation procedure of the certificate after receipt by the contracting authority. In case of ambiguity, the contracting authority is free to request additional information from the tenderer. The contracting authority may not directly contact the central service of the Penal Register to obtain this certificate without the tenderer's intervention.

²⁸ Belgium has two models: Model one is generic, and Model two is somewhat more in depth. Model two is required when the purpose of the certificate is to demonstrate suitability for working with underage children. Since Model two certificates require more thorough examination, their issuance takes more time.

²⁹ Depending on the commune. In some cases the requesting party will be exempt from payment, including when the certificate is intended for use in job applications.

Electronic certificates

As indicated above, holders of a Belgian eID card can request a certificate electronically, but the resulting document will still be on paper and sent by mail.

However, a pilot project has been initiated in early April 2007, in which the electronic request will result in an electronic (and electronically signed) certificate. The electronic certificate can be requested through a web portal (see e.g. <http://www.stadmechelen.be/eloket/>, the portal of the commune of Mechelen) using the eID card. Following a successful request, a signed PDF-file will be made available to the requesting party via the secured portal, from where it can be downloaded and sent to other parties. The application was created as a joint collaboration between the city of Mechelen, the federal government, IT service provider CIPAL and Adobe. Since the resulting PDF-file was electronically signed by the city of Mechelen, there seems to be no reason to doubt its legal validity. However, it remains to be seen if the project will see significant take-up in other communes, and how the PDF file will be treated in practice by recipients.

Additionally, it is worth reiterating the remaining objections: the electronic certificate can only be issued to natural persons (excluding legal entities) who hold a valid eID card (excluding foreigners who have no permanent residence in Belgium) and who reside in the issuing commune (excluding communes which have not yet established such a service).

None the less, the example set by the application is interesting in its own right, as it replaces the traditional signed and stamped paper document by an electronic equivalent, the validity of which is currently undisputed.

Again, it is repeated that specific documents will only be requested at the final stages of the tendering process, i.e. when the best candidate has already been selected. Thus, tenderers do not need to present any documents with their offers.

5.3.2 Requirements with regard to the personal situation of the candidate or tenderer – non-bankruptcy and financial status (art. 45 §2 (a-b) of Directive 2004/18/EC)

Prevalence/actual use in calls

As indicated above, this is a common (though not mandatory) requirement in Belgian procurements. However, in compliance with the circular letter of 14 April 2007, only the best candidate tenderer can be asked to supply specific evidence; other candidates are exempt, as their offer will be considered an implicit declaration on honour of compliance.

What document (if any) is used?

Belgian tenderers are usually required to submit an attestation of non-bankruptcy, issued by the local commercial courts. Alternatively, formal statements are occasionally also accepted.

Attestations can be requested at the clerk's office of the commercial courts of the jurisdiction where the requesting party is established. Delivery is usually instantaneous, and the court fees of 30 EUR must be paid.

The attestation must be requested in person, and the resulting document bears the stamp of the commercial court and the handwritten signature of the clerk of the court.

Contents

The attestation identifies the issuing authority, the requesting party (including official address and unique enterprise number), date and place of issuance, and contains a declaration that the requesting party has not been declared bankrupt and has not filed for a wind-up.

Electronic certificates

The attestation has no electronic equivalent, and no plans for such an equivalent have currently been announced.

While it might theoretically be possible to replace the paper document with an electronic version that has been digitally signed, one of the main problems is that the originals are stamped by the clerk of the court to confirm the official nature of the document. This role is occasionally played by server certificates issued to an administrative authority, although such solutions are not yet commonplace. However, it should be noted that the law does not appear to mandate the presence of the stamp. None the less, it seems doubtful that the signature of the clerk of the court would suffice if his legal capacity cannot be deduced by the recipient of the document.

Again, it is repeated that specific documents will only be requested at the final stages of the tendering process, i.e. when the best candidate has already been selected. Thus, tenderers do not need to present any documents with their offers.

5.3.3 Requirements with regard to the personal situation of the candidate or tenderer – compliance with fiscal and social obligations (art. 45 §2 (e-f) of Directive 2004/18/EC)

Prevalence/actual use in calls

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Attestations demonstrating compliance with fiscal and social obligations are common requirements in Belgian procurements. In fact, the latter (a social security attestation) is mandatory³⁰ in most³¹ procurements; whereas the fiscal attestations are optional and less universally required.

As indicated above, in compliance with the circular letter of 14 April 2007, only the best candidate tenderer can be asked to supply specific evidence; other candidates are exempt, as their offer will be considered an implicit declaration on honour of compliance.

What document (if any) is used?

For both requirements (social and fiscal obligations) an attestation exists.

For compliance with social law, Belgian tenderers were required to submit an attestation of the Federal Service of Social Security (*Rijksdienst voor Sociale Zekerheid / Office National de Sécurité Sociale*; see www.rsz.fgov.be). The attestation confirms compliance up to the most recent fiscal quarter.

Apart from procurements, the certificate is often requested as a part of auditing procedures.

This attestation can be requested³² via phone, fax or e-mail (for Dutch speaking tenderers: tel. 0032 (0)2 509 32 79; fax. 0032 (0)2 509 31 45; e-mail: ad2-sectieattesten@rsz.fgov.be; and for French or German speaking tenderers: tel. 0032 (0)2 509 32 81 and 0032 (0)2 509 32 82; fax: 0032 (0)2 02 509 36 97; e-mail: dq2-sectionattestations@onss.fgov.be). Attestations can be requested in the Belgian official languages (Dutch, French or German).

Delivery can take several days (2-5 days), depending on the chosen medium of communication. Certificates are free of charge.

Social security certificates are only available on paper, stamped and carrying a hand written signature.

With regard to fiscal obligations, an attestation for direct taxes (the so called form 276C2) and VAT declarations can be required, both of which must be requested at the local tax office of the tenderer's jurisdiction, and which have largely the same characteristics as the social security attestation: the document can only be provided in a paper form, stamped and carrying a hand written signature.

³⁰ As indicated below, this requirement has lost most of its meaning since contracting authorities are required to obtain the certificates directly, without intervention of the tenderer.

³¹ Social security attestations are not required for calls with a value of less than 22.000 EUR.

³²

See <http://www.onssrsz.lss.fgov.be/onssrsz/Algemeen/faqonss.nsf/2d0dd974a70b419ec12566ad0051c485/d986991ae5d2924641256bc7004274bf?OpenDocument>

Delivery varies from commune to commune, typically ranging from instantaneous to one week. Certificates are free of charge.

Typically, these documents may not be any older than 6 months, although this term is not legally mandated.

Contents

The certificate identifies the issuing authority (including the specific public official), the requesting party (including by enterprise number), date and place of issuance, and the requested information (i.e. compliance with fiscal or social obligations). The document is signed by the public official and stamped.

As noted above, under Royal Decree of 20 July 2005 contracting authorities are required to electronically obtain any information themselves if they are capable of doing so without further expense. For most federal and regional procurements, this means that social security certificates are usually no longer asked for; however, it is still common to request certificates with regard to direct taxes and VAT. For smaller contracting authorities (especially local non profit organisations) who may not be able to request the required information without expense, paper certificates may still be required.

Electronic certificates

None of the attestations have an electronic equivalent that is provided to the tenderer, and no plans for such an equivalent have currently been announced.

While it might theoretically be possible to replace the paper document with an electronic version that has been digitally signed, one of the main problems is that the originals are stamped by the public official to confirm the official nature of the document. No digital stamping service is currently in common use in Belgium, so that this attribute is difficult to recreate electronically, even if it could be said to meet legal requirements.

However, since contracting authorities subject to the Royal Decree of 20 July 2005 will use electronic means to directly validate whether the tenderer is in compliance with these requirements, one could argue that in fact electronic attestations already exist and are in common use, in the form of electronic confirmations exchanged between the source administrations and the contracting authority. Of course, these electronic attestations are never delivered to the tenderer himself, which means that they are unavailable for tendering procedures outside of Belgium, for which the paper attestations remain the only option.

Again, it is repeated that specific documents will only be requested at the final stages of the tendering process, i.e. when the best candidate has already been selected. Thus, tenderers do not need to present any documents with their offers.

5.3.4 Requirements with regard to the suitability to pursue the professional activity

Prevalence/actual use in calls

Generic suitability to pursue a professional activity as indicated through enrolment in a trade/professional register is not as often asked for in Belgian procurements as the previous requirements. The main reason for this is likely that all Belgian enterprises are registered in the Crossroads Banks of Enterprises, and the information in this database is freely available on line (see http://kbo-bce-ps.mineco.fgov.be/ps/kbo_ps/kbo_search.jsp?lang=fr&dest=ST). Thus, for Belgian tenderers it is not useful to ask for specific certificates or statements, since the relevant information can be accessed freely using the enterprise's name, address of establishment or unique enterprise number as a search criterion in the on line search engine. The requirement is therefore only useful for larger procurements where a significant number of foreign tenderers might be expected.

What document (if any) is used?

As stated above, Belgian tenderers need not provide any information, since their information can be found using their name, address of establishment or unique enterprise number, all of which should be included in the offer to begin with.

Furthermore, it can even be argued that asking for an extract from Belgian tenderers would not be legal anymore, due to the aforementioned Royal Decree of 20 July 2005. After all, the information is freely available on line, and contracting authorities should therefore be required to access and collect this information themselves.

Contents

No certificate exists; only the information accessible through the aforementioned web site.

Through the website, all basic identification information regarding the tenderer can be accessed, including:

- Full name and legal form;
- Unique enterprise number;
- Seat of establishment and date of establishment;
- Activities according to VAT, social security and tax status;
- Management details, including general managers and daily management;
- Basic financial information, including capital and date of deposit of balance sheets;
- List of establishments on Belgian soil.

Electronic certificates

See above: no official certificate exists; only the information accessible through the aforementioned web site.

5.3.5 Requirements with regard to economic and financial standing

Prevalence/actual use in calls

Evidence with regard to economic or financial standing is commonly asked for, in particular by requesting a summary of the turnover (possibly limited to relevant assignments only) or by requesting a copy of the balance sheets, both usually for a period of e.g. the most recent three years. Other possibilities such as bank statements or insurance extracts are conceivable, but rarely asked for in practice.

Typically, unsigned copies are provided, although it is possible to request audited or initialled documents.

What document (if any) is used?

The most commonly requested documents are balance sheets and annual accounts of the tenderer, and a statement of global or specific revenue over the last three accounting years. These are documents that the tenderer is typically required to keep at any rate, and are therefore easily available.

Annual accounts for Belgian tenderers tend to be copies of the accounts which are annually deposited at the so called Balance Central of the National Bank of Belgium. Electronic copies of these accounts can be retrieved through the web site of the Balance Central in a matter of minutes (see <http://www.nbb.be/PR/Exe/BA/BaSrcN.asp>), or by sending a request by mail or fax. The on line service is not for free, and has two pricing models: either a full subscription of 605 EUR per annum (which allows unlimited consultations), or a limited subscription of 121 EUR per annum with a cost of 2,42 EUR per requested account. Alternatively, paper accounts can be requested without a subscription at a cost of 0,25 EUR per page plus postage.

Obviously, since the accounts are deposited by the tenderers themselves on a yearly basis, they will typically not need to resort to the Balance Central to obtain a copy. However, the Balance Central is relevant for a different reason: since it is an electronically accessible source which can be accessed by contracting authorities, deposited accounts are covered by the aforementioned Royal Decree of 20 July 2005, and contracting authorities are therefore required in principle to access these documents directly, without requesting that the tenderer provides them.

It should be noted that both the paper annual accounts and the electronic version are considered copies, i.e. there are unsigned and unstamped. Their legal value thus mostly originates from the fact that their addition to an offer is an implicit guarantee from the tenderer with regard to their accuracy.

Other documents (bank statements, balance sheets) are also occasionally requested, and also tend to have the status of unauthenticated documentation.

Contents

The annual accounts from the Balance Central typically state

- Full name and legal form;
- Unique enterprise number;
- Seat of establishment and date of establishment;
- Date of approval of the annual account by the management and period covered by the account;
- Management details, including general managers and daily management, and period of appointment;
- Identification of any external auditor or accountant;
- Full balance sheets and financial/fiscal results;

As stated above, neither the paper nor the electronic version contain any stamp or signature.

Electronic certificates

See above: no official certificate exists; only the information accessible through the aforementioned web site. As a result, contracting authorities are in principle required not to request this information from Belgian tenderers, but instead to access it directly.

5.3.6 Requirements with regard to technical and/or professional ability

Prevalence/actual use in calls

The requirement to demonstrate technical and/or professional ability is a common (though not mandatory) requirement in Belgian procurements. However, specific certificates are rarely required.

What document (if any) is used?

Typically, tenderers are required to demonstrate technical and/or professional ability by indicating the profiles of its personnel, their qualifications and past realisations. However, this information is usually integrated into the main body of the offer in the form of resumes and/or project references. Authentic documents (such as certified diploma's, certified descriptions of products/service or certified references) are significantly less common. In such cases a paper copy is usually provided, and the contracting authority may require the tenderer to sign/initialise it to warrant its authenticity.

The acquisition time and costs of any required document of course varies from requirement to requirement.

Contents

Contents vary depending on the requirements. As noted above, typical examples include qualifications, diplomas, product/service descriptions and past realisations.

Electronic certificates

Since there is no systematic practice of requesting certain certificates, it is difficult to assess if electronic certificates are legally acceptable.

However, it should be noted that in most cases paper copies of the original certificates or statements are sufficient, and these are usually not signed. There seems to be no reason why electronic copies of such documents would not be equally acceptable. If the contracting authority requires the certificates or attestations to be signed, the general principles of the Belgian legal framework for e-procurement and e-signatures should be followed. Thus, a qualified signature seems most suitable to ensure this functionality.

As stated above, in practice this information is usually integrated into the main body of the offer in the form of resumes and/or project references rather than separate authentic documents, and no separate signature is thus required.

5.3.7 Requirements with regard to quality assurance standards

Prevalence/actual use in calls

The requirement to demonstrate compliance with quality assurance standards is an uncommon requirement in Belgian procurements, being mostly limited to procurement with a higher value and/or specific technical nature.

What document (if any) is used?

If included in the call, tenderers are usually required to provide a certificate from an independent accreditation authority. The most common requirement is that the tenderer demonstrates the compliance of his/her products or services with certain standards, typically originating from the Belgian Bureau of Normalisation (NBN – see www.nbn.be), which will replace the Belgian Institute of Normalisation (BIN – see www.bin.be) in the course of 2007. Compliance with other standards (specifically ISO standards) might also be required.

Certificates are usually provided by independent accreditation authorities. The two most common examples are the BENOR mark (which is specifically in use in the construction sector; see <http://www.nbn.be/NL/benornl.html>), and more generically BELAC accreditation³³ (BELgian organisation for Accreditation – see <http://www.belac.be/>), which provides certificates attesting the authority to assess compliance with Belgian standards. Only the latter will be examined in more detail below.

Accreditation can take several weeks, and costs 309,06 EUR to file an accreditation request, and 92,72 EUR per hour for an auditor/expert's assessment.

Contents

A BELAC certificate is a paper document identifying the origin (BELAC), the recipient, the nature of the certificate (including the assessed standard), date of testing and issuance, duration of the accreditation, and finally the identification (with signature) of the president of the accreditation bureau³⁴.

Electronic certificates

The provided certificates are usually delivered in paper form, or in unsigned PDF-form. Whether electronic versions can be considered authentic is highly doubtful, as the Royal Decree of 31 January 2006 establishing the BELAC accreditation system requires a signature of the president on behalf of the Bureau (art.7 §5). An electronic signature would thus need to allow the recipient to determine that the signature was placed on behalf of the Bureau, and not in the personal capacity of the signatory.

In practice, as stated above, copies of the certificate are typically deemed sufficient, so that the absence of a signature on the provided document need not be a barrier.

5.3.8 Requirements with regard to environmental management standards

Prevalence/actual use in calls

The requirement to demonstrate compliance with environmental management standards is an uncommon requirement in Belgian procurements, being mostly limited to procurement with a higher value and/or specific technical nature.

What document (if any) is used?

³³ Which has replaced earlier Belgian accreditation systems, including BKO, BELTEST and BELCERT.

³⁴ For an example, see <http://www.stork.com/intermes/Images/TechnicalServices/SMT/Intermes/certificates/cert%20004-test%20n.pdf>

If included in the call, tenderers are usually required to provide a certificate from an independent accreditation authority, or a description of the processes used in their undertakings. Other possibilities are requiring ISO 14001 certification, or certifications of EMAS audits in conformity with Regulation (EEC) No 761/2001 of the European Parliament and of the Council of 19 March 2001 allowing voluntary participation by organisations in a Community eco-management and audit scheme (EMAS)³⁵.

The most common requirement is that the tenderer demonstrates the compliance of his/her products or services through an attestation provided by an accredited organisation (e.g. a BELAC-accredited organisation; see above). A list of such accredited environmental management agencies is published online; see http://mineco.fgov.be/organization_market/accreditation/belcert/pdf/BELAC_6-010_16-01-2006_FNE_EMS.pdf

Certification duration and cost can vary from organisation to organisation.

Contents

The resulting certificate is typically a paper document identifying the origin (the accreditation agency), the recipient, the nature of the certificate (including the assessed standard), date of testing and issuance, duration of the accreditation, and finally the a signature on behalf of the accreditation bureau.

Electronic certificates

The provided certificates are usually delivered in paper form, or in unsigned PDF-form. Whether electronic versions can be considered authentic is doubtful, since there is no way of verifying the origin. None the less, in practice copies of the certificate are typically deemed sufficient, so that the absence of a signature on the provided document need not be a barrier.

5.4 Interoperability

As described above, the main federal e-Procurement system in Belgium is the JEPP platform, with the Walloon region's MAP platform as a second important system. Of the current functionality, publication information is freely accessible, and e-tendering (presently in the pilot stage) will use e-signatures created by the Belgian eID card or by PKCS#12 certificates for foreign tenderers when it becomes fully available in late 2007.

Thus, the platform can be expected to be accessible to all tenderers in the future.

³⁵ See <http://europa.eu/scadplus/leg/en/lvb/l28022.htm>

5.5 Future trends/expectations

As indicated above, the main expectation is the full implementation of the currently inactive modules of the JEPP platform, specifically the e-tendering module which is expected to enter general use in late 2007, and which will permit the use of eID card signatures and PKCS#12 certificates. Thus, the platform will be open to foreign tenderers, although it remains to be seen which PKCS#12 certificates will be supported by the platform.

A secondary trend might be the continued introduction of electronic certificates within the framework of administrative simplification initiatives. As recently witnessed in the pilot projects regarding electronic extracts from penal registers in certain Belgian communes, this is a field which enjoys some interest, and extension of these initiatives to other communes and to other types of certificates seems likely.

5.6 Assessment

Belgian's e-procurement initiatives are still undergoing development, but the full use of the e-tendering module in late 2007 will mean a very significant step forward for e-procurement. Even outside of the JEPP platform, the Belgian government and administration have undertaken significant efforts to reduce red tape and to make public procurements more accessible, including through the Royal Decree of 20 July 2005 (which requires contracting authorities to obtain administrative information themselves if such information is available electronically and free of charge) and through the circular letter of 14 April 2007, which labels any offer (including from foreign tenderers) an implicit declaration on honour of compliance with Belgian exclusion criteria. Thus, Belgian efforts have focused on reducing the need for additional supporting evidence, and on creating a technical platform that makes electronic tendering possible. Depending on the supported PKCS#12 certificates, the JEPP platform should also be freely usable by foreign candidate tenderers.

Specifically with regard to certificates and statements, Belgian procurements are characterised by a fair degree of flexibility, in the sense that the contracting authority has a substantial freedom in determining which certificates and statements are required, and in determining if provided originals or copies (including foreign documents) meet these requirements. The general principles of good administrative governance generally ensure that decisions to reject documents are not made arbitrarily, and that tenderers typically have the opportunity to clarify and/or rectify any issues.

Significant initiatives have been taken in simplifying tendering procedures by eliminating certain certificates and statements that were previously common (or at least by reducing the number of candidates who need to provide such documents, since only the best candidate must provide them), which have been generally received very positively. To some extent, Belgian tenderers have been the main beneficiaries of these rules, since administrations will typically not be able to electronically retrieve certain required certificates for non-national tenderers (e.g. social security attestations, as discussed above). Thus, non-national tenderers will still have to provide such certificates, whereas Belgian ones increasingly do not.

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None the less, the general accessibility of the e-tendering module of JEPP in late 2007 will prove a significant step forward in this regard, as foreign tenderers are expected to be able to submit tenders using PKCS#12 certificates.

In summary, the Belgian e-Procurement framework is not entirely complete as it stands, but current plans to permit full e-tendering are very promising.

6 Bulgaria

6.1 Public procurement framework

6.1.1 General framework

The Bulgarian public procurement entails two separate frameworks: one for the utility services, and one for the traditional sectors. It consists of one primary act and five secondary legislative acts. The general provisions regarding public procurements are stipulated in the Public Procurements Act (PPA), in force as of 1st October, 2004³⁶ and the Rules for its implementation, in force as of 1st July, 2006³⁷. The PPA abolished the old Public Procurements Act, which was in force from June 1999 to October 2004, and in general transposed the EU public procurements legal framework.

Based on the PPA a number of secondary legislative acts were enforced as follows:

- the Rules for the Implementation of the Public Procurements Act (RIPPA) regarding the execution of the PPA provisions, the publication of the information, the circumstances which shall be entered in the Public Procurements Register, the rules for the electronic auctions, the exchange of information during the public procurement procedure etc;
- the Organizational Rules of the Public Procurement Agency³⁸ regarding the structure and the organization of the Public Procurement Agency (Agency);
- the Regulation for Granting Small Public Procurements³⁹ (RGSPP) regarding granting public procurements with a low value;
- the Regulation for Keeping the Public Procurements Register⁴⁰ regarding the register where the information about the public procurements shall be collected and stored;
- the Regulation for Granting Special Public Procurements⁴¹ regarding public procurements related to the security and the defence of the country or related to the trade with weapons, munitions and military equipment.

³⁶ Public Procurement Act/*Закон за обществените поръчки*, promulgated in State Gazette on 6th April, 2004 with last amendments, promulgated in State Gazette on 29th September, 2006.

³⁷ Rules for the implementation of the Public Procurements Act/*Правилник за прилагане на Закона за обществените поръчки*, promulgated in State Gazette on 30th June, 2006.

³⁸ Organizational Rules of the Public Procurement Agency/*Устройствен правилник на Агенцията по обществени поръчки*, promulgated in State Gazette on 23rd March, 2007, with last amendments from 6th October, 2006.

³⁹ Regulation for Granting Small Public Procurements/*Наредба за възлагане на малки обществени поръчки*, valid from 1st January, 2004, with last amendments from 30th June 2006.

⁴⁰ Regulation for Keeping the Public Procurement Register/*Наредба за водене на регистъра за обществени поръчки*, valid from 1st November, 2000.

⁴¹ Regulation for Granting Special Public Procurements/*Наредба за възлагане на специални обществени поръчки*, valid from 1st October, 2004, with last amendments from 23rd January, 2007.

This legal framework is applicable to all public procurements and covers all state authorities, the President of the Republic of Bulgaria, the Bulgarian National Bank, all other state institutions established by a law, the diplomatic and consular bodies, bodies governed by a public law, their associations, public enterprises which provide specific communal services (electricity, water, gas supplies etc.) and non-public enterprises when they on the base of a special or exclusive right perform some activities related to the provision of such specific services. The municipal authorities also must adhere to the general legal framework outlined above.

According to Art. 17 of the PPA the competent authority in charge of implementation of the state policy regarding the public procurements is the Minister of the Economics and Energetics (the Minister). Under the authority of the Minister a Public Procurement Agency (Agency) is founded. The Agency is a legal entity assisting the Minister in relation to his competences regarding the public procurements.

One of the basic principles of the public procurements framework (Art. 2, Para 1 of the PPA) is the transparency and the free and loyal competition. It establishes requirements for prior publication of procurements. This typically means that an announcement must be published on the website of the State Gazette (see <http://dv.parliament.bg>) (Art. 27, Para 2 of the PPA). Notwithstanding this obligation, the contracting authorities are allowed to publish the information about the procurements through other channels to increase response rates, including by directly contacting potential tenderers, although such announcements may not take place before the legally required publication or contain more/other information, to ensure fair competition.

In exceptional circumstances prior publication is not required, and the so called 'negotiation procedure without prior publication' can be followed. This can only be done in a limited number of situations indicated in the law.

In either case, the publication will indicate the administrative requirements to be met, including by naming certificates and statements which must be provided by the prospective tenderers.

6.1.2 Certificates and statements

The administrative requirements to be met are defined in the PPA, the RIPPA and the RGSP. While these vary depending on the type of procurement (works, supplies or services), the tenderer is commonly required to provide the following documents with regard to the exclusion criteria (which establish a tenderer's eligibility to participate in a call):

- Certificate for a good standing or an certificate for the registration of an entity according to its national legislation;
- Statement that the tendered (or its manager/managers or members of its managerial bodies):
 - is not a related person to the contracting authority or its employees on a leading position;
 - has not been sentenced for:

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- a crime against the financial, fiscal or social security system, including money laundering under Art. 253 – 260 of the Criminal Code;
 - a bribe under Art. 301 – 307 of the Criminal Code;
 - a participation in an organized criminal group under Art. 321 and 321a of the Criminal Code;
 - a crime against the property under Art. 194 – 217 of the Criminal Code; or
 - a crime against the economy under Art. 219 – 252 of the Criminal Code.
 - has not been declared insolvent; and
 - is not in a process to be wound up or in similar procedure under its national law;
- Statement that the tenderer (or its manager/managers or members of its managerial bodies):
 - is not under pending procedure for declaring insolvent or in similar procedure under its national law;
 - has not suspended its activity;
 - was not denied the right to practice certain profession or activity;
 - does not have pecuniary fiscal or social security obligations.

The certificate for a good standing is the most commonly required (and mandatory) certificate in Bulgarian procurements. Generally, this certificate is required from each merchant registered in the Bulgarian commercial register as well as other Bulgarian legal entities (for example, non-profit organizations). An equivalent document for the registration and the legal status of the foreign legal entities as excerpt from their commercial or relevant register is also admissible. Instead of a certificate for a good standing the natural persons (except if they are registered as sole traders in the commercial register) shall present a copy of their ID card.

Bulgarian tenderers are usually required to present a copy of such certificate. For procurements with a higher value the contracting authorities require the provision of original certificate or certified copy by a notary public thereof.

The certificate is valid up to 6 months so it must be issued not later than 6 months before its submission. The certificate is provided by the district court of domicile. Delivery typically takes 5 working days and a state fee of 5 BGN (approximately 2.50 EUR) is charged. Since the commercial register is publicly available every person could obtain such certificate for every entity, registered in the register. The certificate identifies the issuing authority, the date and place of issuance and includes the most important elements of the legal status of the entity which concerns (address, representatives etc.). The resulting document bears the stamp of the court and the handwritten signature of the clerk of the court.

At this stage, the certificates for a good standing are issued only as paper documents. However, in practice copies of the certificate are typically deemed sufficient. In case where original certificate need to be presented, it must be submitted during the term for the submission of the offers.

The compliance with the requirements regarding the personal situation, initially the candidates are requested to provide the above listed statements. When a contract will be executed the tenderer shall present to the contracting authority documents issued by the competent authorities and certifying the circumstances declared with these statements.

The provision of the above mentioned documents (if such are requested) is mandatory for each tenderer. For foreign tenderers equivalent documents delivered by the competent judiciary or governmental body from the country of origin shall also be accepted. When the tenderer's country of origin does not deliver such documents as certificate for a good standing, a declaration under oath will also be deemed acceptable if such declaration is valid under the law of the tenderer's country of origin. When such declaration is not applicable the tenderer shall present an official statement executed before judicial or administrative authority, notary or competent professional or commercial authority in the tenderer's country of origin. The foreign offers and certificates must be always accompanied by a translation by a certified interpreter (Art. 56, Para 4 of the PPA).

With regard to selection criteria (which establish the financial and technical suitability of the tenderer, a different set of supporting documents is typically required. These include:

- Bank statements or copy of an insurance for professional liability;
- Balance sheets and annual accounts of the tenderer, if the publication of balance sheets is mandatory in the tenderer's country of origin;
- Overall turnover for the last three accounting years;
- Documents certifying the professional and educational qualifications of the tenderer and leading members of its team;
- List of the technical persons including the persons who are in charge with the quality control;
- Statements detailing the working equipment to be used by the tenderer;
- Statements detailing the average staff of the tenderer in the last three years;
- Statement detailing technicians or technical services at the tenderer's disposal;
- Certificates from accredited institution certifying the compliance of the goods with specific specifications or standards.

Copies of the required documents are often submitted in procurement proceedings and are typically accepted by the contracting authority. In this case an additional statement on each page that the presented copy is a true copy of the original with the stamp and the signature of the tenderer is also required. However in some cases the contracting authority requires an original or certified copies by a notary public of the documents (most notably the attestations from commercial register, court certificates, social security and fiscal documents) to be provided.

This is relevant when the tenderer submits the offer in electronic way. From a legal perspective, problems with electronic documents can only arise if the document is required to be presented in original. In this case the tenderer must additionally present all documents which are not in electronic form (i.e. original paper documents) within the term for the submission of the offers.

With regard to verification issues, there are no formal rules for verifying the validity of the offer. The contracting authority is thus relatively free to assess the validity and value of the provided evidence.

6.2 E-Procurement initiatives and status

The transposition of the Public Procurement Directives including the e-Procurement Directive was a condition for the EU membership of the Republic of Bulgaria. As stated above, the act currently in force is the new Public Procurement Act (PPA) from 2004. The PPA transposes the provisions of the e-Procurement Directives. The rules implemented in the PPA are elaborated on secondary legislative acts – RIPPA, RGSP and the other acts listed above.

The e-Procurement Directives were transposed in the Bulgarian legal framework through its amendment from May 2006. This amendment entered into force a few months later on 1st July, 2006.

The amended legislative act settles several services in relation to the public procurement that could be provided on electronic way:

- e-notification - submission of notification from the contracting authority by electronic means;
- e-tendering – tendering an offer by electronic means;
- electronic auction; and
- dynamic purchasing system.

Since the legal provisions concerning these options are valid from 1st July, 2006 at the present moment no practices for the use of electronic auctions or dynamic purchasing system were found. Regardless the existence of adequate legal regulation, the electronic auctions and the dynamic purchasing systems still do not work in practice.

The main e-Procurement service provided at this moment is the electronic submission of notifications to the Agency. The submission of notifications and other information about the opened public procurement is an obligation for each contracting authority, introduced by PPA and is related to their entering in the Public Procurement Register and to their publication in the official website of the State Gazette.

The contracting authorities may choose from several options for submission of e-notifications. The most appropriate according to the guidelines of the Agency are the use of software application specially developed for this purpose or online submission.

According to the Agency's Annual Report for 2006⁴² the specialized software application, named "Forms Editor"⁴³, is already available for all Bulgarian contracting authorities and may be used for submitting by electronic means of prior notifications and general notifications. This software is also available for free download on the Agency's website. The contracting authorities may also submit notifications directly from the Agency's website through web interface. Except these recommendable options, the contracting authorities may submit documents through email or stored on floppy disks,

⁴² Available only on Bulgarian - <http://www.aop.bg/fckedit2/user/File/bg/agency/aop-god-doc-2006.pdf>

⁴³ „Редактор на форми”

CDs, DVDs etc. In any case, the use of universal electronic signature⁴⁴ is required for submission of a valid electronic notification.

An electronic register for the public procurements is developed at the Bulgarian Public Procurement Agency. The Register is available on the Agency's website and for informational purposes it may be even freely used without any necessity of prior registration. The Register offers options for searching the database under different criteria. More detailed informational services are available after prior registration of the users. Since the access does not require use of any electronic signature, the Register is generally available for foreigners, but its English version is still incomplete. Thus, in practice the Register and the Agency's website cannot be used by persons that do not read the Bulgarian language.

The application of the Register requires usage of universal electronic signature by the contracting authorities for the submission of notifications concerning opening of public procurement procedures.

The website of the Agency is the main resource of information and templates concerning the public procurements in Bulgaria. It is also the access point to the Register and to the web templates for public procurement notifications. Pursuant to the last annual report of the Agency⁴⁵ the further plans are to be developed an electronic public procurement portal.

According to recent information from the Agency, the application available on its website provides the first functionality – e-notification (i.e. the simple publication in the Register and in the website of the State Gazette and search functionality). Furthermore, the second functionality - e-tendering (questions and answers session), is in process of completion. An option for obtaining in electronic form of all the documentation is in a process of development. The Agency website does not allow for full electronic tendering at this point, and offers cannot be electronically submitted through the portal.

The PPA (Art. 57, Para 5) provides that offers could be submitted electronically to the contracting authorities under the terms and the order of the Electronic Document and Electronic Signature Act (EDESA). According to the EDESA the universal electronic signature is the only type of electronic signature which has the effect of a handwritten signature in respect to everyone, unlike the "basic" and the advanced electronic signature which have such an effect only between private persons. Thus, only the universal electronic signature could be used for the submission of an offer. The universal electronic signature shall be considered any qualified electronic signature, the certificate for which is issued by a certification service provider, registered by the Bulgarian Communication Regulation Commission under a special procedure under Art. 34 of EDESA.

The certificates for electronic signatures issued by foreign certification-service-providers may not be applicable when the use of an electronic signature (universal electronic signature) is required. Thus, at this stage, foreign tenderers generally can not submit their offers through electronic means. As mentioned above, in case where the offer is submitted in electronic way, the original paper certificates

⁴⁴ The universal electronic signature is a kind of "qualified" electronic signature which certificate is issued by a certification-service-provider registered at the Bulgarian Communications Regulation Commission.

⁴⁵ Available only on Bulgarian - <http://www.aop.bg/fckedit2/user/File/bg/agency/aop-god-doc-2006.pdf>

and other original documents shall be presented to the contracting authority before the expiry of the term for the submission of the offers.

A noteworthy initiative in the field of e-Procurement is the Electronic Market for Small Public Procurements (<http://smallsrv.minfin.bg/>)⁴⁶ at the Ministry of Finance (Electronic Market). The purpose of the application is to provide available, transparent and competitive operational environment for more effective communication between the tenderers and the contracting authorities. The application provides information about open procedures for small public procurements. The contracting authorities submit this information to the Electronic Market electronically by using a universal electronic signature, and the tenderers have the opportunity to submit their offers through the website of the application. To use the application the tenderers have to be registered in the system and to possess a valid certificate for universal electronic signatures. The application relies only on certificates issued by registered at the Communications Regulation Commission certification-service-providers and is not generally available for non-national tenderers. However, the submission of notification to the application's website does not relieve the contracting authorities to send a notification to the Agency as described above.

6.3 Certificates, attestations and declarations

In this section, we will take a closer look at how the common requirements defined by the e-Procurement Directives are typically met in Bulgaria.

6.3.1 Requirements with regard to the personal situation of the candidate or tenderer – absence of conviction (art. 45 §1 and §2 (c-d) of Directive 2004/18/EC)

Prevalence/actual use in calls

As indicated above, this is a requirement in Bulgarian procurements.

What document (if any) is used?

Bulgarian tenderers are usually required to submit a statement for compliance with this requirement. Furthermore, before the execution of the contract the tenderer is obliged to present a certificate from the competent authorities. Since only natural persons could bear penal liability the certificates for conviction are issued only for them. In case the tenderer is a legal entity, such certificate is required for its managers and representatives – natural persons.

⁴⁶ Small public procurements are public procurements which value low. For example for providing services within the territory of Republic of Bulgaria the limit for small public procurement is 30 000.00 leva (BGN) without VAT.

Apart from procurements, the court certificate for conviction is often requested during job application procedures. Finally, special requirements for absence of conviction are laid down in the Commercial Act regarding the managers and the members of the boards of the legal entities.

The certificate is provided by the regional court of birthplace, but it is also possible to be obtained from any other regional court. For natural persons who are borne abroad or whose birthplace is unknown the competent authority which issues certificates for conviction is the Minister of Justice. Delivery can vary from 3 to 7 days and depends on whether the certificate will be issued by the court of birthplace or other regional court. The cost of 3 BGN (approximately 1.50 EUR) is charged.

Traditionally, the delivery of such a certificate required the requesting party to present himself physically before the issuing authority.

Contents

The certificate identifies the issuing authority, the requesting party (including his/her unique citizenship number), the date and the place of issuance and includes criminal convictions (which have not been revoked through pardon or rehabilitation). The resulting document bears the stamp of the court and the handwritten signature of the clerk of the court.

There is no formal validation procedure of the certificate after receipt by the contracting authority. The contracting authority may not directly contact the court to obtain this certificate without the tenderer's intervention.

Electronic certificates

At this stage, the certificates for conviction are issued only as paper documents. For this reason the certificate for conviction shall be presented in original before the execution of the public procurement contract.

6.3.2 Requirements with regard to the personal situation of the candidate or tenderer – non-bankruptcy and financial status (art. 45 §2 (a-b) of Directive 2004/18/EC)

Prevalence/actual use in calls

As indicated above, this is a requirement in Bulgarian procurements.

What document (if any) is used?

Report on comparison and assessment of eID management solutions interoperability

Bulgarian tenderers are usually required to submit a formal statement for compliance with this requirement. Furthermore, before the execution of the contract the tenderer is obliged to present a certificate, issued by the competent court.

The certificate can be requested from the district court of domicile where the requesting party is established. Delivery is within 7 days, and a fee of 2 BGN (approximately 1 EUR) must be paid.

The resulting document bears the stamp of the court and the handwritten signature of the clerk of the court.

Contents

The certificate identifies the issuing authority, the requesting party (including registered office and company file number), the date and the place of issuance, and contains a declaration that the requesting party has not been declared bankrupt.

Electronic certificates

The certificate has no electronic equivalent at the present moment and it shall be presented in original before the execution of the public procurement contract.

After 1st January 2008 when the new Commercial Register is expected to replace the commercial register at the district courts electronic certificates for all circumstances entered will be issued.

6.3.3 Requirements with regard to the personal situation of the candidate or tenderer – compliance with fiscal and social obligations (art. 45 §2 (e-f) of Directive 2004/18/EC)

Prevalence/actual use in calls

Statements for the compliance with fiscal and social obligations are requirements in Bulgarian procurements.

What document (if any) is used?

Bulgarian tenderers are usually required to submit a declaration for compliance with this requirement. Furthermore, before the execution of the contract the tenderer is obliged to present a certificate for absence of fiscal and social obligations issued by the National Income Agency (NIA).

The certificate can be requested at the Territorial Directorate of NIA where the requesting party is established. Apart from procurements, the certificate is used for many other purposes.

This certificate can be requested electronically through an application signed with universal electronic signature. Delivery can take several days (7-14 days), depending on whether the request is submitted to the right Territorial Directorate of NIA. Certificates are free of charge.

The certificates are available either on paper, stamped and carrying a hand written signature or as electronic document, signed with universal electronic signature.

Contents

The certificate identifies the issuing authority, the requesting party (including the unique identification code or the unique citizenship number), the date and the place of issuance, and the requested information (i.e. compliance with fiscal or social security obligations).

Electronic certificates

As mentioned above the certificate has an electronic equivalent that is provided to the tenderer if such is requested. The requesting party shall indicate the way of receiving the certificate. An additional requirement for obtaining an electronic certificate is the possession of a valid universal electronic signature. However, the paper certificates are significantly more often used. Since the submission of public procurement offers on electronic way is not common, the use of such electronic certificates is also not a common practice.

The electronic certificates are signed by universal electronic signature and their validation is through examination whether the certificate of the signature is valid and whether the titular of this signature is the competent authority.

6.3.4 Requirements with regard to the suitability to pursue the professional activity

Prevalence/actual use in calls

Generic suitability to pursue a professional activity as indicated through enrolment in a professional register is not as often asked for in Bulgarian procurements as the previous requirements. The main reason for this is likely that all Bulgarian enterprises are registered in the commercial register and a certificate for a good standing is always required for the public procurement procedure. The requirement is therefore only useful for procurements where a specific professional capacity is needed.

What document (if any) is used?

If it is required by the contracting authority, the tenderers need to prove their suitability to pursue a professional activity. For this purpose they could provide a statement or a certificate issued from the relevant professional register, or to present other appropriate evidences.

Contents

The content of such certificates varies depending on the issuing authority. However, for the procurement purposes such certificate shall identify the issuing authority, the requesting party, the date and the place of issuance and statement whether the requesting party is entered in the relevant register or not.

Electronic certificates

Whether the certificate will have an electronic equivalent or not depends on the issuing authority. However, in order to be used for procurement purposes the electronic certificate shall be signed with valid universal electronic signature.

6.3.5 Requirements with regard to economic and financial standing

Prevalence/actual use in calls

Evidence with regard to economic or financial standing according to the PPA are bank statements or professional insurance extracts, summary of the overall turnover (possibly limited to relevant assignments only) or a copy of the annual financial report or of some of its parts, both usually for a period of e.g. the most recent three years. However, in case the tenderer can not provide such evidences other kind of documents could be also admitted by the contracting authority.

Typically, copies certified with an additional statement that they are true copies of the original, signed and stamped by the tenderer are provided.

What document (if any) is used?

The most commonly requested documents are the annual financial reports of the tenderer and a statement for its overall or specific turnover for the last three fiscal years. These are documents that the tenderer is typically required to keep and are therefore easily available. Regardless the fact that some of the potential tenderers are obliged to provide their annual financial reports to the commercial register, the contracting authorities do not obtain a copy of these documents from the register but directly from the tenderer. However, the new Commercial Register⁴⁷ shall provide online access to the annual financial reports presented by the merchants and the contracting authorities shall request the

⁴⁷ The new Commercial Register shall replace the commercial registers at the district courts after 1st January, 2008. However, the start of the new register was already postponed several times.

tenderer to provide them with a copy of its annual financial reports only if they are not available in the new Commercial Register.

Statements for the overall turnover are also occasionally requested and tend to have the status of unauthenticated documentation. Furthermore, original bank statements, stamped and signed, issued from the bank of the tenderer are requested too.

The acquisition time and costs of any required document varies from requirement to requirement.

Contents

Contents vary depending on the requirements.

The content of the annual financial reports - one of the most common requirements with regard to economic and financial standing, is determined in the Bulgarian Accountancy Act⁴⁸. The annual financial report contains balance sheet, report of the incomes and expenditures, report of the cash flow, report of the own capital and attachments. The annual financial report includes the names of its compliers (accountants) and the names of the managers and the representatives of the enterprise who shall signed it. The company's stamp and the stamp of the accounting company are also required.

Electronic certificates

No official electronic certificate exists at the present moment.

6.3.6 Requirements with regard to technical and/or professional ability

Prevalence/actual use in calls

The requirement to demonstrate technical and/or professional ability is a common requirement in Bulgarian procurements. However, specific certificates are rarely required.

What document (if any) is used?

Typically, tenderers are required to demonstrate technical and/or professional ability by indicating the profiles of its personnel, their qualifications and past realisations. However, this information is usually integrated into the main body of the offer in the form of resumes and/or project references. Authentic documents (such as certified diploma's, certified descriptions of products/service or certified

⁴⁸ Закон за счетоводството/Accountancy Act.

references) are significantly less common. In such cases a paper copy is usually provided, and the contracting authority may require the tenderer to sign/initialise it to warrant its authenticity.

The acquisition time and costs of any required document varies from requirement to requirement.

Contents

Contents vary depending on the requirements. As noted above, typical examples include qualifications, diplomas, product/service descriptions and past projects.

Electronic certificates

Since there is no systematic practice of requesting certain certificates, it is difficult to assess if electronic certificates are acceptable. However, in case the electronic certificate is signed with a universal electronic signature, it shall have the same legal value as its paper equivalent – signed and stamped.

It should be noted that in most cases paper copies of the original certificates or statements are sufficient. There seems to be no reason why electronic copies of such documents would not be equally acceptable. If the contracting authority requires the certificates or attestations to be signed, the general principles of the Bulgarian legal framework for e-procurement and e-signatures should be followed. Thus, a universal electronic signature seems most suitable to ensure this functionality.

As stated above, in practice this information is usually integrated into the main body of the offer in the form of resumes and/or project references rather than separate authentic documents, and no separate signature is thus required.

6.3.7 Requirements with regard to quality assurance standards

Prevalence/actual use in calls

The requirement to demonstrate compliance with quality assurance standards is an uncommon requirement in Bulgarian procurements, being mostly limited to procurement with a higher value and/or specific technical nature.

What document (if any) is used?

If included in the call, tenderers are usually required to provide a certificate from an independent accredited organization or agency for quality management. The most common requirement is that the tenderer demonstrates the compliance of his products or services with the Bulgarian State Standards. Compliance with other standards might also be required.

Certificates are provided by independent organizations that are accredited by the Bulgarian Service for Accreditation or by foreign accreditation body, member of the European Cooperation for Accreditation.

The acquisition time and costs of any certificate depends on the particular requirements with regard to the quality standards. However, generally the tenderers present copies of certificates which are required for their main activities and are issued before the opening of the procurement procedure.

Contents

The resulting certificate is typically a paper document identifying the origin, the recipient, the nature of the certificate, the date of testing and issuance, the duration of the accreditation, and finally the a signature on behalf of the accredited organization.

Electronic certificates

Generally, the electronic certificate shall be signed with universal electronic signature.

6.3.8 Requirements with regard to environmental management standards

Prevalence/actual use in calls

The requirement to demonstrate compliance with environmental management standards is an uncommon requirement in Bulgarian procurements, being mostly limited to procurement with a higher value and/or specific technical nature.

What document (if any) is used?

If included in the call, tenderers are usually required to provide a certificate from an independent accredited organization. The certificate shall demonstrate the compliance of the tenderer's services with certain environmental management.

Certification duration and cost can vary from organization to organization.

Contents

The resulting certificate is typically a paper document identifying the origin, the recipient, the nature of the certificate, the date of testing and issuance, the duration of the accreditation, and finally a signature on behalf of the accredited organization.

Electronic certificates

Generally, the electronic certificate shall be signed with universal electronic signature.

6.4 Interoperability

As described above, the existing e-Procurement applications in Bulgaria are generally not available for non-nationals. At this stage, when the main functionality of the Agency's website and of the integrated in it Register is the e-notification, as a main barrier can be considered the lack of English version of these online resources.

Furthermore, while the current functionality is technically accessible to non-nationals, the use of the future functionalities will depend on universal electronic signatures. Regarding the current e-signature legal framework this will render the e-procurement functionalities non-accessible to foreigners. Since receipt of the required certificates for universal electronic signatures would imply prior face to face identification, it seems unlikely that non-nationals without address in Bulgaria will have opportunity to submit offers or to communicate with the Bulgarian contracting authorities electronically.

6.5 Future trends/expectations

As indicated above, the main expectation is the implementation of the currently inactive functionalities for questions and answers and for obtaining the procurement's documentation electronically. While these functionalities will initially be available only on Bulgarian, it remains to be seen if/how the application can be opened to non-national tenderers.

A future trend will be the implementation of the new E-Governance Act which will reform the current administrative practices, particularly regarding the issuance and the acceptance of electronic certificates, attestations and other documents. Pursuant to the E-Governance Act a significant part of the required documents shall be obtained *ex officio* by the contracting authorities directly from the relevant authority which is primary data administrator of the required information. Thus the provision of certain certificates from Bulgarian tenderers will become unnecessary.

Another recent expectation to be noted is the new electronic Commercial Register. Since the Register will be available for all contracting authorities, they will be able to obtain all information entered in it directly from its official website. Furthermore the contracting authorities will be obliged to obtain the relevant information for the tenderer directly from the Commercial Register only on the base of the tenderer unique identification code.

6.6 Assessment

Bulgarian's e-procurement initiatives are still in an early stage, since the website of the Agency does not yet allow for much of the functionalities prescribed in the e-Procurement Directives. It remains to be seen whether the future implementation will meet the end users' needs, and in particular if and how the system will be made accessible to non-nationals. However, the requirement a universal electronic signature to be used for the communication with the state and municipal authorities will render the e-procurement functionalities inaccessible to foreigners.

Specifically with regard to certificates and statements, the Bulgarian procurements are characterised by a fair degree of flexibility, in the sense that the contracting authority has a substantial freedom in determining which certificates and statements are required, and in determining if provided originals or copies (including foreign documents) meet these requirements.

Unfortunately, the possibilities of the e-Procurement are still not used in practice. The submission of offers by electronic means is not a popular practice and some of the contracting authorities still are not ready to accept such electronic offers.

In summary, the Bulgarian e-Procurement framework is still incomplete. Regarding the foreign tenderers not only the e-Procurement framework but also the improvements of the e-signatures legislation will be of key importance for the accessibility of the e-Procurement functionalities.

Finally, the forthcoming reform in the Bulgarian administrative practice which will be introduced by the new E-Governance Act will generally alternate the existing public procurement practices.

7 Croatia

7.1 Public procurement framework

7.1.1 General framework for public procurement

The Public Procurement Office of the Government of the Republic of Croatia is a professional service of the Government of the Republic of Croatia authorised to implement, supervise and enforce the Public Procurement Act and other subordinate legislation in the field of public procurement.

Prior to the foundation of the Public Procurement Office, based on the Regulation establishing the Public Procurement Office adopted in 2003 (Official Gazette 179/03), activities from the scope of the Public Procurement Act (Official Gazette 117/01) had been performed by the Department for Public Procurement within the Ministry of Finance. As it was necessary to provide human and technical resources to meet the new needs and requirements the Public Procurement Office moved from the building of the Ministry of Finance to the new facilities on 1 September 2005. At the meeting held on 4 August 2005 the Government of the Republic of Croatia adopted the Regulation on amendments to the Regulation establishing the Public Procurement Office of the Government of the Republic of Croatia (Official Gazette 98/05 hereinafter: Regulation) upon which, for the purpose of performing the activities within the scope of work of the Office, the following internal organisational units were formed: the Department for Supervision of Public Procurement Procedures, the Department for the Development and Improvement of the Public Procurement System and the International Relations Department.

According to the said Regulation, the Department for Supervision of Public Procurement Procedures supervises the enforcement of laws and subordinate legislation in the field of public procurement. It systematically monitors the regularity of regulations enforcement, provides expert assistance for the purpose of uniform action in the enforcement of supervision and gives instructions and opinions to parties obliged to adhere to the Public Procurement Act. The department also submits motions for the initiation of misdemeanor procedures to the misdemeanor court, as well as motions for the initiation of criminal procedures to the Public Prosecution Service of the Republic of Croatia.

The Department for the Development and Improvement of the Public Procurement System collects, processes and analyses public procurement data, develops and maintains the website of the Office, maintains the data-base of the Office, prepares and implements the education programs for the benefit of the parties concerned and promotes the system of public procurement by holding seminars and giving professional advice.

The International Relations Department participates in the work of international institutions in the field of public procurement, performs the activities of international cooperation directly or in cooperation with the relevant bodies of the Republic of Croatia. It organises, prepares, implements and coordinates international projects in the field of public procurement, coordinates and monitors the alignment of the Croatian legislation in the field of public procurement with the *acquis communautaire* of the European Union, and draws up the required reports, maintains contact with international institutions and organizations accredited in the Republic of Croatia.

Report on comparison and assessment of eID management solutions interoperability

The Regulation establishing the Public Procurement Office was adopted in 2003 and revised and amended by the Regulation on amendments to the regulation establishing the Public Procurement Office of the Government of the Republic of Croatia, which came into effect on 10 August, 2005. Article 5a defines the scope of work of the Department for Supervision of Public Procurement Procedures as follows:

- supervising the enforcement of laws and other subordinate legislation in the field of public procurement,
- systematically monitoring the regularity of the regulations enforcement,
- maintaining the prescribed registers,
- drafting proposals of administrative acts,

- providing expert assistance for the purpose of uniform action in the enforcement of supervision and in that regard giving instructions and opinions to parties obliged to adhere to the Public Procurement Act,
- submitting motions for the initiation of misdemeanor procedures to the misdemeanor court or motions for the initiation of criminal procedures to the Public Prosecution Service of the Republic of Croatia,
- participating in the drafting of legislative proposals and the proposals of subordinate legislation in the field of public procurement,
- participating in the preparation and implementation of programs of informing the parties concerned and promoting the system of public procurement in the form of seminars and professional advice,
- engaging in other activities within the scope of work of the Office.

Besides these activities, the Public Procurement Office had also been issuing prior approvals for Direct Negotiations according to the article 13 of the Law, until the Act on Amendments to the Public Procurement Act came into effect on 1 October, 2005.

The Department for Development and Improvement of the Public Procurement System engages in the following activities:

- collecting, filing, processing and analyzing public procurement data
- developing and maintaining the web pages of the Office,
- maintaining the data-base of the Office,
- preparing and implementing programs of informing the parties concerned and promoting the system of public procurement through seminars and professional advice,
- participating in the drafting of legislative proposals and the proposals of subordinate legislation in the field of public procurement,
- engaging in other activities within the scope of work of the Office.

Report on comparison and assessment of eID management solutions interoperability

In order to meet the needs for a complete transparency and provide the public with the relevant information, the Public Procurement Office created the web-site⁴⁹ which contains the information such as: general information about the Office, Public Procurement Bulletin, information on appeals procedure, legislation framework, contact information for telephone enquiries available daily between 9am-3pm, useful links etc.

The scope of the work of the Department included preparations of the standard bidding documentation and the preparation of the practical guide for procuring entities regarding the standard bidding documentation.

According to the provisions of the Institutional framework which were in effect until 2003 all activities regarding the public procurement were performed by the Public Procurement Administration within the Ministry of Finance. With regard to the need for the institutional strengthening of the public procurement system as well as the strengthening of the role of the Public Procurement Office, the Public Procurement Office was taken out of the organizational structure of the Ministry of Finance to become a professional service of the Government of the Republic of Croatia.

The State Commission for Supervision of Public Procurement Procedure⁵⁰ was established with the purpose of coordinating the Croatian public procurement system with legal tradition of the European Union, pursuant to obligations arising from the Stabilization and Accession Treaty.

The State Commission was established by the Act on the State Commission for Supervision of Public Procurement Procedure (Official Gazette, No. 117/03) as an autonomous and independent national body of second instance which exercises its jurisdiction by deciding on complaints concerning public procurement procedure.

In accordance with its organisation and jurisdiction, it follows that the State Commission has the characteristics of both a judiciary and an administrative body. The principles of legality and transparency, set out in the Public Procurement Act, apply to the structure and practice of the State Commission. Those principles are applied in the State Commission manner of acting and decision making, financing and the manner of members' appointment. The State Commission passes written decisions and conclusions on cases under its jurisdiction at the council meetings.

On the website of the State Commission for Supervision of Public Procurement Procedure one can find information on all aspects of the legal protection system relating to public procurement procedure in the Republic of Croatia.

Besides information on legal protection procedure, laws, EU directives, and useful links, the website provides case-law of both the State Commission and the European Court of Justice regarding public procurement, Registry of administrative procedure cases, et al.

7.1.2 Legal framework

The legal framework for public procurement in Croatia is made up of a number of regulatory texts, specifically:

- Public Procurement Act, Official Gazette, No. 117/01.
- Decision on the proclamation of the act on amendments and records of public procurement, Official Gazette, No. 92/05.

⁴⁹ www.javnabava.hr

⁵⁰ www.dkom.hr

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- Act on the State Commission for supervision over public procurement procedure, Official Gazette, No. 117/03.
- Regulation on announcements and records of public procurement, Official Gazette, No. 14/02.
- Regulation on Amendments to the Regulation on announcements and records of public procurement, Official Gazette, No. 122/05.
- Regulation establishing the public procurement office of the Government of the Republic of Croatia, Official Gazette, No. 179/03.
- Regulation on Amendments to the Regulation establishing the public procurement office of the Government of the Republic of Croatia, Official Gazette, No. 98/05.
- The Regulation on procurement procedures of goods, work and services of lesser value, Official Gazette, No. 14/02.

In accordance with the Law for Public Procurement and its accompanying regulations and ordinances, public procurement announcements have to be published according to specified forms of content and are available on the Internet. There is no specific eProcurement legislation, and the Public Procurement Directives have not been transposed into national law.

7.2 E-procurement initiatives and status

The Public Procurement Office budget for 2005 comprised three activities: administration and management, development of the IT system, and the office equipment. In 2005 the PPO also received a donation of IT equipment.

As the amount of public procurement represents a considerable percentage of Croatia's GDP, the Public Procurement Office will need to intensify activities regarding the development of IT system and e-procurement. The Public Procurement Office will continue with activities regarding data-bases for analytical purposes, improve the system of data exchange and analyse and integrate various existing data-bases containing information about entities obliged to adhere to the Public Procurement Act.

In accordance with the National program for the suppression of corruption in the Republic of Croatia 2006-2008 the Public Procurement Office will complete the preparation and then proceed with the implementation of an e-procurement system. According to the above mentioned program, the Public Procurement Office continuously reports to the Ministry of Justice about all activities stated in the Action plan of the Public Procurement Office, notably the suppression of corruption by monthly completed activities. However, no specific eProcurement platform is in place yet.

The Public Procurement Office published the first draft of the new Public Procurement Act which is planned to be adopted in the beginning of 2008. The new Public Procurement Act will be harmonised with European union legislation. Among others, the novelties are that it will regulate new ways of procurement, competitive talk, e-auctions, e-procurement, new electronic system of public announcements, a unique dictionary of public procurement (CVP), a new system of legal protection, etc. The elevated level of transparency of the whole process of public procurement is one of the

biggest new elements in the draft of the new Public Procurement Act. The new Act will regulate the procedures for launching electronic announcements through a portal for the Official Gazette⁵¹, which will include all procurement above 50 000 kunas. A pilot project for e-Procurement should start in the fall of this year, and will be covered by the new Act. Based on estimates of the calculation of efficiency, the portal will reduce costs by 15%. It will be a long-term project, but Croatia will be able to start it on the basis of the new legal framework which will be provided by the new Public Procurement Act.

7.3 Certificates, declarations and attestations

In this section, we will take a closer look at how the common requirements defined by the Public Procurement Directives are typically met in Croatia.

Tenderers or candidates may participate equally in procurement procedures without limitation pertaining to residence or registered seat, differing national classification of activity, status of legal or natural person and origin of goods. The client shall not reject the tender of a tenderer solely on the grounds that such tenderer's seat is in a country with which the Republic of Croatia has not concluded an agreement on equal rights for tenderers.

The client may not apply discriminatory measures nor limit free market competition between tenderers or candidates, nor demand evidence or apply procedures which would place them in an unequal position, nor demand that they employ national sub-contractors or perform any other operation, export of goods or services, unless specified otherwise by international agreement, treaty or special legislation, in which case the client shall cite the extent of participation by domestic tenderers or candidates or the share of goods or services of domestic origin in the tender documentation. Legal and natural persons who directly or indirectly participate in the preparations for tendering, or among whom there is a co-ownership relation or conflict of interest, may not participate in tendering as tenderers unless their participation is necessary under particularly justified circumstances.

Procurement procedures and utilisation of funds shall be public and transparent. All persons interested in participating in procurement procedures shall be entitled to receive information on procurement procedures pursuant to the provisions.

All tenderers or candidates participating in a tendering procedure shall furnish any such evidence as may be required to demonstrate their qualifications. The client shall not impose any requirements with respect to the qualifications of tenderers apart from those stipulated by the provisions of this Act, nor shall the client set any requirement that may place any of the tenderers at a disadvantage.

The client shall specify in the tender documentation the types of evidence demonstrating the qualifications of tenderers, as well as the conditions and relative weights of specific indicators. Such conditions and evidence of qualifications shall be equal for all tenderers.

⁵¹ www.nn.hr

All evidence shall be attached in its original form or as certified copies.

Each tenderer and candidate participating in a tendering procedure shall demonstrate its: legal capacity; business qualifications; financial and economic qualifications; technical qualifications; absence of a criminal record; qualifications with respect to personnel; professional authorisation – membership in a professional association or registration in a trade register as a condition for participating in the relevant procurement.

Tenderers and candidates participating in a joint tender shall demonstrate their joint qualifications for the overall tender and their multiple qualifications for their respective portions of such tender.

The contracting authority shall exclude any unqualified tenderer from participation in procurement procedures:

1. if bankruptcy proceedings have been initiated against such tenderer, unless there is a final decision confirming the bankruptcy plan;
2. if such tenderer undergoes liquidation proceedings or has terminated its operations;
3. if a final sentence has been passed in criminal action against the responsible officer in the past five years, such sentence being connected with its business activity;
4. if the authority can prove that such tenderer or candidate has failed to duly fulfil any obligation previously assumed in a contract as the result of a serious professional omission;
5. if such tenderer has failed to fulfil any of his tax liabilities or obligations related to pension or health insurance;
6. if such tenderer has failed to provide any information or has provided necessary evidence on the qualifications any false information or made any false statement or concealed any information in connection with its qualifications or goods, services or works to be supplied; or
7. if such tenderer has failed to meet other requirements related to its professional authorisation.

The new Public Procurement Act will regulate new ways of procurement, competitive talk, e-auctions, e-procurement, new electronic system of public announcements, unique dictionary of public procurement (CVP), new system of legal protection, etc. It will e-procurement in a way that in tendering procedure there would have to be mentioned if the documents will be given through electronic way or by mail in written. And if the documents and the offer itself will be submitted through an electronic they all would have to be signed with an advanced electronic signature.

7.3.1 Requirements with regard to the personal situation of the candidate or tenderer – absence of conviction (art. 45 §1 and §2 (c-d) of Directive 2004/18/EC)

A tenderer demonstrates this requirement with an extract of judicial record (certificate of non conviction). A convicted participant will be automatically excluded from participation and any possible awards will be nullified.

A certificate from the court register and professional or trade registers kept in the country of domicile, or any such other certificate or statement issued in place of a certificate as may be required in the country of domicile must be provided.

Also, a certificate of no criminal record regarding participation in a criminal organisation, corruption, fraud or money-laundering, certified by the competent authority, in which case the tenderer's responsible officer gives a statement for himself and for the legal person. The certificate ascertains that a natural or legal person was or was not found guilty for a crime by a definite ruling.

Electronic certificates

No electronic versions of the above mentioned documents are available.

7.3.2 Requirements with regard to the personal situation of the candidate or tenderer – non-bankruptcy and financial status (art. 45 §2 (a-b) of Directive 2004/18/EC)

It is required to have a certificate of the tax authority on the state of debt issued by the competent pension and health insurance institutions, a statement issued by the tax authority or any equivalent document as may be issued in the country of domicile.

If no certificates, debt statements or statements of accounts are issued in a tenderer's country of domicile, the client may request such tenderer to make an appropriate statement before a judicial or administrative body, notary public or any such other competent body of the client's country.

Electronic certificates

You can obtain the documents providing financial information and business success through an electronic service WEB-BON⁵² at FINA⁵³ (Croatia financial agency) versions of the above mentioned documents are available. In this way you can obtain an electronic document which can be presented in electronic format.

7.3.3 Requirements with regard to the personal situation of the candidate or tenderer – compliance with fiscal and social obligations (art. 45 §2 (e-f) of Directive 2004/18/EC)

⁵² <http://bon.fina.hr>

⁵³ www.fina.hr

To prove the personal situation of the candidate or tenderer they need to provide the evidence demonstrating due fulfilment of tax liabilities and payment of pension and health insurance contributions which shall not be older than 30 days counting from the date on which the invitation to tender was released, whereas other evidence shall not be older than six months.

Electronic certificates

No electronic versions of the above mentioned documents are available.

7.3.4 Requirements with regard to the suitability to pursue the professional activity / Requirements with regard to technical and/or professional ability

For technical and personnel-related qualifications, tenderers are required to provide, depending on the nature, scope or importance or purpose of the works, goods or services:

- a list of contracts:
 - of works performed in the past five years, with certificates issued by the contracting authority on satisfactory performance of such works, including the value, date and place of performance of the works, and information whether they are completed and performed according to the rules of the profession;
 - on supply or services, concluded in the past three years, including the value, date and name of the contracting authority with a certificate issued by the contracting authority on duly performed contractual obligations,
- a list of expert persons or expert services, especially those responsible for quality control, available to the tenderer or candidate;
- a description of technical plans and measures for quality assurance, and research plans of the tenderer;
- evidence on the verification of production or technical capacities, a study and research or available control measures, if necessary, if the object of procurement is complex or serves for special purposes, and which evaluation is performed by the contracting authority or it is performed on his behalf by the competent official authority of the country in which the tenderer has registered office;
- a list of employees of the provider of services or contractor with their educational and professional qualifications, and the qualification of the person(s) responsible for providing services and managing works;
- a statement about environmental management measures, only in appropriate cases for works or services to be applied by the tenderer or candidate during performance of a works contract or a services contract;
- a statement on the average annual number of employees of the candidate or tenderer of works or services, and on the number of persons in the management in the past three years;

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- a statement with the list of tools, facilities or technical equipment available to the candidate or tenderer of services or works;
- a statement about the part of the contract that the tenderer intends to assign to subcontractors;
- in view of the type of goods which are the object of procurement:
 - samples, descriptions and/or photographs, whose authenticity has to be confirmed, if requested by the contracting authority;
 - certificates issued by the relevant quality control institutions, confirming the compliance of the products with the technical specifications and norms.

Electronic certificates

No electronic versions of the above mentioned documents are available.

7.3.5 Requirements with regard to economic and financial standing

Depending on the nature of the object of procurement, it is required to have:

- an appropriate bank or some other financial instrument to attest to the reliability of the tender, to guarantee the performance, or to attest to coverage of professional liability,
- the profit and loss account or balance sheets or parts thereof, if the mentioned financial statements are mandatory in the tenderer's or candidate's country of registered office,
- financial statements showing total annual earnings in the past three financial years, depending on the date of establishment or the beginning of activity, if the said data are accessible.

Electronic certificates

No electronic versions of the above mentioned documents are available.

7.3.6 Requirements with regard to quality assurance standards

Technical requirements regarding goods, services or works to be procured shall constitute an integral part of tender documentation and shall be determined by technical specifications and national standards applicable in the Republic of Croatia. Such specifications and standards shall be based on European standards and technical approvals or, in exceptional circumstances, on a certain non-standard feature.

The provisions of these shall not apply:

- if they are inapplicable due to incompatibility with existing equipment;
- if there is no way to establish compliance with the aforementioned standards;
- if goods, services or works to be procured are innovative and unsuitable for the use of existing standards;
- if the application of such standards would put into question the mutual recognition of equivalent approvals for specific types of telecommunications equipment or those in the fields of information technology and telecommunications.

In order to describe goods, services or works to be procured, generic descriptions and requirements shall be used regarding quality, safety, denotation, testing, testing methods and packaging. The client shall not use technical specifications requiring goods of a particular make or origin, which may favour certain tenderers.

The Croatian Standards Institute (HZN – Hrvatski zavod za norme⁵⁴), which is responsible for standardization in the Republic of Croatia, began operating in July 2005, following the Croatian legislature's compliance with European regulations in the area of standardization, accreditation and metrology. Organizations such as the European Committee for Standardization (CEN), European Committee for Electrotechnical Standardization (CENELEC) and the European Telecommunications Standards Institute (ETSI) are responsible for standardization in the European Union. World standardization organizations are the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC).

If so required by circumstances, goods, services or works to be procured may also be described by drawings, samples or in any such other manner, provided, however, that such drawings or samples are delivered together with the tender and are clearly designated as forming a part thereof.

If options or alternative tenders are allowed, the client shall specify so in tender documentation and determine minimum technical requirements to be met by such tenders, as well as the methods of their comparison and evaluation.

Electronic certificates

No electronic versions of the above mentioned documents are available.

7.3.7 Requirements with regard to environmental management standards

⁵⁴ See www.hzn.hr

If included in the call, tenderers are usually required to provide a certificate from an independent accreditation authority, or a description of the processes used in their undertakings. Other possibilities are requiring ISO 14001 certification, or certifications of EMAS audits in conformity with Regulation (EEC) No 761/2001 of the European Parliament and of the Council of 19 March 2001 allowing voluntary participation by organisations in a Community eco-management and audit scheme (EMAS)⁵⁵.

In cases when the client requires a certificate of quality and the presentation of certificates issued by independent authorised bodies on the basis of European standards, the client shall be obliged to accept the equivalent certificates issued by other authorised bodies of the European Community member states. The client shall accept any other form of evidence of quality assurance measure if the tenderer demonstrates that it not in a position or has no right to seek the aforementioned certificates.

Quality certificates may be required from a tenderer only if such request is justified by the nature of goods, services or works to be procured, and in accordance with such tenderer's interests regarding the protection of its own technical or business secrets. The client may request any tenderer to supplement or explain the attached certificates within a reasonable period.

Electronic certificates

No electronic versions of the above mentioned documents are available.

7.4 Interoperability

As noted above, Croatia does not have any specific e-Procurement system in place yet, and interoperability is therefore not yet a concern.

By broadening the integration processes in the EU, where Croatia currently has the status of a candidate country, a need has arisen for the implementation of Pan European public administration services. The objective of the EU IDABC programme⁵⁶ is to establish a framework which will enable a harmonious delivery of Pan European e-public services among public administrations of member states. By participating in this programme, Croatia is getting involved in the process of developing its e-Public Administration programme in the European Union and the European Interoperability Framework. Within the framework of the implementation of the European Commission Action Plan for electronic procurement, activities in the development of open technical specifications, technical and functional requirements for information systems for electronic public tenders began in 2006.

In order to make the information, issued by bodies of government administration on their Internet pages, accessible to all citizens and legal entities under equal conditions, regardless of the platform used in their work, it is essential that the Internet pages abide by open internet standards, that is, that

⁵⁵ See <http://europa.eu/scadplus/leg/en/lvb/l28022.htm>

⁵⁶ europa.eu.int/idabc/

they are not specially adjusted to any individual application for content reading. Furthermore, internet pages must provide the content accessibility to persons with special needs, considering that these people will have most difficulties in using public administration services through the traditional communication channels.

The Croatian government is aware of these concerns, and is taken interoperability concerns into account in the development of its future eProcurement plans.

7.5 Future trends / expectations

The main expectation is the implementation of the e-Procurement Directives at the end of 2007, and the creation of an e-Procurement platform. No specific details are available yet at this time.

With the purpose of facilitating the process of adaptation, the Croatian State Commission for Supervision of Public Procurement Procedure (the State Commission), together with its twinning partner, the Slovenian National Review Commission for Reviewing Public Procurement Procedure, is realising the CARDS project 'Strengthening the Capacity of the State Commission for Supervision of Public Procurement Procedure'. Its fundamental purpose is to contribute to the development and strengthening of reliable and transparent public procurement system in the Republic of Croatia, through institutional development of the State Commission, and to achieve the highest possible level of accordance with European standards.

The project is divided into three components:

- analyzing and developing legislative framework concerning legal protection in the public procurement system;
- enhancing professional skills and abilities of the State Commission members and employees, as well as the tenderers and clients participating in the public procurement system;
- elevating the level of knowledge on legal protection to all participants in public procurement procedure.

The purpose and aims set above will be accomplished by means of thoroughly planned activities, such as daily consultation of the State Commission members and employees, provision of technical and professional help in laying draft laws and other legal acts relating to public procurement system in the Republic of Croatia, study trips to the EU Member States with the purpose of introducing the best practice model, the State Commission members' and employees' practice with the twinning partner, seminars and professional workshops for the public procurement subjects, creation and printing of manuals for the public procurement subjects, creation of data basis containing relevant ECJ decisions, creation of data basis containing decisions passed by the State Commission, etc.

One of the project's essential components is to upgrade the website of the State Commission, which will improve the institution's transparency and facilitate the work of the tenderers and clients participating in the public procurement system by updating information on daily basis and publishing decisions passed by the State Commission.

7.6 Assessment

As regards the award of public contracts, amendments to the Public Procurement Act entered into force in October 2005. Since then, no significant legislative developments have taken place in this sector. In February 2006, a Decision on the working group for drafting the proposal on implementation of the Public Procurement Act was adopted. In March 2006, the working group for drafting the Concessions Act was established within the Ministry of Finance. Some implementing measures were issued during the reporting period.

However, weaknesses in co-ordination of policy making and implementation continue to undermine the coherence of the public procurement system. There is e.g. currently no institutional capacity in the field of concessions, with the exception of a registry on concessions held at the Ministry of Finance.

Some progress has been achieved, but specific gaps remain to be addressed in relation to a number of legislative aspects of public contracts. Alignment with the *acquis* in this chapter is underway, but considerable and sustained efforts are needed on the design of a strategy and strengthening of the institutional set-up.

Among the key measures for increasing Croatia's ICT competitiveness the Council proposes the establishment of electronic public procurement at the national and local level, as well as other electronic services such as e-City and e-Health and the removal of limits on e-business among business entities. Special attention should be given to enhancing the institutional capacity of national ICT industries and directing national ICT agencies to the development of the market.

The development and use of an e-Procurement system is a key priority, but no general system is currently available, nor are electronic certificates currently being used. The programme of e-Procurement is planned to start in the fall of this year, both at the local level and at the national level. In this way the transparency of public procurement and the fight against corruption will be simultaneously enhanced. However, no details are available yet on how electronic certificates or attestations would be handled.

8 Cyprus

8.1 Public procurement framework

8.1.1 General Framework

Public procurement encompasses all purchases by central, regional and local government entities, public institutions and bodies, state-owned or state controlled private companies and, under certain circumstances, private companies operating in the water, energy, transport and telecommunications sectors.

The legislation that is applicable in the award of government contracts consists mainly of the following:

- (a) Coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and related matters Law of 2006⁵⁷
- (b) Coordination of Procurement procedures of entities operating in the water, energy, transport and postal services sectors Law of 2006.⁵⁸
- (c) The Public Procurement Law of 1997 to 2004,⁵⁹
- (d) The Law Regarding Tenders in the Water, Energy, Transport and Telecommunications sectors of 2002 to 2003.⁶⁰
- (e) The Radiocommunications Law⁶¹ which also refers specifically to public procurement issues.

As from May 1st 2004, all companies set up in accordance with the laws of an E.U. member state and having their registered office, central administration, or principal place of business in the territory of the European Union, have free access to the public procurement markets in the Republic of Cyprus. Under the Association Agreement between the European Communities and the Republic, E.U. companies are entitled to be treated as favourably as national companies in procurement procedures.

Furthermore, as from May 1st 2003, there was an abolition of the preferential treatment of local suppliers by any public procurement that is published for works or supply of services to the public sector or to local authorities or utilities.

⁵⁷ Law 12(I) of 2006.

⁵⁸ Law 11(I) of 2006.

⁵⁹ Law No. 102(I)/1997 as amended by Law No. 44(I)/1998, Law No. 103(I)/1998, Law No. 2(I)/1999, Law No. 24(I)/1999, Law No. 32(I)/1999, Law No. 45(I)/1999, Law No. 102(I)/1999, Law No. 40(I)/2000, Law No. 177(I)/2000, Law No. 1(I)/2001, Law No. 33(I)/2001, Law No. 58(I)/2001, Law No. 59(I)/2001, Law No. 51(I)/2003, Law No. 154(I)/2004.

⁶⁰ Law No. 29(I)/2002 as amended by Law No. 52(I)/2003.

⁶¹ Law No. 146(I)/2002 as amended by Law No. 16(I)/2004, Law No. 180(1)/2004 and Law 74(I) of 2006.

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With regards to e-Procurement, the Government of the Republic of Cyprus has since 2003 proceeded with the preparation of an e-procurement project. Within this framework, the Treasury Department has made a relative proposal for the financing of a project through the Transition Facility Funds of the E.U. for the design and development of an information system on e-procurement, implementing electronic public procurement procedures.⁶²

The Coordination of procedures for the award of public works contracts, public supply contracts, and public service contracts Law of 2006⁶³ was enacted on 17 February 2006, for the purposes of harmonization with Directive 2004/18/EC as amended by Regulation 2083/2005/EC. On the same day, the House of Representative adopted the Coordination of the procurement procedures of entities operating in the water, energy, transport and postal services sectors Law of 2006⁶⁴ for the purposes of harmonization with Directive 2004/17/EC as amended by Regulation 2083/2005/EC. This report mainly concentrates on the first law.

It should be noted that the Coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and related matters Law of 2006 abolished the Law on the Award of Contracts (Supply, Works and Services) of Entities Operating in the Water, Energy, Transport and Telecommunications Sectors of 2003 to 2004.⁶⁵ The Coordination of Procurement procedures of entities operating in the water, energy, transport and postal services sectors Law of 2006 abolished the Law on the Award of Public Contracts (Supply, Works and Services) of 2003 to 2006.⁶⁶

These Laws were abolished even though they were fully harmonized with the Classical Directives (92/50/EEC, 93/36/EEC 93/37/EEC as amended by Directives 97/52/EC and 2001/78/EC), the Utilities Directives (93/38/EEC as amended by Directives 98/4/EC and 2001/78/EC) and the Remedies Directives (89/665/EEC and 92/13/EEC).

8.1.1.1 Public Procurement Law

The Public Procurement Law applies only to public contracts that are considered to be confidential⁶⁷ in that they concern the provision of military equipment, relevant material, the award of works by the National Guard or the provision of services relevant thereto.⁶⁸

⁶² Report on Structural Reforms in Cyprus in the Context of the Cardiff Exercise; created October 2003; available from www.mof.gov.cy; accessed 15 February 2005.

⁶³ Law No. 12(I) of 2006.

⁶⁴ Law No. 11(I) of 2006.

⁶⁵ Law No. 100(I)/2003 as amended by Law No. 24(I)/2004 and Law No. 182(I)/2004.

⁶⁶ Law No. 101(I)/2003 as amended by Law No. 23(I)/2004, Law No. 181(I)/2004 and Law No. 16(I) of 2006.

⁶⁷ Section 3

⁶⁸ Section 18

8.1.1.2 Tenders in the Telecommunications sector Law

The Law was enacted for the purposes of harmonisation with Council Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors⁶⁹ and Directive 98/4/EC of the European Parliament and of the Council amending Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.⁷⁰

A. Scope of Application and Thresholds

The Law applies whenever contracting entities exercising certain activities falling within the water, energy, transport and telecommunications sectors, intend to conclude a supplies, works or service contract. In the field of telecommunications, the Law applies to the provision or operation of public telecommunications networks or the provision of one or more public telecommunications services.

The Law does not apply, *inter alia*,

- (a) To contracts concluded by the contracting entity that exercises the activity of providing or operating public telecommunications networks or providing one or more public telecommunications services where the contract concerns purchases intended exclusively to enable them to provide one or more telecommunications services where other entities are free to offer the same services in the same geographical area and under substantially the same conditions;
- (b) To Contracts for voice telephony, telex, radiotelephony, paging and satellite services.

For the Law to apply, the contracts concluded by contracting entities must reach certain thresholds. In the field of telecommunications, the Law applies to contracts the estimated value of which, net of VAT, is equal to or exceeds the equivalent amount in CYP of EUR 600,000 for supply and service contracts and EUR 5,000,000 for works contracts.

B. Procedures for the Award of Contracts

For the purpose of awarding a contract for the provision of telecommunications services, other than voice telephony mobile radiotelephony, paging and satellite telecommunications, as well as for the provision of automatic data processing and associated services, contracting entities may use the open procedure, the restricted procedure or the negotiated procedure as described by the Law, provided that a call for competition has been made.

In some cases contracting entities are afforded the opportunity to use the above procedures without making a prior call for competition, *inter alia*:

⁶⁹ OJ L 199 of 9 August 1993, p. 84.

⁷⁰ OJ L 101 of 1 April 1998, p.1.

- (a) In the absence of tenders or suitable tenders in response to a procedure with a prior call for competition, provided that the original contract conditions have not been substantially changed;
- (b) Where a contract is purely for the purpose of research, experiment, study or development and not for the purpose of ensuring profit or of recovering research and development costs and in so far as the award of such contract does not prejudice the competitive award of subsequent contracts which have in particular these purposes;
- (c) When, for technical or for reasons connected with protection of exclusive rights, the contract may be executed only by a particular supplier, contractor or service provider;
- (d) In so far as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting entities, the time limits laid down for open and restricted procedures cannot be adhered to.

C. Other Provisions

The Law contains detailed and complex provisions regarding the following issues:

- (a) Technical specifications in contest documents;
- (b) Calls for competition;
- (c) Design contests;
- (d) Time limits for the submission of tenders;
- (e) Subcontracting;
- (f) Pre-selection systems;
- (g) Selection criteria in closed and negotiated procedures;
- (h) The submission of tenders by joint ventures (groupings) of suppliers, contractors and service providers;
- (i) Criteria for the award of contracts on the basis of the lowest price only or of the most economically advantageous tender, involving various criteria depending on the contract in question, such as: delivery or completion date, running costs, cost-effectiveness, quality, aesthetic and functional characteristics, technical merit, after-sales service and technical assistance, commitments with regard to spare parts, security of supplies and price;
- (j) Confidentiality of information;
- (k) The exclusion of certain suppliers, contractors and service providers (i.e. due to bankruptcy, dissolution, etc); and
- (l) Cancellation of tenders.

8.1.1.3 The Radiocommunications Law

A. Award of Individual Rights to Use Radiofrequencies

Section 23 of the Radiocommunications Law concerns public tenders for the grant of individual rights of use for radiofrequencies.

B. Public Calls for Tenders

For the purpose of promoting the optimal use of the radio frequencies spectrum, the Minister of Communications and Works may, following a relevant proposal by the Director of Electronic

Communications of the Ministry of Communications and Works (the Director) issue a decision determining the circumstances where public calls for tenders may be invited for the grant of individual rights for the use of radio frequencies, in case the overall demand for radio frequencies for the relevant service or the system in question cannot be met or it is foreseen that such a demand will not be met within a short period of time. The Director is the person responsible for the invitation for and the carrying out of the procedure for the public call for tender on the basis of clear, objective and non-discriminatory rules.

According to this Section, the Council of Ministers may also issue Regulations determining the general criteria which will apply to the selection of authorised undertakings and the evaluation of tenders as well as specific terms for the preparation of public tender documents including, *inter alia*:

- (a) The type of authorisation included in the invitation to tender;
- (b) Proof by the tendering party of his financial standing and technical competence and soundness in relation to the authorisation he requires;
- (c) The geographical area covered by the applicable authorisation;
- (d) The extent to which the public call for tenders shall include all radio frequencies designated in the radio frequency plan for the particular service in question, and

C. Auctions

By virtue of Section 24 of the Law, the Minister may determine the cases where applications for the grant of individual rights of use shall be made by virtue of an auction procedure. The auction procedure involves the submission by the applicant of a bid specifying the amount which he is willing to pay to the Director with respect to the grant of the individual right of use.

In this respect, the Council of Ministers may issue Regulations providing for the issuing and publication of notices by the Director regarding such auctions. Regulations may also prescribe for the grant of the individual rights of use, as well as the terms, conditions and limitations subject to which such individual rights of use shall be issued. In particular, the said Regulations may provide for:

- (a) The requirement that the applicant's bid specifies the amount which he is willing to pay, either as a cash sum or by reference to a variable, or as the amount of a one off payment or as the amount of a periodic payment,
- (b) The requirements, including the technical or financial requirements, requirements relating to the fitness of the applicant to hold the individual right of use and requirements intended to restrict the holding of two or more such individual rights of use by any one person, which must be met by the applicants for the grant of such individual right of use;
- (c) The requirement for any applicant to pay a specified deposit to the Director;
- (d) The specification of the circumstances in which such a deposit is, or is not, to be refundable;
- (e) The fees, the conditions, and limitations subject to which such individual right of use is to be issued;

An individual right of use that has been granted must specify the method used for determining the sum or sums payable in accordance with the applicant's bid for the grant of the individual right of use and the said fees must be paid to the Director by the authorised undertaking.

D. Refusal of the Director to Grant an Individual Right of Use

Section 26 of the Law provides that the Director may refuse to grant an individual right of use where this is in the public interest or in the interest of national security or where there are insufficient radio frequencies available or where the application for the issuing of an individual right of use fails to meet the necessary requirements for the grant of the right.

Where the application for an individual right of use is rejected, the Director:

- (a) Shall inform the applicant for the reasons for the rejection of the application,
- (b) Shall provide the applicant with the opportunity to demonstrate the reasons for which the individual right of use should have been granted,
- (c) May, having taken into consideration the reasons mentioned in paragraph (b), grant the individual right of use under such terms and conditions he may deem necessary,

may, following an examination of the reasons mentioned in paragraph (b), confirm his decision.

8.2 E-Procurement initiatives and status

8.2.1 General e-Procurement framework and initiatives

As mentioned elsewhere in this study, the regulatory framework for eProcurement is in place since 17 February 2006, primarily by means of 2 laws:

- (a) The Coordination of Procedures for the award of public works contracts, public supply contracts and public service contracts Law⁷¹ (hereinafter the '**eProcurement General Law**'), enacted on 17 February 2006, for the purposes of harmonization with Directive 2004/18/EC as amended by Regulation 2083/2005/EC, and
- (b) The Coordination of Procurement procedures of entities operating in the water, energy, transport and postal services sectors Law⁷² (hereinafter the '**eProcurement Services Law**'), enacted for the purposes of harmonization with Directive 2004/17/EC as amended by Regulation 2083/2005/EC.

In addition, the Council of Ministers has issued the Coordination of Procedures for the award of public works contracts, public supply contracts and public service contracts Regulations of 2007⁷³ (hereinafter the '**eProcurement Regulations**').

⁷¹ Law 12(I) of 2006

⁷² Law 11(I) of 2006

⁷³ No. 201/2007, published in the Official Gazette of the Republic on 4 May 2007.

Further to the above, the Auditor General of the Republic acting as the head of the the Treasury Department (the Competent Authority) and on the basis of the powers afforded to her by section 91 of the **eProcurement General Law** issued 2 Orders:

- (a) the Coordination of Procedures for the award of public works contracts, public supply contracts and public service contracts Order of 2006⁷⁴ (hereinafter the '**eProcurement General 2006 Order**') which lists the names of the contracting authorities in the Republic, and
- (b) the Coordination of Procedures for the award of public works contracts, public supply contracts and public service contracts Order of 2007⁷⁵ (hereinafter the '**eProcurement General 2007 Order**').

The Auditor General of the Republic also issued the Coordination of Procurement procedures of entities operating in the water, energy, transport and postal services sectors Order of 2007⁷⁶ (hereinafter the '**eProcurement Services Order**') on the basis of section 75 of the **eProcurement Services Law**, listing the names of the contracting authorities in the Republic within the various sectors concerned.

As can be seen from the above, the Cypriot legal framework has fully adopted the relevant European Directives on eProcurement since February 2006 although the practical framework has not yet been completed.⁷⁷ eProcurement procedures such as framework agreements and electronic auctions will start to apply when the Government issues specific Regulations for this purpose, probably after finalization of the project for the creation of a full e-Procurement platform which will implement the public procurement procedures electronically.

8.2.1.1 Definitions

The definitions given by the eProcurement laws are basically identical to those given by the relevant Directive. Both laws define the term "written" as a series of words or numbers which can be read, reproduced and subsequently communicated. This series may include information which is transmitted and stored by electronic means. Due to the fact that "public contracts" are to be concluded in writing under the Law, it is inferred that they can be concluded by electronic means.

The term "electronic means" is defined as a means using electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means.

⁷⁴ No 470/2006, published in the Official Gazette of the Republic on 20 December 2006.

⁷⁵ No. 136/2007, published in the Official Gazette of the Republic on 28 March 2007.

⁷⁶ No. 37/2007, published in the Official Gazette of the Republic on 19 January 2007.

⁷⁷ See: www.treasury.gov.cy/treasury/treasury.nsf/

The Laws further define the term "dynamic purchasing system" as a completely electronic process for making commonly used purchases, the characteristics of which, as generally available on the market, meet the requirements of the contracting authority.

An "electronic auction" is defined as a repetitive process involving an electronic device for the presentation of new prices, revised downwards, and/or new values concerning certain elements of tenders, which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods.

8.2.1.2 Dynamic purchasing systems

According to section 36 of the **eProcurement General Law**, contracting authorities may use dynamic purchasing systems for concluding public contracts. However, in order for this to be implemented in practice the Law provides that the Council of Ministers must issue relevant Regulations. As mentioned elsewhere, this has not yet happened and it is projected to take place in 2009.

In order to set up a dynamic purchasing system, contracting authorities must follow the rules of the open procedure in all its phases up to the award of the contracts to be concluded under this system. All tenderers satisfying the selection criteria and having submitted an indicative tender which complies with the specification and any possible additional documents shall be admitted to the system. Indicative tenders may be improved at any time provided that they continue to comply with the specification documents of the tender. With a view to setting up the dynamic purchasing system and to award contracts under that system, contracting authorities shall use solely electronic means in accordance with section 48(2) to (5) of the Law.

For the purposes of setting up the dynamic purchasing system, contracting authorities shall:

- (a) publish a tender notice making it clear that a dynamic purchasing system is involved;
- (b) indicate in the specification, amongst other matters, the nature of the purchases envisaged under that system, as well as all the necessary information concerning the purchasing system, the electronic equipment used and the technical connection arrangements and specifications;
- (c) offer by electronic means, on publication of the notice and up to the expiry of the system, unrestricted, direct and full access to the specification and to any additional documents and shall indicate in the notice the internet address at which such documents may be consulted.

A dynamic purchasing system may not last for more than 3 years, except in duly justified exceptional cases. Contracting authorities may not resort to this system to prevent, restrict or distort competition. No charges may be billed to the interested economic operators or to parties to the system.

8.2.1.3 Rules applicable to communication

All communication and information exchange may be by electronic means if the contracting authority so chooses and provided that this means of communication is generally available so as not to restrict economic operators' access to the tendering procedure.

Communication and the exchange and storage of information must be carried out in such a way as to ensure that the integrity of data and the confidentiality of tenders and requests to participate are preserved, and that the contracting authorities examine the content of tenders and requests to participate only after the time limit set for submitting them has expired.

The tools to be used for communicating by electronic means, as well as their technical characteristics, must be non-discriminatory, generally available and interoperable with the information and communication technology products in general use.

The following rules are applicable to devices for the electronic transmission and receipt of tenders and to devices for the electronic receipt of requests to participate:

- (a) Information regarding the specifications necessary for the electronic submission of tenders and requests to participate, including encryption, must be available to interested parties. Moreover, the devices for the electronic receipt of tenders and requests to participate must conform with certain requirements annexed in the Law;⁷⁸
- (b) Electronic tenders must be accompanied by an *advanced electronic signature* in conformity with section 4(1) of the Electronic Signatures Law of 2004;⁷⁹
- (c) The Council of Ministers may prescribe an accreditation scheme aiming at enhancing the level of certification service provision for these devices;
- (d) Tenderers or candidates must undertake to submit, before expiry of the time limit laid down for submission of tenders or requests to participate, the specified⁸⁰ documents, certificates and declarations if they are not available in electronic format.

The following rules will apply to the transmission of requests to participate:

- (a) Requests to participate in procedures for the award of public contracts may be made in writing (including by electronic means) or by telephone;
- (b) Where requests to participate are made by telephone, a written confirmation (including by electronic means) must be sent before expiry of the time limit set for their receipt;
- (c) Contracting authorities may require that requests for participation made by fax must be confirmed by post or by electronic means, where this is necessary for the purposes of legal proof. In this case, any such requirement, together with the time limit for sending confirmation by post or electronic means, must be stated by the contracting authority in the contract notice.

As mentioned above, devices for the electronic receipt of tenders and requests to participate must conform to certain requirements annexed in the Law. Annex IX of the Law provides for the requirements relating to devices for the electronic receipt of tenders, requests for participation and plans and projects in contests.

⁷⁸ Annex IX of the Law.

⁷⁹ Law No. 188(l) of 2004.

⁸⁰ Referred to in sections 51 to 56 and 58 of the Law

Devices for the electronic receipt of tenders, requests for participation and plans and projects in contests must at least guarantee, through technical means and appropriate procedures, that:

- (a) Electronic signatures relating to tenders, requests to participate and the forwarding of plans and projects comply with national provisions adopted pursuant to Directive 1999/93/EC (although the relevant e-signatures legislation is in place, there is no platform available yet);
- (b) The exact time and date of the receipt of tenders, requests to participate and the submission of plans and projects can be determined precisely;
- (c) It may be reasonably ensured that, before the time limits laid down, no-one can have access to data transmitted under these requirements;
- (d) If that access prohibition is infringed, it may be reasonably ensured that the infringement is clearly detectable;
- (e) Only authorised persons may set or change the dates for opening data received;
- (f) During the different stages of the contract award procedure or of the contest access to all data submitted, or to part thereof, must be possible only through simultaneous action by authorised persons;
- (g) Simultaneous action by authorised persons must give access to data transmitted only after the prescribed date;
- (h) Data received and opened in accordance with these requirements must remain accessible only to persons authorised to acquaint themselves therewith.

8.3 Certificates, attestations and declarations

In this section, we will take a closer look at how the common requirements defined by the e-Procurement Directives are typically met in Cyprus.

8.3.1 Requirements with regard to the personal situation of the candidate or tenderer – absence of conviction (art. 45 §1 and §2 (c-d) of Directive 2004/18/EC)

Prevalence/actual use in calls

This is a non mandatory requirement in Cypriot procurements according to section 51(1) of the **eProcurement General Law**. The Law provides that the contracting authorities may request the relevant certificates “where necessary”.

What document (if any) is used?

Any candidate or tenderer who has been the subject of a conviction by final judgment of which the contracting authority is aware for one or more of the reasons listed below is excluded from participation in a public contract⁸¹:

⁸¹ Section 51(1) of the Law basically copies Article 45 of the Directive.

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- (a) Participation in a criminal organisation, as defined in Article 2(1) of Council Joint Action 98/733/JHA;
- (b) Bribe, as defined in Article 3 of the Council Act of 26 May 1997 and Article 3 of Council Joint Action 98/742/JHA respectively;
- (c) Fraud within the meaning of Article 1 of the Convention relating to the protection of the financial interests of the European Communities;
- (d) Money laundering, as defined in Article 1 of Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering.

Further to the above, section 51(2) (c) and (d) of the Law provides that any economic operator may be excluded from participation in a contract where that economic operator:

“(c) has been convicted by a judgment which has the force of *res judicata* in accordance with the legal provisions of the country of any offence concerning his professional conduct;

(d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate...”

For the purpose of implementing the conditions of section 51(1) and (2) (c), the Law requires that the contracting authorities shall, where necessary, ask candidates or tenderers to supply the documents referred to in section 51(3) of the Law and may, where they have doubts concerning the personal situation of such candidates or tenderers, also apply to the competent authorities to obtain any information they consider necessary on the personal situation of the candidates or tenderers concerned. There is no provision as to the exact nature of the certificate required under section 51(2) (d) above (grave professional misconduct). It may be presumed that the competent authorities will examine this according to the profession of the tenderer.

For foreign tenderers, where the information concerns a candidate or tenderer established in another State, the contracting authority may seek the cooperation of the competent authorities of the Member State where candidates or tenderers are established. In accordance with the legislation of the member state where they are established, such requests shall relate to legal and/or natural persons, including, if appropriate, company directors and any person having powers of representation, decision or control in respect of the candidate or tenderer. The Law also provides that contracting authorities may derogate from the above requirements for overriding requirements in the general interest.

According to section 51(3), contracting authorities must accept as sufficient evidence the production of an **extract from the "criminal record"** or, failing that, of an equivalent document issued by a competent judicial or administrative authority in the country of origin or the country whence that person comes showing that these requirements have been met.

Where natural persons are concerned and regarding criminal records, a **“certificate of good behaviour”** (πιστοποιητικό καλής διαγωγής) for Cypriots who are natural persons can be obtained from the Police Headquarters in Nicosia.

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The “**certificate of good behaviour**” identifies information such as any previous convictions of the person concerned (if any) and the name of the issuing authority. It is signed and stamped by the Police.

Fees and Payment

The “**certificate of good behaviour**” is provided by the Police on the spot on payment of CYP£5.00 (approx. 8.55 EUR). Apart from procurements, this type of certificate is requested for immigration purposes.

Electronic certificates

There is no possibility for the issuing of electronic certificates in Cyprus. There are no eID cards or electronic signatures in Cyprus.

8.3.2 Requirements with regard to the personal situation of the candidate or tenderer – non-bankrupt and financial status (art. 45 §2 (a-b) of Directive 2004/18/EC)

Prevalence/actual use in calls

It is not clear from the wording of the Law whether this is a mandatory requirement in Cypriot procurements. The Law simply provides that tenderers will be excluded in case the relevant provisions apply.

What document (if any) is used?

According to section 51(2) (a) and (b) of the **eProcurement General Law**, any economic operator may be excluded from participation in a contract where that economic operator:

“(a) is bankrupt or is being wound up, where his affairs are being administered by the court, where he has entered into an arrangement with creditors, where he has suspended business activities or is in any analogous situation arising from a similar procedure under national laws and regulations;

(b) is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding up or administration by the court or of an arrangement with creditors or of any other similar proceedings under national laws and regulations...”

For the purpose of implementing the above conditions, section 51(3) the Law provides that the contracting authorities may accept as sufficient proof that the tenderer is compliant, an extract from the

criminal record, that is a “**certificate of good behaviour**” from the Police. There is no provision for an attestation of non-bankruptcy.

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As mentioned above, the “**certificate of good behaviour**” identifies information such as any previous convictions of the person concerned and the name of the issuing authority and it signed and stamped by the Police. The “**certificate of good behaviour**” is provided on the spot on payment of CYP£5.00 (approx. 8.55 EUR). Apart from procurements, this type of certificate is requested for immigration purposes.

Electronic certificates

There is no possibility for the issuing of electronic certificates in Cyprus. There are no eID cards or electronic signatures in Cyprus.

8.3.3 Requirements with regard to the personal situation of the candidate or tenderer – compliance with fiscal and social obligations (art. 45 §2 (e-f) of Directive 2004/18/EC)

Prevalence/actual use in calls

It is not clear from the wording of the Law whether this is a mandatory requirement in Cypriot procurements. The Law simply provides that tenderers will be excluded in case the relevant provisions apply.

What document (if any) is used?

According to section 51(2) (e) and (f) of the **eProcurement General Law**, any economic operator may be excluded from participation in a contract where that economic operator:

“... (e) has not fulfilled its obligations relating to the payment of social security contributions in accordance with the legal provisions of the country in which he is established or with the legal provisions of the Republic;

(f) has not fulfilled its obligations relating to the payment of taxes in accordance with the legal provisions of the country in which he is established or with the legal provisions of the Republic ...”

For both requirements (social security and tax obligations), the tenderer needs to provide a certificate issued by the competent authority in the country in which he is established or a certificate issued by the competent authorities in Cyprus.

Where social security obligations are concerned, the competent authority in Cyprus for issuing a relevant certificate is the Department of Social Insurance Services of the Ministry of Labour and Social Insurance.⁸² There are no fees for the issuing of a relevant certificate. Social security certificates are only available on paper, stamped and carrying a hand written signature. They are sent by post to the requesting party within approximately one week from request. The applicant must go to the district office of the Department of Social Insurance Services in person.

Where tax obligations are concerned, the competent authority is the Inland Revenue Department of the Republic of Cyprus which is subject to the Ministry of Finance of the Republic. Certificates can be issued for both individuals and companies. Certificates are free of charge. Certificates must be requested in person. The document can only be provided in a paper form.

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The certificate identifies the issuing authority, the requesting party (individual or company), date and place of issuance, and the amounts paid. The document is signed by the public officer in the name of the Director and stamped.

Electronic certificates

There is no possibility for the issuing of electronic certificates in Cyprus. There are no eID cards or electronic signatures in Cyprus.

8.3.4 Requirements with regard to the suitability to pursue the professional activity

Prevalence/actual use in calls

This is not a mandatory requirement but the contracting authority may request the tenderer to prove that he is registered in one of the professional or trade registers or to provide a declaration on oath or a certificate.

What document (if any) is used?

Where companies are concerned, according to section 52(1) of the **eProcurement General Law** as complemented by the **eProcurement General 2007 Order**, the following types of certificates may be required, for the following types of contracts:

⁸² See: http://www.mlsi.gov.cy/mlsi/sid/sid.nsf/dmlapplicationforms_gr/dmlapplicationforms_gr?OpenDocument#

- (a) For *Public Works Contracts*, the contractor in Cyprus may be requested to provide a certificate from the *Council of Building and Civil Engineering Contractors*⁸³ in accordance with the Registration and Monitoring of Building and Civil Engineering Contractors Law of 2001.⁸⁴

The scope of the Council of Building and Civil Engineering Contractors is to register, classify and issue registration certificates, and annual licences to all Building and Civil Engineering Contractors. The law provides for two categories of contractors, "Building Contractors" and "Civil Engineering Contractors". Each category has five classes "A" to "E". Both companies and individuals may be registered with the Council.

- (b) For *Public Supply Contracts*, the supplier in Cyprus may be requested to provide a certificate from the Registrar of Companies and Official Receiver⁸⁵ stating that his company was incorporated or registered or to provide a certificate stating that the person concerned has declared on oath that he is engaged in the profession in question in a specific place under a given business name.
- (c) For *Public Supply Contracts*, the same certificates may be requested from the service provider in Cyprus as for Public Supply Contracts under point (b) above.

Section 52(2) of the Law also provides that in procedures for the award of public service contracts, insofar as candidates or tenderers have to possess a particular authorisation or to be members of a particular organisation in order to be able to perform in their country of origin the service concerned, the contracting authority may require them to prove that they hold such authorisation or membership in the said organisation.

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Regarding the certificate of registration (individual contractor or company) issued from the Council of Building and Civil Engineering Contractors, the certificate identifies information such as the details of the applicant, the Council, etc.

Where companies are concerned, the certificate from the Registrar identifies the company registration number, name and address, the issuing authority and the date and place of issuance. The document is signed by the Registrar of Companies and Official Receiver and stamped.

Fees and Payment

Regarding the certificate of registration issued from the Council of Building and Civil Engineering Contractors, the certificate costs CYP£15.00 plus VAT 15% (approx. 30 EUR). The fee can either be paid at the premises of the Council or sent to the Council via mail (P.O Box 20595, 1660, Nicosia).

⁸³ The official website of the Council is: www.contractors-council.org.cy

⁸⁴ Law No. 29(I) of 2001.

⁸⁵ The official website of the Registrar is: http://www.mcit.gov.cy/mcit/drcor/drcor.nsf/index_en/index_en?opendocument

For companies, the Certificate of Incorporation and the Certificate of Registered Office is delivered by the Department of Registrar of Companies and Official Receiver (Corner Makarios Avenue & Karpenisiou "XENIOS" Building, 1427 Nicosia). It costs CYP£10 (approx. 17 EUR) each and an additional CYP£10 for rapid delivery service, each. No eID cards may be used. Requests cannot be done online.

Payment may be either in cash or by cheque in the name of the Registrar of Companies or by transfer of the amount payable to the Deposit Account to the Registrar of Companies at the Central Bank of Cyprus (A/C Number 6001010) with the copy of the deposit to the Registrar of Companies. In addition payment may also be done at the Cyprus Embassy in the country of the applicant (Account number 14.01.04.1.00.206). Furthermore an applicant from abroad should also pay £2 for postal expenses.

Electronic certificates

There is no possibility for the issuing of electronic certificates in Cyprus. There are no eID cards or electronic signatures in Cyprus.

8.3.5 Requirements with regard to economic and financial standing

Prevalence/actual use in calls

Evidence with regard to economic or financial standing is not mandatory but may be asked for by the contracting authority. This depends on the contracting authority which has an obligation to specify, in the contract notice or in the invitation to tender, which reference or references they have chosen and which other references must be provided.

What document (if any) is used?

According to section 53(2) of the **eProcurement General Law** the economic and financial standing of an economic operator may be proven, as a general rule, by furnishing one or more of the following declarations:

- (a) Appropriate bank statements or, where appropriate, a certificate of professional risk indemnity insurance;
- (b) The presentation of balance-sheets or extracts from the balance-sheets, where publication of the balance-sheet is required under the law of the country in which the economic operator is established;
- (c) A statement of the undertaking's overall turnover and, where appropriate, of turnover in the area covered by the contract for a maximum of the last three financial years available, depending on the

date on which the undertaking was set up or the economic operator started trading, as far as the information on these turnovers is available.

An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect. Under the same conditions, a group of economic operators may rely on the capacities of participants in the group or of other entities.

If, for any valid reason, the economic operator is unable to provide the references requested by the contracting authority, he may prove his economic and financial standing by any other document which the contracting authority considers appropriate.

Annual accounts for Cypriot tenderers tend to be copies of the audited accounts which are annually deposited at the Inland Revenue Department. Certified copies of annual reports for Cypriot companies are also available from the Office of the Registrar of Companies and Official Receiver.

Contents

Certified copies of annual reports for Cypriot companies typically state the name and address of the company, company registration number, share capital, shareholders, management details, including general managers and secretary and identification of any external auditor or accountant. The certificate is stamped and signed by the authority.

Electronic certificates

There is no possibility for the issuing of electronic certificates in Cyprus. There are no eID cards or electronic signatures in Cyprus.

8.3.6 Requirements with regard to technical and/or professional ability

Prevalence/actual use in calls

The requirement to demonstrate technical and/or professional ability is a non mandatory requirement in Cypriot procurements. It may be asked for by the contracting authority but this depends on the authority itself. According to section 54(6) of the eProcurement General Law, the contracting authority must specify, in the notice or in the invitation to tender, which certificates or documents it wishes to receive. This also depends on the nature, quantity or importance, and use of the works, supplies or services in question.

What document (if any) is used?

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According to section 54 of the eProcurement General Law, the technical and/or professional abilities of the economic operators is assessed and examined by furnishing one or more of the following documents according to the nature, quantity or importance, and use of the works, supplies or services:

(a) (i) a list of the works carried out over the past five years, accompanied by certificates of satisfactory execution for the most important works. These certificates shall indicate the value, date and site of the works and shall specify whether they were carried out according to the rules of the trade and properly completed. Where appropriate, the competent authority shall submit these certificates to the contracting authority directly;

(ii) a list of the principal deliveries effected or the main services provided in the past three years, with the sums, dates and recipients, whether public or private, involved. Evidence of delivery and services provided shall be given:

- where the recipient was a contracting authority, in the form of certificates issued or countersigned by the competent authority,
- where the recipient was a private purchaser, by the purchaser's certification or, failing this, simply by a declaration by the economic operator;

(b) an indication of the technicians or technical bodies involved, whether or not belonging directly to the economic operator's undertaking, especially those responsible for quality control and, in the case of public works contracts, those upon whom the contractor can call in order to carry out the work;

(c) a description of the technical facilities and measures used by the supplier or service provider for ensuring quality and the undertaking's study and research facilities;

(d) where the products or services to be supplied are complex or, exceptionally, are required for a special purpose, a check carried out by the contracting authorities or on their behalf by a competent official body of the country in which the supplier or service provider is established, subject to that body's agreement, on the production capacities of the supplier or the technical capacity of the service provider and, if necessary, on the means of study and research which are available to it and the quality control measures it will operate;

(e) the educational and professional qualifications of the service provider or contractor and/or those of the undertaking's managerial staff and, in particular, those of the person or persons responsible for providing the services or managing the work;

(f) for public works contracts and public services contracts, and only in appropriate cases, an indication of the environmental management measures that the economic operator will be able to apply when performing the contract;

(g) a statement of the average annual manpower of the service provider or contractor and the number of managerial staff for the last three years;

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(h) a statement of the tools, plant or technical equipment available to the service provider or contractor for carrying out the contract;

(i) an indication of the proportion of the contract which the services provider intends possibly to subcontract;

(j) with regard to the products to be supplied:

- (i) samples, descriptions and/or photographs, the authenticity of which must be certified if the contracting authority so requests;
- (ii) certificates drawn up by official quality control institutes or agencies of recognised competence attesting the conformity of products clearly identified by references to specifications or standards.

An economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the contracting authority that it will have at its disposal the resources necessary for the execution of the contract, for example, by producing an undertaking by those entities to place the necessary resources at the disposal of the economic operator.

In procedures for awarding public contracts having as their object supplies requiring siting or installation work, the provision of services and/or the execution of works, the ability of economic operators to provide the service or to execute the installation or the work may be evaluated in particular with regard to their skills, efficiency, experience and reliability.

The above information is usually integrated into the main body of the offer in the form of resumes and/or project references. Copies of authentic documents (such as certified diplomas, certified descriptions of products/service or certified references) may be attached. A paper copy is usually provided.

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Contents vary depending on the requirements and the issuing authority.

Electronic certificates

There is no possibility for the issuing of electronic certificates in Cyprus. There are no eID cards or electronic signatures in Cyprus.

8.3.7 Requirements with regard to quality assurance standards

Prevalence/actual use in calls

The requirement to demonstrate compliance with quality assurance standards is a non mandatory requirement in Cypriot procurements. It may be asked for by the contracting authority but this depends on the authority itself. The tenderer himself may choose to include relevant certificates in order to demonstrate his ability to carry out the work.

What document (if any) is used?

According to section 55 of the eProcurement General Law, if the contracting authorities require the production of certificates drawn up by independent bodies attesting the compliance of the economic operator with certain quality assurance standards, the contracting authorities must refer to the quality assurance systems based on the relevant Cypriot standards series CYS EN ISO 9000 which are certified by bodies conforming to the Cypriot standards series CYS EN ISO 45000 concerning certification. Contracting authorities shall recognise equivalent certificates from bodies established in other Member States and shall also accept other evidence of equivalent quality assurance measures provided by economic operators.

With regards to quality assurance systems based on the relevant Cypriot standards series CYS EN ISO 9000, the Cyprus Organization for Standardization (CYS)⁸⁶ is in charge of activities of standardization by virtue of the Standardization, Accreditation and Technical Information Law of 2002.⁸⁷

With regards to certification by certified bodies conforming to the Cypriot standards series CYS EN ISO 45000, the competent authority is the Cyprus Organization for the Promotion of Quality⁸⁸ under the auspices of the Ministry of Commerce, Industry and Tourism. The basic aims of the Organization are:

- the introduction and management of the national system for accreditation
- the introduction and operation of the system implementing the principles of good laboratory practice
- the management of the national system for technical notification
- the promotion of quality infrastructures

In October 2004, the Cyprus Organization for the Promotion of Quality started offering accreditation services with regard to:

- Laboratories
- Certification Bodies
- Inspection Bodies
- Environmental Verifiers

⁸⁶ Homepage of the Cyprus Organization for Standardization: <http://www.cys.org.cy/standardisation.html>

⁸⁷ Law No.156(I)/2002

⁸⁸ Homepage of the Cyprus Organization for the Promotion of Quality: <http://www.cys.mcit.gov.cy/english/about.html>

Cyprus Organization for the Promotion of Quality is also responsible for the verification of the implementation of Good Laboratory Practice (GLP) and is actively involved in the Notification procedure of conformity Assessment Bodies (New Approach Directives). Accreditation criteria are specified in the Internal Regulations ("Framework for the Operation of the Accreditation System").

The Cyprus Organization for the Promotion of Quality is the official representative of the Republic of Cyprus to:

- the European co-operation for Accreditation (EA)
- the International Laboratory Accreditation Cooperation (ILAC)
- the Standing Committee for Technical Notification
- the Senior Officials Group on Standardization and Conformity Assessment Policy (SOGS)
- the Committee for Technical Barriers to Trade - World Trade Organization (TBT - WTO)
- the Codex Alimentarius Commission of the Food and Agriculture Organization (FAO) of the United Nations
- the GLP
- the FAB

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No organisation or other body has as yet been accredited by the Cyprus Organization for the Promotion of Quality. However a number of Cyprus laboratories have achieved accreditation by competent bodies from abroad and for only a number of tests/calibrations methods which accompany the accreditation certificate issued by the competent bodies.

Electronic certificates

There is no possibility for the issuing of electronic certificates in Cyprus. There are no eID cards or electronic signatures in Cyprus.

8.3.8 Requirements with regard to environmental management standards

Prevalence/actual use in calls

The requirement to demonstrate compliance with environmental management standards is a non mandatory requirement in Cypriot procurements. It may be asked for by the contracting authority when performing a public works contract or a public services contract, and only in appropriate cases, i.e. for demonstrating that the economic operator will be able to apply the environmental management measures when performing the contract.

What document (if any) is used?

According to section 56 of the eProcurement General Law, where the contracting authority requires the economic operator to demonstrate compliance with environmental management standards, the economic operator will need to produce a relevant certificate drawn up by independent body attesting the compliance of the economic operator with certain environmental management standards.

In this case, the certificate must comply with the Community Eco-Management and Audit Scheme (EMAS) or with the environmental management standards based on the relevant European or international standards certified by bodies conforming to Community law or the relevant European or international standards concerning certification.

Contracting authorities have an obligation to recognise equivalent certificates from bodies established in other Member States and must also accept other evidence of equivalent environmental management measures provided by economic operators.

Certification duration and cost can vary from organisation to organisation.

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No information has been located as to a competent authority in Cyprus, except that the Environment Service of the Ministry of Agriculture, Natural Resources and Environment has made initiatives in implementing the use of such schemes in Cyprus, especially in the Tourism sector.⁸⁹

Electronic certificates

No information has been located for this matter in Cyprus.

8.4 Interoperability

As mentioned above, the Cypriot legal framework has fully adopted the relevant European Directives on eProcurement since February 2006 but the practical framework has not yet been completed.⁹⁰ No eProcurement platform has yet been created and thus there is prospect of interoperability. There is no electronic signature platform either.

⁸⁹

See: [http://www.visitcyprus.biz/CTOWeb/CTOWebTradeSection.nsf/PressReleasesLookupeng/3E93DAF60EF4715DC22572DC001EC780/\\$FILE/presentations.pdf](http://www.visitcyprus.biz/CTOWeb/CTOWebTradeSection.nsf/PressReleasesLookupeng/3E93DAF60EF4715DC22572DC001EC780/$FILE/presentations.pdf)

⁹⁰ See: www.treasury.gov.cy/treasury/treasury.nsf/

8.5 Future trends/expectations

E-Procurement procedures such as framework agreements and electronic auctions will start to apply when the Government issues specific Regulations for this purpose. This is not projected to happen until 2009 which is the year that it is reported that the initiative for creating a full e-Procurement platform will be implemented, as described below.

e-Procurement Strategy Project

According to a published report on Structural Reforms in Cyprus, the Government of the Republic of Cyprus has proceeded with the preparation of an e-procurement project. Within this framework, the Treasury Department has made a relative proposal for the financing of a project through the Transition Facility Funds of the E.U. for the design and development of an information system on e-procurement, implementing electronically the public procurement procedures.⁹¹

More specifically, a project was announced in 2004 entitled “**Measures to develop the implementing capacity of the Cypriot Authorities in applying the European Public Procurement legislative package.**”⁹² The competent authority in charge of the implementation of this Project is the Public Procurement Directorate of the Treasury of the Republic of Cyprus.

The objective of this Project is the building of the appropriate institutional capacity for the effective implementation of the *acquis communautaire* in relation to Public Procurement in Cyprus and for the application of best practices in Public Procurement from the point of identification of needs, up to and including the disposal of the assets.

The project has three distinct purposes:

- Enhancement of the effective operation of the Public Procurement Directorate (PPD) of the Treasury and of all the contracting authorities implementing the relevant EU Acquis;
- Harmonisation of the Public Procurement legislation with the new legislation package on public procurement adopted by the E.U. Parliament in February 2004 (already completed early 2006);
- Analysis of the needs and determination of the strategy for the introduction of e procurement in public procurement.

The Treasury considers that, in the framework of the present project, the development of the Best Practice Guide as well as the provision of training will ensure that, the staff of the Competent Authority as well as those of the contracting authorities, will develop the necessary skills and acquire the necessary knowledge in order to conduct procurement procedures effectively and efficiently, while safeguarding best value for money purchases.

⁹¹ Report on Structural Reforms in Cyprus in the Context of the Cardiff Exercise; available from [www.mof.gov.cy/mof/MOF.nsf/E9569390FC55C7B2C2257177006AFCB3/\\$file/CARDIFF%20REPORT%202004_FINAL.pdf](http://www.mof.gov.cy/mof/MOF.nsf/E9569390FC55C7B2C2257177006AFCB3/$file/CARDIFF%20REPORT%202004_FINAL.pdf)

⁹² See: ec.europa.eu/.../document/2004-016-926.01.01%20European%20Public%20Procurement%20legislative%20package.pdf

Activities under the e-Procurement Project

Improving implementing capacity: This component includes the following:

- Preparation of a set of recommendations to further develop and improve the national Public Procurement System in general, including recommendations for the Public Procurement Directorate of the Treasury in terms of role, mandate, main functions and staffing as well as recommendations for providing for conciliation and attestation procedures as required in Council Directive 92/13/EEC.
- Preparation of a detailed “Best Practice Procurement Guide” giving guidance on the practical aspects of the procedures of the Directives and the Cyprus harmonized Laws on Public Tenders, including guidance from the point of identification of needs up to and including the disposal of assets making special reference to the efficient use of procurement procedures. This would include description of proven good practice for public procurement, programs, projects, risks and service management. This includes also guidance on and the actual preparation of, standard tender documents (including technical specifications and Terms of Reference) for supplies, works and services including:
 - Standard contracts
 - Short List Reports.
 - Evaluation Report.
 - Standard tender dossier.
 - Framework Contracts.
- Proposal and provision of a Training Programme and provision of training courses/seminars which will help the staff in the Public sector and semi-governmental organizations to assimilate the provisions of the Directives and the Public Tenders Laws. There is a need to assess training needs and develop training plans and training materials. The Training requested in the current project should include inter alia:
 - (a) Training on the provisions of the new Directive which is going to be transposed into National legislation before the end of 2005.
 - (b) Preparation of material for a sustainable training program to be repeated when necessary.
- Training on the use of The Best Practice Guide via training seminars and information initiatives/campaigns planned for the procurement personnel of both the private and the public sector. The foreseen training would lead to assurance that there is adequate number of personnel in the contracting authorities with appropriate knowledge to handle and run the harmonized procurement procedures. Furthermore it should also result in the long run, in improved tender documents and standardized contracts for supplies, works and services for all contracting authorities.

eProcurement Study

Further to the above, the Project foresaw the preparation of a study concerning the application of e-procurement in Cyprus as well as the drafting of the Terms of Reference to be included in a tender will

allow the application of e-procurement in Cyprus as set in the Internal Market Strategy of the European Commission. This eProcurement strategy study for the preparation of the Terms of Reference for the project was completed in July 2006. The study covers the eRegistration, eNotification, ePreparation of a call for tenders, eTendering, eAwarding phases as well as the Statistical Analysis. eOrdering and eInvoicing are not in the scope of the study.⁹³

The tender procedure was estimated to take place in two stages, Prequalification and Invitation to Tender (within July 2006 – June 2007), whilst the execution of the project is expected to commence in July 2007 and finish in December 2008. The eProcurement System is expected to be operational in January 2009.

Linked activities

The Treasury has signed, in February 2004, a Twinning Light Contract titled “Enhancement of the administrative capacity in implementing the harmonized public procurement rules” (Project number: CY/2002/IB/OT-01-TL). This Twinning programme includes the Preparation of two Guides for Public Procurement as well as the Design and Implementation of a National Training Programme. The budget for this project is 200.0000 Euro and the aim is to provide basic working tools as well as to cover basic training needs of the staff in contracting authorities involved in implementing the EU Public Procurement Directives. It should be noted that the activities of the present project under the Transition

8.6 Assessment

Cyprus’ e-procurement initiatives are still in an early stage, since the eProcurement System planned under the e-Procurement Strategy Project is expected to be fully operational in January 2009. It remains to be seen whether the future implementation will meet the end users’ needs, and in particular if and how the system will be made accessible to non-nationals. Nevertheless, Cyprus is on the right track due to the fact that it has already adopted the entire necessary legislative framework for the purpose of implementing the *acquis communautaire*.

With regard to certificates and necessary documents, Cypriot procurements are characterised by a fair degree of flexibility, in the sense that the contracting authority has a substantial freedom in determining which certificates and statements are required, and in determining if provided originals or copies (including foreign documents) meet these requirements. However, electronic certificates are not yet in use, due to a lack of supporting infrastructure.

References to relevant legislation mentioned in this Study

Translated name of legislation	Greek original name of legislation
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⁹³ See: <http://ec.europa.eu/idabc/en/document/6059/388>

<p>Coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and related matters Law of 2006.</p> <p>Law 12(I) of 2006</p>	<p>Συντονισμού των Διαδικασιών Σύναψης Δημόσιων Συμβάσεων Προμηθειών, Έργων και Υπηρεσιών και για Συναφή Θέματα Νόμος του 2006</p>
<p>Coordination of Procurement procedures of entities operating in the water, energy, transport and postal services sectors Law of 2006.</p> <p>Law 11(I) of 2006</p>	<p>Συντονισμού των Διαδικασιών Σύναψης Συμβάσεων Προμηθειών, Έργων και Υπηρεσιών στους Τομείς του Ύδατος, της Ενέργειας, των Μεταφορών και των Ταχυδρομικών Υπηρεσιών και για Συναφή Θέματα Νόμος του 2006</p>
<p>The Public Procurement Law of 1997 to 2004.</p> <p>Law No. 102(I)/1997 as amended by Law No. 44(I)/1998, Law No. 103(I)/1998, Law No. 2(I)/1999, Law No. 24(I)/1999, Law No. 32(I)/1999, Law No. 45(I)/1999, Law No. 102(I)/1999, Law No. 40(I)/2000, Law No. 177(I)/2000, Law No. 1(I)/2001, Law No. 33(I)/2001, Law No. 58(I)/2001, Law No. 59(I)/2001, Law No. 51(I)/2003, Law No. 154(I)/2004</p>	<p>Προσφορών του Δημοσίου Νόμος του 1997</p>
<p>The Law Regarding Tenders in the Water, Energy, Transport and Tele-communications sectors of 2002 to 2003.</p> <p>Law No. 29(I)/2002 as amended by Law No. 52(I)/2003</p>	<p>Προσφορών στους Τομείς του Ύδατος, της Ενέργειας, των Μεταφορών και των Τηλεπικοινωνιών Νόμος του 2002</p>
<p>The Radiocommunications Law of 2002.</p> <p>Law No. 146(I)/2002 as amended by Law No. 16(I)/2004, Law No. 180(1)/2004 and Law 74(I) of 2006</p>	<p>Ραδιοεπικοινωνιών Νόμος του 2002</p>
<p>Law on the Award of Contracts (Supply, Works and Services) of Entities Operating in the Water, Energy, Transport and Telecommunications Sectors of 2003 to 2004.</p> <p>Law No. 100(I)/2003 as amended by Law No. 24(I)/2004 and Law No. 182(I)/2004</p>	<p>Σύναψης Συμβάσεων (Προμήθειες, Έργα και Υπηρεσίες) στους Τομείς του Ύδατος, της Ενέργειας, των Μεταφορών και των Τηλεπικοινωνιών Νόμος του 2003</p>
<p>Law on the Award of Public Contracts (Supply,</p>	<p>Σύναψης Συμβάσεων (Προμήθειες, Έργα και</p>

Works and Services) of 2003 to 2006. Law No. 101(I)/2003 as amended by Law No. 23(I)/2004, Law No. 181(I)/2004 and Law No. 16(I) of 2006	Υπηρεσίες) Νόμος του 2003
Coordination of Procedures for the award of public works contracts, public supply contracts and public service contracts Regulations of 2007. No. 201/2007	Συντονισμού των Διαδικασιών Σύναψης Δημοσίων Συμβάσεων Προμηθειών, Έργων και Υπηρεσιών (Γενικοί) Κανονισμοί του 2007
Coordination of Procedures for the award of public works contracts, public supply contracts and public service contracts Order of 2006. No 470/2006	Συντονισμού των Διαδικασιών Σύναψης Δημοσίων Συμβάσεων Προμηθειών, Έργων και Υπηρεσιών και για Συναφή Θέματα Διάταγμα του 2006
Coordination of Procedures for the award of public works contracts, public supply contracts and public service contracts Order of 2007. No. 136/2007	Συντονισμού των Διαδικασιών Σύναψης Δημοσίων Συμβάσεων Προμηθειών, Έργων και Υπηρεσιών και για Συναφή Θέματα Διάταγμα του 2007
Coordination of Procurement procedures of entities operating in the water, energy, transport and postal services sectors Order of 2007. No. 37/2007	Συντονισμού των Διαδικασιών Σύναψης Δημοσίων Συμβάσεων Προμηθειών, Έργων και Υπηρεσιών στους Τομείς του Ύδατος, της Ενέργειας, των Μεταφορών και των Ταχυδρομικών Υπηρεσιών και για Συναφή Θέματα Διάταγμα του 2007
Electronic Signatures Law of 2004. Law No. 188(I) of 2004	Νομικού Πλαισίου για τις Ηλεκτρονικές Υπογραφές καθώς και για Συναφή Θέματα Νόμος του 2004
Registration and Monitoring of Building and Civil Engineering Contractors Law of 2001. Law No. 29(I) of 2001	Εγγραφής και Ελέγχου Εργοληπτών Οικοδομικών και Τεχνικών Έργων Νόμος του 2001
Standardization, Accreditation and Technical Information Law of 2002. Law No.156 (I)/2002	Τυποποίησης, Διαπίστευσης και Τεχνικής Πληροφόρησης Νόμος του 2002

9 Czech Republic

9.1 Public procurement framework

This Section provides general information on public procurement legal framework in the Czech Republic.

9.1.1 General framework

The public procurement framework is governed by the Public Procurement Act and the Act amending certain acts in relation to the enactment of the Public Procurement Act.⁹⁴ The Civil Code and Commercial Code complement the framework.⁹⁵ With regard to e-procurement, the relevant acts are the Act on Electronic Signatures and the Act on Information Systems of Public Administration and Electronic Communications Act.⁹⁶

The Public Procurement Act was enacted shortly after enactment of the previous Public Procurement Act of 2004 in order to implement the European procurement directives 2004/17/EC and 2004/18/EC.⁹⁷ It covers all issues of public procurement such as types of contracting authorities, types of procedures, types of contracts. The Government of the Czech Republic and several ministries have issued statutory instruments to the Act,⁹⁸ covering practical issues such as information system details or electronic devices issues.

⁹⁴ Act no. 137/2006 Coll., on Public Procurement (zákon č. 137/2006 Sb., o zadávání veřejných zakázek)

Act no. 138/2006 Coll., amending certain acts in relation to the enactment of the Public Procurement Act (Zákon č. 138/2006 Sb., kterým se mění některé zákony v souvislosti s přijetím zákona o veřejných zakázkách)

⁹⁵ Act no. 40/1964 Coll., Civil Code (Zákon č. 40/1964 Sb., občanský zákoník)

Act no. 513/1991 Coll., Commercial Code (Zákon č. 513/1991 Sb., obchodní zákoník)

⁹⁶ Act no. 227/2000 Coll., on Electronic Signature (Zákon č. 227/2000 Sb., o elektronickém podpisu)

Act no. 365/2000 Coll., on Information Systems of Public Administration (Zákon č. 365/2000 Sb., o informačních systémech veřejné správy)

Act no. 127/2005 Coll., on Electronic Communications (Zákon č. 127/2005 Sb., o elektronických komunikacích)

⁹⁷ DIRECTIVE 2004/17/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors

DIRECTIVE 2004/18/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts

⁹⁸ Decree no. 326/2006 Coll., on attestation procedure regarding electronic devices (Vyhláška č. 326/2006 Sb., o podrobnostech atestačního řízení pro elektronické nástroje, náležitostech žádosti o atest a o výši poplatku za podání žádosti o atest (vyhláška o atestačním řízení pro elektronické nástroje))

The Ministry for Regional Development is in charge of preparation of the public procurement legal framework, sets out initiatives, operates important public procurement applications such as the Public Procurement and Concessions Portal, and has additional minor functions related to public procurement. The Office for the Protection of Economic Competition is the supervising authority in the field of public procurement and it can impose sanctions for related administrative offences.

The contracting authority must publish certain information about the procurement. That includes the announcement of the procurement procedure and the announcement of the results of the procurement. The contracting authority has to publish such information (i) for below-threshold contracts, in the Publishing Subsystem of the Public Procurement Information System (<http://www.isvzus.cz/usisvz/>, accessible also through the Central Address⁹⁹ www.centralniadresa.cz), and (ii) for above-threshold contracts, in the Publishing Subsystem of the Public Procurement Information System and also in the Official Journal of the European Communities. Responses to the announcement are then submitted directly to the contracting authority.

The local authorities do not have any autonomy in the public procurement and the public procurement legal framework is uniformly applicable to all entities in the Czech Republic. Use is made of the Public Procurement and Concessions Portal (www.portal-vz.cz).

9.1.2 Certificates and statements

The tenderer has to meet a set of qualification requirements in order to participate in the procurement. The contracting authority may only request proof of qualification that is directly related to the procured contract. The tenderer may either prove its qualification by submitting individual documents and information required by the contracting authority and law or by submitting an extract from the List of Approved Economic Operators or a Certificate issued within a System of Certified Economic Operators. Generally, equivalent foreign extracts and Certificates are accepted if they were issued in a country that (i) is an EU country or a country with which the Czech Republic has a relevant agreement, and (ii) is the country where the tenderer has its registered address.

Unless the contracting authority sets a lower standard, the documents and information submitted have to be provided as originals or as verified copies. Generally, there is no limit with regard to the date of

Decree no. 328/2006 Coll., that sets the flat rate of procedure costs regarding review of actions of contracting authority for purpose of the Public Procurement Act (Vyhláška č. 328/2006 Sb., kterou se stanoví paušální částka nákladů řízení o přezkoumání úkonů zadavatele pro účely zákona o veřejných zakázkách)

Decree no. 329/2006 Coll., that sets detailed requirements on electronic measures, electronic devices and electronic actions in relation to public procurement (Vyhláška č. 329/2006 Sb., kterou se stanoví bližší požadavky na elektronické prostředky, elektronické nástroje a elektronické úkony při zadávání veřejných zakázek)

Decree no. 330/2006 Coll., on publishing of announcement for purpose of public procurement (Vyhláška č. 330/2006 Sb., o uveřejňování vyhlášení pro účely zadávání veřejných zakázek)

⁹⁹ Central Address is the central publication site that comprises all information that public authorities must publish. That includes public procurement-related information. However, the Central Address merely contains a link to public procurement websites and an archive of procurements according to previous Public Procurement Acts.

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issue of the documents, except for the documents proving the basic qualification requirements – these may not be older than 90 days. The contracting authority has to accept documents in the Czech language, but it may state that the documents also have to be provided in another language. Documents have to be provided in hard copy or in an electronic version. Please see section 9.2. for information about requirements with regard to electronic signatures of electronic documents.

Generally, the following documents have to be submitted to prove basic qualification requirements and professional requirements:

- a Criminal Registry extract,
- a set of Statements with regard to tax, social insurance, competition law etc.,
- a confirmation of a Tax Office,
- a confirmation of a Social Security Office,
- a Commercial Registry extract,
- a business permit or a license etc.,
- proof of membership in a chamber or association, but only if such membership is required by law for performance under the procured contract,
- proof of professional competence, but only if such competence is required by law for performance under the procured contract.

The contracting authority may set economic and financial qualification requirements at its discretion on condition that they are proportional to the nature of the contract. Such requirements are typically proved by:

- the tenderer's liability insurance contract,
- the tenderer's latest balance-sheet or its part,
- information about the tenderer's turnover during not more than the last three years.

The contracting authority may also set technical qualification requirements, there is a fixed set of such requirements that the contracting authority may choose from and the selected requirements must be proportional to the nature of the contract. Such requirements are proved by:

- a list of important contracts performed over the last three years,
- a list of technicians or departments that will take part in performing the contract,
- samples, descriptions or pictures of the goods to be delivered,
- proof of compliance of the products issued by the relevant authority,
- a description of the technical equipment and services used by the tenderer to maintain quality,
- a review of the production/technical facilities by the contracting authority,
- proof of education and professional qualification of the supplier or its managers,
- measures regarding protection of environment that the supplier will be able to use when performing the contract,
- an overview of an average annual number of employees taking part in the performance of the contract, etc.,
- an overview of devices and equipment that the supplier will have at its disposal when performing the contract.

A tenderer may choose to register in the List of Approved Economic Operators – to do so, it must meet basic qualification requirements and at least some of the professional qualification requirements. Similarly, it can choose to register in the System of Certified Economic Operators. To do so, it has to meet basic qualifications requirements and some of the professional, economic and financial and/or technical qualification requirements. The tenderer may then prove the relevant requirements by submitting a Certificate or an extract from the List and the contracting authority has to accept it.

A foreign tenderer proves the requirements in the extent required by Czech law and the contracting authority by submitting appropriate documents according to the laws of the country of the tenderer's registered address. Such documents have to be translated officially into the Czech language unless the contracting authority states otherwise. The contracting authority has to review the documents submitted and may require appropriate Statements in cases when it is not clear whether the submitted documents prove the required qualification or in cases when the required documents are not issued by the foreign authority. The contracting authority has to observe the standard public procurement procedure when reviewing the translated documents, but need not follow a specific procedure in this regard. The contracting authority is advised to verify which documents can be issued in the individual EU countries in the European Commission-operated database "Certificates issued on the eligibility of tenderers and official lists of economic operators" located at http://ec.europa.eu/internal_market/publicprocurement/2004_18/index_en.htm.

9.2 E-Procurement initiatives and status

This Section provides information about the e-procurement initiatives and its status.

9.2.1 General e-Procurement framework and initiatives

The regulation framework of e-procurement is integrated in the general procurement framework. The following acts are relevant with regard to e-procurement in addition to the Public Procurement Act:

- Act on Electronic Signature,
- Act on Information Systems of Public Administration (sets conditions for operation and use of information systems operated by public administration, such systems include public procurement systems such as the Public Procurement and Concessions Portal and the Public Procurement Information System),
- Electronic Communications Act (applies with regard to some of the generally defined terms used in the e-procurement framework.)

The e-procurement framework is based on several principles:

- decentralization – The idea is to avoid the creation of a central platform. The creation of free space for (i) individual contracting authorities and individual application operators on one hand and (ii) central purchasing body on the other hand should eventually lead to an optimal balance between centralized and atomized public procurement solutions;
- standardization – The use of same standards by all contracting authorities should increase interoperability;
- support for open standards rather than proprietary standards;
- both contracting authorities and tenderers design the electronic devices;
- existence of several independent central purchasing bodies.

9.2.2 Public Procurement and Concessions Portal and the Information System on Public Contracts

The Portal is available at www.portal-vz.cz and is a main information website for public procurement. It provides detailed information in the Czech and English languages on the public procurement framework in the Czech Republic. It contains links and information on the applicable legislation, judicial decisions and guidelines, links to and information about other related websites, a separate section on information about e-procurement, a section with public procurement e-education and e-training materials, links to related websites, and a questions and answers section. The information on the portal is provided solely by public authorities and is useful especially for tenderers that wish to understand how the public procurement framework works. The Portal is operated by the Ministry for Regional Development.

The Information System is available at www.isvz.cz and it contains following features:

- Publication Subsystem,
- List of Approved Economic Operators,
- List of the Systems of Certified Economic Operators,
- statistical data,
- data required to complete the public procurement forms.

The Information System is operated by the Ministry for Regional Development.

The Publication Subsystem is a section of the Information System on Public Contracts and has a separate location at www.isvzus.cz/usisvz. It serves solely as a publication site for information that the contracting authority must publish according to law (that includes tender notifications, notifications about cancelled tenders, list of successful tenderers etc.). The tenderers may submit the information in the Publication Subsystem using special forms via regular mail, fax or electronically. The Publication Subsystem is operated by Czech Post.

The List of Approved Economic Operators and the List of the Systems of Certified Economic Operators contain the search feature and the relevant Journals and the former allows obtaining a non-binding informing electronic extract from the List.

The non nationals may freely access information in the Information System.

9.2.3 Individual applications

As explained in the section above, the e-procurement framework is not centralized. There are software applications that allow either partial e-procurement actions or a complex e-procurement procedure.

Software applications used for electronic procurement must be approved by the Ministry of Industry and Trade to verify that their use constitutes no discrimination and that they are generally accessible and that they are in compliance with Annex XXIV of the Directive 2004/17/EC and Annex X of the Directive 2004/18/EC. The Decree of the Ministry of Informatics no. 326/2006 Coll. sets the details of

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the approval procedure. The attestation fee ranges from CZK 10,000 to CZK 50,000 (around EUR 350 to EUR 1,700), depending on the number of procurement procedure types that the software application can be used for. The Ministry of Industry and Trade has only recently acquired the authority in this matter from the former Ministry of Informatics (dismantled in June 2007). The approved software applications have been listed in the Journal of the Ministry of Informatics at www.micr.cz/dokumenty/vestnik.htm and the practice will continue in the near future.

In practice, the entity that operates the software application files an approval request with the Ministry of Industry and Trade and assures that the application is approved. Then the software application operator licenses the software or rents the application for use by the contracting authority on a private basis.

Please find below a list of complex e-procurement applications with a list of their functions.¹⁰⁰

Software application name	Functions				Operator
	Publication, Filing questions to the contracting authority, Submitting of tenders, Submitting of electronic certificates/attestations, Electronic awarding, Electronic Auction	Tendering through electronic catalogues	Dynamic purchasing system	E-invoicing, E-payment	
ppeSystem, Veřejné zakázky, verze 1.01	Yes	Yes	Yes	No	PPE.CZ, s.r.o., 28. října 2663/150, 702 00 Ostrava www.ppe.cz
Softender, verze 1	Yes	Yes	Yes	No	B2B Centrum a. s., Mučednická 2, 616 00 Brno www.softender.cz
PROe.biz, verze 2.42G/cz	Yes	N/A	No, but will be implemented by end of 2007	No	Sentinet s. r. o., Čs. legií 1719/5, 702 00, Moravská Ostrava www.proe.biz

Please note that the applications' publication function is secondary as the contracting authority must publish at official publication locations as described in the section above. In practice, the tenderer finds the publication of the announcement of the public procurement on the central publication site and the procurement form includes a link to the e-procurement application, where the tenderer can exchange information with the contracting authority, submit documents, etc.

The following software applications have only limited functions:¹⁰¹

¹⁰⁰ <http://www.micr.cz/files/3847/mi-V2007c2-20070529.pdf>

¹⁰¹ <http://www.micr.cz/files/3847/mi-V2007c2-20070529.pdf>

Software application name	Functions	Operator
Uveřejňovací subsystém Informačního systému o veřejných zakázkách, verze 1.0	Publication	Česká pošta, s. p., Olšanská 38/9, 130 00 Praha 3 www.cpost.cz
PCJ VZ, verze 1	Completing forms	SEV Computing, s. r. o., Starostrašnická 25/16, 100 00 Praha 10 www.sev.cz
602XML Filler, verze 2	Completing forms	Software602 a. s., Hornokřčská 15/703, 140 00 Praha 4 www.602.cz
RAY server W01, verze 1.0	Publication	RAY cz s. r.o., Pod dálnicí 5, 140 00 Praha 4
GILDA – veřejné zakázky, verze 8/2006	Web application for public contracts administration	MCo consulting s.r.o., Seifertova 36, 130 00, Praha 3 www.mco.cz
EZAKAZKY, verze 1	Tracking of procurement opportunities, creating archive of public contracts, distributing procurement specification	OTIDEA a.s., U Habrovky 247/11, 140 00, Praha 4 www.otidea.cz
E-ZAK, verze M	Publication, distribution of specifications, distribution of additional information	QCM s.r.o., Rybkova 1, 602 00 Brno www.qcm.cz
Redakční a publikační systém Miranda 2, verze 5	Publishing certain information about the procurement on the website of the Czech National Bank	Česká národní banka, Na Příkopě 28, 115 03 Praha 1 www.cnb.cz

In addition to the above, several proprietary e-mail clients and Adobe Reader have been approved for use in public procurement.

All of the applications are accessible to non-nationals.

9.2.4 Electronic submission of documents

The tenderer and the contracting authority must use an electronic signature based on a qualified certificate for some of the most important actions, when done electronically. The actions that have to bear electronic signature are:

- on behalf of the tenderer: an offer, an application, objections against the actions of the contracting authority, electronic proof of meeting qualification requirements, a proposal in a proposal competition;
- on behalf of the contracting authority: an announcement of a procurement procedure, a call for negotiation, a call for proposal in a procurement procedure or for participation in a competition dialogue, a decision on selection of the best offer, a notification on the way of handling objections.

Please note that the contracting authority may (i) request that *any* electronic document bears an electronic signature based on a qualified certificate or an electronic mark based on a qualified system certificate, or (ii) choose not to allow the tenderers to do actions electronically at all. If the contracting authority chooses none of these two options, the tenderer is not legally required to use electronic signature for other actions than described above. Please note that in practice in rare cases the software application might require the electronic signature for submission of documents anyway.

9.2.5 Current initiatives

The current e-procurement initiatives and target deadlines include:¹⁰²

- Introducing a new technical specification for electronic devices (2008-2009),
- Preparing e-procurement guidelines and guidelines on use of electronic catalogues (12/2007),
- Preparing a technical specification on ordering systems (2010),
- Preparing a technical specification for e-invoicing (2010),
- Preparing a legal and technical analysis for long-term data archiving (2008).

9.2.6 Dynamic purchasing system, electronic auction and electronic catalogue

When purchasing via the dynamic purchasing system, the contracting authority first has to initialize the dynamic purchasing system in an announcement based on rules for open public procurement. The contracting authority specifies the following information: (i) the type and subject of the procurement to be procured in the dynamic purchasing system, (ii) the conditions that the tenderer must meet to be included in the dynamic purchasing system (they must include qualification requirements), (iii) the procurement evaluation criteria, (iv) information about the dynamic purchasing system and the electronic equipment used, and (v) information regarding preliminary offers.

The contracting authority also has to specify what is to be procured under the dynamic purchasing system and only those products that were included in such specification may be procured under the dynamic purchasing system for the entirety of its duration. The system is open for any tenderer that provides a preliminary offer that meets the requirements of the contracting authority and meets the conditions for entering the system (namely qualification requirements). The system may be operated for up to four years.

The electronic auction may be used in all procurement proceedings that allow for competition between tenderers. The contracting authority that wishes to use the electronic auction has to publish at least the following information in the specifications: evaluation criteria, auction value limits and conditions for submitting new auction values, information about the procedure, about the electronic devices used and about the type of information that will be provided to the tenderers during the auction.

¹⁰² The report on performing the National Plan for year 2006 (available at http://www.portal-vz.cz/uploads/elektronicke_zadavani/prava_o_plneni_za_rok_2006.doc)

The tenderer may use an electronic catalogue to submit a tender, especially if contracting under a framework agreement or in the dynamic purchasing system.

9.3 Certificates, attestations and declarations

This section describes how tenderers in the Czech Republic prove that they meet the public procurement requirements.

9.3.1 Requirements with regard to the personal situation of the candidate or tenderer – absence of conviction (art. 45 §1 and §2 (c-d) of Directive 2004/18/EC)

Prevalence/actual use in calls

A record of no criminal convictions is a mandatory requirement, while a record of non-criminal convictions under article 45 §2 (c) of the Directive 2004/18/EC is a common but generally not a mandatory requirement.

What document (if any) is used?

The requirement to prove a clean record of criminal convictions is met by submitting an extract from the Criminal Registry of (i) the tenderer if he/she is a natural person, (ii) all members of statutory body of the tenderer if the tenderer is a legal entity (if any of such members is a legal entity, of all members of its statutory body as well etc.). If the tender is submitted via a structural unit of a foreign tenderer, an extract from the Criminal Registry of its manager is needed as well.

The extract contains information about criminal convictions with regard to a particular person. It is universally used as proof of a clear criminal record. Apart from procurements, it may be required in a wide variety of situations when setting up a business, when applying for a job or for a membership in professional associations, when filing a range of applications at the social security office, tax office, etc.

The extract is provided to natural persons only. The applicant may only request the extract in person and not on other persons' behalf. Therefore the contracting authority may not directly obtain the extract of the tenderer. The extract is issued by the Criminal Registry with branches in Prague, Brno, Ostrava and Pilsen. The request to obtain an extract from the Criminal Registry may be filed directly at one of the Criminal Registry branches (the extract is issued immediately), or through the regional public prosecutor's office, at municipal offices and abroad at consulates of the Czech Republic (the application is reviewed and then sent to the Criminal Registry which issues and sends back the extract, the procedure takes from several minutes when applying directly at the Criminal Registry in the Czech Republic up to four weeks when submitting the request abroad). A CZK 50 (approximately EUR 2) stamp must be attached to the application.

The requirement to show a clean record of non-criminal convictions under article 45 §2 (c) of Directive 2004/18/EC is met by submitting a Statement stating that the tenderer has a clean record with regard to such convictions.

Contents

Extracts identify the relevant person and list criminal convictions or state that the person has no record of criminal convictions. Extracts are signed by the public official and stamped.

The Statement should state the tenderer has no record of non-criminal convictions related to the professional conduct and it must be signed.

Electronic version

Currently, it is not possible to request extracts electronically. The reason for this is the existing insufficient legal and technological framework of the electronic signature, which could allow persons to obtain other persons' extracts and access information about their criminal convictions. Neither is there an initiative in place that would lead to a breakthrough in this regard.

The Statement can be submitted electronically.

9.3.2 Requirements with regard to the personal situation of the candidate or tenderer – non-bankruptcy and financial status (art. 45 §2 (a-b) of Directive 2004/18/EC)

Prevalence/actual use in calls

This is a mandatory requirement.

What document (if any) is used?

This requirement is met by submitting a Statement by the tenderer, in which the tenderer declares to be meeting this requirement.

Contents

The tenderer's declaration of meeting the requirement, signed by a person that has right to act on the tenderer's behalf.

Electronic version

The Statement can be submitted electronically.

9.3.3 Requirements with regard to the personal situation of the candidate or tenderer – compliance with fiscal and social obligations (art. 45 §2 (e-f) of Directive 2004/18/EC)

Prevalence/actual use in calls

There are three groups of requirements related to this matter: (i) proof of no outstanding tax payments (tax obligation), (ii) proof of no outstanding medical insurance payments (medical insurance obligation), (iii) proof of no outstanding payments related to social security and to the state employment policy contributions (social security obligation). The tenderer has to prove that it has met these requirements both with regard to the Czech Republic and to the country of its registered address, if it is a foreign entity. These requirements are mandatory.

What document (if any) is used?

To prove meeting the tax obligation, the tenderer has to submit a tax deficiency confirmation issued by the Tax Office and with regard to consumer tax, a Statement stating that the tenderer has no outstanding consumer tax payments. The tax deficiency confirmation is required in various situations such as when setting up business, for audit purposes, to prove one's standing in tenders, when seeking membership in professional associations etc. The confirmation may be obtained at a local Tax Office and there is no fee for businesses and a fee of CZK 300 (approximately EUR 11) for natural persons. It takes up to one month to issue the confirmation.

To prove meeting the medical insurance obligation, the tenderer must submit a Statement that the tenderer has no outstanding medical insurance payments.

To prove meeting the social security obligation, the tenderer has to submit a confirmation with regard to obligations regarding insurance payments issued by the Social Security Office. This confirmation is issued in a wide range of situations such as when setting up a business or for auditing purposes. The confirmation can be obtained at a local Social Security Office and there is no fee. It takes 2-4 weeks to issue the confirmation.

Contents

Both the tax deficiency confirmation and the confirmation with regard to obligations regarding insurance payments include identification of the entity on whose behalf it is issued, identification of the issuing authority, information about the due payments or other obligations, signature and a stamp.

Electronic version

The tax deficiency confirmation issued by the Tax Office and the confirmation with regard to obligations regarding insurance payments issued by the Social Security Office cannot be obtained electronically.

9.3.4 Requirements with regard to the suitability to pursue the professional activity

Prevalence/actual use in calls

These requirements are mandatory.

What document (if any) is used?

The following documents are used:

- a commercial registry extract,
- a business permit or a license etc.,
- proof of membership in a chamber or association, but only if such membership is required by law for performance under the procured contract,
- proof of professional competence, but only if such competence is required by law for performance under the procured contract.

A foreign tenderer proves the suitability to pursue the professional activity based on documents and procedures determined under applicable law in the country of its registered address and if such documents and procedures do not exist, by a Statement.

Contents

Commercial registry extracts include basic information about the business such as the name of the company, registered address, identification number, purpose of business, name of the authorized representative, registered capital, and dates of all changes in the commercial registry record.

A business permit or a license includes proof of membership in a chamber or association and proof of professional competence, identification of the holder, identification of the issuing authority, information about the fact that they prove (business permission, chamber membership etc.), and a stamp and signature of the relevant authority.

Electronic version

It is expected that it will be possible to obtain a regular electronic version of the commercial registry extract in the course of 2007, but at the moment only a non-binding informatory version is available electronically. The remaining documents are not issued electronically.

9.3.5 Requirements with regard to economic and financial standing

Prevalence/actual use in calls

This requirement is common, but not mandatory.

What document (if any) is used?

The contracting authority may request any documents on condition that such request is adequate to the nature of the procured contract. The contracting authority has to state in the contract specification which documents it will request and typically they include one or more of the following:

- the tenderer's liability insurance contract,
- the tenderer's latest balance-sheet or its part,
- information about tenderer's turnover over not more than the last three years.

A foreign tenderer proves the suitability to pursue the professional activity based on documents and procedures determined under applicable law in the country of its registered address and if such documents and procedures do not exist, by a Statement.

Contents

Liability contracts identify the parties and describe their duties clearly. The remaining documents include an identification of the tenderer, the accounting or financial information and a signature and/or stamp of the issuing entity.

Electronic version

The documents can be submitted electronically.

9.3.6 Requirements with regard to technical and/or professional ability

Prevalence/actual use in calls

This requirement is common, but not mandatory.

What document (if any) is used?

The contracting authority may request one or more of the following:

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for all contracts

- a list and descriptions of important contracts performed over the last three years (this must be accompanied by a statement from the receiving party of the contract that proves the delivery, or, if the statement cannot be objectively obtained, by a Statement of the tenderer),
- a list of technicians or departments that will take part in performance of the contract,

for public supply contracts only

- samples, descriptions or pictures of the goods that would be delivered,
- proof of compliance of the products issued by the relevant authority,

for public supply contracts and public service contracts only

- a description of the technical equipment and services used by the tenderer to maintain quality,
- a review of the production/technical facilities by the contracting authority,

for public service contracts and public works contracts only

- proof of education and professional qualification of the supplier or its managers,
- measures regarding protection of environment that the supplier will be able to use when performing the contract,
- an overview of an average annual number of employees taking part in the performance of the contract, etc.,
- an overview of devices and equipment that the supplier will have at disposal when performing the contract.

Contents

Documents usually include university diplomas and various academic and professional Certificates, service descriptions, product descriptions, statistical data, information sheets etc.

Electronic version

Documents are usually submitted in a hard copy as a part of or an attachment to a larger set of tender documents. Documents can be submitted electronically.

9.3.7 Requirements with regard to quality assurance standards

Prevalence/actual use in calls

This requirement is not common and must be justifiable by the specific nature of the contract.

What document (if any) is used?

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For services and deliveries contracts, and as an addition to documents providing information about quality assurance standards that might be required under technical requirements under D.6. above, the contracting authority may request a quality management system Certificate issued according to Czech technical norms (CSN EN ISO 9000) by an appropriate certification institution.

Certification may cost up to CZK 200.000 (approximately EUR 7100) depending on the size of the company and other factors and may take up to one month since the start of the audit. The contracting authority has to accept equivalent Certificates from other countries. ISO Certificates are used for wide variety of business-related purposes.

Contents

Certificates identify the certification institution, the tenderer, inform about the norm that is met, and contain a signature and a stamp of the certification institution.

Electronic version

The Certificate is not issued electronically.

9.3.8 Requirements with regard to environmental management standards

Prevalence/actual use in calls

This requirement is not common and must be justifiable by the specific nature of the contract.

What document (if any) is used?

For services and construction works contracts, the contracting authority may request an eco-management and audit scheme (EMAS) Certificate or an environmental management system (EMS) Certificate issued according to Czech technical norms (CSN EN ISO 14000) by an appropriate certification institution.

Certification may cost up to CZK 200.000 (approximately EUR 7100) depending on the size of the company and other factors and may take up to one month since the start of the audit. The contracting authority must accept equivalent Certificates from other countries.

Contents

Certificates identify the certification institution, the tenderer, inform about the norm that is met, and contains a signature and a stamp of the certification institution. ISO Certificates are used for wide variety of business-related purposes.

Electronic version

The Certificate is not issued electronically

9.4 Interoperability

The software applications used in the Czech Republic are without exception accessible to non-nationals. In general, the publication-only applications do not require any registration and are accessible to anyone. Complex applications require registration and any entity, including a foreign entity, may register. When submitting electronic documents, the tenderers have to attach an electronic signature as described in section 9.3. above.

9.5 Future trends/expectations

One of the most important expectations with regard to the near future is the creation of comprehensive e-procurement guidelines. Other significant initiatives include the development of technical specifications for e-invoicing and e-payments and development of a framework on long-term data archiving. These initiatives are in their initial phases and their target deadline is in 2010. Public authorities will continue the e-procurement information campaign, although it is not clear if e-procurement will become a higher priority for the government. The Czech Republic also intends to prepare a national e-procurement strategy for use in the EU context.¹⁰³

9.6 Assessment

Significant progress has been made in the e-procurement field in the Czech Republic and its development is comparable to the current standard in the EU countries. The most important functionalities of e-procurement applications are already operational and in use, the technical specification for e-invoicing and e-payments and the framework on long-term data archiving are still under development. The level of information about e-procurement and number of contracts procured electronically keeps growing. Some concepts used in the Czech Republic, such as approach to the electronic devices validation, are being introduced in other countries as well.¹⁰⁴

¹⁰³ The report on performing the National Plan for year 2006 (available at http://www.portal-vz.cz/uploads/elektronicke_zadavani/prava_o_plneni_za_rok_2006.doc)

¹⁰⁴ Shane Reilly, CARSA: Compliance verification in electronic public procurement. (Available at http://www.portal-vz.cz/uploads/elektronicke_zadavani/ompliance_verification_in_electronic_public_procurement_final_report.pdf)

At the same time, e-procurement in the Czech Republic is facing the following challenges:

- E-procurement is difficult and costly. For many contracting authorities as well as tenderers, the use of e-procurement and electronic signature would require significant expenses, for example extensive costly training. The set of laws, decrees and guidelines in place is confusing and despite the progress it is still often considered much easier and safer for the contracting authorities to procure contracts in the standard way.
- Many documents required for public procurement (certificates, as noted above) are not readily available in an electronic version. For example, it is difficult to obtain an electronic extract from the Commercial Registry and an electronic extract from the Criminal Registry, both of which are commonly required. That slows down the e-procurement procedure, makes it more costly and less practical. Due to the legal and technical difficulties with electronic signatures described in section 9.4 above we do not expect a significant increase in the use of e-procurement in the near future.
- There are no sufficient incentives for the use of e-procurement. E-procurement initiatives are not encouraged strongly due to the limited support from the government. Due to the fact that e-procurement brings about a number of practical difficulties described above and that there are no sufficient pro e-procurement incentives, many contracting authorities still choose the standard way of public procurement rather than e-procurement.

The comprehensive e-procurement guidelines that are expected to be published by the end of 2007 may make e-procurement more user friendly. However further legislation in favour of e-procurement may also be necessary. Such an initiative would require the government's continued support.

"In the Czech Republic, attestation is provided for e-procurement tools that are compliant with the applicable national laws. It presents an interesting option for a verification compliance mechanism (and indeed is also planned to be implemented within the French system), and may provide another alternative to those countries which again do not have the resources to develop their own compliance verification mechanism."

10 Denmark

10.1 Public procurement framework

10.1.1 General framework

The first public procurement law in Denmark was Act number 216 of 8 June 1966 on invitation to submit tenderers ("*litigationsloven*"). This Act has been modified numerous times and was most recently substituted by Act number 338 of 18 May 2005 regarding the invitation to submit tenderers on certain public and public funded contracts ("*tilbudsloven*"), most recently modified by Act number 572 of 6 June 2007.

The Act number 338 was intended to increase the transparency of procurements and to simplify the framework. The terminology is in agreement with Directive 2004/18/EC.

Simultaneously with this Act, the procurement directives 2004/17/EC on utilities and 2004/18/EC on public works, supplies and services have been implemented by the following governmental orders:

- Governmental order number 937 of 16 September 2004 concerning the procedures for the award of public works contracts, public supply contracts and public service contracts; and
- Governmental order number 936 of 16 September 2004 concerning procurement procedures of entities operating in the water, energy, transport and telecommunications sectors

According to Danish law the public procurement directives are directly applicable since they are incorporated *telles quelles*, i.e. the directives have been implemented without any material changes to the contents of the directives.

The text of each directive is included as an annex to the respective governmental order. Consequently, the actual text of the directives constitutes the current legislation in the field of public procurement in Denmark.

Some of the new provisions in the procurement directives are non-compulsory for Member States, e.g. the provisions on framework agreements, centralised purchasing, electronic auctions and competitive dialogue. This entails that each Member State must decide whether to implement these rules into national law. Denmark has chosen to implement all new procurement procedures and instruments with only one exception. Electronic auctions cannot be used in the field of public works contracts – mainly to prevent a risk of fragmenting the building process.

The procurement directives have been in effect in Denmark since 1 January 2005.

The remedies directives 89/665/EC and 92/13/EC are implemented into Danish law by:

- Act number 415 of 30 May 2000 on the Danish Complaints Board, amended by Act No. 450 of 7 June 2001, Act No. 306 of 30 April 2003, Act No. 338 of 18 May 2005 and Act No. 431 of 6 June 2005; and
- Governmental order number 602 of 26 June 2000.

The procurement in Denmark is organised in a decentralised structure.

The Danish Administration of Competition ("*Konkurrencestyrelsen*") has the superior responsibility of negotiation, implementation and guidance of understanding of the procurement regulations. However, the individual contracting authority has responsibility for the implementation of its own specific procurement procedures.

In Denmark the procurement regulations have been implemented by a framework law, which gives authorisation to the department of finance and business to implement new procurement regulations created by the EU administratively (without further approval of the Danish Parliament).

This means that Denmark has the opportunity to implement any new procurement regulations quickly and by a simple procedure.

10.1.2 Certificates and statements

The tenderer is obligated to provide the contracting authority with a signed solemn declaration. The contracting authority may not sign a contract with a tenderer, who has not met this requirement.

The solemn declaration is a statement where the tenderer guarantees that the information submitted is correct.

The solemn declaration is typically a standard formula enclosed by the contracting authority in the procurement material. The tenderer must fill in the solemn declaration and send it back to the contracting authority along with the bid.

The information the tenderer must fill out in the standard formula is the name of the company, SE number and address. In addition the tenderer must confirm two pre-printed statements.

- That the tenderer do not meet any of the exclusion criteria mentioned in Article 45 of Directive 2004/18/EF.
- That the tenderer has no unpaid due debt to public authorities.

A contracting authority may not sign a contract with a tenderer, whose debt to the public is more than DKK 100,000. "Debt to the public" means unpaid due taxes and unpaid due duty, both to the public authorities in Denmark and to the public authorities in the tenderer's home country.

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This solemn declaration also functions as a general power of attorney, which allows the contracting authority to make any necessary inquiries to verify the correctness of the submitted information, for instance by contacting the Danish Commerce and Companies Agency (*Erhvervs- og Selskabsstyrelsen*) or the Danish Taxation Department (*Skat*).

The solemn declaration must be signed by hand. Since the solemn declaration is in Danish, this means there is no language validation issue.

Another often used standard document is the so-called Declaration of Service (see below in section 10.2.2.). This document gives information about the tenderers' financial situation, possible convictions etc.

With regard to selection criteria (which establish the financial and technical suitability of the tenderer), a different set of supporting documents is typically required. These can include:

- Bank statements, balance sheets and annual accounts of the tenderer, if the publication of balance sheets is mandatory in the tenderer's country of origin
- Declarations from the tenderer's bank, accountant, insurance company
- Professional and educational qualifications
- Statements containing references to works/supplies/services provided in the most recent five years, as evidenced by attestations of acceptance
- Statements detailing the working equipment to be used by the tenderer
- Statements detailing the average staffing of the tenderer in the last three years
- Statement detailing technicians or technical services at the tenderer's disposal

10.2 E-Procurement initiatives and status

10.2.1 General e-Procurement framework and initiatives

As mentioned above Denmark has chosen to give access to all new procurement procedures and instruments, with the exception of electronic auctions in the field of public works contracts.

Below is listed which e-procurement initiatives Denmark has taken and the status of the progress.

- e-notification:

Both local procurements and EU-procurements are announced on Tenders Electronic Daily, www.ted.europa.eu.

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On this website tenders announce the basic information on the procurement. The basic information includes information on the tender, the area of procurement and deadline.

Local procurements are also announced on other websites.

Denmark is divided into 5 regions. These regions' procurements are announced on www.regionsudbud.dk. The announced procurements involve all of the regions procurements above DKK 500,000. It is possible for tenderers to subscribe to specific categories of tenders for which the tenderer will thereafter be notified by email.

The Danish Commerce and Building Agency (*Erhvervs og Byggestyrelsen*) and the National Association of Local Authorities in Denmark ("*Kommunernes Landsforening*") have by a joint initiative created the website www.udbudsavisen.dk. The purpose of this website is to make public procurement in Denmark more transparent.

On www.udbudsavisen.dk two types of procurements are announced.

- All EU-procurement from Denmark and from other countries.
 - Smaller Danish public procurements, which are under the European threshold value.
 - Procurements not included in directive 2004/18/EC announced by the Danish public authorities. This is usually within the senior citizens area.
- e-tendering (questions and answers session, submission and opening of proposals).

In principle, it is possible for the tenderer to receive the tender documents and for the tenderer to send a bid by email.

It is also possible for the tenderer to ask questions revolving the procurement to the tender by email.

- e-awarding (evaluation of proposals and granting);

It is possible for the contracting authority to inform the tenderers on granting and rejections by email.

- e-auctions:

Procurement can be ended with an e-auction. E-auctions can be used within open procedures, restricted and negotiated procedures, and negotiated procedure with prior publication of a

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contract notice. E-auctions are also available within the frameworks of a dynamic purchasing system and with the reopening of competition. A limitation to e-auctions is public works contracts, as mentioned previously.

To ensure equal treatment, non-discrimination and transparency in the decision to award contracts the directive 2004/18/EC provide several conditions which must be meet.

The main conditions within e-auctions are:

- If the procurement is ended by an e-auction, this must appear by the contract documents.
 - The progress of the procurement must be fixed in advance.
 - A number of detailed conditions must be mentioned in the specifications.
 - Exact specification must be mentioned in the contract.
 - Only quantitative elements can be made object for an e-auction.
 - During the e-auction any information about the individual tenderers may not be forwarded.
-
- e-invoicing and e-payment:

By government order 991 of 7 October 2004 on e-invoicing with public authorities it was made possible for public authorities to send invoices electronically to natural or legal persons. At the same time it was made possible for natural or legal persons to send invoices to public authorities electronically.

The order requires the public authority to use e-invoicing unless one of three exceptions is fulfilled.

- Settling for cash payments for issued certificates, authorisations, identification papers, handing over goods, administration of a letter of complaint etc.
- If it is easier or cheaper to send an invoice by regular mail.
- If the receiver of the invoice cannot receive the invoice electronically or wishes to receive the invoice by regular mail.

With e-invoicing to public authorities, the public authority is required to include an order number, EAN-number and a reference code. The public authority must be able to receive e-invoices created in OIOXML.

OIOXML is a communication standard created to make different computer programmes working together. The OIOXML is a guideline, which has been specially adapted to the Danish needs.

The OIOXML is a part of a project, which main purpose is:

- Improved exchange of data, both internal in the public sector and between the public and the private sector.
- Improved handling of data and easier access to already gathered data and recycle of this data.
- Easier implementing of e-services.

Information on OIOXML can be found on www.oio.dk.

10.2.2 Administrative simplification for Danish tenderers

The Danish Commerce and Companies Agency ("*Erhvervs- og Selskabsstyrelsen*") coordinates the gathering of information from other Danish public authorities in connection with procurements.

This system is to make it easier for the tenderers to gather information, declarations etc. With this system the tenderer shall only contact one public authority.

When the Danish Commerce and Companies Agency has gathered all relevant information, they issue a public Declaration of Service ("*Serviceattest*") to the tenderer. The Declaration of Service is an electronic document which can be sent direct to the contracting authority.

Among the public authorities the Danish Commerce and Companies Agency will contact is the Danish Labour Market Supplementary Pension ("*ATP*"), bankruptcy court ("*skifteretten*"), the crime register ("*Kriminalregistret*") and the Central Customs and Tax Administration ("*Told og Skat*"). Of course the Declaration is only available to Danish entities; foreign entities must still provide the certificates mentioned below (see section 10.3).

The contracting authority has to review the submitted declarations, and may require additional information in cases when it is not clear whether the submitted documents prove the required qualification (e.g. because of language issues) or in cases when the required documents are not issued by the foreign authority.

To get a Declaration of Service, the tenderer must fill out a formula titled Request of Declaration of Service ("*anmodning om serviceattest*")¹⁰⁵. This request must be sent to the Danish Commerce and Companies Agency.

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See http://www.eogs.dk/graphics/_ny%20eogs/Registrering%20af%20selskaber%20og%20virksomheder/Find%20person%20eller%20virksomhed/anmodning_serviceattest.pdf

The declaration of service costs DKK 725 and payment will be collected subsequent. The procedure usually takes 1-2 weeks.

A request is possible either by mail or by the internet.

In Denmark is it possible with the use of the website www.virk.dk and with the use of digital signature (*digital signatur*) in some degree to engage in electronic correspondence with public authorities, to apply for certain documents or to register changes within the company.

www.virk.dk is the business community's access to the Danish public authorities. The website is developed by a private-public partnership. The main functions are consulting services and access to commerce-oriented tools, among which the opportunity to make direct and electronic declarations to the Danish public authorities.

The digital signature is available for natural persons and can be used on most public authorities' websites.

A digital signature can be ordered on www.virk.dk or a www.digitalsignatur.dk. On the latter website you can find further information on the digital signature in Denmark.

10.3 Certificates, attestations and declarations

In this section we will provide an overview of the common requirements defined by the e-Procurement Directives and how these requirements typically are met in Denmark.

10.3.1 Requirements with regard to the personal situation of the candidate or tenderer – absence of conviction (art. 45 §1 and §2 (c-d) of Directive 2004/18/EC)

Prevalence/actual use in calls

The contracting authority will usually demand a Declaration of Service which gives information on the matter.

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An extract from the criminal register is rarely requested in procurement, however this certificate is often requested during job application procedures, specifically when applying for a public function or for a position involving contact with the under aged.

Which document (if any) is used?

As mentioned above, the tenderers' personal situation on the matter is usually solved by the Declaration of Service issued by the Danish Commerce and Companies Agency.

Other options are to get an extract from the criminal register or have declaration of the matter made before the notary or an administrative authority.

An extract from the criminal register is issued by the local police and is free of charge. If such extract is required, the contracting authority will usually be interested in extracts of the criminal register for the company's management, board of directors or the company's other responsible.

Extracts from the criminal register shall not be submitted with the bid unless the contracting authority specifically asks for it.

If an extract from the criminal register can not be issued the tender must settle with a declaration of the matter declared for a notary or an administrative authority.

Contents

The certificate identifies the issuing authority, the requesting party, date and place of issuance, and relevant decisions. The latter includes criminal convictions (which have not been revoked through grace, pardon or rehabilitation), internments, and dispossession of parental authority (by date, jurisdiction, description of facts and final decision). The document is signed by the public official and stamped.

Electronic certificates

As previously mentioned, the Declaration of Service is electronic.

However, it is not possible to apply for an extract from the criminal register electronically, nor can it be issued electronically.

Having a declaration of the matter declared for a notary or an administrative authority cannot be done electronically.

10.3.2 Requirements with regard to the personal situation of the candidate or tenderer – non-bankruptcy and financial status (art. 45 §2 (a-b) of Directive 2004/18/EC)

Prevalence/actual use in calls

In all procurements it is necessary for the contracting authority to ensure that the tenderer is not under bankruptcy.

It is a common demand by the contracting authority.

Which document (if any) is used?

Two types of documents prove this.

1: The Declaration of Service which - as mentioned above - the Commerce and Companies Agency in Denmark issues for Danish tenderers. The Declaration of Service proves that the tenderer does not fall within the scope of the art. 45, § 2, litra a), b), c) or F) situations.

2: A solemn declaration. This is demanded in every procurement. Further information on the solemn declaration is stated in section 10.1. above.

Contents

The contents of the Declaration of Service and the solemn declaration is different, however regarding evidence of non-bankruptcy, the documents proves the identification of the tenderer and whether or the tenderer is bankrupt.

Electronic certificates

N.A.

10.3.3 Requirements with regard to the personal situation of the candidate or tenderer – compliance with fiscal and social obligations (art. 45 §2 (e-f) of Directive 2004/18/EC)

Prevalence/actual use in calls

Usually, no specific documents from the Danish Taxation Authorities (*Skat*) are required.

Which document (if any) is used?

As previous mentioned, a contracting authority usually demands a Declaration of Service. This will usually fulfil the contracting authority's need of information regarding the tenderers' fiscal and social obligations.

Contents

N.A.

Electronic certificates

N.A.

10.3.4 Requirements with regard to the suitability to pursue the professional activity

Prevalence/actual use in calls

The requirement with regard to the suitability to pursue professional activity is a common (though not mandatory) requirement in Danish procurements. However, specific certificates are rarely required.

Which document (if any) is used?

Very often a statement of the tenderers' business profile, including a description of the organization etc is required.

Contents

The statement of the tenderer's business profile usually provides a broad view and a good insight of the company, including information on the hierarchy, the work procedure and employees.

Beside this, the content can be very different depending on the requirements.

Electronic certificates

N.A.

10.3.5 Requirements with regard to economic and financial standing

Prevalence/actual use in calls

The tender can only require information about the tenderer's financial situation, if the required information concerns the procurement.

This is a usual demand.

Which document (if any) is used?

The most typical demanded documentation is:

- Annual account for the last 2-3 years
- Balance sheet at the time of the offer, and for the last 2-3 years
- Information about the tenderer's financial position
- Declaration of the tenderer's total average turnover if possible in a period of the latest three months.

The evaluation of the tenderer's financial situation is not limited to a part of the financial situation, but involves both the tenderer's own capital and liquidity.

The tender can only demand annual accounts and balance sheets from tenderers who are established in countries where they are required by law to make these public.

The declarations are usually from the tenderers' bank or accountant.

Contents

The balance sheet usually states:

- Full name and legal form;
- CVR number;
- Place of establishment and date of establishment;
- Date of approval of the annual accounts by the management and period covered by the annual accounts;
- Management details, including general managers and daily management, and period of appointment;
- Identification of any external auditor or accountant;
- Full balance sheets and financial/fiscal results;

Declarations from the tenderer's bank or accountant usually states:

- Full name and legal form;
- CVR number;
- Place of establishment and date of establishment;
- The tenderer's creditworthiness and financial standing.

Electronic certificates

N.A.

10.3.6 Requirements with regard to technical and/or professional ability

Prevalence/actual use in calls

The requirement to demonstrate technical and/or professional ability is usually only demanded in larger procurements. It is not often required.

Which document (if any) is used?

The tender's opportunity to require documents depend on the type of procurement.

With public service contracts the tender can demand a list of all the tenderer's fulfilled works within the latest 5 years.

With this list of references a declaration of qualities of the work must be submitted. This must at least include the most important and biggest jobs within the time period. It has now become possible for the authority which issues these declarations to send this direct to the tender.

With public works contracts the tender can demand a list of all the tenderer's fulfilled works within the last 3 years.

The above mentioned documents are qualified as references ("*reference*").

The contracting authority can also request for the employees' curriculum vitae and certificate of education. This is relevant in some employment procurements. This is usually in procurement where professional competence and experiences are of high value in the valuation.

Contents

The forwarded documents are subjects to an evaluation of the tenderer's technical and professional abilities and are used to compare with a post-check.

The content can be very different depending on the requirements.

Electronic certificates

N.A.

10.3.7 Requirements with regard to quality assurance standards

Prevalence/actual use in calls

This is a common requirement.

What document (if any) is used?

The Danish Complaints Board of Procurement has stated that the tender can not demand a copy of the liability insurance policy. The tender can only require a declaration from the insurance company, which states that the tenderer has proper insurance.

Contents

The declaration from the tenderer's insurance company usually states:

- Identification of the tenderer
- Identification of the insurance company
- Contents of the insurance, including coverage and validity period

The document must only prove that the tenderer has a proper a valid insurance.

Electronic certificates

N.A.

10.3.8 Requirements with regard to environmental management standards

Prevalence/actual use in calls

The legal position in Denmark with environmental considerations in procurement is, that a call for tender may demand the use certain production processes, including the use of ecological methods of production. However, it is a condition that the tender must allow the verification if a product is produced by the required method.

What document (if any) is used?

The technical specifications may be listed with a reference to European standards/specifications. If such do not exist, a reference to international or national standards/specifications is possible.

Today only a few European standards regarding the environment within products and service exist (see EMAS framework). If the tender must take environmental considerations into account, it is necessary for the tenderer to supply the required technical specifications.

The call for tender may not set conditions which provide that a certain product or service has a special environmental trademark. The tender must instead list the environmental requirements, in line with the criteria for the wished environmental mark. Any form of documentation than a certificate of an environmental mark must always be accepted.

Documentation for an environmental mark can be a copy of a certificate, which authorises the tenderer to use the trademark in question. Other documentation than certificates, include test results from tests performed by an independent authority.

Contents

A tender may choose to buy "green" products. However the tender must be aware that considerations to the environment may not place foreign tenderers in a worse position than Danish ones with regard to the possibility to comply with the environmental considerations.

The website www.gronindkobsportal.dk helps both public and private tenders with information and useful tools to be conscious of the environment.

Electronic certificates

N.A.

10.4 Interoperability

The system with the Danish Commerce and Companies Agency's declaration of service is very useful for national tenderers. This makes it very easy for them to get prequalified for the procurement. It is much more difficult for foreigners without a permanent residence in Denmark to gather the relevant documents for the tender.

Most of the systems which makes is possible for tenderers to order official documents over the internet are based on the Danish e-signature, which means that foreigners are de facto excluded.

10.5 Future trends/expectations

Denmark is well on its way with e-procurements. Several opportunities have already been made possible, including e-auction, e-invoicing and the system with the declaration of service from the Danish Commerce and Companies Agency. The latter works very well in practise and can hardly be made easier for tenderers with residence in Denmark.

For the time being the procurements are announced in more than one place.

Most of the e-systems are fairly new, and these are up and running as good as they can be. In the future the work will consist of elaboration and improvement of these systems, among here extend the knowledge and use of the systems.

10.6 Assessment

Denmark e-procurement initiatives have seen a good beginning. There is no doubt that a lot of work is still to be done, even though the different e-procurement opportunities are up and running.

As mentioned before the administrative simplification for the tenderer, with residence in Denmark, has been very successful, as the electronic Declaration of Service replaces a number of certificate types for Danish tenderers. However, for foreign tenderers who rely on non-Danish certificates no measures have been taken yet. In addition, as noted above, a number of certificates which are occasionally required still exist only in paper form.

11 Estonia

11.1 Public procurement framework

11.1.1 General framework

Development of Public procurement falls within the competence of the Ministry of Finance (MOF) (www.fin.ee; *Rahandusministeerium*).

The Public Procurement Office (PPO) (*rha.gov.ee*; *Riigihangete amet*) is a public authority under the supervision of the MOF. It advises procuring entities, exercises control over the sector etc.

In Estonia public procurement is regulated by the *Public Procurement Act*¹⁰⁶ (PPA) (*Riigihangete seadus*), which entered into force on 1. May 2007. Both utility services and traditional sectors are regulated by the PPA. The PPA replaced the earlier law from the year 2000, which carried the same title.

The PPA is supplemented by various Government Decrees.

- Statute of Public Procurements Dispute Committee, Regulation No. 28 of the Minister of Finance dated August 18 April 2007. (*Riigihangete vaidlustuskomisjoni põhimäärus, Rahandusministri 18. aprilli 2007. a määrus nr 28*).¹⁰⁷
- Evaluation of procurement procedures of procuring entities related to utilities and requirements to evaluation officers, Government of the Republic Regulation No. 167 dated 31 May 2007 (*Võrgustikega seotud hankija hankemenetluste läbiviimise korra hindamine ja nõuded atesteerijatele, Vabariigi Valitsuse 31. mai 2007. a määrus nr 167*).¹⁰⁸
- Statute of the state register of public procurements, Government of the Republic Regulation No. 158 dated 18 May 2007 (*Riikliku riigihangete registri põhimäärus, Vabariigi Valitsuse 18. mai 2007. a määrus nr 158*).¹⁰⁹
- Procedure of handling the information submitted to the Public Procurement Office subject to a communication of the Commission of the European Communities and communicating thereof to the Commission of the European Communities, Government of the Republic Regulation No. 114 dated 26 April 2007 (*Euroopa Komisjoni teate alusel Riigihangete Ametile esitatava*

¹⁰⁶ Available on-line at: <https://www.riigiteataja.ee/ert/act.jsp?id=12791579> (20.06.2007)

¹⁰⁷ Available on-line at: <https://www.riigiteataja.ee/ert/act.jsp?replstring=33&dyn=12791579&id=12820682> (20.06.2007)

¹⁰⁸ Available on-line at: <https://www.riigiteataja.ee/ert/act.jsp?replstring=33&dyn=12791579&id=12837909> (20.06.2007)

¹⁰⁹ Available on-line at: <https://www.riigiteataja.ee/ert/act.jsp?replstring=33&dyn=12791579&id=12832159> (20.06.2007)

*informatsiooni käsitlemise ja Euroopa Komisjonile edastamise kord, Vabariigi Valitsuse 26. aprilli 2007. a määrus nr 114*¹¹⁰

Several decrees, which must be adopted under the PPA have not yet been adopted.

This legal framework is in principle applicable to all public procurements. Local administrations thus have no regulatory autonomy.

There is one central on-line register for public procurements called the *Public Procurement Registry* (PPR) (*Riigihangete register*), which is accessible on-line at <https://riigihanked.riik.ee/>. Typically procurements are initiated by publishing a notice in the PPR.

In compliance with European obligations, procurements with a value exceeding certain thresholds established by PPA are also published in the Official Journal of the European Communities (on-line version: see Tenders Electronic Daily, <http://ted.publications.eu.int>).

Notwithstanding this obligation, contracting authorities are of course allowed to publish the procurement through other channels to increase response rates, including by directly contacting potential tenderers, although such announcements may not take place before the legally required publication or contain more/other information, to ensure fair competition.

In exceptional circumstances prior publication is not required, and the so called 'negotiation procedure without prior publication' can be followed. This can only be done in a limited number of situations indicated in the law.

If the procurement is published, the publication will indicate the administrative requirements to be met, including by naming certificates and statements to be provided by prospective tenderers, and by indicating the specific administration and/or contact person to whom the finalised offer should be provided.

11.1.2 Certificates and statements

The administrative requirements to be met are defined in the PPA. The conditions must be proportionate.

The PPA lists several criteria (§§ 38-42) regarding the qualification of the tenderer:

- Grounds for excluding a tenderer from the procurement, such as e.g. a prior offence for false public procurement, money laundering and other listed offences, bankruptcy, tax debt, presenting false data regarding qualification etc. Depending on the type of exception from a written statement concerning the absence of the circumstances mentioned, a confirmation from the Tax authority, or a confirmation from the punishment register may be required.
- Grounds for qualifying as a tenderer, such as economic status and trade competence. Documents may be required to prove that the tenderer qualifies according to the conditions. These documents vary in practice, from e.g. submission of a written statement and third parties concerning the absence of the circumstances mentioned, to documents from the relevant authorities and professional bodies etc. The contracting authority specifies in each case which specific documents are needed, but usually copies are accepted.

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Available on-line at:
<https://www.riigiteataja.ee/ert/act.jsp?replstring=33&dyn=12791579&id=12824141> (20.06.2007)

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- The procuring entity may require as proof of financial and economic status bank statements or similar evidence to show that the tenderer has access to the funds necessary for performing the contract, financial reports for the last three years, information regarding net turnover of the tenderer in related areas for the last three years, evidence of professional liability insurance (or similar), etc.
- For technical and trade competence the procuring entity may require e.g. a list of similar construction works within up to 5 years, a list of procurement contracts meeting the set criteria and performed within the last 3 years, data regarding qualifications of particular employees, technical quality control mechanisms etc.

For foreign tenderers equivalent documents delivered by the competent judiciary or governmental body from the country of origin will also be accepted if they meet the requirements of the PPA. For several of the conditions the exception is listed that if the tenderers authorities do not issue corresponding documents this may be replaced by a sworn confirmation according to certain conditions.

Often the contracting authorities do not require original copies of the documents. Normally signatures are expected. Originals may be requested by the contracting authority.

The contracting authority is relatively free in determining the verification and language issues.

The authority must respect the basic principles of good administration. In practice, this means that any decision to reject certain evidentiary documents must be motivated and transparent. Additionally, the decision must be proportionate and respect the fundamental principles of public procurement. When a contracting authority considers that the provided certificates are incomplete, ambiguous or unclear, it may request clarification from the tenderer rather than rejecting an offer outright. In this way, arbitrary decision making is avoided.

11.2 E-Procurement initiatives and status

According to the PPA, it implements the EU directives 2004/17 and 2004/18. However, dynamic purchasing systems and electronic auctions are still under development.

The central on-line register is located at <https://riigihanked.riik.ee> and it is maintained by the MOF. Electronic public procurement notices are published there. Any contracting authority must accede to it, which brings the direct benefit for them of cost free publication of procurements.

E-notification: a simple publication and search functionality has currently been integrated in the system. Notification there is considered to be the original notice.

Registering a user can be done on-line and a password is sent via e-mail. Only a user identified with an ID card can register as a procuring entity. If one does not have the ID card the register must be contacted directly.

The PPA in principle includes the necessary legal basis for eProcurement. However the PPA still requires the adoption of a government regulation regarding requirements for the equipment used for electronic auctions as well as rules of procedure for electronic auctions (§ 51 7 of the PPA). Until the adoption of such rules, eProcurement will be limited to publishing notices and delivering documents electronically. The relevant provisions of the PPA will become enforceable 1. January 2008.

MOF is responsible for further development of the eProcurement system.

In principle a central purchasing environment is not required and every procuring entity may in fact develop its own environment (taking into account the to be set standards).

The PPA does not expressly give a preferential position to Estonian tenderers. They are expected to produce the same documents as all tenderers. The law does foresee one potential preference: when a tender requires the submission of certain documents and the tenderer has failed to include these, the procuring entity may not set aside the offer if it can without substantial cost access the same documents in a public register. This may indirectly favour Estonian tenderers as the Estonian registers may be more easily available.

11.3 Certificates, attestations and declarations

In this section, we will take a closer look at how the common requirements defined by the eProcurement Directives are typically met in Estonia.

11.3.1 Requirements with regard to the personal situation of the candidate or tenderer – absence of conviction (art. 38 § 1 1 and §2 (c-d) of Directive 2004/18/EC)

Prevalence/actual use in calls

This is a common requirement in Estonian procurements.

What document (if any) is used?

According to the PPA the procuring entity shall not enter into a procurement contract with any person and shall remove from the procurement at any time the tenderer or applicant who or whose legal representative have been punished pursuant to a criminal or misdemeanour procedure for organising a criminal group or belonging thereto, or for violating any public procurement requirements, or for fraudulent conduct, or for committing any offences related to office or money laundering, and in case of whom the information concerning the punishment has not been deleted from the punishment register according to the Punishment Register Act, or in case of whom the punishment is valid according to the legislation of its country of residence or country of location.

Normally a submission of a written statement concerning the absence of the circumstances mentioned would be required.

If the procuring entity has reasonable doubts that the tenderer, applicant or subcontractor of the tenderer have problems with fulfilling the criteria, it may require from the tenderer or the applicant a respective statement of the punishment register concerning the absence of the said grounds or file an inquiry with the authorised processor of the punishment register or request an equivalent document issued by the court or administrative agency of the country of location of the subcontractor of the tenderer or the applicant or a statement issued by any other authorised administrative agency or a written authorisation of the tenderer or the applicant or the subcontractor of the tenderer to contact the respective administrative agencies for obtaining a confirmation concerning the absence of the said grounds. If the country of location of the tenderer or the applicant or the tenderer's subcontractor does not issue such documents, it may be replaced by a sworn affidavit of the tenderer, the applicant or the tenderer's subcontractor or its representative or a statement made in front of a competence justice or

administrative agency or notary or professional or occupational association according to the legislation of the country of location of the tenderer or the applicant or the tenderer's subcontractor.

The punishment register (<http://www.pol.ee/?id=467>) is operated by the Police Board (*Politseiamet*). Once a year a person has a right to receive a free printout of the register and its archive. Otherwise a fee is charged.

Traditionally, the delivery of such a certificate required the requesting party to present himself physically before the issuing authority. However, natural persons are now often granted the possibility of requesting the certificate electronically, using their ID card.

Contents

Article 11 of the Punishment Register Act (*Karistusregistri seadus*) lists the data to be entered in punishment register card

- (1) The data concerning a natural person are the following:
 - 1) given name and surname;
 - 2) personal identification code;
 - 3) citizenship;
 - 4) residential address.
- (2) In the case of a change in personal data, the new personal data and the number, place of preparation and the number of the change registration shall be entered in the punishment register card.
- (3) In the case of a foreigner or a person without a personal identification code, the date and place of birth and the name and number of the identity document of the person shall be entered in his or her register card.
- (4) Data concerning the punishment of a natural person are the following:
 - 1) the name of the court which made a judgment or ruling in the criminal or misdemeanour matter, the name of the extra-judicial body which made a decision in the misdemeanour matter, the date of making the judgment, decision or ruling and the number of the criminal or misdemeanour matter;
 - 2) the section, subsection and clause of the Penal Code or another Act which is the basis for the judgment, decision or ruling made in the criminal or misdemeanour matter;
 - 3) the type and term or category of the punishment imposed on the person for the criminal offence or misdemeanour;
 - 3-1) the date on which the judgment, decision or ruling enters into force;
 - 4) the time the person spent in provisional custody before the making of the court judgment;
 - 5) information concerning the substitution or aggregating of punishments;
 - 6) the date of payment of the amount of pecuniary punishment or a fine;
 - 6-1) the date on which community service is performed;
 - 7) the date of the end of a sentence of imprisonment;
 - 8) the date of the end of the probationary period;
 - 9) the date of release of the person on parole;

- 10) the date on which administration of coercive psychiatric treatment to a person is terminated;
 - 11) the date on which application of a sanction to a person younger than 18 years of age is terminated;
 - 12) the date of entry into force of a resolution of the President of the Republic granting a pardon to the person.
- (5) The data concerning a legal person are the following:
- 1) name;
 - 2) address of the seat;
 - 3) registration number or, in the case of a foreign legal person without a registration number, the number or letter combination considered equal to a registration number.
- (6) Data concerning the punishment of a legal person are the following:
- 1) the name of the court which made a judgment or ruling in the criminal or misdemeanour matter, the name of the extra-judicial body which made a decision in the misdemeanour matter, the date of making the judgment, decision or ruling and the number of the criminal or misdemeanour matter;
 - 2) the section, subsection and clause of the Penal Code or another Act which is the basis for the judgment, decision or ruling made in the criminal or misdemeanour matter;
 - 3) the type and term or category of the punishment imposed on the person for the criminal offence or misdemeanour;
 - 3-1) the date on which the judgment, decision or ruling enters into force;
 - 4) information concerning the substitution or aggregating of punishments;
 - 5) the date of payment of the amount of pecuniary punishment or a fine;
 - 6) the date of enforcement of the judgment for compulsory dissolution.

Electronic certificates

The holders of an Estonian ID card can request a certificate electronically, but the resulting document will still be on paper and sent by mail.

11.3.2 Requirements with regard to the personal situation of the candidate or tenderer – non-bankruptcy and financial status (art. 45 §2 (a-b) of Directive 2004/18/EC)

Prevalence/actual use in calls

This is a common requirement in Estonian procurements.

What document (if any) is used?

Normally a submission of a written statement concerning the absence of the circumstances mentioned would be required.

Contents

The submission identifies the receiving party, date and place of issuance etc. It must contain a confirmation that the submitting party is not in bankruptcy or liquidation, its practice of commercial activities has not been suspended, and it is not in any other similar situation according to the laws of its country of location.

Electronic certificates

There is no electronic equivalent, and no plans for such an equivalent have currently been announced.

11.3.3 Requirements with regard to the personal situation of the candidate or tenderer – compliance with fiscal and social obligations (art. 45 §2 (e-f) of Directive 2004/18/EC)

Prevalence/actual use in calls

This is a common requirement in Estonian procurements.

What document (if any) is used?

Submission of a statement by the Tax and Customs Board and the tax administrator of local taxes in the country of location of the procuring entity or the country of residence or country of location of the tenderer or the applicant, or the administrative agency with the respective competence of the country of location of the tenderer or the applicant is required.

In case the administrative agency with the respective competence in the country of location of the tenderer or the applicant does not issue any statements with such contents, the statement of such administrative agency concerning the absence of tax arrears is required.

Contents

The certificate identifies the issuing authority (including the specific public official), the requesting party (including by enterprise number), date and place of issuance, and the requested information (i.e. compliance with fiscal or social obligations). The document is signed by the public official and stamped.

Electronic certificates

None of the attestations have an electronic equivalent that is provided to the tenderer, and no plans for such an equivalent have currently been announced.

11.3.4 Requirements with regard to the suitability to pursue the professional activity

Prevalence/actual use in calls

This is a common requirement in Estonian procurements.

What document (if any) is used?

If any special requirements have been established in the legislation concerning the activity to be performed subject to the procurement contract, the procuring entity shall verify whether the tenderer or the applicant has such activity license or registration or whether it is a member of the respective organisation according to the legislation of its country of location by demanding if necessary from the tenderer or the applicant a respective statement, if these data are not available for the procuring entity without significant costs via a register.

Contents

Depends largely on the particular requirement.

Electronic certificates

Depending on the particular requirement registration data may be available on-line. Eg. <http://mtr.mkm.ee/>.

11.3.5 Requirements with regard to economic and financial standing

Prevalence/actual use in calls

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This is a common requirement in Estonian procurements.

What document (if any) is used?

For verifying the compliance of the economic and financial situation of the tenderer or the applicant with the qualification requirements, the procuring entity shall require in the notice of the planned procurement the submission of one or more of the following documents:

- 1) a relevant bank statement or any other relevant document deemed acceptable by the procuring entity, which shows that the tenderer or the applicant have at their disposal the financial resources required for the performance of the procurement contract or that they have the opportunity of getting these;
- 2) the annual reports for up to three past years, or extracts from such annual reports, if the annual reports are public according to the legislation of the country of location of the tenderer or the applicant;
- 3) data about the net turnover of all the economic activities of the tenderer or the applicant or the net turnover in the area related to the procurement contract or in the part complying to the object of the procurement contract, if available, during up to three past financial years.

The procuring entity may require from the tenderer or the applicant the submission of a professional liability insurance certificate or any other relevant document deemed acceptable by the procuring entity, which shows that the tenderer or the applicant have the required funds for indemnification for a damage arising from any potential violation of the procurement contract or that it has an opportunity to get these.

If it is required and relevant for the attestation of the professional qualifications of the tenderer or the applicant, the tenderer or the applicant may establish its compliance with the requirements concerning their economic or financial situation in the framework of the performance of a particular procurement contract in addition to its figures even based on the means of any other person, if it proves to the procuring entity in an acceptable manner that such person has got the means required for the performance of the procurement contract and complying with the object of the procurement contract and the tenderer or the applicant are able to use the respective means of such person if necessary for the performance of the procurement contract.

Joint tenderers and joint applicants may rely for attestation of the compliance of their economic and financial situation with the qualification requirements in case of aggregate indicators on the respective aggregate indicators of all the joint tenderers or joint applicants.

If the tenderer or the applicant cannot submit with good reason the documents required by the procuring entity in the notice of the planned procurement, it may describe its economic and financial situation using any other documents deemed acceptable by the procuring entity provided that the tenderer or the applicant is thereby not placed in a better position in comparison with other tenderers or applicants.

Contents

See above.

Electronic certificates

No official certificate exists. Some of the data is available on-line. For example the annual accounts are available from the electronic version of the commercial register. (<https://ar.eer.ee/>).

11.3.6 Requirements with regard to technical and/or professional ability

Prevalence/actual use in calls

This is a common requirement in Estonian procurements.

What document (if any) is used?

(1) For verifying the compliance of the technical and professional competence of the tenderers or applicants with the qualification requirements, the procuring entity shall require in the notice of the planned procurement according to the nature, quantity and method of use of the things purchased, services or construction works ordered pursuant to the procurement contract the submission of one or more of the following data and documents:

- 1) the list of the construction works performed during the past five years complying with the requirements determined by the procuring entity, which records the cost, time and place of performance of the more important construction works, including any construction works ordered by means of public procurement if rational and available, and evidence showing that these construction works were done according to the contracts entered into and following the good practice;
- 2) the list of more important contracts for sale of objects or provision of services performed within up to three past years complying with the requirements determined by the procuring entity, including if rational and available any things or services procurement contracts, together with their cost, dates of entry into and information about other contracting parties;
- 3) data about the workers or entities of the tenderer or the applicant responsible for the technical, primarily quality control, regardless of whether they are directly in the composition of the undertaking of the tenderer or the applicant or act as subcontractors; in case of any construction works procurement contracts, data about the persons or technical entities responsible for the performance of the construction works;
- 4) description of the technical equipment and means and measures of observing and analysing the quality of the work used by the tenderer or the applicant for ensuring quality;
- 5) data about the experience, education and professional qualification required in case of the tenderer or the applicant or its managers and persons responsible for the provision of services or management of construction works for the provision of the respective services or management of the respective construction works;
- 6) in case of construction works or services procurement contracts, the environmental management measures applied upon performance of the procurement contract, if such measures are relevant;

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7) in case of services or construction works procurement contracts, the average number of the workers, management board members of the tenderer or the applicant and other people employed by the company on contractual basis during the past three years;

8) confirmation by the tenderer concerning the existence of the work equipment or means of transport, equipment and technical equipment or existence of a respective written agreement for the acquisition or use of the required equipment, which the tenderer or the applicant can use for the performance of the procurement contract;

9) in case of services procurement contracts, the size of the part of the procurement contract, with respect of which the tenderer or the applicant intends to enter into subcontracts;

10) samples, descriptions or photos of the things constituting the object of the procurement contract, if necessary together with evidence concerning their authenticity;

11) statements of technical control or supervisory agencies concerning the compliance of the things constituting the object of the procurement contract together with a reference to the technical norms or standards.

(2) If the estimated cost of the procurement contract is equal to the international limit or exceeds it, the notice of the planned procurement of the procuring entity must inter alia always require the information mentioned in clause 1 or 2 of subsection 1 of this section.

(3) If any special requirements have been established in the legislation concerning the activity to be performed subject to the procurement contract, the procuring entity shall verify whether the tenderer or the applicant has such activity license or registration or whether it is a member of the respective organisation according to the legislation of its country of location by demanding if necessary from the tenderer or the applicant a respective statement, if these data are not available for the procuring entity without significant costs via a register.

(4) If required by the procuring entity, the following shall be added to what is on the list mentioned in clause 2 of subsection 1 of this section 1 concerning the proper performance of the more important contracts:

1) statement issued by the other contracting party, if the other contracting party is a procuring entity mentioned in clauses 1-3 of subsection 1 of section 10 of this Act;

2) written confirmation by the other contracting party or the tenderer or the applicant, if the other contracting party is a legal person governed by private law or a private individual.

(5) If the things or services constituting the object of the procurement contract are complicated or for special purpose, a competent authority of the country of location of the procuring entity or the tenderer or the applicant shall verify on agreement with the procuring entity the production possibilities of the tenderer or the applicant or their technical competence and if necessary even their possibilities of research work and take quality assurance measures.

(6) If required and relevant for the attestation of the professional qualifications of the tenderer or the applicant, the tenderer or the applicant may attest the compliance of its technical and professional competence with the qualification requirements in the framework of the performance of a particular procurement contract in addition to its indicators even based on the indicators of any other person with regard to equipment and measures or specialists regardless of the nature of its legal relations with such person. For this purpose it has to prove to the procuring entity in an acceptable manner that such person has the respective means and measures or specialists and that the tenderer or the applicant is able to use these if necessary for the performance of the procurement contract.

(7) Joint tenderers or joint applicants may rely upon proving their compliance with the technical and professional competence with the qualification requirements on the competence of other joint tenderers or joint applicants, if this is possible based on the nature of the respective criterion.

(8) If the object of a purchasing procurement contract includes in addition to the objects even their delivery or installation or associated services or construction works, the procuring entity may verify the

qualifications of the tenderer or the applicant or any other person mentioned in subsection 6 of this section for the provision of such services or performance of the construction works taking primarily into consideration the technical and professional competence of such person.

(9) If the procuring entity requires in its notice of planned procurement the submission of statements by independent authorities with regard to that the tenderer or the applicant observes certain quality assurance standards, it shall refer to the relevant quality assurance systems based on series of European standards, which have been approved for the series of European standards concerning certification by respective authorities. The procuring entity shall recognize the equivalent statements of the authorities of other member states of the European Union and accept other proof submitted by the tenderer or the applicant concerning any equivalent quality assurance measures.

(10) If the procuring entity requires subject to clause 6 of subsection 1 of this section in its notice of planned procurement the submission of the list of the environment management measures taken, it shall refer to the European Union Eco-Management and Audit Scheme (EMAS) or the European Union legislation based on relevant European or international standards and concerning certification, or environment management standards approved by the authorities in compliance with the relevant European or international standards. The procuring entity shall recognize any equivalent statements of the authorities of other member states of the European Union and accept other proof submitted by the tenderer or the applicant concerning any equivalent environment management measures.

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Contents vary depending on the requirements. Typical examples include qualifications, diplomas, product/service descriptions and past realisations.

Electronic certificates

Since there is no systematic practice of requesting certain certificates, it is difficult to assess if electronic certificates are legally acceptable.

As stated above, in practice this information is usually integrated into the main body of the offer in the form of resumes and/or project references rather than separate authentic documents.

11.3.7 Requirements with regard to quality assurance standards

Prevalence/actual use in calls

This is a common requirement in certain (such as e.g. IT procurement) areas.

What document (if any) is used?

According to the PPA, if the procuring entity requires in its notice of planned procurement the submission of statements by independent authorities with regard to that the tenderer or the applicant observes certain quality assurance standards, it shall refer to the relevant quality assurance systems

based on series of European standards, which have been approved for the series of European standards concerning certification by respective authorities. The procuring entity shall recognize the equivalent statements of the authorities of other member states of the European Union and accept other proof submitted by the tenderer or the applicant concerning any equivalent quality assurance measures.

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Currently no single competent authority has been appointed in Estonia. In practice for example the MOF has requested in IT procurements a description of the equipment and methods used to guarantee quality. Quality system must be accredited by e.g. a certifying authority (presenting a certificate) or internal quality management system of the tenderer (the tenderer presents a description of the used methods and procedures).

Electronic certificates

The provided certificates are usually delivered in paper form.

In practice, copies of the certificate are typically deemed sufficient, so that the absence of a signature on the provided document need not be a barrier.

11.3.8 Requirements with regard to environmental management standards

Prevalence/actual use in calls

This is an uncommon requirement. In case of construction works or services procurement contracts information regarding the environmental management measures applied upon performance of the procurement contract, if such measures are relevant, may be requested.

What document (if any) is used?

If the procuring entity requires in its notice of planned procurement the submission of the list of the environment management measures taken, it shall refer to the European Union Eco-Management and Audit Scheme (EMAS) or the European Union legislation based on relevant European or international standards and concerning certification, or environment management standards approved by the authorities in compliance with the relevant European or international standards. The procuring entity shall recognize any equivalent statements of the authorities of other member states of the European Union and accept other proof submitted by the tenderer or the applicant concerning any equivalent environment management measures.

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The resulting certificate is typically a paper document identifying the origin (the accreditation agency), the recipient, the nature of the certificate (including the assessed standard), date of testing and issuance, duration of the accreditation, and finally the a signature on behalf of the accreditation bureau.

Electronic certificates

The provided certificates are usually delivered in paper form.

11.4 Interoperability

As described above, there are no e-Procurement systems in Estonia going beyond publishing of tenders. This is fully accessible to non-nationals.

11.5 Future trends/expectations

At the moment there are no major e-procurement development projects expected from the side of the state. Adoption of a government regulation regarding requirements for the equipment used for electronic auctions as well as rules of procedure for electronic auctions is expected.

The future development of independent electronic environments of purchasing authorities may lead to extended use of electronic procurements relying on identification via the Estonian ID cards.

11.6 Assessment

Estonia's e-procurement initiatives are still in an early stage. The PPA has just entered into force and the implementing acts have not yet all been adopted. After the necessary legal environment will be in place, it is likely that a stronger shift towards electronic procurement will be taken.

Specifically with regard to certificates and statements, Estonian procurements are characterised by a fair degree of flexibility, in the sense that the contracting authority has a substantial freedom in determining which certificates and statements are required, and in determining if provided originals or copies (including foreign documents) meet these requirements. The general principles of good administrative governance generally ensure that decisions to reject documents are not made arbitrarily, and that tenderers typically have the opportunity to clarify and/or rectify any issues. However, the use of electronic certificates is generally not possible.

12 Finland

12.1 Public procurement framework

12.1.1 General framework

The relevant authorities in the field of public procurement are:

-the Ministry of Finance (*Valtiovarainministeriö*) <http://www.vm.fi/>, which is responsible for general direction and development of state public procurement.

-the Ministry of Trade and Industry (*Kauppa- ja teollisuusministeriö*) <http://www.ktm.fi/index.phtml?s=102>, which is amongst others responsible for preparation of legal acts in the field of public procurement and consultation regarding their contents.

-*Valtion hankintatoimen neuvottelukunta* http://www.vm.fi/vm/fi/09_valtiontalous/06_valtionhallinnon_hankintatoimi/01_valtion_hankintatoimen_neuvottelukunta/index.jsp is an organ set up by the Ministry of Finance that is amongst others responsible for the development of procurement cooperation, promotion of centralized procurement and other procurement cooperation, development of relevant legislation and monitoring of state joint procurement unit's activities.

-The Consulting Unit of the Public Procurement (*Julkisten hankintojen neuvontayksikkö*), www.hankinnat.fi is a joint organization of *Kuntaliitto* and the Ministry of Trade and Industry that advises contracting authorities and market players on application of public procurement laws.

-Hansel Oy <http://www.hansel.fi/> is state joint procurement unit.

-the National Audit Office of Finland (*Valtiontalouden tarkastusvirasto*) <http://www.vtv.fi/> has monitoring functions regarding public procurement.

-The Market Court (*Markkinaoikeus*) <http://www.oikeus.fi/markkinaoikeus/> is a specialist court. Public procurement belongs to its jurisdiction.

Like the European e-Procurement Directives, the Finnish public procurement entails two separate frameworks: one for utility services, and one for traditional sectors, with the former being somewhat more flexible.

The basic applicable law is the Public Procurement Act (2007/348)¹¹¹, which contains the general public procurement principles. The Public Procurement Act entered into force on 1 June 2007 replacing the older act of 1992.¹¹² There is a separate act covering utility services ("Utility Services Procurement Act").¹¹³ The Public Procurement Decree (614/2007) supplements the acts.¹¹⁴

The Public Procurement Act is in principle applicable to all public procurements in traditional sectors including the communities, regions, provinces, communes, and any associations established by these. Local administrations thus have no regulatory autonomy; any contracting authority wishing to organise a public procurement must adhere to the legal framework.

One of the basic principles of the legal framework is the organisation of a competitive environment, including through a prior publication of procurement opportunities. This typically means that an announcement must be published in the Journal of Public Procurements¹¹⁵, which is published on a weekly basis. (See also <http://www.credita.fi/lehdet/julha/>). In compliance with European obligations, procurements with a value exceeding certain thresholds established by the public procurement acts are also published in the Official Journal of the European Communities (on-line version: see Tenders Electronic Daily, <http://ted.publications.eu.int>). Notwithstanding this obligation, contracting authorities are of course allowed to publish the procurement through other channels to increase response rates, including by directly contacting potential tenderers, although such announcements may not take place before the legally required publication or contain more/other information, to ensure fair competition.

In exceptional circumstances prior publication is not required, and the so called 'negotiation procedure without prior publication' (*suorahankinta*) can be followed. This can only be done in a limited number of situations indicated in the law, including in procurements beneath a threshold value set by the Public Procurement Act, urgent procurements which could not have been foreseen, or when only invalid offers have been presented in a prior procurement procedure.

In either case, the publication will indicate the administrative requirements to be met, including by naming certificates and statements to be provided by prospective tenderers, and by indicating the specific administration and/or contact person to whom the finalised offer should be provided.

¹¹¹ In Finnish *Laki julkisista hankinnoista* (2007/348). <http://www.finlex.fi/fi/laki/ajantasa/2007/>

¹¹² In Finnish *Laki Julkisista Hankinnoista*, http://www.finlex.fi/fi/laki/alkup/1992/?_offset=4&_max=1715

English translation available at <http://www.finlex.fi/fi/laki/kaannokset/1992/>

¹¹³ In Finnish *Laki vesi- ja energiahuollon, liikenteen ja postipalvelujen alalla toimivien yksiköiden hankinnasta* (349/2007).

<http://www.finlex.fi/fi/laki/alkup/2007/20070349>

¹¹⁴ *Valtioneuvoston asetus julkisista hankinnoista* (614/2007)

<http://www.finlex.fi/fi/laki/kokoelma/2007/20070090.pdf>

¹¹⁵ *Julkiset hankinnat*, published by Edita.

12.1.2 Certificates and statements

The administrative requirements to be met are defined in the Public Procurement Act.¹¹⁶ While these vary depending on the type of procurement (works, supplies or services), the tenderer is commonly required to provide the following documents with regard to the exclusion criteria (which establish a tenderer's eligibility to participate in a call):

- Certificates and explanations that the tenderer:
 - is not in a state of bankruptcy, being wound up or similar status;
 - has not filed for a state of bankruptcy, being wound up or similar status;
- Statement that the tenderer has not made serious errors in the performance of its professional obligations, or has made serious false statements when providing information.
- Attestation of compliance with obligations under social law;
- Attestation of compliance with obligations under fiscal law;

(sections 53 – 55 of the Public Procurement Act).

It is worth noting that the contracting authority is free to indicate that it is willing to accept less formal documents as evidence.

For foreign tenderers, the Public Procurement Act provides that equivalent documents delivered by the competent judiciary or governmental body from the country of origin will also be accepted. When the tenderer's country of origin does not deliver such documents, a declaration under oath or a solemn declaration in accordance with the legislation of the tenderer's country will also be deemed acceptable.

With regard to selection criteria (which establish the financial and technical suitability of the tenderer), a different set of supporting documents is typically required. These include most notably:¹¹⁷

- Bank statements, balance sheets and annual accounts of the tenderer, if the publication of balance sheets is mandatory in the tenderer's country of origin;
- Global revenue over the last one to three accounting years;
- Professional and educational qualifications;
- Statements containing references to works/supplies/services provided in the most recent five years;
- Statements detailing the working equipment to be used by the tenderer;
- Statements detailing the average staffing of the tenderer in the last three years;
- Statement detailing technicians or technical services at the tenderer's disposal.

(sections 56 – 60 of the Public Procurement Act).

¹¹⁶ The Utility Services Procurement Act contains some exclusion criteria that are similar to those of the Public Procurement Act. Utility Services Procurement Act also refers to certain exclusion criteria of the Public Procurement Act.

¹¹⁷ The Utility Services Public Procurement Act refers to the selection criteria enumerated in the Public Procurement Act.

When the tenderer cannot present the required documentation with regards to economical and financial suitability for valid reasons, this may be demonstrated through any other documents which the contracting authority deems suitable.

It is worth noting that the documents pertaining to selection criteria mentioned above are usually¹¹⁸ not originals in the sense that they carry no signature demonstrating their authenticity. Copies of such documents (which carry no signature themselves) are often submitted in procurement proceedings, and such copies are typically accepted by the contracting authority. This situation is different from most of the exclusion criteria documents (most notably the social security and fiscal documents), which because of their nature are originals (or photocopies or PDF copies), i.e. signed and/or stamped.

This is relevant because there is no reason in principle why an electronic copy would not be equally acceptable as a paper copy. From a legal perspective, problems with electronic documents can only arise if the document is required to be an original.

With regard to verification and language issues, there are no formal rules for verifying the validity of an offer. The contracting authority is thus relatively free to assess the validity and value of the provided evidence.

In case of foreign offers, section 57 of the Public Procurement Act allows the contracting authority to demand to deliver an extract proving that the tenderer has been registered in the appropriate professional or business register, a declaration under oath, a certificate that the tenderer is engaged in business, or a license or a certificate proving membership in an association that prove a right to provide services in the country of establishment.

However, as for all decisions, the authority must respect the basic principles of good administrative governance. In practice, that means that any decision to reject certain evidentiary documents must be motivated and transparent. Additionally, the decision must be proportionate. When a contracting authority considers that the provided certificates are incomplete, ambiguous or unclear, it may request clarification from the tenderer rather than rejecting an offer outright. In this way, arbitrary decision making is avoided.

12.2 E-Procurement initiatives and status

According to the Public Procurement Act and the Utility Services Procurement Act, they implement the EU directives 2004/17 and 2004/18. However, dynamic purchasing systems and electronic auctions are still under development.

¹¹⁸ Notwithstanding the contracting authority's right to request original documents, e.g. balance sheets or revenue statements which have been certified by an independent auditor.

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HILMA is a free of charge, electronic notification channel that is maintained by the Ministry of Trade and Industry and where the contracting authorities publish public procurement notifications (www.hankintailmoitukset.fi) Any contracting authority must accede to the HILMA platform, which brings the direct benefit for them of cost free publication of procurements.

E-notification: a simple publication and search functionality has currently been integrated in the HILMA-platform. It should be noted that notification at HILMA is considered to be the original one. The current registration process (which is a low security username/password system) allows contracting authorities to register their contact details (name, address, phone, e-mail, etc.).

The HILMA platform does not automatically notify a tenderer when a new procurement of potential interest becomes available. The tenderers may only review the notifications at HILMA. Certain private operators (Edita Publishing Oy www.credita.fi, Tieke www.tieke.fi, Inoa www.inoa.fi) offer value added services where private operators may subscribe for automatic notifications of public procurement related notifications to e-mail. As noted above, HILMA is a pure notification channel and it is not possible to submit tenders through it.

In general, in Finland there is a sufficient legal framework in existence for e-procurement. What is missing is the necessary technical infrastructure. At the moment the state authorities have obviously no plans to develop HILMA into that direction. Instead, it seems that needed technical tools enabling e-procurement beyond electronic publication at HILMA, will be developed by private companies. At the moment such private products, however, are not yet available on the market. None the less, it is possible (and this frequently occurs in practice, especially for smaller procurements) that a call for offers indicates that offers may be submitted electronically, e.g. via e-mail.

Finland has a reasonably developed legal framework enabling e-procurement:

- Finland has implemented Directive 1999/93 by the Electronic Signature Act which entered into force in 2003.¹¹⁹
- The Act on Electronic Services and Communication in the Public Sector¹²⁰ ensures, amongst others, availability of electronic services. According to section 5 of the act an authority in possession of the requisite technical, financial and other resources, shall within the bounds of these, offer to the public the option to send a message to a designated electronic address or other designated device in order to lodge a matter or to have it considered.

¹¹⁹ Laki sähköisistä allekirjoituksista (2003/14)
<http://www.finlex.fi/fi/laki/ajantasa/2003/20030014?search%5Btype%5D=pika&search%5Bpika%5D=Laki%20s%C3%A4hk%C3%B6isist%C3%A4%20allekirjoituksista>

In English <http://www.finlex.fi/fi/laki/kaannokset/2003/en20030014>

¹²⁰ Laki sähköisestä asioinnista viranomaistoiminnassa (2003/13).
<http://www.finlex.fi/fi/laki/ajantasa/2003/20030013>

In English available at: <http://www.finlex.fi/fi/laki/kaannokset/2003/en20030013>

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- Finland has implemented Directive 2001/115/EC fully with the amendments to the Value Add Tax Act.¹²¹ Electronic invoices can be issued with the consent of the other party and have the same legal status as invoices on paper. There are no additional requirements, for example electronic signatures are not required.
- The Public Procurement Act defines the concepts 'written' and 'electronic form'. 'Written' is defined as a series of alphanumeric characters that can be read, reproduced and subsequently communicated. Electronic form is defined as a communications form using electrotechnic data processing and storing equipment and where data is distributed, transmitted or received by cable, optic or other electromagnetic means.
- According to the Public Procurement Decree (section 19) in public procurements exceeding national and EU thresholds the tools to be used for communicating by electronic means as well as their technical characteristics, must be non-discriminatory, generally available and interoperable with the information and communication technology products in general use

A contracting authority may require that tenders, requests to participate, applications to the supplier register and plans be accompanied by an advanced electronic signature in conformity with the Electronic Signature Act (14/2003).

In procurements exceeding the EU thresholds regarding product procurements, building contracts, and rights of use contracts, as well as in service procurements in accordance with the Public Procurement Act and Utility Services Procurement Act annex A, the request to participate (including also applications to the supplier register and tenders), as well as applications to participate done in the planning competitions and plans can be received in electronic form, provided that the receipt fulfils the following requirements:

- 1) information regarding the specifications necessary for the electronic submission of tenders and requests to participate, including encryption, shall be available to tenderers and candidates;
- 2) tenderers or candidates shall submit, before expiry of the time limit laid down for submission of tenders, the requested documents, certificates and declarations and notifications that do not exist in electronic form;
- 3) the time of receipt of tenders, requests to participate and the submissions of plans and projects can be determined
- 4) before the time limits laid down, no-one can have access to data transmitted in electronic form;
- 5) if the access prohibition is infringed the infringement is clearly detectable;
- 6) only authorised persons may confirm or amend the dates for opening the received data;

¹²¹

In

Finnish

Arvonlisäverolaki

(1993/1501)

<http://www.finlex.fi/fi/laki/ajantasa/haku.php?search%5Btype%5D=pika&search%5Bpika%5D=arvonlis%C3%A4verolaki>

Translation of the Act is available at <http://www.finlex.fi/fi/laki/kaannokset/1993/en19931501>

- 7) in the event that there is more than one authorised person, they can only grant access to all delivered data or part of the data by acting simultaneously, during different phases of the procurement procedure or planning competition or by using a supplier register;
- 8) simultaneous action by authorised persons must give access to data transmitted only after the prescribed date, and
- 9) data received and opened in accordance with these requirements must remain accessible only to persons authorised to acquaint themselves therewith.

12.3 Certificates, attestations and declarations

In this section, we will take a closer look at how the common requirements defined by the e-Procurement Directives are typically met in Finland.

12.3.1 Requirements with regard to the personal situation of the candidate or tenderer – absence of conviction (art. 45 §1 and §2 (c-d) of Directive 2004/18/EC)

Prevalence/actual use in calls

As indicated above, this is a common (though not mandatory) requirement in Finnish procurements.

What document (if any) is used?

In Finland the Legal Register Centre¹²² maintains the criminal register. The right of private persons to get certificates from the criminal register is limited. A person who applies for a position involving work with children may obtain a criminal background certificate. In addition, a private person may obtain an extract from the criminal register for presentation to the foreign country's officials for residence permit application or for other similar purposes.

In accordance with the Personal Data Protection Act¹²³ a person may check what information is kept about him in the criminal register. What is given for this purpose however is only a print out without any signature or stamp; not an electronic certificate.

¹²² In Finnish *Oikeusrekisterikeskus* <http://www.oikeus.fi/oikeusrekisterikeskus/>

¹²³ In Finnish *Henkilötietolaki* (1999/523), available from <http://www.finlex.fi/fi/laki/ajantasa/1999/19990523>

in English from <http://www.finlex.fi/fi/laki/kaannokset/1999/en19990523>

According to the Criminal Register Act¹²⁴ even a right of public authorities to get access to the criminal register is strictly limited. Under certain circumstances, when "weighty reasons" exist, public authorities may get access to criminal record information.

Contracting authorities may ask declarations from the tenderers that they have not been convicted of crimes that form a ground for exclusion. These can be provided electronically.

12.3.2 Requirements with regard to the personal situation of the candidate or tenderer – non-bankruptcy and financial status (art. 45 §2 (a-b) of Directive 2004/18/EC)

Prevalence/actual use in calls

As indicated above, this is sometimes required in Finnish procurements.

What document (if any) is used?

Finnish tenderers can be required to submit an attestation of non-bankruptcy, issued by the Legal Register Centre. Alternatively, formal statements are occasionally also accepted.

According to the Act on Bankruptcy and Corporate Restructuring Register¹²⁵ Everybody has a right to get extracts from the bankruptcy and corporate restructuring register. Extracts can be ordered via telephone. A fee of 9,20 EUR must be paid.

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The attestation identifies the issuing authority, the address to which it is mailed (requesting party's address), date and place of issuance, and contains a declaration that the (legal / natural) person who is subject of the attestation has not been declared bankrupt or to corporate restructuring. It is signed and stamped by the Legal Register Centre.

¹²⁴ In Finnish *Rikosrekisterilaki* (1993/770) Available at <http://www.finlex.fi/fi/laki/ajantasa/1993/19930770?search%5Btype%5D=pika&search%5Bpika%5D=Laki%20rikosrekisterist%C3%A4>
<http://www.finlex.fi/fi/laki/ajantasa/1993/19930770?search%5Btype%5D=pika&search%5Bpika%5D=rikosrekisterilaki>

¹²⁵ In Finnish *Laki konkurssi- ja yrityssaneerausrekisteristä* (2004/137) <http://www.finlex.fi/fi/laki/ajantasa/2004/20040137?search%5Btype%5D=pika&search%5Bpika%5D=Laki%20konkurssi-%20ja%20yrityssaneerausrekisterist%C3%A4>

Electronic certificates

The attestation has no electronic equivalent, and no plans for such an equivalent have currently been announced.

12.3.3 Requirements with regard to the personal situation of the candidate or tenderer – compliance with fiscal and social obligations (art. 45 §2 (e-f) of Directive 2004/18/EC)

Prevalence/actual use in calls

Contracting authorities can require that the candidates demonstrate their compliance with payment of taxes, social security payments and work pensions. These requirements should be asked only in sectors where there is an unusual amount of breaches (for example construction sector) or if there otherwise is a reason to believe that some of the candidates need further checking.

It should be noted that according to Finnish legislation¹²⁶ a customer of certain labour supply services has an obligation to check that the contractor has taken care of its tax and pension insurance obligations. A failure to check can lead to administrative fines.

What document (if any) is used?

The candidates may be asked to submit a certificate given by the tax authority regarding payment of taxes. The certificate can be requested via phone from +358 10 193 520.¹²⁷ Anybody can order the certificate, but it will be mailed only to the address of the person who is subject of the certificate. The certificate will be send by express mail. The certificate is free of charge.

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The certificate identifies the issuing authority, the person who is subject to the certificate, date and place of issuance. The document is signed by the public official and stamped. The content of the certificate depends on whether or not the person who is the subject of the certificate has duly submitted his/her tax returns and paid the taxes. The certificate also states whether or not the person

¹²⁶ *Laki Tilaaajan selvitysvastuusta ja vastuusta ulkopuolista työvoimaa käytettäessä* (1233/2006). <http://www.finlex.fi/fi/laki/ajantasa/2006/20061233>

¹²⁷ See http://www.vero.fi/default.asp?article=213&domain=VERO_MAIN&path=5,363&language=FIN

who is subject of the certificate is registered in the VAT register and the register of prepayment of taxes. The certificate can be given in Finnish, Swedish or English.

Electronic certificates

The certificate from the tax authorities is available only in paper version. At the moment there are no published plans to develop electronic systems.

12.3.3.1 Social obligations

Candidates can ask a certificate regarding payment of pension insurance payments from pension insurance companies, e.g. at Ilmarinen insurance company¹²⁸. The certificate is given only to the insured himself. It can be given in Finnish, Swedish or English, in paper version. Those who have web service agreement with Ilmarinen can print the certificate from the web themselves. The certificate identifies the date since when the insured has been insured and whether the payments have been duly made.

12.3.4 Requirements with regard to the suitability to pursue the professional activity

Prevalence/actual use in calls

Generic suitability to pursue a professional activity as indicated through enrolment in a trade/professional register is not as often asked for in Finnish procurements as the previous requirements. The main reason for this is likely that all Finnish enterprises are registered in the Business Information System (BIS) web page, and the information in this database is freely available on line (see <http://www.ytj.fi/>). Thus, for Finnish tenderers it is not useful to ask for specific certificates or statements, since the relevant information can be accessed freely using the enterprise's name or unique enterprise number as a search criterion in the on line search engine. The requirement is therefore only useful for larger procurements where a significant number of foreign tenderers might be expected.

Contents

¹²⁸ <http://www.ilmarinen.fi/>

No certificate exists; only the information accessible through the aforementioned web site.

Through the website, all basic identification information regarding the tenderer can be accessed, including:

- Full name and legal form;
- Unique enterprise number;
- Seat of establishment and date of establishment;
- Activities according to VAT, social security and tax status;

Electronic certificates

See above: no official certificate exists; only the information accessible through the aforementioned web site.

12.3.5 Requirements with regard to economic and financial standing

Prevalence/actual use in calls

Evidence with regard to economic or financial standing is sometimes asked for, in particular by requesting a summary of the turnover (possibly limited to relevant assignments only) or by requesting a copy of the annual accounts, both usually for a period of e.g. the most recent one year, or three years if there are some particular reasons for such request. Other possibilities such as bank statements or insurance extracts are conceivable, but rarely asked for in practice. The evidence is typically required in large individual procurements and in long term annual or framework procurements.

Typically, unsigned copies are provided, although it is possible to request audited or initialled documents.

What document (if any) is used?

The most commonly requested documents are annual accounts of the tenderer, and a statement of global or specific revenue over the last three accounting years. These are documents that the tenderer is typically required to keep at any rate, and are therefore easily available.

Annual accounts for Finnish tenderers tend to be copies of the accounts which are annually deposited at the trade register. Electronic copies of these accounts can be retrieved through the web site of the trade register (see <http://www.prh.fi/fi/tilinpaatokset/palvelut/jaljennostilaus.html>) (delivery by e-mail, by fax or by mail), ordering telephonically, from self service equipment at trade register free of charge, from co-operation partner's internet service (<https://eportti.tietopalvelut.com/>) or by obtaining a micro film copy. The on line service is not for free. (See prices at

<http://www.prh.fi/fi/tilinpaatokset/hinnasto.html>) For example a copy of annual accounts delivered by e-mail cost 10 EUR.

Sometimes contracting authorities check financial standing themselves, from example from www.asiakastieto.fi or from www.ralacon.fi that is construction sector specific portal.

Obviously, since the accounts are deposited by the tenderers themselves on a yearly basis, they will typically not need to resort to the trade register to obtain a copy.

It should be noted that both the paper annual accounts and the electronic version are considered copies, i.e. there are unsigned. Their legal value thus mostly originates from the fact that their addition to an offer is an implicit guarantee from the tenderer with regard to their accuracy.

Other documents (bank statements, balance sheets) are also occasionally requested, and also tend to have the status of unauthenticated documentation.

Contents

The contents of the annual accounts are regulated in the Accounting Act¹²⁹ and the required contents depends amongst others on the legal form and scope of activities of the corporation in question, for example:

- Profit and loss account;
- Balance sheet;
- Cash flow statement;
- Report covering fundamental events during the financial year, information about company's R&D activities and future forecasts.
- Annual accounts must be dated and signed.

Electronic certificates

See above: no official certificate exists; only the information accessible through the aforementioned sources.

12.3.6 Requirements with regard to technical and/or professional ability

¹²⁹ In Finnish, *Kirjanpitolaki* (1997/1336)
<http://www.finlex.fi/fi/laki/ajantasa/1997/19971336?search%5Btype%5D=pika&search%5Bpika%5D=kirjanpitolaki>

Prevalence/actual use in calls

The requirement to demonstrate technical and/or professional ability is a common (though not mandatory) requirement in Finnish procurements. However, specific certificates are rarely required.

What document (if any) is used?

Typically, tenderers are required to demonstrate technical and/or professional ability by indicating the profiles of its personnel, their qualifications and past realisations. However, this information is usually integrated into the main body of the offer in the form of resumes and/or project references. Authentic documents (such as certified diploma's, certified descriptions of products/service or certified references) are significantly less common. In such cases a paper copy is usually provided, and the contracting authority may require the tenderer to sign/initialise it to warrant its authenticity.

The acquisition time and costs of any required document of course varies from requirement to requirement.

Contents

Contents vary depending on the requirements. As noted above, typical examples include qualifications, diplomas, product/service descriptions and past realisations.

Electronic certificates

Since there is no systematic practice of requesting certain certificates, it is difficult to assess if electronic certificates are legally acceptable.

However, it should be noted that in most cases paper copies of the original certificates or statements are sufficient, and these are usually not signed. There seems to be no reason why electronic copies of such documents would not be equally acceptable. If the contracting authority requires the certificates or attestations to be signed, the general principles of the Finnish legal framework for e-procurement and e-signatures should be followed. Thus, a qualified signature seems most suitable to ensure this functionality.

As stated above, in practice this information is usually integrated into the main body of the offer in the form of resumes and/or project references rather than separate authentic documents, and no separate signature is thus required.

12.3.7 Requirements with regard to quality assurance standards

Prevalence/actual use in calls

The requirement to demonstrate compliance with quality assurance standards is an uncommon requirement in Finnish procurements.

What document (if any) is used?

If included in the call, tenderers are usually required to provide a certificate from an independent accreditation authority. A typical requirement is that the tenderer demonstrates the compliance of his/her products or services with certain standards, for example standards of the Finnish Standards Association SFS (www.sfs.fi) Compliance with other standards (specifically ISO standards) might also be required.

Certificates are provided by independent accreditation companies, like Inspecta Oy (<http://www.inspecta.fi/>) or Det Norske Veritas (www.dnv.fi).

At Inspecta an accreditation typically takes several weeks. The costs, that depend on the size of the company, start from few thousand EUR.

Contents

Inspecta gives a certificate that is a paper document identifying the origin (Inspecta), the recipient, the nature of the certificate (including the assessed standard), date of testing and issuance, duration of the accreditation, identification number and signature.

Electronic certificates

The certificates provided by Inspecta are delivered in paper form. A PDF form is also provided, with scanned signature on the certificate. Because the signature is not a real electronic signature, the electronic version cannot be considered original.

In practice, as stated above, copies of the certificate are typically deemed sufficient, so that the absence of a signature on the provided document need not be a barrier.

12.3.8 Requirements with regard to environmental management standards

Prevalence/actual use in calls

Compliance with environmental management standards should be taken into account to the extent reasonably possible in Finnish procurements.

What document (if any) is used?

The contracting authority may define the materials to be used in the production process and define that the production process must be environmentally friendly. It is also possible to set requirements how much the use of product may consume electricity, water or fuel, to the effective life of the product and possibilities for its recycling. The contracting authority may not request that the product has an environmental certificate, although contracting authority may utilize the requirements set in the environmental standards when determining the requirements of the products.

The Swan is the official Nordic ecolabel, introduced by the Nordic Council of Ministers <http://www.ymparistomerkki.fi/>

Application fee of the Nordic ecolabel in 2007 is 2000 EUR + VAT. In addition, a running royalty of 0,4 % of the turnover of the labelled products (0,3 % in case of services) is payable.

Contents

The resulting certificate is a paper document identifying the issuer, the recipient, the nature of the certificate, date of testing and issuance, duration of the accreditation, serial number, and finally the a signature of issuer.

Electronic certificates

The provided certificates are delivered in paper form, but it may also be sent in PDF-form. Only the paper version is the original, but in practice copies of the certificate are typically deemed sufficient, so that the absence of an original signature on the provided document need not be a barrier.

12.4 Interoperability

As described above, at the moment, there are no actual e-procurement systems in Finland. The HILMA platform has only notification and search functions. Its current functionality (electronic notification of public procurements and search) is fully accessible to non-nationals (provided that they know at least one of the national languages, Finnish or Swedish). As mentioned above, additional e-procurement tools will be developed by private enterprises. There seems to be no major legal or technical obstacles why foreigners would not be able to participate in Finnish public procurements.

12.5 Future trends/expectations

As indicated above, at the moment there are no major e-procurement development projects expected from the side of the state, except electronic auctions and dynamic purchasing systems. E-procurement tools are expected to be provided by private operators.

12.6 Assessment

Finland's e-procurement initiatives are still very much in an early stage; a new legal framework has just recently entered into force and the HILMA platform has just recently been opened. Uptake and actual use is thus still in development.

Specifically with regard to certificates and statements, Finnish procurements are characterised by a fair degree of flexibility, in the sense that the contracting authorities have a substantial freedom in determining which certificates and statements are required, and in determining if provided originals or copies (including foreign documents) meet these requirements. The general principles of good administrative governance generally ensure that decisions to reject documents are not made arbitrarily, and that tenderers typically have the opportunity to clarify and/or rectify any issues. However, electronic certificates are largely unavailable (see above), which means that a contracting authority can either permit copies of certificates to be considered, or otherwise to disallow electronic tendering.

13 France

13.1 Public procurement framework

13.1.1 General framework

The French public procurement framework is mainly contained into the Public Procurement Code (*Code des marchés publics*), approved by Decree n° 2006-975 of 1st August 2006, and its application decrees. A complete list is available at:

http://www.minefi.gouv.fr/themes/marches_publics/directions_services-daj-marches_publics-textes_application_code2006.php. The Circular of 3 August 2006¹³⁰ clarifies the provisions of the Code.

With regard to e-procurement, the following decrees should be mentioned:

- Ministerial decree of 28 August 2006 adopted in application of Article 48.I and 56 of the Public Procurement Code and relative to dematerialisation of contracts' awarding procedure.
- Ministerial Decree of 12 March 2007 adopted in application of Article 56.III of Public Procurement Code and relative to experimentations of dematerialisation of contracts' awarding procedure.

This legal framework is applicable to all public procurements¹³¹, i.e. contracts concluded by the Central government, its public bodies (*établissements publics*) other than those of an industrial and commercial nature, the local authorities and their public bodies. Local authorities thus do not have regulatory autonomy.

Public procurement should ensure compliance with regard to three main principles intended to guarantee the proper use of public funds: freedom of access to public procurement, equal treatment of candidates and transparency of procedures. They call for prior definition of the procuring entity's needs, compliance with the publication and competition requirements and selection of the economically most advantageous tender (Article 1 of the Code).

It follows that one of the basic principles of the legal framework is the organisation of a competitive environment, including through a prior publication of procurement opportunities. This typically means that every call for tenders superior to 4,000 euros must be published. For public procurement contracts without an amount inferior to 90,000 euros, public authorities are free of the means of publication. The

¹³⁰ O.J. n° 179 of 4 August 2006 page 11665

¹³¹ Specific public authorities such as research centers of the National Bank of France, are excluded from the scope of application of the Code. These entities are subject to the provisions of Ordinance n°2005-649 of 6 June 2005.

publication should however ensure an effective competition between tenderers. It thus allows public authorities to publish the tender electronically, provided that the website is granted with sufficient diffusion and audience to ensure the respect of the aforementioned principles mentioned (freedom of access to public procurement, equal treatment of candidates and transparency of procedures).¹³²

Tenders with an amount superior to 90,000 EUR (thresholds established by article 40 of the Code varying from the object of the contract: goods/works/supplies) must be published in the Official Bulletin of Public Procurement Contract Announcements (on-line version available at: <http://djo.journal-officiel.gouv.fr/MarchesPublics/>) or in a journal with authorisation to publish legal announcements. The public body also decides whether, in view of the nature or the value of the goods or services in question, a publication in a specialised journal of the economic sector concerned is called for to ensure publicity consistent with the aforementioned general principles.

In compliance with European obligations, procurements with a value exceeding certain thresholds defined in article 39 of the Code should be published in the Official Bulletin of Public Procurement Contract Announcements and in the Official Journal of the European Communities (on-line version: see Tenders Electronic Daily, <http://ted.publications.eu.int>). The publication in the Bulletin of Public Procurement Contract Announcements can not take place before the publication in the Official Journal of the European Communities. Furthermore, this article acknowledges the possibility of electronic publishing in the website of the contracting authority for open and competitive dialogue procedures (articles 57.II and 67.II of the Code respectfully). The contracting authority should previously send a pre-information notice to the OFEC.

In either case, the publication should use the model approved by decree¹³³ which transposes the model approved in Regulation (EC) n°1564/2005. There should be indicated the administrative requirements to be met, including by naming certificates and statements to be provided by prospective tenderers, and by indicating the specific administration and/or contact person to whom the finalised offer should be provided. It should indicate as well a precise definition of the object of the contract and the criteria taken into account for its awarding.

In exceptional circumstances prior publication is not required. Article 26 of the Code precisely defines the cases where such procedures can be followed: procurements beneath a threshold value (4,000 euros), urgent and unforeseen procurements, supply contracts which are concluded solely for research, testing, experimentation, refinement, design or development purposes without any immediate commercial aim. Finally, some contracts can be negotiated without prior publication nor opening to competition such as: complementary contracts, provided that the initial contract was awarded after opening to competition, service or works contracts having as their object the delivery of provisions similar to those covered by an earlier contract performed by the same contractor, service contracts which are awarded to one or more successful bidders in a tendering procedure, contracts which, for technical or artistic reasons, or to protect exclusive rights, may only be entrusted to a specific contractor. It should be noted that these public procurement contracts does not fall under the scope of provisions relative to e-procurement.

¹³² MINEFI, Legal Vade-mecum on dematerialization of public procurement, available on-line at: http://www.minefi.gouv.fr/directions_services/daj/marches_publics/vademecum/vmdemat.htm#4, last accessed on 21 June 2007.

¹³³ Ministerial decree of 28 August 2006 defining notice models [*fixant les modèles d'avis pour la passation et l'attribution des marchés publics et des accords-cadres*], O.J. n° 199 of 29 August 2006, p. 12769

13.1.2 Certificates and statements

The administrative requirements to be met are defined by articles 44 to 46 of the Public Procurement Code (hereinafter, "the Code") and their application decrees.

The tenderer is mandatory required to provide a sworn statement, duly dated and signed by the candidate, to the effect that:

- It has met its obligations in terms of tax and contributions.
- It has not been barred from tendering according to the criteria defined by article 8 of the Ordinance n°2005-649

It should be noted that only the awarded tenderer is required to produce attestations and certificates of compliance with fiscal and social obligations. Failure to produce such documents would exclude the tenderer from the contract awarding (article 46 of the Code).

If the tenderer is in receivership, a copy of the judgment(s) rendered to that effect should be produced as well.

With regard to selection criteria (which establish the financial and technical suitability of the tenderer), information which facilitates the evaluation of the prospective tenderers' professional and technical capabilities and financial standing can be required.¹³⁴ These include most notably:

- Balance sheets of the tenderer for the last three years whenever the publication of balance sheets is legally mandatory;
- Global revenue over the last three accounting years and the relative part of the goods, services or public works of the tender;
- Bank statements or insurance evidence covering professional risks;
- Professional and educational qualifications of the tenderer and the management staff. When a certificate of professional activities is required, the contracting authority should admit any other means of evidence such as professional identity certificates or reference to previous works attesting the professional ability of the tenderer to perform the work;
- Statements containing references to main supplies and services provided in the most recent five years with indication of the amount, date and public or private recipient. Deliveries and services provisions should be evidenced by a certificate or by a statement of the tenderer;
- Statements of works' execution indicating the amount, period and place of execution and if they have been successfully executed in accordance with the state of the art;
- Statements detailing the working equipment to be used by the tenderer;

¹³⁴ Information which can be required to tenderers is defined in Article 45 of the Code and in the Ministerial decree of 28 August 2006 defining the list of information and documents which could be asked to public procurement candidates [*fixant la liste des renseignements et des documents pouvant être demandés aux candidates aux marchés passés par les pouvoirs adjudicateurs*], O.J. n°199 of 29 August 2006, p.12766.

- Statements detailing the average staffing and management staff of the tenderer in the last three years;
- Statement detailing technicians or technical services at the tenderer's disposal.
- Certificates issued by quality control services to certify the conformity of goods with technical specifications. These certificates can be replaced by any other equivalent means of proof of the quality when tenderers do not have access to such certificates and can not obtain them within the delay of the tender.
- Samples, descriptions and/or photographs of goods
- When tenderers need a specific authorisation or should be members of a specific organisation to be able to provide the service in their country origin, they can be asked to produce such authorisation or prove their membership.

In order to prove its professional and technical capabilities and financial standing, the prospective tenderer may request that the professional and technical capabilities and financial standing of one or more subcontractors also be taken into account. In which case, it must prove the capabilities and standing of the said subcontractor(s) and show that they are available to perform the contract.

Foreign tenderers must produce equivalent certificates, where required, issued by the institutions and departments of the country concerned. If that country does not issue such certificates, it may be replaced with a sworn statement, or, in States in which such statements do not exist, with a solemn declaration made by the person concerned before the relevant judicial or administrative authority, a notary or a qualified professional body in that country. Contracting authorities may ask tenderers to produce a translation by certified interpreter of documents not redacted in French.

It is worth noting that the aforementioned documents are usually not originals in the sense that they carry no signature or seal demonstrating their authenticity. Copies of such documents (which carry no signature or seal themselves) are often submitted in procurement proceedings, and such copies are typically accepted by the contracting authority. French tenderers are deemed liable for the veracity of the documents they submit. False statements, attestation or certificate are criminally sanctioned as forgery.

This situation facilitates the use of electronic documents since Article 1316-1 of the Civil Code acknowledges electronic to written form provided that it is possible to identify its author and assuring its integrity through a certain period of time.

13.2 E-Procurement initiatives and status

13.2.1 General e-Procurement framework and initiatives

Initiated in 2001, full transposition of the Public Procurement Directives has been finalised by Decree n° 2006-975 of 2006 approving the Public Procurement Code. Article 56 of this Code regulates e-tendering for public procurement contracts with certain thresholds defined by Article 26.II of the

Code¹³⁵. Article 56 stipulates that the provisions of the Code which refer to written documents shall not impede their replacement by an electronic carriers or electronic exchanges. Furthermore, since the 1st of January 2005, contracting authorities are required to accept electronic tenders. The objective is that from 2010 such authorities could require tenderers to submit their offer electronically. Experimentations in that sense will be carried out in certain public procurement in order to prepare the different actors.¹³⁶

The obligation to receive electronic tenders has given way to the launch of multiple initiatives for the implementation of "virtual public procurement rooms" (*salle des marchés publics électroniques*). 70 platforms are currently in use.¹³⁷ Central Government public procurements have been centralised into a platform (<http://marches-publics.gouv.fr>) managed by the company Achatpublic.com which provides the technical information and support to tenderers [see: <http://www.achatpublic.com>]. Achatpublic.com is a private company created in 2003 with public partners and subject to public economic and financial control. From this website, tenderers can consult the calls, download files and answer on-line to the tender. This site provides also services for e-auctions and e-catalogue.

Similar initiatives are conducted by local authorities who have joined in order to use centralised platforms and reduce costs. Two platforms, set up as experiments and followed up by the Central government in the context of the E-administration Plan ADELE, should be mentioned: the "e-Bourgogne platform" [<https://marches.e-bourgogne.fr/>] set up by the Bourgogne region and the "e-megalis platform" [<https://www.e-megalisbretagne.org/a1b/>], set up by the region of Brittany.

A label has been created in the beginning of 2007 to help local authorities in their choice between the multiple platforms the market offers and to enhance trust between tenderers.¹³⁸ The label, named "dem@pe", ensures that the platform meets the technical and organisational requirements in compliance with the Code. It is intended to platform editors, hosters and public authorities which have decided to adapt a specific platform to their specific needs. The label is managed by EdiBuild France, the National Federation of Public Works (*Fédération Nationale des travaux public*, FNTP) and the Ministry of Economy, Finances and Employment. [More information is available at: <http://www.edibuild-fr.org/Labeldem@PE/index.php>].

The present report will focus on the platform of central government public procurement website (<http://www.marches-public.gouv.fr>). This platform offers the dematerialization of the complete

¹³⁵ Public Procurements contracts awarded according to adapted procedures are not subject to the provisions of article 56. However, contracting authority may opt for electronic procedures and ensure the confidentiality and security of the electronic exchanges, as well as the accessibility to the network without discrimination.

¹³⁶ Such experimentations are regulated by a Ministerial decree of 12 March 2007 adopted in application of Article 56.III and relative to dematerialisation experimentations of contract awarding procedures, [*pris en application du III de l'article 56 du code des marchés publics et relatif aux expérimentations de dématérialisation des procédures de passation des marchés publics formalisés*], O.J. n° 91 of 18 April 2007 page 6946.

¹³⁷ http://synergies.modernisation.gouv.fr/article.php?id_article=402&

¹³⁸ Alviset Christophe, Dématérialisation des marchés publics : attribution du premier label "dem@pe", Minefi Collectivités locales n°36, disponible on-line at : <http://www.secteurpublic.fr/public/article.tpl?id=9085&rub=8272&t=D%E9mat%E9rialisation+des+march%C3%A9s+publics+%3A+attribution+du+premier+label+%22dem%40pe%22+> (last accessed on 21 June 2007)

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procedure of contracts' awarding in accordance with the provisions of the Code as detailed below (e-notification, e-tendering, e-awarding, e-auctions, e-catalogues). The objective of the Ministry of Economy, Finances and Employment is to dematerialise all procedures relative to public procurements and extends the actual dematerialisation to archiving, awarding, payments and accounting.¹³⁹

The e-notification and e-tendering procedures are regulated by article 56 of the Public Procurement Code and the Ministerial Decree of 28 August 2006 adopted in execution of articles 48.I and 58 of the Code¹⁴⁰.

As detailed above, electronic notification is foreseen in some specific cases (for open procedures and competitive dialogue above European thresholds) and can be largely employed by contracting authorities for contracts with an amount inferior to 90,000 euros. The public entity which opts for e-notification should specify in the tender the modality of access to the network. In any case, it should allow the free download of the tender regulation. To access other documents, e.g., contract terms, tenderers should be authenticated (with a low security username/password system) and provide the name of the person in charge of the download and a contact email. They can subscribe to an automatic alert service which informs them of the publication of new public procurement announcements in their field of interest. As this registration does not require information which is specific to French entities, registration is open to foreigners.

In restrictive procedures, the contracting authority which opts for sending the invitation letter by electronic means should indicate the possibility of downloading the documents. However, it can be decided that confidential, sensitive or heavy documents can only be made available in a paper-based format. In either case, the address where these documents could be asked should be indicated in the call or in the tender's regulation. Nevertheless, if the companies request so, these documents are sent to them by snail mail or, if the tender's regulation allows it, on electronic carrier. An obligation is imposed on contracting authorities to use electronic carriers with a format commonly used. Furthermore, the fact that a tenderer has obtained a document on-line does not impede it to further submit paper-based documents or, if the tender's regulation allows it, documents saved on electronic carriers.

As regards the e-tendering phase (questions and answers session, submission and opening of proposals), Article 56.II contains an obligation to Contracting parties to ensure the confidentiality and security of electronic exchanges in a network available to all tenderers, without discrimination.

A secure electronic signature is required for this phase of the tender. Electronic certificates used by the tenderer should be compliant with the level 2 of the general security framework (*referential general de sécurité*, the so-called "PRIS") and be authorised by State Reform Ministry.¹⁴¹ (both available at:

<http://www.entreprises.minefi.gouv.fr/certificats/>). Level 2 of the PRIS requires a face to face registration.

¹³⁹ See: <http://www.minefi.gouv.fr/performance/audit/pdf/annexe4.pdf>, p.4.

¹⁴⁰ O.J. n° 199 of 29 August 2006, p. 12766

¹⁴¹ MINEFI, op. cit. fn.4

Information relative to tenderers and to the tender should be submitted separately in different folders or electronic carriers. A receipt is then sent to the tenderer by the Contracting authority, certifying the date and the hour of reception.

Specific provisions are dedicated to the processing of contaminated files. Contracting authority may repair such files on condition that they keep track of the operations realised. Non-repaired contaminated files are considered not received. The Contracting authority may ask the candidate to send the document again. In order to prevent contaminated files from being rejected, the new Public Procurement Code allows the tenderer to send, together with its tender, an electronic or paper-based back-up copy before the end of the delay for the tenders' submission. This back-up copy should be placed in a sealed box with an explicit mention indicating that it is a back-up copy. This copy will only be opened if the original file has not been received by the contracting party or if it is contaminated. The evidence of the contamination of the file should be kept by the contracting authority. In any other case, the back-up copy should be destroyed. Contaminated back-up files may be repaired by the Contracting authority. In case of open procedure and open design contests, when a candidate is rejected, the tender is deleted without being read, as well as the back-up copy. If the offer were sent on a physical carrier, it is sent back to the sender.

To meet these obligations, the platform of Achatpublic.com offers a service of encryption and escrow of encrypted tenders to ensure the confidentiality, authentication functions (electronic signature based on a JAVA platform and a function of verification of certificates to define the tenders which have been opened by the contracting authority), a time-stamping function and a possibility of tracking the different actions performed into the platform by contracting authorities registered into an event diary (*journal des évènements*).

The platform provided by Achatpublic.com also offers a service of e-auctions and e-catalogue for the Union of Public Purchase group (*Union des Groupements d'Achat Public*). Introduced in 2001, e-auctions are regulated by article 54 of the Code. This procedure is limited to public procurement above form certain thresholds defined in article 26.III of the Code for the purchase of common goods. Confidentiality is ensured through the use of pseudonyms during the procedure.

Finally, article 78 of the Code introduces a new procedure in conformity with the e-procurement directives, the so-called dynamic acquisition system. The procedure is entirely based on electronic means but limited, as well as e-auctions, to common goods. However, at this point, mainly the Defence Ministry has integrated such possibility into its platform.

13.3 Certificates, attestations and declarations

First of all, it is worth noting that copies are largely admitted by French public authorities. The submission of false copies is labelled as forgery and as such is criminally punished (article 441-1 Penal Code). The right of tenderers to submit their offer electronically is thus facilitated.

In that sense, Article 1316 of the Civil Code equates electronic documents to written documents provided that it is possible to identify their author and to assure their integrity over a certain period of time. For public procurement, a qualified electronic signature acknowledged by the Ministry of State

Reform is required (the list is available at: <http://www.entreprises.minefi.gouv.fr/certificats/>). Documents issued by third parties in a paper-based format can be scanned by the tenderer provided that they have sufficient resolution to guarantee their readability and they are electronically signed. When the documents are received by the contracting party, a time-stamped electronic receipt is sent to the tenderer.

It follows that since the 1st of January 2005, as contracting authorities are required to accept electronic submissions of tenders, no obstacle in French Law should in principle hinder e-tendering.

13.3.1 Requirements with regard to the personal situation of the candidate or tenderer – absence of conviction (art. 45 §1 and §2 (c-d) of Directive 2004/18/EC)

Prevalence/actual use in calls

As indicated above, this is a mandatory requirement in French procurements. Tenderers should present a sworn statement to the effect that they have not been convicted for the last five years for a series of crimes listed Article 8 of the Ordinance n° 2005-649¹⁴² (Article 43 of the Code).

What document (if any) is used?

No specific document is required. However, the Ministry of Economy, Finances and Employment has published voluntary declarative form, the so-called DC5 form “statement of the tenderer”, which use is usually required by contracting authorities.

Contents

The statement is included and pre-redacted into the DC5 form, together with the other sworn statements required from the tenderer by article 43 and 44 of the Code. It contains as well declarative information relative to the financial standing of the candidate, to technical, professional ability of the tenders and the means at its disposal. The DC5 form is available on-line at:

http://www.minefi.gouv.fr/themes/marches_publics/formulaires/index.htm

Electronic statement

As mentioned above, no specific format is required and as such the document can be submitted electronically provided that it is electronically signed by the tenderer with a certificate authorised by the Ministry of State Reform.

¹⁴² Ordinance n°2005-649 of 6 June 2005 relative to procurements contracts awarded by public or private persons non subject to public procurement code [*aux marches passés par certaines personnes publiques ou privées non soumises au code des marchés publics*], O.J. of 7 June 2005.

13.3.2 Requirements with regard to the personal situation of the candidate or tenderer – non-bankruptcy and financial status (art. 45 §2 (a-b) of Directive 2004/18/EC)

Prevalence/actual use in calls

Tenderers in French public procurements must submit a sworn statement to the effect that they are not in a situation of personal bankruptcy or are being wound up neither in France nor in other country. In case the tenderer is put into receivership or to an equivalent procedure regulated by foreign law, it should present a copy of the judgement and justify that it has been allowed to pursue its activity during the foreseen execution period of the contract.

What document (if any) is used?

No specific document is required. However, the use of the aforementioned DC5 form is commonly required by contracting parties.

A copy of the judgement relative to the receivership and the authorisation to pursue the activity is delivered by the bailiff (*Greffe*) of the Tribunal of Commerce.

Contents

As regards the DC5 form, the sworn statement is pre-redacted and literally reproduces the content of article 43 and 44 of the Public Procurement Code and the content of the article they refer to.

The certified copy of the judgment is delivered by the bailiff to the tenderer, duly stamped and signed by the public official.

Electronic certificates

As mentioned above, no specific format is required and as such the DC5 form can be submitted electronically provided that it is electronically signed by the tenderer with a certificate authorised by the Ministry of State Reform.

As regards the copy of the judgement and the correlative authorisation, as bailiffs do not deliver electronic certified copies, a scanned copy with sufficient resolution and signed by the tenderer is admitted by public authorities.

13.3.3 Requirements with regard to the personal situation of the candidate or tenderer – compliance with fiscal and social obligations (art. 45 §2 (e-f) of Directive 2004/18/EC)

Prevalence/actual use in calls

Tenderers are required to produce a sworn statement certifying their compliance with their fiscal and social obligations. Certificates and attestations are exclusively requested to the tenderer to whom the contract is awarded. Failure to produce such documents would exclude the candidate from the awarding of the contract.

What document (if any) is used?

As for the previous required sworn statement, despite free format is the rule, the DC5 form is commonly used.

Certificates and attestations of compliance with social and fiscal obligations are issued by competent authorities. A Ministerial decree¹⁴³ has defined the certificates to be produced and the competent authorities which should issue such documents. Tenderers are allowed to submit a copy of the aforementioned certificates and attestations.¹⁴⁴

A simplified procedure has been set up to centralise the collection of such certificates and attestations. Tenderers can obtain the so-called “annual status of received certificates” (*état annuel des certificats reçus*) (DC7 form) issued by the local tax administration. This document certifies the compliance of the tenderer with its fiscal and social obligations at 31 of December of the previous year and is valid for the whole year.

To obtain this certificate, the tenderer has two possibilities. Either it produces all the certificates requested to the competent tax administration together with the DC7 fulfilled. This public authority issues then a unique original document. Or the tenderer fulfils and signs the DC7 form asking for this administration to obtain the required certificates from the competent authorities. In case some certificates are missing because, in a delay of 30 days, it has received negative answers or no answer at all, this authority can not issue the unique original and should handle the certificates received to the tenderer.

The delay to issue the certificates is a maximum of 30 days (general administrative delay). Tenderers are thus recommended to ask the certificate in December, before the year starts, in order to make sure to comply with the short terms of public procurements tendering.

¹⁴³ Ministerial decree of 31 January 2003, O.J. n°31 of 6 February 2003, page 2243.

¹⁴⁴ Ibid.

Contents

The DC7 form contains a list of the certificates which can be asked of the tenderer. He should indicate to which bodies these certificates should be requested and the number of copies he needs. The form is available on-line at: http://www.minefi.gouv.fr/themes/marches_publics/formulaires/index.htm

The certificate identifies the issuing authority (including the specific public official), the requesting party (including by enterprise number), date and place of issuance, and the requested information (i.e. compliance with fiscal or social obligations). The document is signed by the public official and stamped.

Electronic certificates

Article 8 of the Ordinance n°2005-1516 of 8 December 2005 stipulates that administrative acts can be signed electronically, provided that the e-signature meets the requirements set by the general security framework. For fiscal certificates, the electronic format of the document is available at: http://www.colloc.minefi.gouv.fr/colo_struct_marc_publ/form_tele/latt_fisc.html

Only one certificate is issued per year. It follows that candidates are asked to present copies of the certificates. As mentioned above, scanned copies are commonly admitted, provided that they are electronically signed.

13.3.4 Requirements with regard to the suitability to pursue the professional activity

Prevalence/actual use in calls

Certificates demonstrating the suitability to pursue the professional activity are exclusively required for regulated professions (taxis, architects, etc.). It is not a mandatory requirement nor it is a document commonly asked in French Public Procurement. Contracting authorities may required such document to tenderers when they need a specific authorisation or own membership of an organisation in their country of origin.

What document (if any) is used?

A copy of the required authorisation or attestation of membership is deemed sufficient.

Contents

The content of these certificates will vary from a body to another. They indicate the issuing authority), the requesting party), date and place of issuance, and the requested information (i.e. suitability to pursue the professional activity).

Electronic certificates

No original certificate has to be produced by the tenderer. It follows that a scanned copy with sufficient resolution and signed by the tenderer is sufficient to fulfil the requirement.

13.3.5 Requirements with regard to economic and financial standing

Prevalence/actual use in calls

Evidence with regard to economic or financial standing is commonly asked for, in particular by requesting a summary of the global turnover and/or of the part relative to the object of the contract. Copy of the balance sheets for a maximum period of three years is usually required. Bank statements or insurance extracts are less commonly asked for in practice.

What document (if any) is used?

The use of the DC5 form is commonly requested by contracting authorities. The candidate has to fulfil a table and indicate its global turnover and the part relative to the object of the contract for the last three years. A copy of balance sheets should be added whenever the tenderer is subject to such obligation.

Contents

Only balance sheets are commonly requested. To be valid such balance sheets should have been presented in due time to the Commerce register. A copy can be requested to the bailiff of the Tribunal of Commerce (*Greffe*) for 10,88 euros.

Electronic certificates

The possibility for companies to send their annual account electronically to the Commerce register will only be available from summer 2007 through www.infogreffe.fr. No delivery of electronic certificate is however planned.

13.3.6 Requirements with regard to technical and/or professional ability

Prevalence/actual use in calls

When the object of the contract justifies it, candidates could be required to demonstrate their technical and professional ability. This requirement should be proportionate to the object of the contract (Article 45 I and II of the Public procurement Code). This requirement is a mandatory requirement in French procurements.

What document (if any) is used?

Typically, tenderers are required to demonstrate technical and/or professional ability by indicating the profiles of its staff, their qualifications and past realisations. The use of the DC5 form is usually required by contracting authorities.

As regards the professional ability, this proof can generally be done by any kind of documents, even by a reference to previous works. Professional identity certificates, usually delivered by professional orders or chambers and which informs on the professional ability of the person, can be required as well.

Certificates issued by qualification bodies can be requested. Qualification bodies are subject to Norm NF X50-091. In this case tenderers can present equivalent means of proof, which implies that they have to produce a certificate issued by independent third parties on the basis of the same criteria of evaluation. Each sector of activity has usually a qualification body (a list of the main qualification bodies is available at: <http://www.qualientreprises.com/>)

Equivalent certificates issued by foreign authorities are admitted (Article 45.II par. 4 of the Code).

Contents

The content of these certificates will vary from a body to another. In any case, they will certificate the durability of a company, its capacity to enter into a contract, its means (human, material, financial and methodological), its know-how and its references certificated by its clients. Probing certificates are delivered as well by certain qualification bodies when the company does not have references. It certificates then the durability of the company, its means and capability to enter into a contract.

Electronic certificates

No original has to be produced by the tenderer. It follows that a scanned copy with sufficient resolution and signed by the tenderer is enough to fulfil the requirement.

13.3.7 Requirements with regard to quality assurance standards

Prevalence/actual use in calls

Article 6 of the Code stipulates that the contract's object should be defined either by reference to technical norms or equivalent defined by normalisation bodies, or by defining performances and functional exigencies precise enough to exactly define exactly the content of the contract. Quality standards are considered to contribute to the openness and transparency of public procurements.

What document (if any) is used?

If included in the call, tenderers are usually required to provide a certificate from an independent accreditation authority which meets pre-defined criteria by the contracting authority. The most common requirement is that the tenderer demonstrates the compliance of his/her products or services with certain standards, typically originating from the French Association of Normalisation (AFNOR – see www.afnor.fr) or the UTE (*Union Technique de l'électricité*, www.ute-fr.com) Compliance with other standards (specifically ISO standards) might also be required.

The most common certificates required are proposed by the label AFAQ AFNOR which provides certificates attesting the authority to assess compliance with French standards (NF norm, AFAQ certificates).

Contents

An AFNOR certificate is a paper document identifying the origin, the recipient, the nature of the certificate (including the assessed standard), date of testing and issuance, duration of the accreditation, and finally the identification (with signature) of the president of the accreditation bureau¹⁴⁵.

Electronic certificates

The provided certificates are usually delivered in paper form, or in unsigned PDF-form. However, as mentioned above, scanned copies with high resolution and electronically signed by the tenderer are admitted by contracting authorities.

¹⁴⁵ For an example, see <http://www.woodyflam.com/images/NF-B.jpg>

13.3.8 Requirements with regard to environmental management standards

Prevalence/actual use in calls

The requirement to demonstrate compliance with environmental management standards is only required for works and services whose execution implies the application of such standards (Article 45.II, par.3 of the Code).

What document (if any) is used?

If included in the call, tenderers are usually required to provide a certificate from an independent accreditation authority. Those certificates should be based on the European system of environmental management and audit (EMAS) or on European or international norm of environmental management such as ISO 14001. The contracting authority cannot impose any certification authority to the tenderers. However, it could refer to a specific label in order to define the technical specifications.

Contents

The resulting certificate is typically a paper document identifying the origin (the accreditation agency), the recipient, the nature of the certificate (including the assessed standard), date of testing and issuance, duration of the accreditation, and finally the a signature on behalf of the accreditation bureau.

Electronic certificates

The provided certificates are usually delivered in paper form, or in unsigned PDF-form. However, as mentioned above, scanned copies with high resolution and electronically signed by the tenderer are admitted by contracting authorities.

13.4 Interoperability

As described above, each public authority is free to choose the platform it prefers provided that it could ensure the security and confidentiality of electronic exchanges, as well as free access to the network without any discrimination for tenderers.

Actually, even if the access to notifications is free, as a simple registration through login/password is required, the submission of tenders is subject to the acquisition of a certificate authorised by the Ministry of State Reform which implies a face to face authentication process. Authorised certificates are mainly issued by French CSPs and no actions have been taken so far in the sense of

acknowledging qualified electronic signature from other countries. It remains to be seen whether these authorised CSPs with delegations outside France would offer such certificates.

13.5 Future trends/expectations

As indicated above, the Ministry of State Reform intends a complete dematerialisation of all public procurement procedures. This objective is twofold: dematerialisation of the procedure for contracting authorities and generalisation of their use by tenderers.

On the one hand the initiative "ADELE80", within the national program for e-administration foresees the complete dematerialisation of the whole public purchasing procedure, from definition of needs to archiving. It follows that the actual dematerialisation should be extended to e-awarding, e-invoicing, e-payments, e-accounting. This implies a complete dematerialisation not only of public procurement procedure in itself but of all public procedures and information exchanges.

On the other hand, from 2010 on public authorities will be able to compel tenderers to submit their offer electronically. Today, tenderers can choose between submitting their offers on paper-based or electronic format. A ministerial decree from March 2007 has allowed experiences where contracting authorities can require tenderers to e-tendering. Such decision should give way to a progressive generalisation of e-procurements.

The current objective integrated by the public procurement code is that by 2010 public authorities should be able to implement electronic procedures in 100% of public procurements and that 50% of public procurement above from European thresholds are actually e-awarded.

13.6 Assessment

French e-procurements have taken a decisive start from the 1st of January 2005 since public authorities are now required to accept electronic tenders. A multiplicity of e-procurement platforms (around 70) has sprung up, and the material conditions have been created for the achievement of the complete dematerialisation objective. Interoperability between the platforms is ensured at central level. However, no specific action has been taken so far to ensure the free access of foreign tenderers to such platforms.

Adaptation of the public procurement Code to the European Directive in 2006 has created the legal certainty required for the spread of e-procurements. The broad acceptance of copies by contracting authorities and the acknowledgement of electronic to paper-based documents by the Civil Code has facilitated the progressive implementation of e-procurement. Specific provisions have been introduced to the new Public Procurement Code to deal with contaminated files and have allowed tenderers to submit back-up copies in paper-based or electronic format, solving a crucial issue for enhancing the trust of tenderers.

E-procurement is developing smoothly in France and from 2007 it has entered in a new phase through the creation of a quality label for e-procurement platforms and the beginning of experimentations in e-procurement where tenderers are required to submit their tenders electronically. The management of trust seems to be the new challenge of e-procurement in France to be fully accepted by the actors. It remains however to be seen whether these initiatives manage to create ensure full acceptance by tenderers and public authorities.

14 Germany

14.1 Public procurement framework

14.1.1 General framework

The German public procurement framework is a complex subject matter comprising provisions on statutory, administrative and self-regulatory levels. The two EC- Procurement Directives 2004/17 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (Sector Directive)¹⁴⁶ and Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (Service Directive)¹⁴⁷ resulted in amendments on administrative and self-regulatory levels. The optional measures of the two EC-Directives to introduce electronic auctions and dynamic purchasing systems have not been transposed so far because industry opposed those innovations. However, those means may apply if tenderer and contracting authority both agrees.

The aim of the EC-Procurement Directives as to promote Information- and Communications Technology has been realized by amendments of the three existing self-regulatory frameworks on procurement (*de: Vergabe- und Vertragsordnungen*) and by introduction of administrative regulation for pre-qualifications of tenderers.

¹⁴⁶ OJ L 134, 30.4.2004, p.1.

¹⁴⁷ OJ L 134, 30.4.2004, p. 114.

The general public procurement framework system consists of the following „cascade“ of hierarchical provisions:

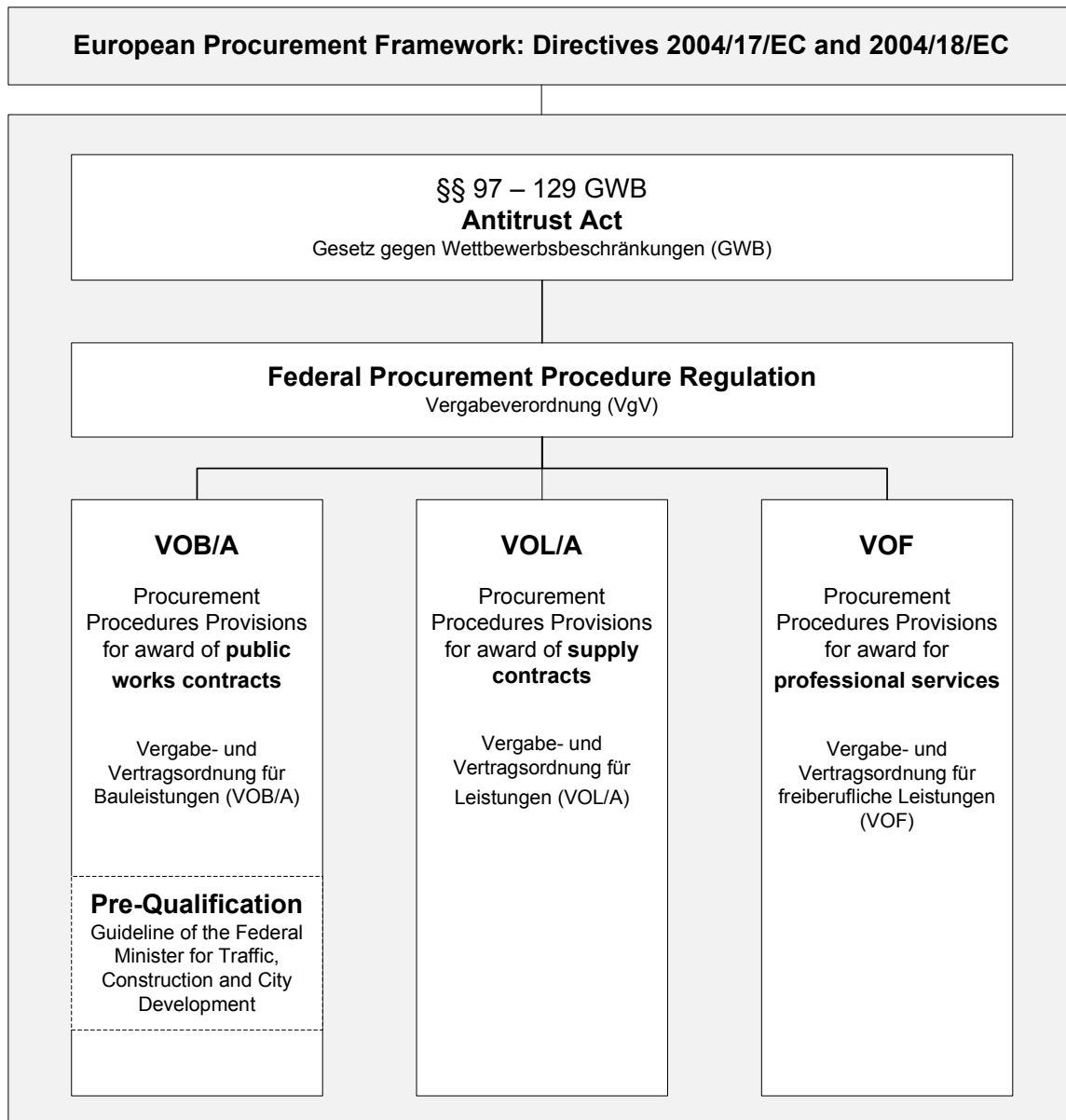


Figure: German system of regulation concerning the award of contracts based on procurements.

The graphic shows that in Germany the subject matters of public procurements are traditionally differentiated into three fields of interests (public works; supply; professional services) and that all fields are covered by general regulation at federal level, which became more detailed by subordinated law and soft-law.

§§ 97-129 GWB (*Gesetz gegen Wettbewerbsbeschränkungen*) contain federal law on the principles of public procurement for all contracting authorities on State, regional and local levels governed by public or private law as far as public interests or common carriers are at stake. The respective provisions apply only for contracts above the thresholds laid down in the two EC-Directives 2004/17 and 2004/18. This has an impact on the range of judicial review of the award of a contract.

§ 97 (4) GWB comprises the general demands for technical/professional qualification, operating effectiveness and reliability of tenderers. The contracting authorities are obliged to accept the most economically advantageous bid (§ 97 (5) GWB), which may not be identical to the lowest bid.

According to § 97 (6) GWB the Federal government has the competence to enact further regulations which resulted in the enactment of the Procurement Procedures Regulations, containing inter alia the option for electronic procurements (e.g. for public works contracts § 21 and § 21a VOB/A).

The Federal Procurement Procedure Regulation (*Vergabeverordnung, VgV*) details the procurement procedures and refers to the Procurement Procedures Provisions (*Vergabe- und Vertragsordnungen*) for specific fields of interest.

The Procurement Procedures Provisions (*Vergabe- und Vertragsordnungen*)¹⁴⁸ are partly dating back to 1926. They were developed by committees composed of experts from contracting authorities, industry associations and Trade Unions. The committees produced soft-law, but by reference made to it by the Federal Procedure Regulation (*VgV*) the status of soft-law enhanced to so-called „regulated self-regulation“.

The revised edition of the Procurement Procedures Provision¹⁴⁹ contain principles for electronic communications and the option for contracting authorities to use advanced electronic signatures.

14.1.2 Certificates and statements

While German Federal law only refers to reliability, operating effectiveness and technical or professional qualification in general (§ 97 (4) GWB), appendix 1 to no.3 VOB/ lists an extensive set of sub-criteria for certificates of qualifications necessary to qualify for participation in procurement procedures. A tenderer has to provide evidence that he is not in a state of bankruptcy and has not been convicted of any crimes, that no record of deception is recorded in the Central Business Register (*Gewerbezentralregister*), that he is properly registered in the Trade Register, and that payments of taxes and social security contributions took place. Moreover, a tenderer has to submit information about the annual turnover and the number of employees and has to confirm that he observes legislation on minimum wages. Some additional information may be requested.

In case of tender from other EU-Member States, which is rather rare so far, the possibility to furnish official documents (like a copy of a central business register, if it does not exist) causes problems. The German contracting authorities try to achieve and evaluate equivalent evidence. The tender regularly has to be submitted in the German language. The new standard forms for tenders, which were put into effect in 2006, use only the German language. There is no existing binding law in Germany stating that the German language must be used by tenderers. But many procurements refer expressly to or imply that condition.

¹⁴⁸ Published in *Bundesanzeiger (BAnz)*, an official gazette; a translation into English is announced by Beuth publishing company for 2007.

¹⁴⁹ Neufassung der Verdingungsordnung für Leistungen – Teil A (VOL/A), Ausgabe 2006, BAnz. vom 30. Mai 2006, S.4.

The Federal Minister for Traffic, Construction, and City Development, issued a guideline (*de: Leitlinie*) for the introduction of a pre-qualification procedures on 25 April 2005 (as amended on 30 November 2006)¹⁵⁰ according to which an „Association for the Pre-Qualification of Construction Enterprises“ (a registered private organisation called „*Verein für die Präqualifikation von Bauunternehmen e.V.*“) has been set up by the top federations of constructing enterprises. The new association (*de: Verein*) acts as a trusted third party and issues certificates on the basis of criteria laid down in the guidelines if the existence of the qualifications, can be demonstrated. The association entrusted six certification agencies¹⁵¹ with the pre-controlling. After a successful procedure has been carried out the association classifies the acknowledged enterprise to the pre-qualified field by name and address in a register. The underlying documents for the controlling of the certification agencies are made accessible electronically by registration numbers and passwords.

From a legal point of view the issuing of a pre-qualification certificate on the basis of transparent guidelines by a trusted third party seems to satisfy the conditions of a collective quality benchmark according to German Trade Mark Act in § 97 MarkenG (*Markengesetz*) and also complies with DIN EN 45012.

The described system of prequalification offers several advantages:

- The pre-registration qualifications for tendering in classified fields without additional exchange of documents and without any further controls.
- The costs for tendering are reduced.
- Uncertainties in the formal procedures were limited.

It is worth mentioning that consent for a special federal act for the introduction of a special registry of corrupt enterprises (*de: Korruptionsregistergesetz*) in the context of public procurement procedures was refused by the Federal Council of States (*de: Bundesrat*).

In order to improve competition in public procurement, which is crucial to achieve the best results for taxpayer's money, the announcements of procurements gain importance.

14.2 E-Procurement initiatives and status

14.2.1 General e-Procurement framework and initiatives

The European e-Procurement framework is fully adopted by the German legislation. Approved and published, the new procurement regulations entered into force on the 1st of November 2006. While the

¹⁵⁰ <http://www.pq-verein.de/anlage2430binary>.

¹⁵¹ See: <http://www.evergabe-online.de>

electronic offer submission has been possible before¹⁵², the new Procurement Procedure Provisions (VOB/A 2006, VOL/2006, VOF 2006)¹⁵³ now cover the whole e-procurement process from initiation to tendering and specifies the procedures.

The procurement office can decide in advance, if the offers must be submitted in (common) written form or if electronic offers are accepted. Below the thresholds, the candidate is always allowed to hand in a written offer. Above the thresholds, the procurement office has the power to make electronic bidding as mandatory.¹⁵⁴ The discussion about advanced and qualified electronic signature has been curtailed. It is up to the procurement office to decide between the two versions.¹⁵⁵

Appendix I of the Procurement Procedure Provisions provides a catalogue of additional requirements, if the procurement authority permits electronic bidding. The catalogue from a technical point of view ensures, that the e-Procurement procedure is on the same level with common procurement procedures. But the regulations are abstract and do not imply any specific standards.

All public procurements on Federal, Federal State and local level are published in the German Procurement Gazette¹⁵⁶ (*de: Deutsches Ausschreibungsblatt*), which is the leading Internet platform for public and private procurements. Potential tenderers are able to check procurements on the basis of pre-installed criteria (e.g. own profile; field of interest; period of time; postal codes). A tenderer may also download and administer the submission forms and submit the tender on paper or electronically (the latter including an electronic signature). At the moment 20.000 enterprises in Germany are subscribers of the Gazette. Public procurements above the thresholds have to be published in the Supplement to the Official Journal of the European Union „tenders electronic daily“. On 25 June, 2007, a total of 61 German public procurements were registered there.

There are private service providers offering information on private and public procurements and selling support for potential tenderers. Their platforms contain a high number of downloads from official sources.

Federal initiative www.evergabe-online.de

Since January 2006, the biggest German e-procurement agency, the Federal Ministry of the Interior, is announcing all public offers of its own department and the 96 additional procurement agencies of the Federal States (*de: Bundesländer*) and at local government level on an Internet platform called “E-Vergabe Online”.¹⁵⁷ Currently, version 3.2 of the platform has been running since December 2006. The total procurement procedure from announcement until the conclusion of the contract can be executed electronically. The contracts are legally binding. At the moment 1793 public e-procurement offers are published.

¹⁵² Former § 15 VgV: “The Procurement Office can decide to accept electronic tendering, if data security and confidentiality is ensured”. Additionally, the needed form regulations are into force since 2002, e.g. „Gesetz über Rahmenbedingungen für elektronische Signaturen und zur Änderung weiterer Vorschriften“ (16th of May 2001), „Verordnung zur elektronischen Signatur“ (16th of November 2001), „Gesetz zur Anpassung der Formvorschriften des Privatrechts und anderer Vorschriften an den modernen Rechtsgeschäftsverkehr“ (13th of July 2001), „Drittes Gesetz zur Änderung verwaltungsverfahrenrechtlicher Vorschriften“ (21th of August 2002).

¹⁵³ VOB/A for public work contracts, VOL/A for public supply and service contracts and VOF for public service contracts with freelancers.

¹⁵⁴ E.g. for public work contracts in § 21 No. 1 (1.1, 1.3) VOB/A and § 21a VOB/A.

¹⁵⁵ E.g. for public work contracts in § 21 No.

¹⁵⁶ See: <http://www.deutsches-ausschreibungsblatt.de>.

¹⁵⁷ See: <http://www.evergabe-online.de>.

The current registration process is based on a software certificate (Soft-Token) or a Signature-Card with hardware card reader. Only with the hardware based certificate including a qualified signature is the candidate able to participate in e-Procurements. Otherwise, only searching is functional as provided by drop-down and text-boxes (e.g. specific fields of interest, procurement authority, category of procurement, CPV-Code, date and so on) and bidding documents can be downloaded. The registration is open to foreigners, but only the German language is installed. Since the web-platform is barrier-free, the technical requirements to have access are very low. The functionality includes e-tendering, e-awarding and e-catalogues. E-invoicing, e-payment and reversed e-auctions are not implemented and are not planned at the moment.

As a great simplification, the prequalification process¹⁵⁸ is open for foreign candidates too and is accepted by the major e-Procurement platform. However, the documents and the web sites of the "Verein für Präqualifikation e.V." are only provided in the German language. Even though foreign certificates are accepted, the candidate has to prove that it is equivalent to the German certificate.

14.3 Certificates, attestations and declarations

In the following section, we take a closer look at how the common requirements defined by the e-Procurement Directives are typically met in Germany.

14.3.1 Requirements with regards to the personal situation of the candidate or tenderer – absence of conviction (Art. 45 §1 and §2 (c-d) of Directive 2004/18/EC)

1. Implementation

Legal requirements with regards to the absence of convictions of the candidate are regulated by German law in § 8a no. 1 (1) VOB/A 2006, § 7a no. 2 (1) VOL/A 2006 and § 11 (1) VOF 2006.

2. Prevalence/actual use in calls

If the procurement office receives information about a candidate not being in line with the personal requirements, the candidate must be excluded from the procedures. It is common but not mandatory to ask for documentary evidence.

3. What document (if any) is used?

In most cases, the candidate has to hand in a self declaration. Furthermore, the procurement office can ask for two different official certificates proving the absence of conviction.

3.1. Certificate of Conduct

Only in a few¹⁵⁹ procurement procedures, the German procurement office will ask for a certificate of good conduct, also called "police clearance certificate" (*de: Polizeiliches Führungszeugnis*). It is an extract from the federal criminal record register and covers all legal requirements regarding the

¹⁵⁸ See above.

¹⁵⁹ Less than 1% of the EU-wide German proceedings based on a keyword retrieval in European TED-System with keyword "Führungszeugnis".

personal situation of the candidate regulated in Art. 45 §1 of Directive 2004/18/EC. The register is held by the Federal Ministry of Justice in Berlin.¹⁶⁰

Because the certificate is a document of personal behaviour, only natural persons can be issued a certificate. The application can be made verbally by personal appearance or in written form at the residents registration office of the local government. Representation is not permitted, unless based on law (e.g. in case of limited legal capability). The fee for every certificate of conduct is € 13 in prepayment. Delivery takes at about two or three weeks depending on the local authority.

Apart from procurement procedures, the document is mostly requested during job applications, specifically when applying for public offices.

Two alternative versions of the certificate exist with slightly different contents. For private purposes (the so called "simple version" or "private certificate of conduct"), the certificate will only be sent out to the applicant in person.

For presentation to a German authority, the certificate will be sent out directly to the authority concerned (so called "extended version" or "official certificate of conduct"). The applicant may require that the certificate of conduct, if it contains any entries, is first sent by the authority to a District Court specified by the applicant for inspection. The District Court may only grant sightings to the applicant in person. After inspection, the certificate of conduct must be forwarded to the authority, or if the applicant objects, must be destroyed by the District Court.

The contracting procurement authority may not directly contact the central service of the Penal Register in order to obtain the certificate. Only few authorities are able to make application for the certificate without the candidate's knowledge, regulated in § 41 (1) (4) BRZG (*de: Bundeszentral-registergesetz*).

3.2. Certificate of the central register of trade and industrial offences

In approximately 25% of the German procurement proceedings equal or above the European thresholds, the candidate is asked to hand in a certificate from the Central Register of Trade and Industrial Offences (*de: Gewerbezentral-register*). The certificate covers the legal requirements regarding the personal situation regulated in art. 45 §2 (c-d) of Directive 2004/18/EC. The register is held by the Federal Ministry of Justice in Bonn.¹⁶¹

Natural persons have to file the application at the residents registration office of the local government. For legal persons and associated persons, the application is provided by the competent local Trade Supervisory Office. The application can be made by personal appearance or in written form by the natural person himself respectively the chief executive officer. Representation is not permitted, save if based on law. The fee for every certificate is € 13 in prepayment or in cheque form. Delivery takes at about two or three weeks.

The certificate will only be sent out to the applicant in person, § 150 (1) GewO (*de: Gewerbeordnung*). In certain cases (but not for procurement proceedings) the certificate can be sent out directly to the authority concerned, § 150 (5) GewO. A special regulation in § 150a (1) no. 4 GewO empowers the procurement office to obtain a certificate of any natural or legal person, who will be involved in the procurement proceedings.

4. Contents

4.1. Certificate of Conduct

¹⁶⁰ <http://www.bmj.bund.de>.

¹⁶¹ <http://www.bmj.bund.de>.

The content of the certificate of conduct is specified by the "Federal Act of Central Register" (*de: Bundeszentralregistergesetz*). The certificate identifies the issuing authority, requesting person (name at birth, family name, prename, address, date of birth, place of birth), registration number, date and place of issuance. Because of automated procedures, the document is not signed.

If the certificate contains the sentence "no criminal record(s)", the applicant is "not previously convicted". Otherwise, it shows key data about criminal convictions which have not been revoked through grace, pardon or rehabilitation. The data set consists on the name of the Criminal Court, file number, criminal offence and the penalty. Although recorded in the database, only fines of more than 90 days income and imprisonment over 3 months will be recorded in the document. After a certain period of time (depending on the penalties), the records in the database will be deleted, § 34 BZRG (*de: Bundeszentralregistergesetz*).

An extended certificate for authorities offers more information about the person, e.g. decisions of administrative courts, revocation of business licence or diminished criminal responsibility.

4.2. Certificate of the Central Register of Trade and Industrial Offences

The certificate shows every fact that is registered in the central database and identifies the issuing authority, the requesting party (name at birth, family name, prename, address, date of birth, place of birth), registration number, date and place of issue. It is generated automatically and is not signed.

According to § 149 (2) GewO (*Gewerbeordnung*), the certificate can contain four categories of data:

- Administrative decisions (*de: Verwaltungsentscheidungen*) like revocations of licences and other business-related decertifications.
- Relinquishment of business licences during administrative procedures.
- Fines related to business activities.
- Criminal convictions related to business activities.

4.3. *Electronic certificates*

The certificates are on paper, but a electronic equivalent is planned for the future. The Federal Bureau of Justice and KDO¹⁶² are developing a system on two levels: Electronic application forms will be provided for citizens as a result of step one. Step two will accompany full electronic support without media conversion for citizens and authorities.¹⁶³ The framework for this initiative is called "Deutschland-Online" (*en: Germany Online*).

14.3.2 Requirements with regard to the personal situation of the candidate or tenderer – non-bankruptcy and financial status (art. 45 §2 (a-b) of Directive 2004/18/EC)

1. Implementation of the Directive

Legal requirements with regard to the personal situation of the candidate related to non-bankruptcy and financial status are regulated by German law in § 8 No. 5 (1) a), b) VOB/A, § 7 No. 5 a), b) VOL/A and § 11 a) VOF

2. Prevalence/actual use in calls

If the procurement office receives information about a candidate not being in line with the personal requirements concerning bankruptcy and financial status, the candidate can be excluded from the proceedings. It is common but not mandatory to ask for documentary evidence.

3. What document (if any) is used?

German tenderers are usually required to submit a self-declaration of non-bankruptcy. In most of the procurement proceedings the procurement office asks for an official attestation issued by the local courts.

The bankruptcy status is filed by three registers depending on legal status of the candidate: The Trade Register for legal qualified traders (*de: Handelsregister*), Register of Cooperatives (*de: Genossenschaftsregister*) and Register of Civil Partnerships (*de: Partnerschaftsregister*).

Everybody can request an attestation at the clerk's office at the local court where the requesting party is established. Delivery is instantaneous, and the court fees of € 10 must be prepaid. A legally attested certificate costs € 18.

¹⁶² <http://www.kdo.de/288.php>.

¹⁶³ http://www.deutschland-online.de/DOL_Internet/broker.jsp?uMen=3f620961-e11d-1111-4fbf-1b1ac0c2f214.

4. Contents

The attestation identifies the issuing authority, date and place of issuance, and contains numerous facts regarding trade name, name of the owner, personal liability, changes of owners, address, amounts of capital deposit, power of procuration, bankruptcy status, wind-ups and so on.

5. Electronic certificates

A digital version of the records is deliverable by court and costs about € 5. Since the beginning of 2007, the Central Business Register is available in the internet with full electronic support without breaking the media chain.¹⁶⁴ The web based portal is a project of the Federal States. From a technical point of view, the retrieval engine allows searching on the decentralised databases of every single Federal State. The output document (PDF) is not digitally signed and costs € 4.50. A invoice form is made out by the authority at the end of the month.

14.3.3 Requirements with regard to the personal situation of the candidate or tenderer – compliance with fiscal and social obligations (art. 45 §2 (e-f) of Directive 2004/18/EC)

1. Implementation of the Directive

Legal requirements regarding the compliance with fiscal and social obligations (art. 45 § 2 (e-f) of Directive 2004/18/EC) are regulated by German law in § 8 No. 5 (1) d) VOB/A 2006, § 7 No. 5 d) VOL/A 2006 and § 11 (4) d) VOF 2006.

2. Prevalence/actual use in calls

Attestations demonstrating compliance with fiscal and social obligations are very common requirements in German procurement procedures. In fact, attestations are quasi-mandatory.

3. What document (if any) is used?

The procurement office usually asks for several documents:

¹⁶⁴ <http://www.handelsregister.de>.

3.1. Tax clearance certificate

A tax clearance certificate¹⁶⁵ is provided by the competent Local Finance Office where the candidate is registered. The document is usually stamped and signed by the responsible official and is free of charge. There are no formal regulations about this certificate. Therefore, the candidate is not required to appear in person. The document will be sent to the candidate by post. Delivery can take several days (2-5 days), depending on the chosen medium of communication. Apart from procurements, the certificate is often requested as a part of auditing procedures.

3.2. Attestation by the Health Insurance Fond

A clearance certificate¹⁶⁶ concerning the obligation to pay the employer's contribution for the Health Insurance is provided by the competent local health insurance office (*de: Ortskrankenkasse*). The document is usually stamped and signed and is free of charge. The candidate is not required to appear in person to make the application. The document will be sent to the candidate by post. Delivery can take several days (2-5 days), depending on the chosen medium of communication. Apart from procurements, the certificate is often requested as a part of auditing procedures.

3.3. Attestation by the Employer's Liability Insurance Association

Furthermore, the local Employer's Liability Insurance Association (*de: Berufsgenossenschaft*) provides a clearance certificate for registered persons.¹⁶⁷ The document is usually stamped and signed by the responsible official and is free of charge. The candidate is not required to appear in person to make the application. The document will be sent to the candidate by post. Delivery can take several days (2-5 days), depending on the chosen medium of communication. Apart from procurements, the certificate is often requested as a part of auditing procedures.

4. Contents

All certificates identifies the issuing authority or association (including the specific public official), the requesting party, file number, date and place of issue and the requested information, i.e. compliance with fiscal or special social obligations. The document only covers the actual status quo, e.g. outstanding tax dues.

¹⁶⁵ See sample - http://www.pktec.de/pdf/Unbedenklichkeit_Finanzamt.pdf.

¹⁶⁶ See sample - http://www.pktec.de/pdf/Unbedenklichkeit_Krankenkasse.pdf.

¹⁶⁷ See sample - http://www.pktec.de/pdf/Unbedenklichkeit_Berufsgenossenschaft.pdf.

5. Electronic certificates

None of the attestations have an electronic equivalent that is provided to the candidate, and no plans for such an equivalent have currently been announced.

While it might theoretically be possible to replace the paper document with an electronic version that has been digitally signed, one of the main problems is that the originals are stamped by the public official to confirm the official nature of the document. No digital stamping service is currently available in Germany, so that this attribute is difficult to recreate electronically.

14.3.4 Requirements with regard to the suitability to pursue the professional activity

1. Implementation of the Directive

Legal requirements with regard to the suitability to pursue the professional activity are regulated by German law in § 8 No. 3 (1) f) VOB/A 2006 and § 7a No. 3 (5) VOL/A 2006.

2. Prevalence/actual use in calls

German building companies need to be registered to pursue professional activities. They require a certificate of enrolment for public works contracts procurements. Depending on the procurement object, other professionals can be asked for an enrolment certificate too. Freelance professionals are not registered, so they do not have to hand in a certificate.

3. What document (if any) is used?

If any document is requested, it is exactly the same as with non-bankruptcy and financial status, see above.

4. Contents

If any document is requested, it is exactly the same as with non-bankruptcy and financial status, see above.

5. Electronic certificates

If any document is requested, it is exactly the same as with non-bankruptcy and financial status, see above.

14.3.5 Requirements with regard to economic and financial standing

1. Implementation of the Directive

Legal requirements with regard to economic and financial standing are regulated by German law in § 8 No. 3 (1) a) VOB/A 2006, § 7a No. 3 (1) VOL/A 2006 and § 12 (1) VOF 2006.

2. Prevalence/actual use in calls

Evidence with regard to economic or financial standing is commonly required in procurement procedures.

3. What document (if any) is used?

The most common requested document is a summary of the general turnover or a copy of the balance sheets. Both documents should cover the period of the last three years. These are documents that the candidate is lawfully required to keep for the Tax Office. Major and specific companies are required to publish their annual accounts.¹⁶⁸ Therefore, these documents should be easily available. Bank statements or insurance policy documents may be required, but not often asked for in practice. Typically, unsigned copies are provided, although it is possible to request audited or initialled documents.

4. Contents

The annual accounts typically state

- Full name and legal form.
- Seat and date of establishment.
- Date of approval of the annual account by the management and period covered by the account.
- Management details, including general managers and daily management, and period of appointment.
- Identification of any external auditor or accountant.
- Full balance sheets and financial/fiscal results.

¹⁶⁸ Published documents are available at <http://www.unternehmensregister.de>.

Neither the paper nor the electronic version contain any stamp or signature.

5. Electronic certificates

No official certificate exists, only the digital version from the beginning of 2007. It is not common, that contracting authorities access the database directly.

14.3.6 Requirements with regard to technical and/or professional ability

1. Implementation of the Directive

Legal requirements with regard to the technical or professional ability are regulated by German law in § 8 No. 3 (1) b)-d) VOB/A 2006, § 7a No. 3 (2) VOL/A 2006 and § 13 (2) VOF 2006.

2. Prevalence/actual use in calls

The requirement to demonstrate technical and professional ability is common but not mandatory in German procurements procedures.

3. What document (if any) is used?

Specific certificates are rarely required. Typically, candidates have to demonstrate technical and professional ability by indicating the profiles of their personnel, their qualifications and past realisations. Usually, this information is integrated into the main body of the offer in the form of resumes or project references. Authentic documents (such as certified diploma's, certified descriptions of products and service or certified references) are sometimes asked for. In such cases a printed copy is usually provided. The acquisition time and costs of any required document vary.

4. Contents

Contents vary depending on the requirements. As noted above, typical examples include qualifications, diplomas, product/service descriptions and past realisations.

5. Electronic certificates

There is no systematic practice of requesting certain certificates electronically.

14.3.7 Requirements with regard to quality assurance standards

1. Implementation of the Directive

Legal requirements with regard to quality assurance standards are regulated by German law in § 8a No. 11 (2) VOB/A 2006, § 7a No. 5 (1) VOL/A 2006 and § 10 (3.2) VOF 2006.

2. Prevalence/actual use in calls

The requirement to demonstrate compliance with quality assurance standards is uncommon in German procurements. Only in procurement procedures with specific technical requirements, quality assurance standards are common.

3. What document (if any) is used?

If included in the call, tenderers are required to provide a certificate from an independent accreditation authority. The most common requirement is that the tenderer demonstrates the compliance of products, services or management structures with certain standards, typically originating from the German Institute of Normalisation (DIN).¹⁶⁹ Compliance with other standards (specifically international ISO standards) might also be required and are accepted. Other international or foreign national standards are accepted by the procurement office, if they are equal to the European or German standards, see § 8a No. 11 (2) VOB/A.

Certificates are usually provided by independent accreditation authorities. A list of German accreditation authorities is available at <http://www.dar.bam.de/cgi/ast.cgi>.

4. Contents

The content of the certificate may vary according to the certified facts. Typically, the document identifies the origin (the accreditation agency), the recipient, the nature of the certificate (including the assessed standard), date of testing and issue, duration of the accreditation and the signature on behalf of the accreditation bureau.

¹⁶⁹ <http://www.din.de>.

5. *Electronic certificates*

The provided certificates are delivered on paper or unsigned PDF-form. In practice, copies of the certificate are typically deemed sufficient, so that the absence of a signature on the provided document is no barrier to participation in procurement procedures.

14.3.8 Requirements with regard to environmental management standards

1. Implementation of the Directive

Legal requirements with regard to environmental management standards are regulated by German law in § 8a No. 11 (1) VOB/A 2006, § 7a No. 5 (2) VOL/A 2006 and § 10 (3.1) VOF 2006. Additionally, the German Environmental Auditing Act (*de: Umweltauditgesetz*) regulates the auditing system and constitutes a board of environmental experts. The essential regulations are harmonised with the European EMAS-Regulation.

2. *Prevalence/actual use in calls*

To demonstrate compliance with environmental management standards is a very new and uncommon requirement in German procurements. It is limited to very few procurements with a higher value or specific technical nature.

3. *What document (if any) is used?*

Certificates are usually provided by independent accreditation authorities. A common accreditation authority related to environmental standards is the *Deutsche Akkreditierungs und Zulassungsgesellschaft für Umweltgutachter (DAU)*.¹⁷⁰ Other international or European standards and accreditation procedures will be accepted by the procurement office, if they are similar to the standard that is asked for, see § 8a No. 11 (1) VOB/A.

4. *Contents*

The resulting certificate is typically a written document identifying the accreditation agency, the recipient, the nature of the certificate including the assessed standard, date of testing and issue, duration of the accreditation, and finally the signature on behalf of the accreditation bureau.

5. *Electronic certificates*

¹⁷⁰ See <http://www.dau-bonn-gmbh.de>.

The provided certificates are commonly delivered on paper or unsigned PDF-form. In practice, copies of the certificate are typically deemed sufficient, so that the absence of a signature on the provided document is no barrier to participation in procurement procedures.

14.4 Interoperability

The e-procurement platforms of public contracting authorities in Germany are accessible free of cost to everybody, while service providers who offer partly identical platforms or add services are accessible upon payment. However, for communications the use of the German language is a precondition.

As far as the use of electronic signatures are concerned the public contracting authorities do not insist on qualified signatures despite only this high level signatures grant full probative value to the electronic documents like a deed according to § 371a Code of Civil Procedure (*de: Zivilprozessordnung – ZPO*). Advanced electronic signatures own evidence by judicial inspection (§ 371 Code of Civil Procedure), which leaves a scope for discretion. The confinement to advanced signatures facilitates a coherent tendering throughout the European Union.

In Germany, a discussion is pending whether judicial review should or must be granted for procurement procedures below the contract thresholds¹⁷¹. An adjustment may be reached in future.

Foreign tenderers still face difficulties to compete effectively. German contracting agencies normally expect sufficient competition among German enterprises and make no efforts therefore to attract enterprises having their place of business elsewhere. There exist private translations of public procurements in Poland into the German language in order to attract German architects to submit a tender.¹⁷² However, language and geographical distance – particularly in the field of construction – will remain a barrier to a free Single Market for procurements in Europe. Problems may decline the more international groups of companies or European enterprises (SE; SCE etc.) play a big role in procurement markets.

14.5 Future trends/expectations

According to the action plan 2007 of the German Ministry of the Interior¹⁷³ the current goals are to improve the existing communication platforms on the Internet for the exchange of data and documents, to extend the software applications for advanced signatures, multi-lingual communications and Linux-based clients. Long term plans until 2010 include a standard form management system, a virtual post-office and the inter-operability of different e-procurement platforms which are in use throughout

¹⁷¹ Pietzcker, Defizite beim Vergaberechtsschutz unterhalb der Schwellenwerte? NJW 2005, 2881-2884.

¹⁷² <http://www.architekturexport.de>

¹⁷³ Bundesminister des Innern, Umsetzungsplan 2007 E-Government 2.0 (www.egov2.de) sub 1.2.4., p.13

Germany. Application service providing with respect to problems concerning electronic signatures as well as to the employment of cryptographic methods will increase.¹⁷⁴

14.6 Assessment

In Germany an efficient public procurement system based on competition and the use of electronic means has come into existence. This is particularly true as far as procurements above the thresholds are concerned. Full judicial review of fair procedures is granted. The database on legal decisions concerning public procurements VERIS (de: *Vergaberecht – Informationssystem*)¹⁷⁵ contains 5648 decisions. The open market policy in public procurements will increase. The language problem will remain a major obstacle.

¹⁷⁴ <http://www.bitkom.org>.

¹⁷⁵ <http://www.vergabedatenbank.de>.

Extended German terminology section

Pre-Qualification (*Prä-Qualifikation*):

Confirmation certificate of a trusted third party that on the basis of general criteria a tenderer is qualified for candidate to take part in public procurement procedures in a classified field

Technical/Professional Qualification (*Fachkunde*):

General competence of a tenderer to perform supply, works or service contracts in course of procurements

Operating Effectiveness (*Leistungsfähigkeit*):

Potential of a tenderer to perform a contract efficiently

Reliability (*Zuverlässigkeit*):

Trustworthiness of a tenderer

Procurement Procedures Regulation (*Vergabeverordnung – VgV*):

Regulations on public procurement issued by the Federal government authorized by § 97 sec.6 GWB

Procurement Procedures Provisions (*Vergabe- und Vertragsordnung*):

Self-regulatory rules on public procurement procedures

15 Greece

15.1 Public procurement framework

15.1.1 General framework

The general legal framework for public procurement consists primarily of Law 2286/1995¹⁷⁶ and the relevant bylaws. Law 2286/1995 in particular regulates the procurement of contracts concluded between one supplier and one or more of the following authorities:

- i) the State,
- ii) local Government organisations,
- iii) legal persons of public law,
- iv) public enterprises,
- v) banks owned by the State,
- vi) state owned legal persons of private law,
- vii) their connected enterprises and
- viii) associations formed by one or several of such bodies.

In accordance with Law 2286/1995, public procurement procedures are contracts entered into by a tenderer and one of the bodies mentioned, which have as their object the purchase, lease, hire or purchase of products, as well as the provision of services (article 1 of Law 2286/1995). The details of the procedures followed are prescribed in the Regulation of Public Procurement, i.e. Presidential Decree 394/1996¹⁷⁷.

The procurement procedures applied by contracting entities are basically the open and the restricted procedure, and only in exceptional cases is the summary or negotiating procedure allowed and for contracts not exceeding the amount of 45.000 Euro on a yearly basis (Article 82 of Law 2362/1995¹⁷⁸). The award of a public procurement contract directly to a contractor without an auction is allowed for contracts amounting to a maximum of 15.000 Euro on a yearly basis (Article 83 of Law 2362/1995). The scope of the auction is to find appropriate and competent contractors, on one hand, and to defend the public interest, on the other hand¹⁷⁹.

The procurement of public works is separately regulated by specific acts and namely, by Law

¹⁷⁶ «Προμήθειες του δημόσιου τομέα και ρυθμίσεις συναφών θεμάτων», Government Gazette A/19, 1995.

¹⁷⁷ «Κανονισμός Προμηθειών Δημοσίου», Government Gazette A/266, 1996.

¹⁷⁸ «Περί Δημοσίου Λογιστικού, ελέγχου των δαπανών του Κράτους και άλλες διατάξεις», Government Gazette A/247, 1995.

¹⁷⁹ See Ap. Gerontas, in: Gerontas/Lytras/Pavlopoulos/Siouti/Flogaitis, Administrative Law, 2004, (in Greek), p. 283.

1418/1984¹⁸⁰ as amended particularly by Law 2229/1994¹⁸¹, and by Decree 609/1985¹⁸², specifying the procurement procedures for public works. Specific provisions are also included in Law 2576/1998¹⁸³.

With two Presidential Decrees, Greece transposed the new Procurement Directives (2004/17 and 2007/18). In more particular, Decree 59/2007¹⁸⁴ implemented the provisions of Directive 2004/17 and, therefore, applies to utility services, whereas Decree 60/2007¹⁸⁵ implements the provisions of Directives 2004/18, referring thus to conventional procurement contracts.

As mentioned above, the legal framework on public procurement is applicable to all public procurements, including the state, the bodies governed by public law and state-owned bodies governed by private law, as well as the local government. Specifically regarding the local government bodies, the Regulation for local government procurement applies (Decision of the Minister of Interior Nr. 11389/1993¹⁸⁶), insofar as it does not contradict Law 2286/1995, which is the main statutory act governing public procurement. In addition, specific rules apply to hospital supplies (Law 2955/2001¹⁸⁷) and to military supplies (P.D. 284/1999¹⁸⁸).

In order to achieve publicity, transparency and non-discrimination amongst suppliers, the law provides a legal obligation for the prior publication of an announcement (article 2 (12) of Law 2286/1995). This applies only to open and restricted procedures, while in summary and negotiated procedures there is no such obligation. In the first case, the supply of goods may not exceed the total amount of 200,000 Euro, while in the second case, urgent procurements which could not have been foreseen are concerned, when only invalid offers have been presented in a prior procurement procedure, or the supplied goods (artworks etc.) are constructed or delivered by a specific supplier, etc.

¹⁸⁰ «Δημόσια έργα και ρυθμίσεις συναφών θεμάτων», Government Gazette A/23, 1984.

¹⁸¹ «Τροποποίηση και συμπλήρωση του ν. 1418/1984 και άλλες διατάξεις», Government Gazette A/138, 1994.

¹⁸² «Κατασκευή δημοσίων έργων», Government Gazette A/223, 1985.

¹⁸³ «Βελτίωση των διαδικασιών για την ανάθεση της κατασκευής των δημοσίων έργων και άλλες διατάξεις», Government Gazette A/25, 1998.

¹⁸⁴ «Προσαρμογή της Ελληνικής Νομοθεσίας στις διατάξεις της Οδηγίας 2004/17/EK «περί συντονισμού των διαδικασιών σύναψης συμβάσεων στους τομείς του ύδατος, της ενέργειας, των μεταφορών και των ταχυδρομικών υπηρεσιών», όπως τροποποιήθηκε και συμπληρώθηκε», Government Gazette A/63, 2007.

¹⁸⁵ « Προσαρμογή της Ελληνικής Νομοθεσίας στις διατάξεις της Οδηγίας 2004/18/EK «περί συντονισμού των διαδικασιών σύναψης δημοσίων συμβάσεων έργων, προμηθειών και υπηρεσιών», όπως τροποποιήθηκε με την Οδηγία 2005/51/EK της Επιτροπής και την Οδηγία 2005/75/EK του Ευρωπαϊκού Κοινοβουλίου και του Συμβουλίου της 16ης Νοεμβρίου 2005.

¹⁸⁶ Government Gazette B/185 of 1993.

¹⁸⁷ «Προμήθειες Νοσοκομείων και λοιπών μονάδων υγείας των Πε.Σ.Υ. και άλλες διατάξεις», Government Gazette A/256, 2001.

¹⁸⁸ «Τροποποίηση, συμπλήρωση και μεταγλώττιση του Π.Δ. 785/1978 «Περί Προμηθειών, εργολαβιών και Εκτελέσεως των Ενόπλων Δυνάμεων», Government Gazette A/181, 1989.

The Regulation of Public Procurement provides in article 4 that the announcement should be published in daily financial newspapers, etc. and that the summary should be published in the Official Journal of the European Communities (on-line version: see Tenders Electronic Daily, <http://ted.publications.eu.int>), in case the value of the procurement exceeds the amount of 128,771 Euro. After the contract is concluded, an announcement is also published, if the value of the contract exceeds the amount of 200,000 Euro. More generally, it is provided that the contracting authorities should publish the procurement procedures that will take place within the next twelve months, if their value exceeds the total amount of 750,000 Euro.

The central institution responsible for public procurement in Greece is the General Secretary of Commerce with its Directorate for Public Procurement¹⁸⁹, which operates under the Ministry of Development (formerly: Trade Ministry). Specific duties are assigned to the Committee for the Policy and Planning of Procurement, according to Law 2286/1995. It is noteworthy that an annual programme for procurement is planned on a yearly basis by the General Secretary of Commerce, which includes all purchases of goods and services of public institutions.

15.1.2 Certificates and statements

The administrative requirements for the procurement of goods and services are established in the Presidential Decree 394/1996 and those for the procurement of works in the Presidential Decree 690/1985 and the Law 1418/1984. Procurement contracts which fall within the EU law underlie the provisions implementing Article 45 of Directive 2004/18.

In more particular, according to article 6 of P.D. 394/1996, tenderers are required to submit with their tender the following documents:

- a (bank) guarantee for their participation;
- an extract from the penal registry, issued in the last trimester, demonstrating that the tenderer has not been convicted for a crime relevant with the exercise of their professional activity;
- a certificate from the competent judicial or administrative authority, issued in the last semester, indicating that they are not in state of bankruptcy, compulsory winding up, administration by the courts or arrangement with creditors or any other similar procedure;
- certificates issued by a competent authority, indicating that they comply with obligations under social and fiscal law; and
- a certificate issued by the relevant chamber of commerce that certifies their registration in the chamber and their specific profession.

Foreign tenderers are required to deliver equivalent documents issued by the competent administrative and judicial authorities of the country of origin, in which they are established. Legal persons established in Greece or abroad have to meet the above mentioned requirement with the exception of the extract from the penal registry. In case the tenderer's country of origin does not deliver such documents, or these do not cover the aforementioned requirements, the tenderer can deliver a declaration before a judiciary or administrative body or a public notary. There are no specific rules with regard to language

¹⁸⁹ See <http://www.gge.gr>

verification; the contracting authority is free to request additional clarifications if foreign documents are not clear enough with regard to their scope and meaning.

The regulation for public procurement (Decree 394/1996) provides for selection criteria of tenderers participating in restricted procedures, which concern their credibility, professional reliability and, as well as their general financial and economic situation and their technical suitability. The supporting documents which are required include (article 8):

- Bank statements, balance sheets and annual accounts of the tenderer and a statement concerning the global turnover of the undertaking and the turnover concerning the goods to be supplied over the last three accounting years;
- Statements containing references to works/supplies/services provided in the most recent three years, as evidenced by attestations of acceptance;
- Statements detailing the technical equipment to be used by the tenderer and the means of control;
- Statements detailing the staffing of the tenderer, certified by a competent authority;
- A specimen of the goods to be supplied, a description or photographs from them.

In open procedures, it is left to contracting authorities, to lay down in the contract notice which of the aforementioned documents should be delivered.

With regard to public work contracts, the law provides for specific documents, which should be delivered, namely attestations that the tenderer has not left works undelivered in a great amount, that it delivered other contracts in due time, etc. (Article 16 of Law 1418/1984).

15.2 E-Procurement initiatives and status

15.2.1 General e-Procurement framework and initiatives

As mentioned above, the Procurement Directives 2004/17 and 2004/18 have been recently transposed with two Decrees, i.e., P.D. 59/2007 and P.D. 60/2007. With these acts the provisions of the Procurement Directives are almost verbatim transposed and therefore, the legal framework is in full compliance with the EU-Directives.

In practice, the electronic procurement will be fully operable once the National System for Electronic Procurement (NSEP) is created. The project for its implementation has been awarded, but the implementation has not yet been finalised.

The main goals to be achieved through this system are the following:

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- Computerization of procurement procedures in order to accelerate and simplify the whole, but also part of the procedures;
- Introduction of new practices, such as framework agreements and electronic auctions;
- Interconnection of contracting authorities and private businesses (suppliers) with the central offices of the General Secretary of Commerce (GSC);
- Upgrade of IT infrastructure of the GSC;
- Establishment of an open system accessible by employees of the GSC, public authorities and suppliers;
- Provision of improved information and advanced electronic services; and
- Provision of training of main actors (public institutions and suppliers).

The NSEP will be installed centrally in the General Secretary of Commerce and the Procurement Directorates of contracting authorities, and it will support local access. Actors of public procurement will have access through a web portal, which will be structured so that different users could gain access to specific functions.

It will support all the main procedures applicable in public procurement, including the following:

- Preparation of the annual programme for procurement (APP)
- Creation and execution of the APP
- Publication and award of procedures
- Submission of requests to participation (in restricted procedures)
- Submission of tenders
- Evaluation of tenders and selection of tenderers
- Award and execution of procurement contracts
- Review of the APP

The broad objectives of the creation of the NSEP is to save funds from the state budget and principally, to speed up procurement procedures and establish transparency.

15.2.2 Administrative simplification

In order to simplify administrative procedures, a Ministerial Decision was issued from the Vice Minister of Interior, Public Administration and Decentralization and the Minister of Justice¹⁹⁰, which provided that eleven documents would not have to be delivered by citizens, but instead administrative authorities have to request them. Subsequently, another Ministerial Decision was issued providing that extracts from the penal registry would also be requested from the authorities themselves.

¹⁹⁰ Κοινή Απόφαση ΔΙΑΔΠ/Α/17402/06, Government Gazette Β/1042, 2006.

However, the Ministry of Interior, Public Administration and Decentralization issued a circular¹⁹¹, stating that the documents included in the aforementioned Decision have to be delivered from the tenderer until a new Presidential Decree amending the Regulation of Public Procurement is enacted. Another circular¹⁹² stated that this applies also for the extract from the penal registry.

As it is evident, the amendment of the Regulation for Public Procurement will bring about simplifications of the tendering procedures.

15.3 Certificates, attestations and declarations

In this section, we will take a closer look at how the common requirements defined by the e-Procurement Directives are typically met in Greece.

15.3.1 Requirements with regard to the personal situation of the candidate or tenderer – absence of conviction (art. 45 §1 and §2 (c-d) of Directive 2004/18/EC)

Prevalence/actual use in calls

As indicated above, this is a common requirement in Greek procurements, which is mandatory in the procurement of supplies of goods and services¹⁹³.

What document (if any) is used?

Greek tenderers are required to submit a recently issued (i.e., within the last three months) extract from the penal registry, certifying that they have not been convicted for any offence concerning their professional conduct. For procurement contracts that fall within the field of application of the P.D. 60/2007 (transposing Directive 2004/18), Article 45 (1) mentions also specific offences, such as participation in a criminal organisation, corruption, fraud relating to the protection of the financial interests of the European Communities and money laundering.

Apart from procurements, the certificate is often requested during job application procedures, in particular when applying for a public function.

¹⁹¹ Εγκύκλιος υπ' αριθ. ΔΙΑΔΠ/Α/18211/11-8-2006.

¹⁹² Εγκύκλιος υπ' αριθ. ΔΙΑΔΠ/Α/24359/30-10-2006.

¹⁹³ In the procurement of public works, it is mandatory only for contracts that fall within the field of application of the Procurement Directives.

The certificate is issued only for natural persons and is provided by the Department of the Court of First Instance in the place of birth of the applicant. Delivery can vary from 2 to 14 days (depending on the distance and certificate type¹⁹⁴), and no cost is charged.

Traditionally, the delivery of such a certificate required the requesting party to present himself physically before the offices of Court house or with representative having an authorization, or even before a citizens' service centre. A plain copy of the identity card is required also the issuance of the certificate.

Applicants also have the possibility to request the certificate electronically, through the citizens' service centres (www.kep.gov.gr) or by telephone (at the hotline of citizens' service centres, i.e. 1564). The certificates for general use are requested from the competent judicial authority though fax or e-mail bearing a digital signature and are sent to the authority requesting it; whereas, in case they are given to citizens, a paper certificate is provided.

Since the introduction of the ex-officio request of this certificate, citizens are no longer required to request this, except in cases where this does not apply. One of these cases refers to public supplies, as it has been mentioned, where the tenderers have still to request it themselves.

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The certificate identifies the issuing authority (Department of Penal Registry), the requesting party, date and place of his birth, date and place of issuance, and relevant decisions. The latter includes criminal convictions, except of those referring to: a) imprisonment to six months or fines, after the lapse of three years, b) imprisonment over six months or confinement in a psychiatric institution, after the lapse of eight years and c) confinement in a penitentiary for a period of up to five years, after the lapse of twenty years. The certificates are also invalid, in cases where the person dies or after he or she reaches 80 years of age, when a minor reaches 17 years of age, when a conviction is revoked through pardon, etc. The document is signed by the public official and stamped.

There is no formal validation procedure of the certificate after receipt by the contracting authority. The contracting authority may not directly contact the departments of the Penal Register to obtain this certificate without the tenderer's intervention.

Electronic certificates

¹⁹⁴ In Greece there are two types of extracts from the penal registry: one for use in a court house, containing information for all offences committed and one for general use, which contains limited information.

As indicated above, anyone (Greek citizens and foreigners with domicile in Greece) can request a certificate electronically, but this not necessary if the recipient is a public authority, since in this case the authorities request it ex officio.

In this specific case, there is an exemption from these rules for public procurement, as it has been already mentioned above, but this is only provisional and it will be lifted once the new Regulation for Public Procurement is issued.

In the meanwhile, tenderers can request the certificate electronically from the website of the citizens' service centres (<http://www.kep.gov.gr>) or by phone; another alternative would be to request it electronically from the website of the public attorney of Athens (<http://www.eispa.gr>). Access to both systems is provided to registered users, but the level of authentication is low, since registration is provided to users registering their personal data in the system and validating an activation link, which is followed by an e-mail message, and no electronic or digital signatures are used. Also, the resulting certificate remains a paper one.

15.3.2 Requirements with regard to the personal situation of the candidate or tenderer – non-bankruptcy and financial status (art. 45 §2 (a-b) of Directive 2004/18/EC)

Prevalence/actual use in calls

As indicated above, this is a requirement, which is mandatory in the procurement of supplies of goods and services in Greece.

What document (if any) is used?

Greek tenderers are usually required to submit an attestation of non-bankruptcy, issued by the Court of first Instance of the domicile of a natural person or of the seat of a legal person.

The certificate of non bankruptcy can be requested at the clerk's office of the courts of the jurisdiction where the requesting party is established. Delivery takes three days, and no court fees are paid, with the exception of stamps.

The certification must be requested in person or by an attorney, and the resulting document bears the stamp of the court and the handwritten signature of the clerk of the court.

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The attestation identifies the issuing authority, the requesting party (including official address), date and place of issuance, and contains a declaration that the requesting party is not in state of bankruptcy, compulsory winding up, or administration by the courts or arrangement with creditors.

Electronic certificates

There is a pilot project that would allow for the electronic application of attestations, in the three major courts of Greece, i.e. the Courts of Athens, Piraeus and Thessaloniki.

In more particular, the Courts of First Instance of Athens (<http://www.protodikeio-ath.gr>), Piraeus (<http://www.protodikeio-pir.gr>) and Thessaloniki (<http://www.protodikeio-thes.gr>), have created an information system for the electronic application and serving of certificates. Access is granted mainly to lawyers of the corresponding Bar Association, who are given a user name and a password, but other persons could also register and gain access to certain services. This service is planned to begin in the next months and it would be linked possibly with the portal of Citizen Service Centres, which would serve the attestations that would be electronically send from the court office in the form of a signed PDF file.

After a successful roll-out of this service, we would anticipate that the electronic issuance of the certificates would become a standard practice of court offices.

15.3.3 Requirements with regard to the personal situation of the candidate or tenderer – compliance with fiscal and social obligations (art. 45 §2 (e-f) of Directive 2004/18/EC)

Prevalence/actual use in calls

Attestations demonstrating compliance with fiscal and social obligations are general requirements in Greek procurements. In accordance with Article 6 of Decree 394/1996 (1) (4), a certificate certifying that the tenderer complied with requirements under social and fiscal law, are mandatory for the participation in procurement procedures, while this is not mandatory, but may lead to exclusion, in procurements which fall within the field of application of P.D. 60/2007 (transposing Directive 2004/18).

What document (if any) is used?

For both requirements (social and fiscal obligations) an attestation exists.

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For compliance with social law, Greek tenderers were required to submit an attestation of compliance with social security obligations, such as those of the Social Security Institution. Particularly, the Institution of Social Security (Ildrima Koinonoikon Asfaliseon – IKA; see www.ika.gr) is the most important social security organisation, encompassing the majority of employees. The attestation confirms compliance up to the most recent fiscal year.

Apart from procurements, the certificate is often requested as a part of auditing procedures, for the issuance of fiscal books and proofs of payment.

This attestation can be requested by the requesting party itself, or with the assistance of a Citizen Service Centre. Attestations can be requested only in the Greek language.

Delivery can take from instantaneous to 5 days, depending on the chosen medium of communication. Certificates are free of charge.

Social security certificates are available on paper, stamped and carrying a hand written signature, but also an electronic equivalent exists.

With regard to fiscal obligations, an attestation can be requested at the local tax office of the tenderer's jurisdiction, or by electronic means and in more particular, using the Internet portal (<https://www.gsis.gr/taxisnet/login.do>)¹⁹⁶.

Contents

The certificate identifies the issuing authority (including the specific public official), the requesting party, date and place of issuance, and the requested information (i.e. compliance with fiscal or social obligations). The document is signed by the public official and stamped.

Tenderers are required to deliver these certificates with their proposals in paper form, but they are able to use the electronic services of tax authorities and of the social security institution, in order to receive this certificate. However, there is still no possibility to send the certificates by electronic means directly to contracting authorities, although this would be legally allowed. Of course, with the introduction of the electronic system for public procurement, the electronic interchange of documents would be a standard practice. Another alternative would be the ex officio request of the attestations by the contracting authorities, which is plasticized in other cases, but not in public procurement. With the amendment of P.D. 394/1996, however, this would be rectified.

¹⁹⁵ The portal has also an English version (<http://www.gsis.gr/english/index.html#>), which is not, however, operational, but one has to use the Greek version.

¹⁹⁶ The portal has also an English version (<http://www.gsis.gr/english/index.html#>), which is not, however, operational, but one has to use the Greek version.

Electronic certificates

As it is already mentioned, both the certificate regarding the fiscal obligations and the one concerning the social security obligations of the tenderer, have electronic equivalents. Tenderers may access the portal of the tax authorities (<http://www.gsis.gr>) to request an attestation electronically, which is delivered to them in PDF form. The authenticity of electronically issued attestations can be confirmed also electronically by the same website. Likewise, the website of the Social Security Institution (<http://www.ika.gr>) provides for the electronic request of an attestation to registered users, and has the same functionality with the one of tax authorities. However, other social security organisations have not introduced electronic certificates.

15.3.4 Requirements with regard to the suitability to pursue the professional activity

Prevalence/actual use in calls

Another requirement for the participation in a procurement procedure is to deliver a certificate issued by the relevant chamber of commerce that certifies the registration of the tenderer in the chamber and their specific profession, or a certificate (for professionals) concerning their professional activity from a public authority, etc., issued at least six months before (Article 6 (1) a 5 of P.D. 394/1996).

This might change, however, after the implementation of the General Electronic Commercial Register, which is introduced with Law 3419/2005¹⁹⁷, but has not yet become operational. The electronic register would include all commercial actors, i.e. most types of companies and natural persons acting as merchants. A unique registration number¹⁹⁸ would be allocated to each registered entity or person, which will be available in documents issued by the electronic register. The latter will function centrally, and therefore, it will provide the ability of electronic submission of certificates. It is notable that the registration in the electronic register would be available in electronic or paper form after an application by any interested person and the submission of a certain fee (article 16 of Law 3419/2005).

¹⁹⁷ “Γενικό Εμπορικό Μητρώο (Γ.Ε.ΜΗ.) και Εκσυγχρονισμός της Επιμελητηριακής Νομοθεσίας”, Government Gazette A/297, 6.12.2005.

¹⁹⁸ Αριθμός ΓΕΜΗ.

In the meanwhile, the currently existing obligation for delivering the said certificate has not been abrogated through an ex officio request, but this may be the case, if the regulation 394/1996 is amended.

What document (if any) is used?

A certificate is issued from chambers of commerce or professional associations (for professionals).

Contents

The certificate includes the following information:

- Full name;
- Title;
- Address;
- Legal form;
- Seat of establishment and date of establishment;
- Date of registration in the chamber of commerce;
- Object of activities

Electronic certificates

See above: no official certificate exists, but this would be possible with the functioning of the electronic commercial register.

15.3.5 Requirements with regard to economic and financial standing

Prevalence/actual use in calls

Regarding economic and financial standing, tenderers are asked to deliver appropriate bank statements, balance sheets and annual accounts of the tenderer and a statement concerning the global turnover of the undertaking and the turnover concerning the goods to be supplied over the last three accounting years.

Typically, unsigned copies are provided, but the contracting authority may ask that they are complemented with a certification by the auditor (accountant under oath), where the services of an auditor are provided, and by a written declaration of the tenderer that this not provided.

What document (if any) is used?

The most commonly requested documents are balance sheets and annual accounts of the tenderer, and a statement of global or specific revenue over the last three accounting years. These are documents that the tenderer is typically required to keep at any rate, and are therefore easily available.

Annual accounts of sociétés anonymes and limited liability companies are published in the Government Gazette (and in the press). They can be retrieved from the website of the Gazette (at <http://www.et.gr>), which provides a search possibility for subscribers (http://www.et.gr/search_index). The subscription in the service of electronic delivery amounts 645 Eur per annum, while the delivery of paper documents has an annual cost of 2.250 EUR.

There is no practice developed to electronically deliver the annual accounts in public procurement, but this will be the case once the electronic procurement system becomes operational.

It is notable that both the paper annual accounts and the electronic version are considered copies, i.e. there are unsigned and unstamped. Other documents (bank statements, balance sheets) are also occasionally requested, and also tend to have the status of unauthenticated documentation.

Contents

The annual accounts typically state

- Full name and legal form;
- Register number of the company (for sociétés anonymes);
- Seat of establishment and date of establishment;
- Date of approval of the annual account by the management and period covered by the account;
- Management details;
- Identification of any external auditor or accountant;
- Full balance sheets and financial/fiscal results;

As stated above, neither the paper nor the electronic version contain any stamp or signature.

Electronic certificates

See above: no official certificate exists. Thus, tenderers are required to deliver this information on paper.

15.3.6 Requirements with regard to technical and/or professional ability

Prevalence/actual use in calls

The requirement to demonstrate technical and/or professional ability is a common (though not mandatory) requirement in Greek procurements. However, specific certificates are not required.

What document (if any) is used?

Typically, tenderers are required to demonstrate technical and/or professional ability by indicating the profiles of its personnel, their qualifications and past realisations. All these are referred to in the general description of the general technical and professional ability and eventually, while resumes and/or project references are annexed in the offer. Authentic documents (such as certified diploma's, certified descriptions of products/service or certified references) are less common. Usually, a paper copy is provided, and the contracting authority may require the tenderer to sign/initialise it to warrant its authenticity.

The acquisition time and costs of any required document of course varies.

Contents

Contents vary depending on the requirements. As noted above, typical examples include qualifications, diplomas, product/service descriptions and past realisations.

Electronic certificates

There is no systematic practice of requesting certain certificates and, therefore, it is difficult to assess if electronic certificates are legally acceptable. However, since in most cases unsigned copies of the original certificates or declarations are sufficient, one can deduce that electronic copies are also acceptable. In case where contracting authorities require certified documents, the general framework for e-signatures (P.D. 150/2001) and e-procurement (P.D. 60/2007, 59/2007) would apply and thus, a qualified signature would be the most appropriate means for authenticating a document.

In practice, of course, this information is integrated in the offer and no separate signature is thus required.

15.3.7 Requirements with regard to quality assurance standards

Prevalence/actual use in calls

The requirement to demonstrate compliance with quality assurance standards is a requirement rarely asked for in Greek procurements, which is limited to procurement with a higher value and/or specific technical nature.

What document (if any) is used?

If included in the call, tenderers are usually required to provide a certificate from an accreditation authority. The most common requirement is that the tenderer demonstrates the compliance of his/her products or services with certain standards, typically originating from the Greek Organisation of Normalisation (ELOT– see www.elot.gr). Compliance with other standards (specifically ISO standards) might also be required, particularly ISO 9001. ELOT provides a list of companies with Quality System Certificate of Conformity, which is accessible online (<http://www.elot.gr/catalogues.htm>).

ELOT grants Conformity Marks and Certificates of Conformity, which indicate the conformity of products, processes, activities, organizations, systems and personnel to the requirements of normative documents, and which are called ELOT Conformity Marks/ Certificates of Conformity¹⁹⁹. In more particular, conformity marks are granted to products in conformity with the requirements of Hellenic Standards, European Standards (EN), Experimental European Standards (CEN), harmonization Documents (HD), as well as European telecommunication Standards (ETSI), Experimental European Telecommunication Standards (I-ETS), issued by ELOT, CEN or CENELEC or ETSI , are defined as Hellenic Marks of Conformity.

Accreditation can take several weeks, and the total cost consists of the initial cost, the yearly cost and audit cost. An estimation of the cost in each specific case depends on the time duration of the work, which is required and necessary²⁰⁰.

Contents

A certificate of conformity is a paper document identifying the origin (ELOT), the recipient, the nature of the certificate (including the assessed standard), date of testing and issuance, duration of the accreditation, and finally the identification (with signature) of the President of ELOT.

¹⁹⁹ Ministerial Decision Nr. 22729/59 of 1998, Ministry of Development, Government Gazette B/708, 1998. See <http://www.elot.gr/profile/quality.html>

²⁰⁰ See <http://www.elot.gr/quality/enacqs.pdf>

Electronic certificates

The provided certificates are delivered in paper form and no electronic equivalent is provided. An electronic version would be legally accepted, since in accordance with Article 8 of P.D. 131/2003 and Article 2 of P.D. 150/2001, an electronic document which bears an advanced electronic signature with a qualified certificate is equated with a document bearing a hand-written signature. However, ELOT has not proceeded yet to the delivering of conformity marks and certificates in electronic form.

In practice, as stated above, copies of the certificate are typically deemed sufficient, so that the absence of a signature on the provided document need not be a barrier.

15.3.8 Requirements with regard to environmental management standards

Prevalence/actual use in calls

The requirement to demonstrate compliance with environmental management standards is a requirement rarely asked for in Greek procurements, which is limited to procurement with a higher value and/or specific technical nature.

What document (if any) is used?

If included in the call, tenderers are required to provide a certificate from an independent accreditation authority, such as the national standardization and accreditation organization, e.g. ELOT. In more detail, ELOT has developed and operates a scheme for the certification of Environmental Management Systems, according to the requirements of the ISO 14000 series of standards and the EA Guidelines for bodies certifying Environmental Management Systems²⁰¹.

Certification can take several weeks, and the total cost consists of the initial cost, the yearly cost and audit cost. An estimation of the cost in each specific case depends on the time duration of the work, which is required and necessary.

Contents

²⁰¹ As a member of IQNet, ELOT also grants the IQNet Certificate for Environmental Management Systems. In 2001 ELOT was assessed by the SINCERT and was granted the accreditation certificate for the certification of Environmental Management Systems, according to the requirements of standard ELOT EN 45012 and ISO/IEC Guide 66.

The resulting certificate is typically a paper document identifying the origin, the recipient, the nature of the certificate (including the assessed standard), date of testing and issuance, duration of the accreditation, and finally the a signature on behalf of ELOT.

Electronic certificates

The provided certificates are delivered in paper form and no electronic equivalent is provided. An electronic version would be legally accepted, since in accordance with Article 8 of P.D. 131/2003 and Article 2 of P.D. 150/2001, an electronic document which bears an advanced electronic signature with a qualified certificate is equated with a document bearing a hand-written signature. However, ELOT has proceeded yet to the delivering of conformity marks and certificates in electronic form. In practice, as stated above, copies of the certificate are typically deemed sufficient, so that the absence of a signature on the provided document is not a barrier.

15.4 Interoperability

As mentioned above, the National System for Electronic Procurement (NSEP) will be the main e-procurement platform, which will be accessible through an Internet portal, supporting all the features of the procurement procedures, according to national law and Directive 2004/18. According to the description in the call for tenders (Part B, Nr. 2.5.1.1), access to the system will be possible to registered users. Qualified signatures will be used with certificates from certified Greek certification providers and also non national providers.

It seems that no other barriers will be imposed, such as eID cards or similar, so that the system will provide full cross-border interoperability.

15.5 Future trends/expectations

As indicated above, the main expectation is the implementation of the National System for Electronic Procurement (NSEP).

Moreover, another expectation would be the continued introduction of electronic certificates within the framework of administrative simplification initiatives. As mentioned above, there are many applications and pilot projects in which the electronic submission of certificates is practised. Additionally, the

simplification of administration procedures with the ex officio request of certificates should and will probably be extended in the public procurement.

15.6 Assessment

Greek initiatives in the field of e-procurement are still in a very early stage, since the NSEP has not been developed yet. From the tender call it is made clear, however, that this system will allow the development of the full potential of e-procurement, since the electronic platform that will be developed will implement traditional and new purchasing techniques. It remains to be seen whether the future implementation will justify this hope.

As far as certificates and statements are concerned, public procurement in Greece is characterized by medium degree of flexibility, since contracting authorities are relatively free to determine which certificates and statements are required in each specific case; it also can decide if authenticated documents or copies of documents meet the requirements. The general principles of administrative law and jurisprudence of Greek courts make sure that rejection of documents is not made arbitrarily by contracting authorities. In particular, it is an obiter dictum that tenderers are able to complement and clarify certificates and statements, but not to replace others not submitted or not legally submitted.

It is noteworthy that a number of initiatives has been undertaken to simplify administrative procedures and tenderers may benefit from them, also. It is expected that with the amendment of the regulation on public procurement, further simplifications with specific regard to public procurement will take place.

In summary, it could be said that the Greek e-Procurement framework remains still immature and it remains to be seen whether the NSEP will be implemented soon, according to the imperatives of EU Directive 2004/18 and the national law on public procurement.

16 Hungary

16.1 Public procurement framework

16.1.1 General framework

The basic applicable law was the Act XL of 1995 regarding public procurement²⁰², which regulated both the basic principles and procedures referring to general public procurement. A new Act CXXIX of 2003 carrying the same title²⁰³ replaced the older Act of 1995. This newer one partially entered into force on 1 January 2005.

The Act CXXIX of 2003 (hereinafter referred as: **Kbt**) was detailed and executed through a number of Government Decrees, including in particular:

- Government Decree of 34/2004. (III. 12.) Korm. on detailed rules of submission and publication of public procurement calls, on control and fees of calls and on the order and charge of publication in Public Procurement Bulletin²⁰⁴;
- Government Decree of 167/2004. (V. 25.) Korm. on the rules for procedural actions that may be performed by way of electronic means and on the Electronic Public Procurement System²⁰⁵;
- Government Decree of 168/2004. (V. 25.) Korm. on the Centralized Procurement System and on the powers and jurisdiction of the Central Procurement Agency²⁰⁶.

This legal framework is in principle applicable to all public procurements, including the government, local self-governments of villages, towns, counties, the capital and the capital's districts and any associations established by these. Local administrations thus have no regulatory autonomy; any contracting authority wishing to organise a public procurement must adhere to the federal framework.

One of the basic principles of the legal framework is the organisation of a competitive environment, including through a prior publication of procurement opportunities. This typically means that an

²⁰² 1995. évi XL. törvény a közbeszerzésről

²⁰³ 2003. évi CXXIX. törvény a közbeszerzésről

²⁰⁴ 34/2004. (III. 12.) Kormányrendelet a közbeszerzési és tervpályázati hirdetmények megküldésének és közzétételének részletes szabályairól, a hirdetmények ellenőrzésének rendjéről és díjáról, valamint a Közbeszerzési Értesítőben történő közzététel rendjéről és díjáról

²⁰⁵ 167/2004. (V. 25.) Kormányrendelet a közbeszerzési eljárásokban elektronikusan gyakorolható eljárási cselekmények szabályairól és az Elektronikus Közbeszerzési Rendszerről

²⁰⁶ 168/2004. (V. 25.) Kormányrendelet a központosított közbeszerzési rendszerről, valamint a központi beszerző szervezet feladat- és hatásköréről

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announcement must be published in the Public Procurement Bulletin²⁰⁷, which is published according to necessity. Typically 2-3 issues are published a week²⁰⁸. (For on-line version see www.kozbeszerzes.gov.hu).

In compliance with European obligations, procurements with a value exceeding the so-called community limits established by Acts of Parliament are also published in the Official Journal of the European Communities.

Major categories of the procurements are settled as *simple*, *national* and *community* level procurements. The chart below indicates the limits.

	Simple (Million HUF)	National (Million HUF)		Community (Thousand EURO)
		Traditional sectors	Utility services ²⁰⁹	
Purchase of goods	8	30	50	211
Public works	15	90	100	5.278
Purchase of services	8	25	50	137
Public works concession	-	100	-	5.278
Services concession	-	25	-	-

Limits concerning simple and national procurements are determined by the Act CXXVII of 2006 on the Central Budget of the Republic of Hungary²¹⁰, whereas the community limits are declared in the Kbt.

Contracting entities may publish the tender notices by other means after they are published by the Public Procurement Council²¹¹. The tender notices published must contain the same information as published in the Public Procurement Bulletin, and they shall contain an indication of the date of dispatch to the Public Procurement Council.

Public procurement procedures may be held in the form of

²⁰⁷ Közbeszerzési Értesítő

²⁰⁸ Number of issues in the last few years: 2004 – 149; 2005 – 150; 2006 – 149; 2007 – 78 – up to now.

²⁰⁹ Special procurement procedures for entities operating in water, energy, transport and postal services

²¹⁰ 2006. évi CXXVII. törvény a Magyar Köztársaság költségvetéséről

²¹¹ Közbeszerzések Tanácsa

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- open,
- restricted,
- competitive dialogue, or
- negotiated procedure.

Negotiated procedures and competitive dialogue may be held only in case of exceptional circumstances.

Contracting entities may use the competitive dialogue procedure if

- not objectively able to establish the public procurement technical specifications for the object of the public procurement, or
- not objectively able to specify the type of contract or the legal and/or financial make-up of the contract.

The contracting entity may employ a negotiated procedure with prior publication of a tender notice if:

- an open or restricted procedure or a competitive dialogue has failed, insofar as the original terms of the contract are not substantially altered in the meantime,
- in exceptional cases for public works and supply or service contracts, when the nature of the public works or the nature of the services or the risks involved do not permit prior overall pricing,
- for public works contracts, when the works involved are carried out purely for the purpose of research, experiment or development, and not to establish commercial viability or to recover research and development costs,
- for service contracts, when the nature of the services to be procured, in particular in the case of certain intellectual services and financial services cannot be established with sufficient precision to permit the award of the contract by selecting the best tender according to the rules governing open or restricted procedures.

In either case, the publication will indicate the administrative requirements to be met, including by naming certificates and statements to be provided by prospective tenderers, and by indicating the specific administration and/or contact person to whom the finalised offer should be provided.

The **Public Procurement Council** was established by **Act XL of 1995 on Public Procurement** and defined as a central budgetary organ. The new **Act CXXIX of 2003 on Public Procurement** basically left its structure intact. The Council is subordinated to Parliament only and is independent from the Government.

The **Secretariat of the Public Procurement Council** is responsible for coordination, preparation of the Council's decisions, data collection, recording and administration activities.

The **Council's manifold duties** are stipulated in the Kbt. Among others the Council:

- monitors the application of the law and provides its opinion on draft legislation in its field,
- makes recommendations (without legal binding force),
- collects and publishes statistical data on public procurement,
- edits the Official Journal of the Public Procurement Council (the Public Procurement Bulletin) verifies and publishes the notices related to the contract award and design contest procedures,
- maintains relationships with international organisations,
- organises education, training etc.

The **Public Procurement Arbitration Board** operates independently alongside the Council and has the power to conduct remedy procedures initiated against any infringement of the legislative provisions applicable to public procurement procedures. The Arbitration Committee is an independent body, governed in their proceedings exclusively by the provisions of law.

16.1.2 Certificates and statements

The administrative requirements to be met are defined in the Kbt. The Kbt only declares the grounds for exclusion and it is the contracting authority who may point out in details what kind of attestations are required in the procedure.

The reasons of exclusion comprise coercive and optional reasons. In case of coercive reasons the tenderer must be excluded from the procedure (*ex lege* exclusion), whilst the optional reasons can be applied at discretion of the contracting authority.

Coercive excluding reasons

Any tenderer will be excluded from participation in the procurement procedure who:

- is being wound up, or is under bankruptcy or liquidation proceeding, or if the tenderer (subcontractor) is adjudicated in a similar proceeding under national laws, or who is any analogous situation arising from a similar procedure under national laws and regulations;
- has suspended its activities or whose operations had been suspended;
- has been convicted of a criminal offense concerning his economic or professional conduct by a judgment,
- has been excluded for any period from participating in public procurement procedures;
- has not fulfilled obligations relating to the payment of taxes, customs duties or social security contributions for over a year in accordance with the legal provisions of the country in which he is established or with those of the country of the contracting authority, unless deferred payment has been authorized;
- has been found guilty of serious misrepresentation in supplying false information in a public procurement procedure that has been concluded within three years, and was excluded from the procedure in consequence.
- has been found guilty by a definitive administrative or court ruling within the preceding five years and sanctioned by employment penalty or payment order for any infringement of obligations relating to the implementation of employment contracts, non-compliance with the obligation of notification relating to employment and in connection with the employment of foreign nationals;
- has committed any criminal act in affiliation with organized crime by definition of the Criminal Code, or if engaged in bribery or bribery in international relations, in any violation of the financial interest of the European communities, or if involved in money laundering operations,

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or any crime of similar nature under the laws of his home country, if found guilty of such crime by final court verdict which has the force of *res judicata*, until exonerated from the detrimental consequences of having a criminal record;

- has been found guilty by a definitive administrative or court ruling within the preceding two years and sanctioned for any infringement of the provisions relating to equal treatment as laid down in the Act on Equal Treatment and the Promotion of Equal Opportunity.

Optional excluding reasons:

The contracting authority may prescribe in the tender notice that any tenderer, or any subcontractor proposed to be contracted for a value in excess of ten per cent of the value of the contract, may be excluded from participation in the procurement procedure who:

- has been convicted of an offense concerning his economic or professional conduct by a judgment made within five years to date,
- has been found guilty and sanctioned within the preceding five years of a legal offense committed in a public award procedure by final and executable decision of the economic competition authority under Section 11 of Act LVII of 1996 on the Prohibition of Unfair Market Practices and Restraint of Trade²¹² or under Article 81 of the Treaty establishing the European Community, or by final executable court ruling passed in conclusion of the judicial review of the said decision of the economic competition authority; or if the tenderer has been condemned for a similar misdemeanor offense by another competition authority or court within the preceding five years;
- has been sanctioned by a final administrative or court ruling for any breach of obligation in connection with a public procurement contract within the preceding five years;
- is not registered in the country where established;
- is not authorized in his country of establishment to engage in the service to which the contract pertains, or is not enrolled in any of the professional or trade registers required.

The contracting authority is free to indicate that it is willing to accept formal or less formal documents as evidence, including declarations of honour. Extracts from official registers provided and authenticated by the proper authority are considered to be formal documents. In practice the original document is often required but in certain cases a photocopy may also be accepted.

For foreign tenderers, the Kbt. provides that equivalent documents delivered by the competent judiciary or governmental body from the country of origin will also be accepted if they adequately demonstrate that the aim of the Kbt. was met. When the tenderer's country of origin does not deliver such documents, a declaration under oath or a solemn declaration before a judiciary or governmental body, a public notary or a competent professional organisation will also be deemed acceptable. There are no specific rules with regard to language verification; the contracting authority is free to request additional clarifications if foreign documents are not clear enough with regard to their scope and meaning.

The contracting authority shall accept the following certificates and statements as sufficient evidence:

²¹² 1996. évi LVII törvény a tisztességtelen piaci magatartás és a versenykorlátozás tilalmáról

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- an extract from the records of the competent court or other authority (police penal certificate) or, failing this, of an equivalent document issued by a competent judicial or administrative authority in the country of origin;
- a certificate issued by the competent authority in the Member State concerned;
- where the competent judicial or administrative authority does not issue such documents or certificates they may be replaced by a declaration made under oath by the tenderer (subcontractor) concerned or, if such declaration is not recognized in that country, a statement made by the tenderer (subcontractor) before the competent judicial or administrative authority, trade association or a competent professional or trade body, or a notarized document;
- the declarations (extracts) from the registers or other declarations and certificates referred to in Annex IX B, Annex IX A and Annex IX C of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, respectively, for public works contracts, public supply contracts and public service contracts;
- an official copy of the license or authorization, or proof of enrolment in the professional or trade registers required;
- the statement made by the tenderer (subcontractor);
- a certificate from the competent authority;
- proof of being listed in the official register of qualified tenderers, where the register offers sufficient proof that none of the grounds for exclusion apply to the tenderer (subcontractor) in question.

The official certificates shall contain an indication that they were "*made out for the purpose of a public procurement procedure*", without indicating the contracting entity or the subject matter of the procedure.

With regard to selection criteria (which establish the financial and technical suitability of the tenderer), a different set of supporting documents is typically required. These include most notably²¹³:

Documents referring to financial suitability:

Tenderers and any subcontractors proposed to be contracted for a value in excess of ten per cent of the value of the contract as a whole shall provide proof of their financial and economic capacity in connection with public supply, public works and public service contracts by means of one or more of the following references:

- statements issued by financial institutions for this purpose, or evidence of relevant professional risk indemnity (liability) insurance;
- presentation of the tenderer's balance sheets (where publication of the balance sheets is required under company law in the country in which the tenderer is established);

²¹³ The enumeration is legally binding only for procurements in traditional sectors, but not for procurements in the utilities sectors, where contracting authorities have more liberty to determine suitable evidentiary documents.

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- statement of the tenderer's overall turnover and its turnover in respect of the services to which the contract relates for the previous three financial years, depending on the date on which the tenderer was set up or started trading, as far as the information on these turnovers is available;
- a statement or document containing the information required by the contracting entity, or any other certificate or document suitable for establishing the tenderer's financial and economic capacity.

Documents referring to technical suitability

Purchase of goods

Suppliers and their subcontractors shall provide proof of their technical capacity and professional qualifications by one or more of the following means according to the nature, quantity and purpose of the products to be supplied:

- a list of the principal deliveries effected in the past three years (indicating *inter alia* the date of performance, name of the other contracting party, the subject-matter of deliveries, sums, or any other information on previous deliveries);
- a description of the supplier's technical facilities, its measures for ensuring quality and its study and research facilities;
- an indication of the technicians (technical bodies) and executives officers involved (including their educational background), whether or not belonging directly to the supplier, especially those responsible for quality control;
- samples, description and/or photographs of the products to be supplied, the authenticity of which must be certified if the contracting authority so requests;
- certificates drawn up by official quality control institutes (accredited under any national system) or agencies of recognized competence attesting conformity to certain specifications or standards of products clearly identified by references to specifications or standards;
- where the products to be supplied are complex or, exceptionally, are required for a special purpose, a check carried out by the contracting authorities or on their behalf by a competent official body on the production capacities of the supplier and if necessary on his study and research facilities and quality control measures.

Public works

Contractors and their subcontractors shall provide proof of their technical capacity and professional qualifications for public works contracts by the following means:

- a list of the principal works carried out over the past five years;
- a statement of the tools, plant and technical equipment available to the contractor for carrying out the work;
- the contractor's educational and professional qualifications and/or those of the firm's managerial staff and, in particular, those of the person or persons responsible for carrying out the public works;

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- a statement of the firm's average annual manpower and the number of managerial staff for the last three years;
- indication of the technicians (technical bodies) and executives officers involved (including their educational background) whether or not belonging directly to the firm.
- in appropriate cases, an indication of the environmental management measures that the tenderer will be able to apply when performing the contract.

Purchase of services

Service providers and their subcontractor shall provide proof of their technical capacity and professional qualifications by one or more of the following means according to the nature, quantity and purpose of the services to be supplied, and in view of the fact that the ability of service providers to perform services may be evaluated in particular with regard to their skills, efficiency, experience and reliability:

- a list of the principal services provided in the past three years (indicating *inter alia* the date of performance, name of the other contracting party, the subject-matter of deliveries, sums, or any other information on previous deliveries);
- the service provider's educational and professional qualifications and/or those of the firm's managerial staff and, in particular, those of the person or persons responsible for providing the services;
- a statement of the service provider's average annual manpower and the number of managerial staff for the last three years;
- an indication of the technicians (technical bodies) and executive officers involved (including their educational background), whether or not belonging directly to the service provider, especially those responsible for quality control;
- a statement of the tools, plant or technical equipment available to the service provider for carrying out the services;
- a description of the service provider's measures for ensuring quality and his study and research facilities;
- where the services to be provided are complex or, exceptionally, are required for a special purpose, a check carried out by the contracting authority or on its behalf by a competent official body on the technical capacities of the service provider and, if necessary, on his study and research facilities and quality control measures;
- an indication of the proportion of the contract (service) which the service provider may intend to sub-contract.
- in appropriate cases, an indication of the environmental management measures that the tenderer will be able to apply when performing the contract.

The contracting authority may prescribe one or more of the certificates described above wishes to receive. The contracting authority may include a clause in the tender notice requiring tenderers other than natural persons to indicate in their tenders the name and professional qualification of the natural persons participating in the performance of the contract.

16.2 E-Procurement initiatives and status

16.2.1 General e-Procurement framework and initiatives

As stated above, the act currently in force is the Act CXXIX of 2003, as detailed and executed through a series of Government Decrees.

While part of the Public Procurement Directives have been transposed through the Kbt and these Decrees, full transposition is not achieved yet. As a result, the Hungarian legal framework has not fully adopted the European Directives. The detailed rules of electronic procurement – as the rules for the electronic auction – are still missing.

A series of initiatives have been taken since 2002 to create a full e-Procurement platform in compliance with the Directives and the Hungarian transposition, in particular through the EKR²¹⁴ (Electronic Public Procurement System). Accessibility: <http://www.kozbeszerzes.hu/> and <http://www.kszf.gov.hu/>.

EKR was originally conceived as a public procurement platform for the Government and for centralised public procurement only, but has since its conception expanded to include a large number of public services, allowing public procurement announcements to be published using the standard XML format. Any contracting authority can accede to the EKR platform voluntarily. The fee for electronic publication of a tender notice and any further document is equivalent with the traditional (printed) publication. Fees are stated by the Government Decree 34/2004 (III. 12.) on detailed rules of submission and publication of public works and procurement notices, on the control of notifications and on the order and fees of publication in Public Procurement Bulletin²¹⁵.

As in several other EU countries, the implementation process is divided into several modules, to be implemented in stages. In 2000 the Government made a resolution on the development of a comprehensive e-procurement system. The modules forecasted by the Government Resolution of 2146/2000. (VI. 30.) Korm. on the system of electronic public procurement and on the necessary measures referring to that²¹⁶ has only been implemented partially.

- e-notification: the simple publication and search functionality has currently been implemented in the EKR-platform. The legal binding force of the electronic and paper publication is equivalent, hence the electronic notification can be as official as the traditional one and not to be deemed only a convenience utility. The current registration process allows tenderers to register their contact details (name, address, phone, e-mail, etc.) and indicate specific fields of

²¹⁴ Elektronikus Közbeszerzési Rendszer

²¹⁵ 34/2004. (III. 12.) Korm. rendelet a közbeszerzési és tervpályázati hirdetmények megküldésének és közzétételének részletes szabályairól, a hirdetmények ellenőrzésének rendjéről és díjáról, valamint a Közbeszerzési Értesítőben történő közzététel rendjéről és díjáról

²¹⁶ 2146/2000. (VI. 30.) Korm. határozat az elektronikus közbeszerzés rendszerének koncepciójáról és a létrehozásával kapcsolatban szükséges intézkedésekről

interest, including e.g. by category of procurement (works, supplies or services). The users' registration is performed on a medium security level: username/password system. Registration can be done via the so called customers' gateway²¹⁷. The EKR platform can then automatically notify the tenderer when a new procurement of potential interest becomes available. As this registration does not require information which is specific to Hungarian entities, registration is open to foreigners.

The other modules have not yet become implemented:

- e-tendering: (questions and answers session, submission and opening of proposals).
- e-contracting: conclusion of procurement contracts on electronic way.
- e-awarding: (evaluation of proposals and granting);
- e-auctions: The notion of an e-auction is defined by the Kbt, but the detailed rules are not worked out yet. In accordance to the Kbt the "electronic auction" shall mean a repetitive process, comprising part of the public procurement procedure, involving an electronic device for the presentation of new prices, revised downwards, and/or new values concerning certain elements of tenders, which occurs after the evaluation of the tenders enabling them to be ranked using automatic evaluation methods;
- dynamic purchasing system: the notion is also defined by the Kbt. No detailed rules currently exist. The elementary definition is as follows: "dynamic purchasing system" shall mean a completely electronic process for making commonly used purchases, the characteristics of which meet the requirements of the contracting entity, which is limited in duration and open throughout its validity to any tenderer which satisfies the selection criteria, to whom any of the grounds for exclusion does not apply and has submitted an indicative tender that complies with the specification;
- e-catalogues: centrally harmonized list of specially protected goods as cars and fuels, IT and telecomm equipments, furniture...
- e-invoicing and e-payment.

The Prime Minister's Office and Ministry for Information and Communication Technology²¹⁸ (hereinafter referred as: IHM) were responsible for the implementation of the project until 2006. After the election in 2006, a new government structure was coined in which the powers and jurisdiction of IHM were assumed by the Ministry of Economy and Transport²¹⁹. The realisation of all modules except the first has suffered significant delays, and none but the first module is presently operational. Several schedules for the realisation of the aforementioned modules has been drafted, but has not yet been approved.

The implementation process thus far resulted in a Government Decree of 167/2004. (V. 25.) Korm. on the rules for procedural actions that may be performed by way of electronic means and on the Electronic Public Procurement System which entered into force on 2 June 2004. This Decree sets the parameters to be used in the accomplished e-procurement site.

²¹⁷ <http://www.magyarorszag.hu/ugyfelkapu> - This is the accessing point of the customers' gateway.

²¹⁸ Informatikai és Hírközlési Minisztérium

²¹⁹ Gazdasági és Közlekedési Minisztérium

It defines the concepts of "electronic document" and "electronic means". An electronic document is defined as a set of data which can be processed by electronic equipment. An electronic means is defined as a means using electronic equipment for data processing (including digital compression) and data storage, as well as distribution, transmission and receipt by cable, radio, optic or other electromagnetic means.

The electronic means must at least guarantee that:

- statement with legal binding force can only be done in electronic document signed by qualified electronic signature;
- any written procedural action shall be provided in electronic document signed by at least an advanced electronic signature;
- the electronic signature used conforms to the rules of Community and national law on advanced electronic signatures generated on the basis of a qualified certificate and using a secure signature creation device (i.e., a so called qualified signature);
- the precise time of receipt by the addressee can automatically be determined by an acknowledgment of receipt sent by electronic means;
- the integrity of the communication exchanges and of their storage is ensured by the service provider;
- it can be reasonably ensured that nobody can access any sent requests for participation or proposals before the chosen publication time; and that any violation of this access limitation can be reasonably detected;
- only authorised persons can determine or change the exact moment of opening of the produced data (i.e. the offer);
- access to the produced data at any stage of the procurement process is only possible if all authorised persons act jointly, and at the time that has been chosen;
- the supporting tools and technical characteristics thereof, including any encryption, are not discriminatory and available for all concerned parties; such tools and characteristics must be clearly identified in the call.

The legal framework for e-tendering has thus been put into place, but no actual implementation work for the electronic submission of offers has been made accessible yet. While the functionality for electronic tendering and electronic auctions has not yet been implemented this is only a partial solution. The EKR does not provide fully electronic tendering as offers cannot be electronically submitted through the portal. It is not declared yet by what time this functionality is expected to become publicly available.

It is however possible and also frequently occurs in practice, especially for smaller procurements that a call for bids indicates that offers may be submitted electronically, e.g. via e-mail, without implicating the EKR site, and without a specific electronic signature being required. This is just a convenience solution. The official documents are required in printed version authenticated by traditional signature and submitted by registered mail.

16.3 Certificates, attestations and declarations

In this section, we will take a closer look at how the common requirements defined by the e-Procurement Directives are typically met in Hungary.

16.3.1 Requirements with regard to the personal situation of the candidate or tenderer – absence of conviction (art. 45 §1 and §2 (c-d) of Directive 2004/18/EC)

Prevalence/actual use in calls

This is a mandatory requirement in Hungarian procurements.

What document (if any) is used?

Hungarian tenderers are usually required to submit a so called “proof of sound behaviour and mores” (*hatósági erkölcsi bizonyítvány*) also referred to as an extract from the penal register.

Apart from procurements, the certificate is often requested during job application procedures, specifically when applying for a public function or for a position involving contact with minors.

For natural persons, the certificate is provided by the Central Office for Administrative and Electronic Public Services (*Közigazgatási és Elektronikus Közszolgáltatások Központi Hivatala* aka: KEKKH²²⁰) Delivery can vary from 14 to 30 days and a cost of 12 EUR (3000 HUF) is charged. Application shall be submitted to the local Documentary Office (*Okmányiroda*) which works as a part of the local self-government.

Contents

The certificate identifies the issuing authority, the requesting party, date and place of issuance, and data referring to relevant decisions, convictions, criminal procedure in progress. The document is signed by the public official and stamped.

Electronic certificates

No electronic equivalent is available.

²²⁰ KEKKH 1094 Budapest, Balázs Béla utca 35.

Tel.: +36-1-4556700 Fax.: +36-1-4556875; e-mail: nyilvantarto.hivatal@mail.ahiv.hu

<http://www.nyilvantarto.hu>

16.3.2 Requirements with regard to the personal situation of the candidate or tenderer – non-bankruptcy and financial status (art. 45 §2 (a-b) of Directive 2004/18/EC)

Prevalence/actual use in calls

As indicated above, this is a common and mandatory requirement in Hungarian procurements.

What document (if any) is used?

Hungarian tenderers are usually required to submit an attestation of non-bankruptcy, issued by the commercial courts of the counties²²¹. Alternatively, formal statements are occasionally also accepted.

Attestations can be requested at the clerk's office of the commercial courts of the jurisdiction where the requesting party is established. Delivery is instantaneous, and the court fees of 12 EUR (3000 HUF) must be paid.

The attestation must be requested in person, and the resulting document bears the stamp of the commercial court and the handwritten signature of the clerk of the court.

Contents

The attestation identifies the issuing authority, the requesting party (including official address and unique enterprise number), date and place of issuance, and contains a declaration that the requesting party has not been declared bankrupt and has not filed for a wind-up.

Electronic certificates

The attestation has no electronic equivalent, and no plans for such an equivalent have currently been announced.

²²¹ County = Megye. The county is a basic unit of Hungarian public administration. Many services are organized on the base of the counties (as commercial courts, taxation, health- and social security service.) Hungary has 19 counties + 1 capital (Budapest) which is accounted as a county in administrative law.

16.3.3 Requirements with regard to the personal situation of the candidate or tenderer – compliance with fiscal and social obligations (art. 45 §2 (e-f) of Directive 2004/18/EC)

Prevalence/actual use in calls

Attestations demonstrating compliance with fiscal and social obligations are mandatory requirements in Hungarian procurements.

What document (if any) is used?

For both requirements (social and fiscal obligations) an attestation exists.

For compliance with social law, Hungarian tenderers were required to submit an attestation of the County Service of Social Security (*Megyei Társadalombiztosítási Főigazgatóság*). The attestation confirms compliance up to the most recent fiscal quarter.

Apart from procurements, the certificate is often requested as a part of auditing procedures.

This attestation can be requested personally, in mail, via phone or fax.

Delivery can take several days (2-5 days), depending on the chosen medium of communication. Certificates are free of charge.

Social security certificates are only available on paper, stamped and carrying a hand written signature.

With regard to fiscal obligations an attestation for direct taxes and VAT (*ÁFA = általános forgalmi adó*) declarations can be required. Attestation referring to central taxes must be requested at the county tax office, but for the local taxes can be requested in the local tax office of the tenderer's jurisdiction. The document can only be provided in a paper form, stamped and carrying a hand written signature.

Contents

The certificate identifies the issuing authority (including the specific public official), the requesting party (including by enterprise number), date and place of issuance, and the requested information (i.e. compliance with fiscal or social obligations). The document is signed by the public official and stamped.

Electronic certificates

None of the attestations have an electronic equivalent that is provided to the tenderer, and no plans for such an equivalent have currently been announced.

16.3.4 Requirements with regard to the suitability to pursue the professional activity

Prevalence/actual use in calls

Generic suitability to pursue a professional activity is often asked for in Hungarian procurements.

What document (if any) is used?

A central and generally mandatory register doesn't exist referring to the suitability to pursue the professional activity. In certain trades, particularly in the field of "regulated professions"²²², membership in a chamber or similar organisation is required by law. Apart from this case the membership in chambers is optional.

The chambers maintain their trade register. An extract from the trade register can be accepted as an attestation of suitability to pursue the professional activity.

Beyond this extract a list of the principal deliveries effected in the past three years (indicating *inter alia* the date of performance, name of the other contracting party, the subject-matter of deliveries, sums, or any other information on previous deliveries) can also be an acceptable document.

Contents

As no administrative register exists in this field, the content of document is not defined clearly. It can contain the data as follows:

- Full name and legal form;
- Unique enterprise number;
- Seat of establishment and date of establishment;
- Activities according to VAT, social security and tax status;
- Management details, including general managers and daily management;

²²² On regulated professions: Act C of 2001 on recognition of diplomas and degrees awarded in foreign countries. (2001. évi C. törvény a külföldi bizonyítványok és oklevelek elismeréséről)

- Basic financial information, including capital and date of deposit of balance sheets;
- List of establishments.

Electronic certificates

No official electronic certificate exists.

16.3.5 Requirements with regard to economic and financial standing

Prevalence/actual use in calls

Evidence with regard to economic or financial standing is commonly asked for, in particular by requesting a summary of the turnover (possibly limited to relevant assignments only) or by requesting a copy of the balance sheets, both usually for a period of e.g. the most recent three years. Other possibilities such as bank statements or insurance extracts are conceivable, but rarely asked for in practice.

Typically, unsigned copies are provided, although it is possible to request audited or initialled documents.

What document (if any) is used?

Statements issued by financial institutions for this purpose, or evidence of relevant professional risk indemnity (liability) insurance, statement of the tenderer's overall turnover and its turnover in respect of the services to which the contract relates for the previous three financial years are also acceptable. These are documents that the tenderer is typically required to keep at any rate, and are therefore easily available.

The contracting authority may also require and subscribe other statement or document containing the information or any other certificate or document suitable for establishing the tenderer's financial and economic capacity

Contents

The annual accounts typically state

- Full name and legal form;
- Unique enterprise number;
- Seat of establishment and date of establishment;

- Date of approval of the annual account by the management and period covered by the account;
- Management details, including general managers and daily management, and period of appointment;
- Identification of any external auditor or accountant;
- Full balance sheets and financial/fiscal results;

Electronic certificates

See above: no official certificate exists.

16.3.6 Requirements with regard to technical and/or professional ability

Prevalence/actual use in calls

The requirement to demonstrate technical and/or professional ability is a common (though not mandatory) requirement in Hungarian procurements.

What document (if any) is used?

Typically, tenderers are required to demonstrate technical and/or professional ability by indicating the profiles of its personnel, their qualifications and past realisations. However, this information is usually integrated into the main body of the offer in the form of resumes and/or project references. Authentic documents (such as certified diploma's, certified descriptions of products/service or certified references) are significantly less common. In such cases a paper copy is usually provided, and the contracting authority may require the tenderer to sign/initialise it to warrant its authenticity. Only in mayor procurements may be required the officially authenticated copy of the diploma.

Contents

Contents vary depending on the requirements. As noted above, typical examples include qualifications, diplomas, product/service descriptions and past realisations.

Electronic certificates

Since there is no systematic practice of requesting certain certificates, it is difficult to assess if electronic certificates are legally acceptable.

16.3.7 Requirements with regard to quality assurance standards

Prevalence/actual use in calls

The requirement to demonstrate compliance with quality assurance standards is a more and more frequent requirement in Hungarian procurements however this is mostly limited to procurement with a major value and/or specific technical nature.

What document (if any) is used?

If included in the call, tenderers are usually required to provide a certificate from an independent accreditation authority. The most common requirement is that the tenderer demonstrates the compliance of his/her products or services with certain standards, typically originating from the Hungarian Standards Institution²²³.

Compliance with other standards (specifically ISO standards) might also be required. Certificates are usually provided by independent accreditation authorities.

Accreditation can take several weeks, and the costs vary in a broad scale per hour for an auditor/expert's assessment.

The leading company in the Hungarian accreditation market is the CERTOP Company²²⁴.

Contents

A CERTOP certificate is a paper document identifying the origin, the recipient, the nature of the certificate (including the assessed standard), date of testing and issuance, duration of the accreditation, and finally the identification (with signature) of the president of the accreditation bureau.

Electronic certificates

The provided certificates are usually delivered in paper form, or in unsigned PDF-form.

²²³ Magyar Szabványügyi Testület

1091 Budapest. Üllői út 25. Tel: +36-1-2566800

<http://www.mszt.hu>

²²⁴ 1113 Budapest, Karolina út 17/B. Tel./Fax: +36-1-4666093

E-mail: certop.bp@certop.hu

16.3.8 Requirements with regard to environmental management standards

Prevalence/actual use in calls

The requirement to demonstrate compliance with environmental management standards is an uncommon requirement in Hungarian procurements, being mostly limited to procurement with a higher value and/or specific technical nature.

What document (if any) is used?

If included in the call, tenderers are usually required to provide a certificate from an independent accreditation authority. The most common requirement is that the tenderer demonstrates the compliance of his/her products or services through an attestation provided by an accredited organisation (e.g. an MSZT-accredited organisation).

Certification duration and cost can vary from organisation to organisation.

Contents

The resulting certificate is typically a paper document identifying the origin (the accreditation agency), the recipient, the nature of the certificate (including the assessed standard), date of testing and issuance, duration of the accreditation, and finally the a signature on behalf of the accreditation bureau.

Electronic certificates

The provided certificates are usually delivered in paper form, or in unsigned PDF-form.

16.4 Interoperability

As described above, the main e-Procurement system in Hungary is the EKR platform. While its current functionality (automated notification) is fully accessible to non-nationals, future functionality will depend on qualified electronic signatures. Depending on the implementation details, this may turn the platform inaccessible to foreigners without a fixed residence in Hungary.

It is also conceivable that other qualified signature solutions could be considered. However, acceptable signatures would likely be limited to a set of accredited CSPs, and thus far only Hungarian CSPs and authorities have been accredited for e-Government applications in this regard. Since receipt of the

required certificates would imply prior face to face identification, it seems unlikely that non-nationals without a fixed residence in Hungary would be able to fully benefit from the portal in the near future.

Some remarks about the results: According to the figures of Public Procurement Council foreign tenderers in the Hungarian procurement market have gained 105 procedures in sum total 320.4 Billion HUF in 2006. Taking the total number of bids it was merely 2%, but taking the aggregate value it has reached 19%²²⁵. This means 3.6% increase comparing with 2005.

16.5 Future trends/expectations

The main expectation is the full implementation of the currently inactive modules of the EKR platform. The launch of an electronic ID card is a foreseen project of Hungarian administration. In all likelihood the eID card will be a basic mean of electronic public administration services in Hungary, also including the public procurement system in its scope.

16.6 Assessment

The Hungarian e-procurement initiatives are still in an early stage, since the EKR platform does not yet allow for much of the functionality prescribed in the Procurement Directives. It remains to be seen whether the future implementation will meet the end users' needs, and in particular if and how the system will be made accessible to non-nationals.

Specifically with regard to certificates and statements, Hungarian procurements are characterised by certain flexibility, in the sense that the contracting authority has a substantial freedom in determining which certificates and statements are required, and in determining if provided originals or copies (including foreign documents) meet these requirements. The general principles of good administrative governance generally ensure that decisions to reject documents are not made arbitrarily, and that tenderers typically have the opportunity to clarify and/or rectify any issues.

However, the development of the Hungarian electronic public procurement system is stagnant. No relevant changes have been fulfilled in the last 3 years.

In summary, the Hungarian e-Procurement framework is still incomplete as it stands, and it remains to be seen if sufficient attention has been given to foreign tenderers.

²²⁵ Press report of Public Procurement Council. 10 January 2007

http://www.kozbeszerzes.hu/index.php?akt_menu=281&details=681

17 Iceland

17.1 Public procurement framework

17.1.1 General framework

Iceland is a republic, has a written constitution and a parliamentary form of government. The president is elected by direct popular vote for a term of four years, with no term limit. Parliament is also selected by a separate popular vote, every four years with no term limits. Most executive power rests with the Government, which is selected from parliamentary majority.

Iceland has only two levels of government – a central government (the state and its institutions) and a local government (municipalities). The country is divided into 79 municipalities (local authorities) which are independent but under the supervision of the Ministry of Social Affairs. Their responsibilities are social welfare, health, education, cultural matters and some infrastructure. The Association of Local Authorities in Iceland is the forum for cooperation between the local authorities.

The central government is the largest buyer in the country and this influential role is strategically used in government procurement policy both in terms of furthering the general objectives of efficiency, competition, accountability and transparency in the procurement procedures and in terms of using public procurement to develop the Icelandic business community, e.g. by using electronic commerce. There is no direct cooperation between central and local on policy matters.

In Iceland all contracting authorities, governmental departments and agencies, local authorities, etc. are solely responsible for ensuring that their own procurement procedures are in line with the law. Contracting authorities shall use the tender services of the State Trading Centre (*Ríkiskaup*) for tenders above domestic threshold values, 5 millions for goods and 10 for services and buildings. All tenders are published on the State Trading Centre webpage as well as the biggest Icelandic newspaper *Morgunblaðið* every Sunday. Tenders above the EU threshold value are also published in the Official Journal of the EU and its electronic equivalent Tenders Electronic Daily.

The Ministry of Finance is responsible for regulating public procurement and for the public procurement policy.

The State Trading Centre is under the ministry of finance and is run as a non profit-company servicing primarily the state in handling procurement, but also providing framework contracts and other services to public companies and municipalities.

The role of the State Trading Centre is to handle procurement on supplies and services in domestic and foreign markets for state institutions and state corporations. The Centre examines joint needs for supplies and services and endeavours to co-ordinate procurement through framework agreements. The Centre also provides commercial assistance and instructions concerning individual procurement

as needed. The Centre offers consultation, handles selling and purchasing of state property and collects information about the procurement needs of the state institutions and state corporations.

No central procurement institution exists for the municipalities.

Procurement is decentralised in the sense that procurement decisions, their arrangement and follow-up are the responsibility of the assigned employee and the head of each organisation of the state. However, the government procurement policy stipulates that all ministries and institutions are obliged to be subscribers to the State Trading Centre's framework contracts. If an institution decides not to use a framework contract, it is required to formally notify the State Trading Centre about this. The local level of government can freely decide whether or not to use the services of The State Trading Centre.

The Government Procurement Policy²²⁶ states the general procurement objectives of efficiency, competition, accountability and transparency in the procurement procedures. It also includes the following measured objectives:

- *All state institutions are to develop a separate procurement policy for themselves.*
- *The use of framework contracts is to grow 30% annually over the four-year-period (2003-2006), measured in turnover. This is to be reached both by increased use of existing contracts and addition of new product categories to the system.*
- *Efficiency in procurement: The state is to save 600-650 million ISK (Icelandic kronur) equivalent to 7.7 million EUR annually. Of the 2.5 billion ISK to be saved over a four-year-period, 1.1 billion is to come from coordinated procurement through electronic commerce. The policy calls for the state to conduct certain routine purchases electronically by the end of 2004, but does not quantify the objective.*

In June 2006 the ministry of finance issued its policy on outsourcing within government.²²⁷ This strategy is under the framework of the general procurement policy.

In March 2006 a forum for motivating innovation through public procurement was established by public and private authorities.²²⁸

The ministry of finance is currently in the process of issuing a policy on e-procurement. This policy is planned to be published in 2007.

Other information regarding procurement can be found at the ministry of finance webpage.²²⁹

The public procurement directives have been implemented by the following governmental orders:

²²⁶ www.rikiskaup.is/media/eplica-uppsetning/Government_Procurement_Policy.pdf

²²⁷ www.fjarmalaraduneyti.is/media/Utgefin_rit/Utvistunarstefna-rikisins.pdf

²²⁸ http://idnadarraduneyti.is/media/Acrobat/Samstarfsvettvangur_opinber_innkaup_mai_2006.pdf

²²⁹ www.fjarmalaraduneyti.is/helstu-vidfangsefni/innkaup/

- The public procurement Act No. 84/2007²³⁰
- The public projects procedures Act no. 84/2001²³¹

The above mentioned Acts implemented the procurement directives on public works, supplies and services as amended by the European Parliament and Council Directive 97/52/EC, the utilities directive as amended by Directive 98/4/EC of the European Parliament and of the Council and the Remedies directives. The Act contains further detailed rules concerning the Complaints Board competence and organisations, the procedures before the Board etc.

Furthermore the above mentioned Act contains provisions, which implement the Commission Directive 2001/78/EC on standard forms.

Furthermore the public procurement Act in Iceland contains instructions to the state authorities concerning purchasing of construction and work contracts, services and goods below the thresholds of the EU-directives.

There are no specific arrangements or provisions in the law or in administrative practice for foreign certificates/attestations/declarations. There is no specific procedure for verification of documents.

For cases where other languages than Icelandic are needed the Icelandic government uses English as a second languages.

17.2 E-Procurement initiatives and status

No specific guidelines on electronic public procurement have been published so far, but the Ministry of Finance has urged state institutions to adopt e-procurement. Furthermore, a clear policy has been issued, that:

- Electronic procurement shall be utilized on a greater scale
- Coordinated procurement shall be increased
- Automated procurement shall be used to the utmost.

The ministry of finance is currently in the process of issuing a policy on e-procurement. The main goal of the policy is that all public administrations shall be able to carry out all of their procurement with electronic means by 2009. The policy divides the procurement process into three main areas: sourcing, order handling process and invoicing and payments process. Icelandic government is a part of the Manchester declaration and has included all objectives that relate to e-procurement into the national e-procurement strategy.

²³⁰ www.althingi.is/lagas/133b/2007084.html

²³¹ <http://eng.fjarmalaraduneyti.is/legislation/nr/825>

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The main policy regarding e-government in Iceland is *"Resources to Serve Everyone - Policy of the Government of Iceland on the Information Society 2004-2007"*.²³² In this policy it has one objective directly related to public procurement. There it states that *"Public purchases of operating supplies are mostly to occur electronically by 2005."*

The e-procurement objectives have been implemented during the last five years through the three main projects:

- The introduction of RM, a national public e-procurement portal focused on e-ordering using framework agreements;
- The introduction of a purchasing card;
- The implementation of Oracle E-Business Suite in state institutions. Some state institutions that stock goods have decided to use the Oracle E-Business Suite for e-purchasing because of its functionality for handling stock.

The Policy also includes several projects with relevance to electronic public procurement:

- Special attention to small units in adoption of e-government
- An electronic service utility – a portal acting as one-stop-shop for communication with the public sector
- Removal of obstacles to e-business
- Furthering uptake of electronic signatures
- Increased use of international standards.

Following is the status for the main automating procurement phases in Iceland:

- Publication of tender notification is done electronically on the State Trading Centre webpage.²³³ Individual contracts falling within the EC Directives must normally be advertised at the start of the award procedure. In addition, it is possible to publish advance notices for purchases which the authority intends to make in the future, referred to as Prior Information Notices (PINs). The contract notices are required to be published in the Official Journal of the EU and its electronic equivalent Tenders Electronic Daily, and are published in the biggest Icelandic newspaper *Morgunblaðið* every Sunday.
- Publication of tender documents is done electronically on the State Trading Centre webpage. E-tendering is on the State Trading Centre action plan for 2007/8.
- Filing questions to the tendering authority is possible by electronic ways in public procurement.
- Receipt of tender documents is not done electronically.
- Tendering through electronic catalogues is not in place.
- Evaluation of tenders has not been automated.
- Electronic awarding (evaluation of proposals and granting) is not done electronically.
- Electronic Auctions are currently not practice in public procurement. Under the new procurement act this is made possible and it is therefore expected to be practised in the near future.

²³² http://eng.forsaetisraduneyti.is/media/English/IT_Policy2004.pdf

²³³ <http://www.rikiskaup.is>

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- Electronic catalogues are used on the national procurement portal, RM.
- Ordering can be done through the national procurement portal, called RM, used for e-ordering by state institutions. Some state institutions (e.g. the university hospital and road administration) use the Oracle E-Business Suite for automated procurement and inventory control.

The national portal was launched in June 2002 and both private and public purchasers and their suppliers had access to the portal. The portal has unfortunately not been fulfilling the expectations that the government and businesses had to the portal and therefore it was decided to close it in current form. In June 2007 the government made a contract with a private company about a new portal that will be planned to launch in fall 2007.

- Dynamic Purchasing Systems are currently not practice in public procurement.
- In 2000, the state in Iceland introduced a purchasing card based on the MasterCard credit card. The idea was to make small purchases and repeat purchases (e.g. subscriptions and energy) more efficient. The purchasing card was introduced as a general system, available to both state and local government, as well as to the private sector. The system has several advantages:
 - The system generates electronic statements that are used for approval and entry (to accounts). Once the expenses are approved they can be imported into the ERP-system of the public entity.
 - The system allows suppliers to be tied to the card based on supplier category via a merchant category code (MCC – a classification system developed by MasterCard) or down to a specific supplier. This enables purchases to be limited to specific suppliers and thereby fights maverick buying outside framework agreements.
 - The system allows costs to be split between several departments. This can easily be managed by entering a percentage split in the web interface.
 - The electronic statements can be used as e-invoices. The law does not provide for this at present, but this is expected to be solved soon.
- Invoicing has been automated to some extent today, primarily through the procurement card, but also through pilot projects based on scanning solutions. Currently there is work being done on the government central accounting system, Oracle-EBS, to enable the system to handle electronic invoices. Roll out is expected to start before the end of august. The goal is to enable all government institutes to send and receive invoices in UBL / NES format before the end of 2008. The Icelandic government received its first invoice in UBL/NES profile 4 format in June 2007.

Tendering service on the State Trading Centre webpage is accessible for both nationals and non-nationals.

There are currently no requirements for electronic signatures in public procurement in Iceland and they are not being used today.

17.3 Certificates, attestations and declarations

In this section, we will take a closer look at how the common requirements defined by the e-Procurement Directives are typically met in Iceland.

Generally speaking, in Iceland there are very limited options of acquiring an electronic versions of certificates/attestations/declarations. Electronic processes that provide the same result are not common either. There are some instances that it is possible to get an electronic copy of a document, then most often in a PDF format that is most often not electronically signed. The Internal Revenue Directorate is one of few governmental authorities that has electronically signed documents available for their customers. Citizens can e.g. get an electronic copy of their tax return in the PDF format, signed with a x.509 certificate.

Many governmental authorities are currently working on electronic versions of their documents and it is expected that most of them will be ready within a few years.

17.3.1 Requirements with regard to the personal situation of the candidate or tenderer – absence of conviction (art. 45 §1 and §2 (c-d) of Directive 2004/18/EC)

Icelandic tenderers or candidates are usually not required to submit information about their personal situation. But if the contracting authority insists the tenderer/candidate in question is obliged to submit such an attest. Natural persons submit an extract from the penal register and legal persons submit an extract from tax collection authorities or private financial credibility register.

17.3.2 Requirements with regard to the personal situation of the candidate or tenderer – non-bankruptcy and financial status (art. 45 §2 (a-b) of Directive 2004/18/EC)

If requested tenderers in Iceland are obliged to document their financial status and non-bankruptcy. Attestation is issued by the commercial court at the request of the tenderer in question.

17.3.3 Requirements with regard to the personal situation of the candidate or tenderer – compliance with fiscal and social obligations (art. 45 §2 (e-f) of Directive 2004/18/EC)

An Attestation demonstrating compliance with fiscal and social obligations is a common requirement to tenderers or candidates in central government procurement in Iceland. Compliance with social law i.e. payment to social security funds is mandatory for tenderers/candidates; and a written, signed and stamped attestation from the respective funds must be presented when requested by the contracting authority.

As for fiscal obligations for direct taxes and VAT declarations can be required from the tax collections authorities.

17.3.4 Requirements with regard to the suitability to pursue the professional activity

In Iceland there is electronic access to central database containing basic information for registered firms. Further information is usually required from tenderers on their activity, depending on volume/value of each case.

17.3.5 Requirements with regard to economic and financial standing

Status on economic or financial standing is usually asked for from tenderers i.e. summary of turnover or by requesting a copy of balance sheets for the period and last three years.

17.3.6 Requirements with regard to technical and/or professional ability

This is a common but not a mandatory requirement in Icelandic procurements but specific certificates are seldom required.

17.3.7 Requirements with regard to quality assurance standards

Request for such compliance is rarely requested in Iceland and limited to special cases and circumstances. If requested then adherence to ISO or the Icelandic IST is most common.

17.3.8 Requirements with regard to environmental management standards

This requirement is not often but increasingly used in Icelandic procurements. Tenderers are most often required to demonstrate the compliance of his/hers product or service by an attest provided by an accredited organization, most usually in PDF form.

17.4 Interoperability

Tendering service on the State Trading Centre webpage is accessible for both nationals and non-nationals. But because the information are sometimes just in Icelandic it could be a barrier for non-nationals.

There are currently no other e-Procurement means for non-nationals in Iceland.

With projects like the NES²³⁴ (Northern European Subset) where the aim is to establish a common platform for e-procurement, interoperability is likely to increase in e-procurement applications. (see *more directly below*)

17.5 Future trends/expectations

This year the ministry of finance is releasing a new e-procurement strategy that sets future goals and project for coming years. With this new e-Procurement strategy there is a hope for fast progress in this field in the coming years. The ministry of finance is currently working on the elaboration and implementation of this strategy.

Today the government is currently implementing a central eIDM system in Iceland that is based on x.509 PKI electronic certificates. The main objective of this project is to build an open and standardized x.509 PKI environment in Iceland. From this structure eIDs will be distributed to citizens and company employees in Iceland. The Icelandic Government is in co-operation with the Federation of Icelandic Banks in building and implementing this system. The banks will start to distribute certificates on bank cards in Q4 2007 and it is expected that most citizens will have certificates on a smart card before the end of 2008. It is expected that these eIDs will be the main method of authentication in e-procurement systems as well as electronic signatures will be used in various places in this process. General distribution and usage of electronic certificates for identification, authentication and electronic signature is seen as a key element in future development of e-procurement in Iceland.

Usage of electronic invoices are also seen as a key component in e-procurement in Iceland and it is expected that the general usages of e-invoicing will be the leading example of how electronic ways can help to improve procurement in the country. The government and businesses in Iceland have been working together to set the standards for e-invoicing in the country. This work has been facilitated by IcePro²³⁵ a committee on trade procedures and e-commerce using EDI, ebXML and other standardized means of Electronic Commerce. This collaboration has also been working with other countries, on a project called NES²³⁶ (Northern European Subset), with the aim to establish a common platform for e-procurement.

²³⁴ <http://www.nesubl.eu/>

²³⁵ <http://www.icepro.is/Pages/CommonSites.aspx?id=15>

²³⁶ <http://www.nesubl.eu/>

17.6 Assessment

Icelandic e-procurement initiatives are still in an early stage, but there is a hope that the new e-procurement strategy will inspire a fast progress in this field in the coming years. The e-procurement infrastructure does not meet users need today but the new strategy has identified a number of fields where special projects are needed for improvements.

Special case: Implementation of a Purchasing Card in the public sector

In 2000, the state in Iceland introduced a purchasing card based on the MasterCard credit card. The idea was to make small purchases and repeat purchases (e.g. subscriptions and energy) more efficient. The system was inspired by a similar system in England. After a slow start the system has been very successful with high uptake in the state, and is also quite popular with local government and the private sector.

The purchasing card was introduced as a general system, available to both state and local government, as well as to the private sector. However, due to substantial initial investment in development and implementation of the system, it was central to the project that the State initiated the project as this assured critical mass in order to justify the system. The purchasing card was developed by Europay, the Icelandic dealer of MasterCard, based on a contract where the state guaranteed that it would only use this credit card for a period of four years. This agreement has since been prolonged for another four years.

The system works like a regular credit card allowing civil servants to use it to shop in regular stores, over the phone or on supplier web shops. The system has built-in spending limits that are managed by authorization at card level or department level.

The system has several advantages:

- The system generates electronic statements that are used for approval and entry (to accounts). Once the expenses are approved they can be imported into the ERP-system of the public entity.
- The system allows suppliers to be tied to the card based on supplier category via a merchant category code (MCC – a classification system developed by MasterCard) or down to a specific supplier. This enables purchases to be limited to specific suppliers and thereby fights maverick buying outside framework agreements.
- The system allows costs to be split between several departments. This can easily be managed by entering a percentage split in the web interface.
- The electronic statements can be used as e-invoices. The law does not provide for this at present, but this is expected to be solved within the first half of 2005.



Væra	Væru Númer	Magn	Afsláttur	Upphæð	V
Brefabind, 50mm, A4, blár	100ED82245	10 * 328 kr.	0%	693 kr.	2.587 kr. 1
Milisþjöld, A4, jan-des	100B40219	10 * 160 kr.	0%	0 kr.	1.600 kr. 1
Milisþjöld 1-31	100ED47106	1 * 259 kr.	0%	0 kr.	259 kr. 1
Ártalsmiðar 2002	100LZ1402	10 * 478 kr.	0%	0 kr.	4.780 kr. 1
Samtals				693 kr.	9.286 kr.

Þar af virðisaukaskattur: 1.827 kr.

Heildarafsátturinn var: 693 kr.
Heildar virðisaukaskatturinn var: 1.827 kr. (24,5%)
Heildar virðisaukaskatturinn var: 1.827 kr.
Heildarupphæðin: 9.286 kr.

The main benefits of the system have been:

- Lower transactions costs (based on time savings from more efficient workflow)
- Increased overview of small purchases and less overspending due to better control, as expenses are registered in the system the day after the purchase as MasterCard imports data from the POS (point of sale) every night.
- Better quality in handling payments (prior to the systems, some requisitions got lost between invoice and payment)
- Inclusion of travel insurance for civil servants traveling with the card
- No need for civil servants to make down payments
- Reduced need for cash. Before the introduction of the system, this was a problem in the sense that many institutions did not have cash or the cash holdings that were readily available to the employees who did the actual purchasing
- Repeat purchases (e.g. subscriptions) are made easier, as the card number and account information needs to be entered only once. Future approval is as easy as a click with the mouse
- Excellent overview of spending for management.

MasterCard has introduced a similar system in its own organization and claims to have reduced the time needed to handle a payment from 33 to seven minutes.

After a hesitant start, uptake took off and the system has now become very popular. The implementation process was slowed down by integration issues (integration between the account statement and the ERP-systems of the public entities) and a transitional period where the government entities ran both the old and the new systems (making the procedure seem more burdensome than before). There were also some concerns about potential misuse. Once these obstacles were overcome, the usage of the card has grown dramatically. The system now has 850 active users, the number of transactions is about 6.000 a month, and while the monthly turnover in December 2003 was around 20.000.000 Icelandic kronur, it rose to 100.000.000 Icelandic kronur for December 2006.

The popularity is mainly due to the ease of use – civil servants experience the system as being faster and easier than the previous procedures.

18 Ireland

18.1 Public procurement framework

18.1.1 General framework

18.1.1.1 Administrative framework

In 2002, the National Public Procurement Policy Unit (NPPPU) was set up by the Department of Finance to deal with public procurement policy development in Ireland. The role of the NPPPU is to (i) formulate policy, (ii) disseminate advice and best practice experience on procurement to the Irish public sector in order to improve its procurement capacity and (iii) deliver the Government's eProcurement strategy.

18.1.1.2 Legal Framework

The legal framework for public procurement in Ireland consists of the European Public Procurement Directives together with their transposing regulations. Directive 2004/18/EC was transposed into Irish law by the European Communities (Award of Public Authorities' Contracts) Regulations 2006 (S.I. 329 of 2006) [the 2006 Regulations] which were introduced in June 2006 while Directive 2004/17/EC was transposed by the European Communities (Award of Contracts by Utility Undertakings) Regulations 2006 (S.I. 50 of 2007) [the 2007 Regulations] which were introduced in January 2007.

Aside from the Directives, there is no formal legislative basis for the regulation of public procurement in Ireland. However a set of national guidelines on public procurement have been developed which apply to all competitive public procurement exercises carried out by contracting authorities including Government Departments, local and regional authorities and other State bodies in the award of contracts in Ireland. The regulation of procurement in Ireland is therefore organised on a national basis.

The national guidelines on public procurement were originally set out in *Public Procurement – 1994 Edition* (referred to as the “Green Book”). In 2004, these guidelines were updated and the new guidelines: *Public Procurement Guidelines- Competitive Process* [the 2004 Guidelines] largely replace the provisions of the 1994 Guidelines [Green Book]. The Green Book guidelines relating to construction procurement were separately updated by Construction Contract Guidelines issued in

2000²³⁷ and in 2007 various reforms to construction procurement were introduced including the development of Guidance Note for Public Works Contracts, Standard Conditions for the Engagement of Construction Consultants, associated guidance material and a suite of five new forms of construction contracts.²³⁸

The 2004 Guidelines provide that contracts above €50,000 and up to the value of EU thresholds which are not part of a 'draw down' or framework contract, should normally be advertised as part of a formal tendering process. The form of advertising is left open though the Guidelines do state that publication on the *etenders.gov.ie* website (see further below) generally meets national advertising and publicity requirements. Prior publication in the OJEU of procurement opportunities with a value exceeding the thresholds set by the Directives is provided for in the regulations transposing the Directives.²³⁹

The requirement of prior publication is dispensed with in the case of the awarding of public contracts in a range of situations.²⁴⁰ These include situations where no tenders or no suitable tenders or no applications have been submitted in response to an open or restricted procedure provided the initial conditions of the contract have not been substantially altered and the authority provides the European Commission with a written report specifying the circumstances necessitating the use of the procedure. Another circumstance in which prior publication is not required is where for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may be awarded only to a particular economic operator.

18.1.2 Certificates and statements

Summary of situation regarding certificates and statements (these are dealt with in greater detail at Section 18.3 below):

18.1.2.1 Tax Clearance Certificates

²³⁷ See *Construction Contract Guidelines: Implementation of the Strategic Review of the Construction Industry's Procurement Recommendations applicable to Public Funded*

Construction Contracts (2000) available at http://www.etenders.gov.ie/guides/guides_list.aspx?Type=2

²³⁸

See

further:

<http://www.finance.gov.ie/ViewDoc.asp?fn=/documents/publications/other/constructreformdec06.htm&CatID=61&m=p>

²³⁹ European Communities (Award of Public Authorities' Contracts) Regulations 2006 (S.I. 329 of 2006), Art.39; European Communities (Award of Contracts by Utility Undertakings) Regulations 2006 (S.I. 50 of 2007), Art.43.

²⁴⁰ European Communities (Award of Public Authorities' Contracts) Regulations 2006 (S.I. 329 of 2006), Art.32

There is no statutory basis for the obtaining of tax clearance certificates but the Revenue Commissioner Circular 22/95 states that in the case of all public sector contracts over a value of £5,000 [€6350] (inclusive of VAT) or more within any 12 month period, the contractor will be obliged to produce a valid tax clearance certificate. The 2004 Guidelines refer at para. 4.3 to the need to obtain tax clearance certificates as outlined in Circular 22/95. Circulars have uncertain status in Irish law but the leading commentators take the view that public authorities may not rely on circulars as against private citizens.²⁴¹ Non-resident contractors or sub-contractors will be required by the contracting authority to produce a statement (in lieu of a tax clearance certificate) from the Revenue Commissioners confirming suitability on tax grounds to be awarded the contract.

18.1.2.2 Other statements

The 2004 Guidelines do not refer to any other types of certificates, attestations or declarations nor is there any reference in the Guidelines to foreign certificates, attestations or declarations.

Which certificates, attestations or declarations are commonly asked for?

A statement confirming that none of the circumstances listed in paragraphs 1 and 2 of Article 45 of EU Directive 2004/18/EC apply to the tenderer is usually requested as is evidence of technical and financial capacity including details of previous experience of staff being assigned to this task, details of relevant reference sites where similar work has been carried out together with an appropriate financial profile of the tenderer for the last three years. In the case of corporate entities, this would include independently audited accounts. Where a tenderer is trading for less than three years, accounts for each year of trading must usually be provided.

Certificates, attestations and declarations from tenderers in overseas jurisdictions are accepted. In relation to tax clearance, the policy is that tenderers from abroad would have to obtain tax clearance from their own country then apply through the Non-Residents Unit of the Irish Revenue Commissioners. In relation to Health and Safety, generally the policy is one of mutual recognition, so that certificates issued by equivalent bodies abroad would be recognised.²⁴²

18.2 E-Procurement initiatives and status

18.2.1 Policy framework

The Department of Finance published a Strategy for the Implementation of E-Procurement in the Irish public sector in 2001 (available at

²⁴¹ Hogan & Morgan, *Administrative Law in Ireland*, Round Hall Sweet & Maxwell, 1998, 48.

²⁴² Source: e-mail from official from NPPPU, July 3, 2007.

<http://www.finance.gov.ie/viewprnt.asp?fn=/documents/Publications/other/eprocurefinal.pdf>). It contained a number of ambitious targets to be achieved before the end of 2007, including:

- 90% of tender competitions (above EU threshold) to be carried out electronically;
- 80% of payment to be carried out electronically.

It has been noted that initial progress was not as quick as envisaged but the establishment in 2002 of a National Public Procurement Policy Unit (NPPPU) in the Department of Finance sought to address these concerns. The NPPPU is charged with the formulation of policy, dissemination of best practice and guidance in public procurement and the delivery of the government's e-procurement strategy.

The level of take up of eProcurement is at present uncertain and hence it is not possible to determine whether the above targets have been met. While figures exist in respect of the number of awarding authorities registered and of registered buyers and suppliers (see further below), there are no overall figures relating to the percentage of tender competitions carried out electronically. A study of the level of roll out of eProcurement in Ireland is planned for September 2007.²⁴³

18.2.2 Legal framework

There is no separate e-procurement legislation in Ireland. As noted above the e-Procurement directives were transposed by the European Communities (Award of Public Authorities' Contracts) Regulations 2006 (S.I. 329 of 2006) [the 2006 Regulations] and the European Communities (Award of Contracts by Utility Undertakings) Regulations 2006 (S.I. 50 of 2007) [the 2007 Regulations], both of which are supplemented by national guidelines.

In particular, Regulation 50 of 2006 Regulations deals with the rules applicable to communication of information relating to public contracts and provides:

“A contracting authority may give or send any information, notice or other communication for a purpose connected with entry into a public contract, or require candidates or tenderers to submit information or tenders, by such of the following means if it chooses:

- (a) by post or personal delivery;
- (b) subject to paragraphs (5) and (6), by electronic means;
- (c) subject to paragraph (7), by telephone or facsimile machine;
- (d) by a combination of any 2 or more of those means.”

'Electronic means' is defined in Regulation 2 as making use of electronic equipment to process (including by compressing digitally) and store data that is sent and received by wire, radio, optical means or other electromagnetic process.

²⁴³ Interview with official from NPPPU, June 26, 2007.

Regulation 50(5) requires that equipment used for communicating by electronic means must be non-discriminatory; generally available; and interoperable with information and communication equipment that is currently in general use. Regulation 50(6) contains further requirements in relation to the equipment used for sending and receiving tenders, and for receiving requests to participate, by electronic means:

- (a) information regarding the specification necessary for the electronic submission of tenders and requests to participate (including encryption) must be made available to candidates and tenderers.
- (b) equipment used for electronically receiving tenders and requests to participate must comply with Schedule 4;
- (c) tenderers or candidates must undertake to submit, before the deadline for submission of tenders or requests to participate, all relevant documents that do not exist in electronic form.

Schedule 4 details the requirements relating to devices for electronic receipt of tenders, requests for participation and plans and projects in contest. Such devices, through technical and appropriate procedures must ensure, *inter alia*,

- (a) that electronic signatures relating to tenders, requests to participate and the forwarding of plans and projects comply with the Electronic Commerce Act 2000, [...]

Regulations 67 and 68 provide for eAuctions. Regulation 67 specifies the conditions under which a contracting authority may hold an electronic auction (in particular, only where the contract specifications can be established with precision) while Regulation 68 sets out the procedure for closing an electronic auction.

'Electronic auction' is defined in Regulation 2 as a repetitive process that:

- “(a) involves the use of an electronic device whereby tenderers present new prices (revised downwards), or new values concerning certain elements of tenders, or both, occurring after an initial full evaluation of the tenders, and
- (b) enables the revised tenders to be ranked by the use of automatic evaluation methods.”

Regulation 36 of the 2006 Regulations provides that a contracting authority may award a public contract by means of a 'dynamic purchasing system', but only as provided by the Regulations.

Also applicable is the Electronic Commerce Act 2000 and the Electronic Commerce (Directive 2000/31/EC) Regulations 2003 (S.I. 68 of 2003). This legislation transposed the Electronic Signatures Directive (Directive 1999/93/EC) and the Electronic Commerce Directive (Directive 2000/31/EC) in Ireland.

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In particular, section 9 of the Electronic Commerce Act deals with the legal validity of information in electronic form. It provides that

“Information ...shall not be denied legal effect, validity or enforceability solely on the grounds that it is wholly or partly in electronic form, whether as electronic communication or otherwise.”

The retention, production or presentation of information in an electronic format cannot therefore be used as the only reason for which the information would be denied legal effect, validity or enforceability. However, it should be noted that this section, on its own, does not establish the legal validity of any given electronic communication. Sections 12 and 18 deal more specifically with legal validity of information or writing given, retained, produced or presented in electronic form.²⁴⁴

For example, section 12 provides that where a person is required or permitted to give information “in writing”, that requirement can be met by writing in electronic form. The scope of this provision is broad in that the definition of “giving” information includes making an application, making or lodging a claim, making or lodging a return, making a request, making an unsworn declaration, lodging or issuing a certificate, making, varying or cancelling an election, lodging an objection, giving a statement of reasons, recording and disseminating a court order, giving, sending or serving a notification. The operation of section 12 is subject to a range of conditions. The most important condition requires that the consent of the public body to which the information is required or permitted to be given in writing be obtained. The public body’s requirements concerning information technology and procedural matters must also be met. Those requirements must, however, be made public and must be objective, transparent, proportionate and non-discriminatory.²⁴⁵

As regards electronic signatures, section 13 provides that where the use of a signature is required, an electronic signature may be used provided two conditions are met:

1. where the recipient is a public body, any information technology or procedural requirements imposed by that body must be complied with; and
2. the person or body to whom the signature is addressed must consent to the use of the electronic signature.

The objective of this provision is to achieve equal legal status between handwritten signatures and *all* other types of electronic signatures in Irish law.²⁴⁶

²⁴⁴ These provisions are subject to the exclusions listed in ss 10-11 of the 2000 Act but these exclusions are not relevant to public procurement.

²⁴⁵ Other conditions include: that it was reasonable to expect, at the time the information was given, that it would be readily accessible to the person or public body to whom it was directed, for subsequent reference and that a public body’s requirement that a particular action be taken by way of verifying the receipt of the information be met. The latter condition is subject to the proviso that such requirements have been made public and are objective, transparent, proportionate and non-discriminatory.

²⁴⁶ This provision is subject to the exclusions listed in ss 10-11 of the 2000 Act but these are not relevant to public procurement.

18.2.3 eProcurement in practice and future plans

18.2.3.1 Current Practice

eTenders (www.etenders.gov.ie) is a public procurement portal which provides online access to public sector procurement opportunities. The site is part of the government's eProcurement initiative which aims to streamline the tendering process, and remove some of the administration burden. The eTenders service is centrally funded and is provided free to both publishing authorities and suppliers. At the moment, neither purchasing authorities nor suppliers are obliged to use this service. As noted above, the 2004 Public Procurement Guidelines state that publication on the eTenders website generally meets national advertising and publicity requirements.

The eTenders website provides information and tools for electronic public procurement for central government, local authorities, the Health Service Executive and hospitals, universities and schools. Information is updated daily.

To gain full access to the site, purchasing authorities and suppliers can register on-line by clicking on the Register link, and then completing the registration form (name, address, email, phone, password etc.). They are then contacted by email to verify their details. And then they receive confirmation of their sign in name and password by email. Therefore full access to the site is by way of simple electronic signature.

As of May 2007, there were 1,702 awarding authorities registered and 3,459 registered buyers, using the service, while the number of suppliers stood at 36,595.

There are no barriers to the use of the eTenders portal by non-nationals.

The site comes within the remit of the National Public Procurement Policy Unit (NPPPU) of the Department of Finance. The NPPPU has awarded the contract for the management and further development of the public sector tenders website www.etenders.gov.ie to Millstream Associates Ltd. Since 2003, Millstream are contracted to provide day-to-day management and administration of the site and to enhance the functionality of the site. The Millstream contract is due to expire shortly and the process to identify the requirements for the future portal is currently underway.

18.2.3.2 For purchasing authorities

The eTenders site is used by public sector authorities to publish their prior information notices (PIN), Request for Tender notices (RFT) and contract award notices (CAN). In 2005 the percentage of CAN's published against those of tender notices was 14.72%. In 2006, this increased to 17.35%.²⁴⁷

²⁴⁷ Source, e-mail from NPPPU official, July 3, 2007

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Tender notices and documents are prepared by publishing authorities in the normal way and are then posted on the site.

Any notice that a publishing authority publishes on eTenders.gov.ie will also be published on OJEU, if the notice meets the required criteria. Ireland was the first country to have its own national OJEU eSender capability within the eTenders website (since 28th April 2004). Ireland is still ahead of most countries when it comes to submitting OJEU notices electronically. Based on recent figures from the Publications Office (OPOCE) Ireland is now in fifth place for online submission of notices, averaging over the 12 months up to the end of May 2007, 93.3%.²⁴⁸

In addition, OJEU notices are uploaded on the eTenders website daily after publication in the OJEU. An email is sent to the awarding authority contact given in the notice when/if the notice is published on the eTenders website.

At present the eTenders website does not support the running of e-auctions but it is on the agenda for the NPPPU. Currently, eAuctions can take place through facilitation by private service providers. The NPPPU makes available a list of known service providers, for this purpose.

For suppliers

Suppliers can search for and view the notices that are published on the eTenders site. Once registered on www.etenders.gov.ie suppliers can express an interest in any tender notice published by a public sector organisation. Once an interest has been expressed, the supplier is sent a copy of the tender notice, which includes contact details of the publishing authority, in electronic form. Suppliers can also obtain any additional documents or files – in electronic form - which support the tender notice. Suppliers will also be notified if the tender notice is changed in any way during the process.

A record of everyone who has registered an interest in a particular notice is available to the purchasing authority who can subsequently contact suppliers for any further communication.

A facility (known as the electronic postbox) enabling suppliers to submit tenders electronically for the open procedure and the first stage of the restricted procedure has been available since 2002 as a pilot scheme. Suppliers outside the pilot group could also request access to this pilot scheme. In 2005, the scheme was opened to all suppliers. The electronic postbox allows suppliers to submit tenders directly and securely online.

To guarantee confidentiality of all responses, data is encrypted during transmission to the online postbox, which cannot be unlocked before a set date and time.

However, the contracting authority is able to access a summary list of responses that have been received. When the tender has been submitted, suppliers will be notified on screen that it has been posted successfully. If a response is late, the supplier will be notified accordingly, and the response will not be accessible by the contracting authority.

²⁴⁸ Source: email from NPPPU official, June 28, 2007.

Provision for online submission of all tenders is expected to be put in place by late July 2007.²⁴⁹

There is an online Q & A facility associated with the tender notice on the eTenders website and all questions and answers are available to new interested parties as part of the notice (and those who have already expressed an interest are automatically alerted to the questions and answers).

In terms of submission of certificates and attestations, current practice is that these documents are scanned and submitted electronically to the postbox in the eTenders website.

18.2.3.3 Future Plans

By the end of July 2007, electronic awarding with regard to pre-qualification will be enabled.

As noted above the process to identify the requirements for the future development of the eTenders website is currently underway. It is understood that the following enhancements will be included in the revised version of the website:

- full online submission of tenders using the restricted procedure
- tendering through e-catalogues
- the development of the postbox to allow for larger file size²⁵⁰
- development of online evaluation tools

The development of a National Supplier Register for common tender information and certificates is also being considered by the NPPPU. The intention is that such a register would provide a single source of information regarding the status of suppliers in terms of matters such as tax compliance and other certification.

Other potential enhancements being considered include the development of the postbox to allow for eSignatures and the facilitation of eAuctions.

The development of e-invoicing and e-payment via the eTenders website is not currently on the agenda. These matters are instead being addressed at sectoral level. For instance, it is understood that the local authorities and the Health Services Executive are rolling out their own e-invoicing and e-payment systems.

18.3 Certificates, attestations and declarations

²⁴⁹ Source: interview with NPPPU official, June 26, 2007.

²⁵⁰ At present there is a 2MB limit on files for downloading with a similar limitation in terms of the size of tender submissions.

In this section, we will take a closer look at how the common requirements defined by the e-Procurement Directives are typically met in Ireland.

18.3.1 Requirements with regard to the personal situation of the candidate or tenderer – absence of conviction (art. 45 §1 and §2 (c-d) of Directive 2004/18/EC)

Art.53 of the 2006 Regulations seeks to transpose the requirements of Art.45 of Directive 2004/18/EC.

Art.53(1) provides that in considering whether or not to award a public contract, a contracting authority shall exclude persons who, to the knowledge of the authority, have been convicted of offences involving:

- a) participation in a prescribed (i.e. within the meaning of Article1 of Council Joint Action 98/733/JHA) criminal organisation, or
- b) corruption, or
- c) fraud, or
- d) money laundering.

In addition, Art.53[4] provides that in considering whether to award a public contract, a contracting authority may exclude from consideration any person:

[...]

(b) who has been found guilty of professional misconduct by a competent authority that is authorised by law to hear and determine allegations of professional misconduct against persons that include the operator, or

(c) who has committed grave professional misconduct provable by means that the authority can demonstrate.

Prevalence/actual use in calls

This is a common, though not mandatory requirement in Irish procurement.

What document, if any, is used?

No formal document is relied upon. The public authority merely asks for confirmation of absence of conviction.

Contents

Not applicable.

Electronic certificates

Not applicable.

18.3.2 Requirements with regard to the personal situation of the candidate or tenderer – non-bankruptcy and financial status (art. 45 §2 (a-b) of Directive 2004/18/EC)

Art.53(4) provides that in considering whether to award a public contract, a contracting authority may exclude from consideration any person—

- (a) who is subject to a bankruptcy or insolvency procedure or process of a kind specified in paragraph 53(5).

Prevalence/actual use in calls

This is a common, though not mandatory requirement in Irish procurement.

What document, if any, is used?

No formal document is relied upon.

Contents

Not applicable.

Electronic certificates

Not applicable.

18.3.3 Requirements with regard to the personal situation of the candidate or tenderer – compliance with fiscal and social obligations (art. 45 §2 (e-f) of Directive 2004/18/EC)

Art.53(4) provides that in considering whether to award a public contract, a contracting authority may exclude from consideration any person—

- (d) who has not fulfilled an obligation to pay a social security contribution as required by a law of the country or territory—

- (i) where the person ordinarily resides or carries on business, or

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- (ii) where the authority is established, or
- (e) who has not fulfilled an obligation to pay a tax or levy imposed by or under a law of the country or territory—
 - (i) where the person ordinarily resides or carries on business, or
 - (ii) where the authority is established

As noted above, Revenue Commissioner Circular 22/95 states that in the case of all public sector contracts over a value of £5,000 [€6,350] (inclusive of VAT) or more within any 12 month period, the contractor will be obliged to produce a valid tax clearance certificate. In addition, Art.60 of the 2006 Regulations provides that in the case of contracts covered by the Directives the 2006 Regulations require that when deciding whether or not to award a public contract a contracting authority is entitled to require the operator to produce to the authority a certificate that the operator has no social security contributions or taxes outstanding.

Prevalence/actual use in calls

Tax clearance certificates are routinely requested in relation to all tenders above €6,350.

Tenderers are commonly asked whether they are in compliance with their obligations relating to social security contributions

What document (if any) is used?

A tax clearance certificate or in the case of qualifying subcontractors carrying out construction, forestry or meat processing operations, a "C2" certificate.

With regard to social security, we are not aware of the use of any formal document to confirm compliance.

Contents

A tax clearance certificate states that a person referred to in the certificate is in compliance with the following obligations:

- (a) the payment or remittance of any taxes, interest or penalties required to be paid or remitted under the tax Acts to the Revenue Commissioners, and
- (b) the delivery of any returns to be made under the Tax Acts

The C2 certificate authorizes a principal contractor to make arrangements to make payments to such subcontractors without deduction of tax. In the absence of a C2 certificate the principal contractor must deduct tax at the rate of 35% from payments to subcontractors. Tax clearance certificates and C2 certificates are normally valid for 12 months. Non-resident contractors or sub-contractors will be required by the contracting authority to produce a statement (in lieu of a tax clearance certificate) from the Revenue Commissioners confirming suitability on tax grounds to be awarded the contract.

Electronic certificates

Tax clearance certificates can be applied for online at: <https://www.revenue.ie/itp/identification.jsp> but this facility is not available to non-residents who are not registered for tax in Ireland. The tax clearance certificate is issued in paper form.

18.3.4 Requirements with regard to the suitability to pursue the professional activity

Art.54 of the 2006 Regulations provides that an economic operator that wishes to participate in a public contract shall, if requested to do so by the contracting authority concerned, provide

- (a) evidence to the satisfaction of that authority that it is enrolled on one of the professional or trade registers, or
- (b) a declaration on oath or a certificate, as described in the relevant Part of Annex IX to Directive 2004/18/EC.

Prevalence/actual use in calls

Depending on the type of tender, this may be required.

What document (if any) is used?

Copy of a licence or registration document.

Contents

Evidence of registration on a professional or trade register or of the holding of a licence may be requested.

Electronic certificates

Not specifically provided for. Paper documents may be scanned and submitted with tender.

18.3.5 Requirements with regard to economic and financial standing

Art.55 of the 2006 Regulations provides that a contracting authority may accept as proof of an economic operator's economic and financial standing one or more of the following references:

- (a) an appropriate statement from a bank or, where appropriate, evidence that the operator has relevant professional risk indemnity insurance;
- (b) the presentation of a financial statement relating to the business of the operator, or a copy of such a statement, but only if the statement is required to be published under a law of the country in which the operator is established or carries on business;
- (c) a statement showing—

- (i) the operator's overall turnover, and
- (ii) if appropriate, the turnover in the kind of business covered by the proposed contract, for a specified period normally not exceeding the preceding 3 years.

Prevalence/actual use in calls

Depending on the type of tender, this may be required.

What document (if any) is used?

In terms of insurance, evidence in the form of a certificate/letter from the relevant insurer.

With regard to financial standing, financial statements over a period of time, commonly 3 years, may be requested although in the case of younger businesses the 3 year requirement may be relaxed.

Contents

See above.

Electronic certificates

Not specifically provided for. Paper documents may be scanned and submitted with tender.

18.3.6 Requirements with regard to technical and/or professional ability

Arts.56 – 59 of the 2006 Regulations deal with the issue of technical or professional ability. Art.56 provides that in considering whether to award a public contract, a contracting authority shall, so far as relevant, assess the technical and professional abilities of the economic operators in accordance with 3 sets of criteria set out in Arts.57 – 59 which deal respectively to public works contracts, public supply contracts and public service contracts.

Prevalence/actual use in calls

This is a common, though not mandatory requirement in Irish procurement.

What document (if any) is used?

A statement by the tenderer and references from previous customers.

Contents

Statement by the tender may include, for example:

- tenderers average annual number of staff/managerial staff over the previous 3 years;
- a list of principal goods/services sold over the past 3 years, including dates of sale, consideration received and identity of purchasers,

- indication of proportion of contract which tenderer intends to possibly sub-contract.

Electronic certificates

Not specifically provided for. Paper documents may be scanned and submitted with tender.

18.3.7 Requirements with regard to quality assurance standards

Art.63 of the 2006 Regulations provides that when requiring the production of certificates issued by independent bodies attesting to the extent to which an economic operator has complied with certain quality assurance standards, a contracting authority shall—

- (a) refer to quality assurance systems based on the relevant European standards series certified by bodies conforming to the European standards series for certification, and
- (b) recognise equivalent certificates issued by recognised bodies established in other Member States, and
- (c) accept evidence of equivalent quality assurance measures provided by other economic operators.

Art.58 of the 2006 Regulations provides that in relation to a public supply contract, an economic operator may provide evidence of the operator's technical ability by producing to the relevant contracting authority one or more of the following:

- (i) certificates prepared by an official quality control institute or agency of recognised competence attesting the conformity of the products, clearly identified by reference to specifications or standards.

Prevalence/actual use in calls

Depending on the type of contract, this may be required.

What document (if any) is used?

ISO certification or evidence of compliance with internal quality systems.

Contents

See above.

Electronic certificates

Not specifically provided for. Paper documents may be scanned and submitted with tender.

18.3.8 Requirements with regard to environmental management standards

Art.64 of the 2006 Regulations provides that when requiring the production of certificates issued by independent bodies attesting to the extent to which an economic operator has complied with environmental management standards as

provided by Regulation 57(1)(d) or 59(1)(f),

Reg. 57(1)(d) provides that In relation to a public works contract, an economic operator may provide evidence of the operator's technical ability by producing to the relevant contracting authority one or more of the following references:

[...]

(d) when appropriate, a specification of the environmental management measures (if any) that the operator would observe in performing the contract;

Reg. 59(1)(f) provides that In relation to the award of a public service contract, an economic operator may provide evidence of the operator's technical ability by producing to the relevant contracting authority one or more of the following:

[...]

(f) when appropriate, a specification of the environmental management measures that the operator would be able to apply when performing the contract;

Prevalence/actual use in calls

Depending on the type of contract, this may be required. It appears that such certificates are not yet commonly requested.

What document (if any) is used?

We are not aware of the use of any particular type of documentation in this regard.

Contents

See above.

Electronic certificates

See above.

18.4 Interoperability

Access is via an internet portal and registration is not restricted on grounds of location or nationality.

18.5 Future trends/expectations

See sections above with regard to proposed enhancement of eTenders website.

In addition the 2004 National Public Procurement Guidelines are being revised and further guidance is being prepared.

18.6 Assessment

Positive aspects of the operation of eProcurement in Ireland include reported positive feedback from users in terms of ease of use of the eTenders website, the reduction in paperwork and associated time saving and the advantages associated with the provision of standard online forms. Other advantages include the availability of the eSender facility and the possibility to reduce deadlines where electronic facilities are provided, e.g. for the receipt of tenders: see Reg.46(8) of the 2006 Regulations. Use of the eTenders website also facilitates audit of procurement processes.

Negative aspects include communications infrastructure deficiencies. For example, lack of universal availability of broadband may act as an inhibitor in terms of use of the website.

In addition a limit of 2MB has been placed on the size of files for downloading with a similar limitation in terms of the size of tender submissions. The imposition of this limit is as a result of the high percentage of suppliers using dial-up internet access. Technical problems with the server have also caused difficulties although these are expected to be addressed in the short term.

There are issues also around the under-resourcing of the NPPPU.

Overall, based on official usage figures referred to above and on reported feedback, it is clear that much progress has been made in terms of the implementation of eProcurement in Ireland. However until more complete figures on the roll out of eProcurement in Ireland are made available, it is difficult to fully assess the adequacy of the country's eProcurement infrastructure.

19 Italy

Prior terminology notice:

“l.” stands for “*legge*”, “Law”, corresponding to what is called an “Act” or a “Statute” under other legal systems, that is a legal source stemming from the legislative branch.

“d.lgs.” stands for “*decreto legislativo*”, which can be translated as “legislative Decree”, or simply “Decree”. It is a form of secondary legislation (delegated legislation, issued by the executive branch), and, without entering into details, such Decrees have the same value as Laws in the Italian legal system.

“lg.” stands for “*decreto legge*”, which can be translated as “law Decree”, or simply “Decree”. It is also a form of secondary legislation, and has the same legal value as a “legislative Decree”.

“d.p.r.” (or “d.P.R.”) stands for “*decreto del Presidente della Repubblica*”, which can be translated as “Italian Republic President’s Decree”, or shorter “President’s Decree”. Such Decrees do not have the same legal value as Laws, and indeed in the system of legal sources they are placed at a hierarchically lower level with respect to the latter ones.

“d.m.” stands for “*decreto ministeriale*”, which can be translated as “Ministry decree”. In the hierarchy of sources, such Decrees are placed under the President’s Decrees.

19.1 Public procurement framework

19.1.1 General framework

At a national level e-procurement is managed by an *ad hoc* public stock company called “Consip” (<http://www.consip.it/>), created in 1997 by the Italian Ministry of Economy and Finance, which is the only shareholder and is entitled to define the strategies of the company. It is worth mentioning that Consip operates only in the public sector for the supply of goods, works and services to public administrations. For that purpose Consip manages the so called “*Programma di Razionalizzazione degli Acquisti della P.A.*”, (“Programme for the rationalisation of public procurement”), hereinafter referred to as “the Programme”, which was initiated through L. of 23 December 1999, No. 488 (see later). It is under the d.m. of 24 February 2000 that Consip has received a specific mandate by the Ministry of Economy and Finance to manage the Programme.

A relevant part of the Programme is performed through a packet of instruments and tools and a dedicated web site, as will be explained later in more details (e-Procurement section). The main

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purpose of the Programme is to introduce time-saving procedures, enhance transparency and reduce red tape. Such an activity represents a sound innovation with respect to the previous situation.

Consip is currently the only national “*centrale di committenza*”, i.e. the central purchasing body, as defined in art. 1, No. 10 of Dir. 2004/18/EC. Other relevant entities are the Authority for monitoring public contracts concerning works, services and goods, regulated under art. 6 of d.lgs. of April 12 2006, No. 163 and the Observatory, regulated under art. 7 of said d.lgs. A relevant technical body is the CNIPA, standing for National Centre for ICT in public administration (www.cnipa.gov.it).

In particular the Observatory works as a central repository for data concerning public contracts throughout the whole national territory. It determines the average costs in relation with specific areas, elaborates statistics, making such information available. The Observatory co-operates with several entities, such as Consip, Cnipa, Istat (the National Institute of Statistics), and Inps (the National Welfare Institute).

The Authority for monitoring public contracts has been established by l. of 11 February 1994, No. 109. It is composed of five members, chosen by the Parliament. The Authority is charged with a screening function on public contracts, and as such can order inspections, ask for information or clarifications, or be requested to issue advices. In cases provided by the law, it can also apply sanctions.

Where/how are procurement opportunities published?

Procurement opportunities are published on the Italian Official Journal (“*Gazzetta Ufficiale*”) and in cases of European level contracts also on the Official Journal of the UE (see also simap.europa.eu).

Moreover, the announcements are electronically published on the web page of the Ministry for Infrastructures and Transportation and on the web page of the Observatory. They are also traditionally published on two national newspapers and on two local ones (see art. 66, § 7 of Decree of 12 April 2006, n. 163).

To whom are answers typically submitted?

Explanations on announcements of public competitions and questions can be addressed directly to the administrations issuing them. Under art. 9 of Decree of 12 April 2006, No. 163 the administrations may also establish a proper office, called “*sportello dei contratti pubblici relativi a lavori, servizi, forniture*”, which works as an information counter.

How is decentralised procurement (e.g. by regions, provinces, communes, ...) regulated? Is there a central platform? What autonomy do local authorities have?

As a general introduction, it can be said that Italian Regions enjoy only a partial autonomy with respect to public procurement. For instance, they cannot follow procedures for the selection of tenderers which are different from the procedures provided by d.lgs. of 12 April 2006, No. 163, cannot endorse a

specific autonomous legislation for sub-contractors, cannot overturn State legislation on security, etc. This principle is now stated by art. 4 of the said d.lgs., which provides a list of competences.

However, regions can establish their own central purchasing body, though on the official e-Procurement website only four cases out of twenty Regions are mentioned (see: http://www.acquistinretepa.it/portal/page?_pageid=173,1396774&_dad=portal&_schema=PORTAL).

These are the following:

- Region Emilia Romagna established the “*Intercent-ER*” (see <http://www.intercent.it>);
- Region Friuli - Venezia Giulia established “*Acquisti On-Line FVG*” (see <http://www.acquisti.regione.fvg.it>);
- Region Marche established “*Acquisti in Rete*” (see: <http://eprocurement.regione.marche.it>);
- Region Piemonte established “*Sistema Piemonte*” (see: <http://acquisti.sistemapiemonte.it>).

What is the legal framework? Identify the main legal sources and their scope.

It must be remarked that Italian public procurement legislation is extremely complex and there are several legal sources to be considered. The present report will consider the most relevant ones, which are the following:

- d.lgs. of 12 April 2006, No. 163 (hereinafter Decree No. 163/06), bearing the title of “Code on public contracts concerning works, services and supplies in adoption of Directives 2004/17/EC and 2004/18/EC”, which implemented the recent e-procurement Directives. This law entered into force on 1 July 2006, that is 60 days since its publication in the Official Journal on 2 May 2006, with the exception of few articles which have not yet entered into force. Note that, despite the title, Decree No. 163/06 regulates both traditional public procurement and public e-procurement.

Decree No. 163/06 introduced several innovations in the Italian system with respect to the previous legislation, in particular it:

a) made Italian legal legislation more consistent with EU requirements concerning the verification of anomalous offers;

b) introduced some unprecedented procedures in compliance with Directive 2004/18/EC. These are:

- “*Dialogo competitivo*”, i.e. “competitive dialogue” (Art. 58 of Decree No. 163/06, implementing Art. 29 of the Directive);
- “*Accordo quadro*”, i.e. “framework agreement” (Art. 59 of Decree No. 163/06, implementing Art. 32 of the Directive. However, such agreements were defined also in the previous Law No. 488/99);
- “*Asta elettronica*”, i.e. “electronic auction” (Art. 85 of Decree No. 163/06, implementing Art. 54 of the Directive);
- “*Sistema dinamico di acquisizione*”, i.e. “dynamic purchasing system” (Art. 60 Decree No. 163/06, implementing Art. 33 of the Directive).

- d.p.r. of 4 April 2002, No. 101, hereinafter President’s Decree No. 101/02. regulating the electronic public purchase of goods and services through automatic systems for choosing the contracting party. Such law introduced the “*gara telematica*” and the “*Mercato elettronico della Pubblica Amministrazione*”

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(see art. 11). For more information on these, please refer to the e-Procurement section of the present report.

Such electronic tools guarantee equal conditions for participants in compliance with principles of transparency, simplification, adoption of EU legislation on electronic signatures and administrative documents.

- l. of 23 December 1999, No. 488, Art. 26 (hereinafter Law No. 488/99). Such provision introduces the so called “*convenzioni*”, i.e. conventions, which are recalled by Decree No. 163/06. Hereinafter such conventions will be referred to as “Art. 26 conventions”. The Ministry of Economy and Finance may conclude Art. 26 conventions with suppliers, by the means of Consip, for the procurement of goods, works and services at the request of public administrations. Such suppliers have to agree to deliver them at fixed fees and at given conditions, within a pre-defined total amount. Therefore Art. 26 conventions can be seen as framework agreements (as in art. 32 of Dir. 2004/18/EC) concerning relevant administrative expenses (e.g. the purchase of energy, computers, printers, heat conditioners, catering services, telephone lines, etc.). Of course such suppliers have to be chosen in compliance with the applicable norms on the choice of contractual parties by public subjects. The Ministry may ask the assistance of specialised consultants, not necessarily Italian, for determining which suppliers are more suitable for entering such conventions.

Art. 26 has undergone several changes in the years, and in the current version it provides (§ 3) that public administrations, regardless if they are State administrations or not, may have recourse to said conventions, even using electronic means indicated in President's Decree No. 101/02 (see the subsequent part on e-Procurement). In any case, the quality and cost parameters indicated in such conventions had to be taken as benchmarks by all administrations. The conclusion of a contract in violation of the said provision is a cause of administrative liability for damages. Such damages are assessed taking into account the difference between the prices indicated in the conventions and that indicated into the contract.

A recent change in legislation has made it mandatory for State administrations, either central or peripheral, with the exclusion of schools and universities, to make their purchases using framework agreements. More specifically, the recent Decree of 1 March 2007 of the Ministry of Economy and Finance has established a specific list of product categories for which having recourse to framework agreements is compulsory. All other administrations are kept free to have recourse to them or, alternatively, to launch a traditional competition (provided all conditions are met). In any case the quality and cost parameters indicated in such conventions must be taken as benchmarks by all administrations (see later about Law No. 296/06).

Any administration adhering to such conventions must check the respect of the parameters set forth in Art. 26 conventions, and may ask the Ministry of Economy and Finance for receiving proper technical advices. Yearly the persons in charge of such bureaus have to report to the political directive body on the accomplished cost reduction. Plainly, indeed, Art. 26 conventions are expected to be money-saving, as the total public demand for given goods, works, services is here presented in aggregated form to suppliers, with a wide room for negotiating and reducing costs. It has been calculated that the cost reduction per unit is around 15% – 20% (<http://www.consip.it/online/Home/Attivitaerisultati/Acquistiinrete/Leconvenzioni.html>).

Art. 26 of Law No. 488/99 is also the legal source which introduced the “*centrale di committenza*”, the central purchasing body as regulated in Art. 11 of Directive 2004/18/EC.

- l. of 27 December 2006, No. 296, Art. 1, §§ 208 – 209, 449 – 458, 1126, 1227, hereinafter referred to as Law 296/06. This law must be considered in combination with art. 26 of Law No. 488/99, which has therefore been slightly changed. The current framework has been already described. It is remarkable to note that, under articles 208 and 209 of the present law, it is set forth that art. 26 of Law No. 488/99 will be annulled at the entering into force of a specific Decree of Ministry of Economy and Finance.

19.1.2 Certificates and statements

What are the general provisions in this legal framework with regard to certificates/attestations/declarations? Which of these documents (if any) are commonly asked for to determine the suitability of the tenderer?

According to the definition given, it can be maintained that in several occasions tenderers are asked to present certificates. For a more detailed explanations refer to following Section 19.3. See Decree 163/06 and the list therein.

However, it can already be noted at this point that all of the certificates mentioned in section 19.3 can be substituted by a so called “*dichiarazione sostitutiva*”, i.e. a self-declaration, under President’s Decree of December 28 2000, No. 445. It is necessary to provide documentation only as a consequence of further checks or upon winning a tender.

Are there specific arrangements or provisions in the law or in administrative practice for foreign certificates/attestations/declarations? Specifically, who verifies such documents? Is there a specific procedure for this? How are language barriers handled?

According to art. 38, §§ 4 – 5 of Decree 163/06 administrations may ask foreign tenderers to provide the relevant certificates. In case they are not available under the legislation of the EU Country concerned, an affidavit is considered suitable. If such an instrument is not available, a declaration made in front of a judiciary authority or a competent administrative authority is equally accepted, or it is allowed a declaration made to a notary public or to a professional entity entitled to receive it under the legislation of the Country concerned. Other articles, like those from 39 to 44 recognise Member States’ certificates. In general, there is no obstacle to the acceptance of a certificate issued in the EU.

19.2 E-Procurement initiatives and status

19.2.1 General e-Procurement framework and initiatives

- *How were the e-Procurement directives transposed? Identify the law(s) or other relevant legal sources.*

As for the implementation of e-Procurement directives in Italy, see previous Section 19.1 concerning Decree No. 163/06.

- *How does e-Procurement work in practice?*
 - o *Please identify the main e-Procurement applications; provide links whenever possible, and include local applications (e.g. on a regional/provincial level).*
 - o *What functionality is provided by these applications?*
 - *Publication only*
 - *Filing questions to the tendering authority*
 - *Submitting of tenders*
 - *Submitting of electronic certificates/attestations*
 - *Electronic awarding (evaluation of proposals and granting)*
 - *Electronic Auctions*
 - *Tendering through electronic catalogues*
 - *Dynamic*
 - *E-invoicing and e-payment*

The main e-Procurement instruments available to Consip are twofold: the electronic competitions for concluding Art. 26 conventions, and the MEPA, which stands for “*Mercato Elettronico per la Pubblica Amministrazione*” (Electronic Market for the public administration). Such electronic instruments are part of the already mentioned Programme run by Consip, and specifically are part of the electronic section of it. Note that for e-Procurement initiatives there is a dedicated web site: www.acquistinretepa.it, which is the starting point in practice for a tenderer to take part in e-Procurement initiatives.

It is worth noting that for accessing both the electronic competitions and the MEPA, suppliers and Public Administrations must undergo a registration procedure, after which they receive an authorisation profile. The creation of such a profile constitutes a compulsory requirement for being eligible to compete in e-procurement initiatives.

The two instruments mentioned above will be examined in some detail.

Currently, about half of the total Art. 26 conventions are concluded through the means of the so called “*gare telematiche*”, that is online public competitions, hereinafter “e-competitions”. E-competitions are allowed even for purchases above the EU threshold which is set at 137,000 euros for central administrations and at 211,000 for local ones. Consip has developed a specific platform to run e-competitions, accessible from the above mentioned web site. The presentation of relevant documentation is accomplished online in one or more rounds, in which bids for a public procurement can be made by the participants. Of course such platform is at disposal of any public administration wishing to launch its own competition for the procurement of goods, works, services and is open to any tenderer.

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Essentially an e-competition is structured into four phases:

1. Preliminary authentication: publication (online as well) of a public announcement containing the rules to be followed for suppliers to be awarded an authentication, with regard to one or more specific product category;
2. Competition announcement: when a procurement competition is launched, a public announcement is published, making reference to the specific product category concerned and inviting authenticated tenderers to take part in the competition for awarding the supply;
3. Competition: this is the proper competition stage, which is run through the software platform, where authenticated tenderers are asked to issue their offers and the latter are then evaluated;
4. Award: the procedure is completed when one of the competitor wins it. At http://www.acquistinretepa.it/portal/page?_pageid=173,772864&_dad=portal&_schema=PORTAL&firsttab=convenzioni&secondtab=vetrina_convenzioni it is possible to monitor the awarded competitions and the stage at which uncompleted competitions currently are.

On 31 March 2000 the first convention was concluded, and the first on line auction on 15 September 2001. On 27 April 2004 the first "paperless" public competition was made, being all official documentation either on cd-rom and online (see <http://www.consip.it/on-line/Home/Chisiamo/Lastoria.html>).

As a general rule, the public announcement for procurement competitions in electronic format have the same legal value of traditional paper-based ones only if they are signed with a qualified advanced signature ("firma digitale" in Italian system, see above), which means that tenderers have to use a software application to verify the signature. Such applications are also publicly available at the web page of CNIPA; see www.cnipa.gov.it.

The announcements of public competitions are also published on the Official Journal of the UE, and of course are opened to participation to foreign tenderers. Official information about public contracts, including the applicable rules are available online at <http://www.consip.it/on-line/Home/Gare.html>.

MEPA is open for purchases under the EU threshold of 137,000 euros for central administrations and 211,000 for local ones. It is aimed to enhance the participation of SMEs in the Programme, and indeed SMEs represent around 80% of the total suppliers in MEPA. In general, MEPA is the proper instrument to have recourse to such purchases which only be managed with difficulty through Art. 26 conventions, either because they concern objects which cannot be aggregated or standardised, or because they concern small and frequent orders (e.g. stationery, computer consumable materials, accessories, clothes, small electric equipment).

MEPA is a real online market based on catalogues including more than 250,000 articles divided into 16 product categories (<http://www.consip.it/on-line/Home/Attivitaerisultati/Acquistiinrete/IMercatoElettronico.html>). As already remarked, public administrations and suppliers wishing to enter the MEPA are required to authenticate and create specific profiles. Suppliers authentication may concern specific areas or the entire national territory. Authenticated suppliers can place direct online offers and administrations can issue direct orders, concluding contracts online. It is mandatory for suppliers to keep their catalogue updated.

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MEPA generally requires an advanced signature with qualified certificate based on a secure-signature-creation device (a smartcard in our case).

MEPA was established on 31 March 2000, but it is only since 1 July 2003 that it is fully operational (see www.consip.it/on-line/Home/Chisiamo/Lastoria.html). In 2006 purchases totalled 38 million euros, a 27% increase with respect to the previous year; the total amount of negotiations performed was above 11,000. 661 administrations have made purchases in 2006, while the authenticated suppliers were almost 1.200 (see www.consip.it/on-line/Home/Attivitaerisultati/Acquistiinrete/IMercatoElettronico.html).

For entering e-competitions or MEPA, suppliers have to fit within the requirements set forth in public announcements of competitions. However, enterprises wishing to take part in such e-procurement initiatives have frequently complained about the convoluted language used in these announcements, which may amount to a real obstacle, discouraging participation. A concrete attempt to overcome this situation was made in 2005 by Consip by the means of specific Guidelines. Such guidelines were inspired by CNIPA, the National Centre for ICT in public administration, an administrative technical body.

Administrations have also access to electronic auctions (art. 85), which must be considered as a peculiar means for the awarding of contracts based on open, restricted or negotiated procedures. They are structured according to the Dir. 2004/18/EC and 2004/17EC scheme. Electronic auctions are available only in those cases in which all elements of the public announcement are clearly specified. They concern either prices only or both prices and the value of the elements contained in the public announcement. In the former case the criterion of the lowest price is adopted, in the latter one the criterion of the best economic offer.

It is relevant to note that prior to the start of an electronic auction, administrations make a first complete, assessment of the offers in accordance with the criteria indicated in the public announcement and with the weighting principles adopted. Only after this stage, all candidates are simultaneously invited to present new prices or new values and are made aware of the mathematic formula to determine the re-ranking of the competitors. In that electronic auctions clearly differ from the already mentioned "e-competitions" introduced by President's Decree No. 101/02. Indeed, while the latter ones are considered as a totally alternative electronic means to traditional competitions, electronic auctions substitute only the awarding phase of the traditional competitions. There are also some other procedural differences. The e-procurement norms contained in President's Decree No. 101/02 which are not fully in compliance with Decree No. 163/06 are expected to be repealed by another Decree (see art. 256 of Decree No. 163/06).

- *Are the applications accessible to non-nationals? Can they submit electronic documents (including certificates or attestations), and if so, how are they validated?*
- *If the applications are not yet fully functional, please describe what functionality is planned for the future, and any expected timeframe..*
- *What type of electronic signature is required in the applications (if any)? Please describe the signature technique, and indicate its legal status (e.g. simple signature, advanced signature, advanced using a qualified certificate, qualified signature, or other type).*

Italian e-procurement solutions are based on the use of “*firma digitale*”, as already mentioned in this report. The relevant source for electronic signatures is the Digital administration Code, which replaces the previous legislation in matter of electronic signatures. Basically, it introduces two types of signatures: a weak one, “*elettronica*” (art. 1, § 1, lett. q), and a strong one, “*qualificata*”, i.e. qualified (art. 1, § 1, lett. r), the former corresponding to the electronic signature of Directive and the latter to the advanced signature with a qualified certificate created by a secure-signature-creation device. The Digital administration Code also sets forth norms concerning the so called “*firma digitale*” (art. 1, § 1, lett. s), which is a type (the only one at present) of the strong signature which is based on PKI, with the private key embedded in a smart card issued by selected certification-service-providers, which have to comply with strict rules concerning both their economic robustness and their trust requirements.

It must be understood that in such a framework, no obstacle to interoperability exists from a legal standpoint, as long as the requirements set forth in the annexes to Dir. 1999/93/EC are met. However, as for the strictly technical side of the question, there is a need to verify case-by-case the interoperability of software applications, and thus it cannot be excluded that some inconsistency of pure technical nature may occur between Italian qualified advanced signature and other non-national signatures. For non-nationals, a practical solution could be to register under an Italian provider and be assigned an Italian e-signature.

19.3 Certificates, attestations and declarations

In this section, we will take a closer look at how the common requirements defined by the e-Procurement Directives are typically met in Italy.

Certificates and other formal attestations of compliance with given requisites are indicated in articles 38 to 50 of Decree No. 163/06. Such norms are detailed and tailored on the specific content of said articles. In particular, art. 38 deals with general requirements concerning all tenderers, covering such issues like the absence of serious convictions and of relevant violations of tax and welfare legislation. Art. 39 – 45 regard public contracts in specific areas (e.g. works, services, goods). The remaining articles are final provisions concerning further information (art. 46), non-national tenderers (art. 47), controls (art. 48), references (articles 49, 50).

With regard to non-national tenderers, it is worth mentioning that non-national tenderers receive the same treatment as the national ones, provided they belong to the EU or have subscribed to the WTO Agreement on public procurement or have entered bilateral agreements with the EU or with Italy ensuring reciprocal conditions in public procurement (art. 47, § 1). Moreover, non-nationals collect all relevant documents asking them to their national authorities and operating under their national legislation. Further facilitating rules contained in art. 38, § 5 have already been examined at the end of Section 19.1 in this report. Concerning the provision of certificates, it is generally irrelevant whether or not the tenderer is a natural or a legal person, though some provisions concerning certificates addresses specifically natural persons or legal persons.

As to certificates in electronic format, they are certainly allowed, in application of art. 15 of Law 59/1997 (“*legge Bassanini*”) and of Directive 95/46/EC, implemented in Italy by the Digital

administration Code. Note, specifically, that in Italian legislation, in order to make an electronic document equivalent to a paper-based one, it is requested to sign it with a “*firma digitale*”. Most Italian administrations currently dispose of and use such PKI based instruments. Their actual use in practice is still limited, including in electronic procurements, but it is possible for administrations to issue electronic certificates (including the certificates mentioned below), using the “*firma digitale*”.

Alternatively, tenderers may also choose to obtain paper originals, and then scan these documents and sign them with their own *firma digitale*. However, in this case the process is a little more complicated, as the signatory must be appointed as the “person in charge for the substitutive storage of documents” (in Italian: “*responsabile per la conservazione sostitutiva*”), and the resulting document must then be signed again by a public official, with his/her *firma digitale* and indicating the exact date, in order to attest to the correspondence between the original documents and their electronic images. Again, this can be applied to any certificate, including the ones below, but the intervention of a second public official.

The main reason why electronic certificates as such are not commonly used, as noted above, is the existence of the self-declaration system. All of the certificates mentioned in this section 19.3 can be substituted by a so called “*dichiarazione sostitutiva*”, i.e. a self-declaration of the tenderer declaring its compliance with the requirements of Italian regulations, under the terms of the Presidential Decree of December 28 2000, No. 445. It is necessary to provide documentation only as a consequence of further checks or upon winning a tender. Thus, the certificates below are not typically used during the tendering process as such.

19.3.1 Requirements with regard to the personal situation of the candidate or tenderer – absence of conviction (art. 45 §1 and §2 (c-d) of Directive 2004/18/EC)

Art. 38 of Decree No. 163/06, recalling art. 45 of Dir. 18/2004/CE, excludes from taking parts to public competitions for works, services and goods, or to be eligible as sub-contractors, such tenderers who:

- are under a procedure for applying preventive measures as set forth under art. 3 of Law of 27 December 1956, No. 1423, concerning public security (art. 38, § 1, lett. b);
- fall under art. 10 of law of May 31 1965, No. 575, concerning mafia’s activities (art. 38, § 1, lett. b).
- have been judged guilty by a definitive decision (or other similar court decision, like an irrevocable “*decreto penale di condanna*” or a “*sentenza di patteggiamento*”) for serious crimes against the State of the EU, or for serious crimes concerning the participation in a criminal organisations, corruption, fraud, money laundering, as in art. 45 of Dir. 2004/18/EC (art. 38, § 1, lett. c);

In order to demonstrate the absence of the above mentioned reasons for exclusion, candidates must provide official declarations, specifically an extract from the penal register. It can be requested at the “*Casellario Giudiziario della Procura presso il Tribunale*” of the place of residence. The “*Casellario Giudiziario della Procura presso il Tribunale*” is the office which administers the penal register. It is located at any criminal court.

These extracts can be provided in electronic form using either of the methods described above (i.e. signed directly by the issuing public official using his firma digitale; or by scanning a paper original and signing the scan electronically, first by the tenderer and then by a public official). In practice, this is still rarely done for electronic procurements, and tenderers generally rely on a “*dichiarazione sostitutiva*”, i.e. a self-declaration, as noted above.

19.3.2 Requirements with regard to the personal situation of the candidate or tenderer – non-bankruptcy and financial status (art. 45 §2 (a-b) of Directive 2004/18/EC)

Art. 38 of Decree No. 163/06, recalling art. 45 of Dir. 18/2004/CE, sets forth that are excluded from issuing public tenders for works, services and goods, nor can be chosen as sub-contractors, tenderers who are bankrupted, or lay in another similiar condition (namely “*liquidazione coatta*” and “*concordato preventivo*” in Italian legislation), even if the procedure for officially declaring bankruptcy is not yet completed.

The former register of bankruptcy was abrogated in 2006. However, the bankruptcy is registered as an entry in the registry of enterprises which is kept by the Chambers of Commerce. It is always possible to request an extract from this registry, and this extract can be requested.

These can be provided in electronic form using either of the methods described above (i.e. signed directly by the issuing public official using his firma digitale; or by scanning a paper original and signing the scan electronically, first by the tenderer and then by a public official). In practice, this is still rarely done for electronic procurements , and tenderers generally rely on a “*dichiarazione sostitutiva*”, i.e. a self-declaration, as noted above.

19.3.3 Requirements with regard to the personal situation of the candidate or tenderer – compliance with fiscal and social obligations (art. 45 §2 (e-f) of Directive 2004/18/EC)

Such tenderers are excluded from taking parts to public competitions or to be eligible as sub-contractors who:

- breached tax laws, either in Italy or in the State where candidates have their headquarters (art. 38, letter g of Decree No. 163/06);
- violated, by a definitive judgement, social security contributions, either in Italy or in the State where they have their headquarters (art. 38, letter i);

Tenderers are asked to provide a “*certificato di regolarità contributiva*”, which can be translated as “certificate of tax compliance”, as regulated in d.lg. of 25 September 2002, No. 210 and art. 3, § 8 of d.lgs. of 14 August 1996, No. 494.

It must be noted that in addition to the cases mentioned under D1 – D3 there are several other situations in which candidates are excluded from taking parts to public competitions. These are the following:

- breach of art. 17 of Law of 19 March 1990, No. 55 (Art. 38, letter d);
- serious breaches of norms concerning safety on the workplace (art. 38, letter e)
- bad faith or serious negligence in executing supplies ordered by the administration which has launched the competition (Art. 38, letter f). In this case the burden of proof is on the administration, which has recourse to any evidence;
- false declarations concerning the relevant requirements to take part in public competitions, in cases where such declarations have been issued the year before the publication of the announcement of competition. The inaccuracy of the declarations must result from the data of the Observatory (art. 38, letter h);
- lack of the certificate required under art. 17 of law of 12 March 1999, No. 68. Such certificate proves the compliance with norms on the protection of disabled persons (Art. 38, letter l);
- punishment under art. 9, § c) of d.lgs. of 8 June 2001, No. 231 or other sanction implying the exclusion from contracts with public administrations (Art. 38, letter m);

No specific certificate to demonstrate compliance exists; however, it is possible to request an extract of your data from the “*anagrafe tributaria*”, a register of the tax office. The required certificates can be provided in electronic form using either of the methods described above (i.e. signed directly by the issuing public official using his *firma digitale*; or by scanning a paper original and signing the scan electronically, first by the tenderer and then by a public official). In practice, this is still rarely done for electronic procurements, and tenderers generally rely on a “*dichiarazione sostitutiva*”, i.e. a self-declaration, as noted above.

19.3.4 Requirements with regard to the suitability to pursue the professional activity

Under art. 39 of Decree No. 163/06, tenderers have to demonstrate that they are enrolled in a professional or trade register. Such demonstration must be given by “certificates”, but the law allows foreign tenderers to provide equivalent documents as under their own legislations.

As for tenders concerning public services, if candidates are requested in their countries to provide a special authorization or to be part of a special organisation to supply the service concerned, the same request may be made by the administration issuing the tender.

Add that under art. 40 of Decree 163/06 public tenderers must show compliance with norms on quality, expertise, accuracy. Such provision has a detailed application. Without going into too many details, this may mean possessing an ISO certificate and to meet certain EU quality parameters.

As to the recourse to certificates in electronic form, please refer to what has already said above: typically, tenderers rely on a "*dichiarazione sostitutiva*", i.e. a self-declaration.

19.3.5 Requirements with regard to economic and financial standing

Under art. 41 of Decree No. 163/06, tenderers have to demonstrate that they possess an adequate economic and financial stability. This can be accomplished by providing a bank statement ("*dichiarazioni bancarie*") or an extract from balance sheets ("*bilanci d'impresa*") or a declaration concerning the total turnover ("*il fatturato globale*").

However, such requirements are expressly indicated in the public announcements of competitions.

It is worth mentioning that as for the extract of the balance sheets and the declaration concerning the total turnover, candidates are allowed to provide a self-declaration, and, only in case they are effectively awarded the competition, they are required to provide the relevant documents.

As to the recourse to certificates in electronic form, please refer to what has already said above.

19.3.6 Requirements with regard to technical and/or professional ability

Under art. 42 of Decree No. 163/06, tenderers have to demonstrate that they possess an adequate professional ability. This can be done in several ways, such as describing the technical organisation of the enterprise, certifying the professional qualifications of its managers, specifying how quality services are handled, providing samples of the goods to be supplied, etc. Note that some of these indications can be performed through a "*dichiarazione sostitutiva*", that is a self-declaration, allowed in those cases which are stated under President's Decree of December 28 2000, No. 445.

As to the recourse to certificates in electronic form, please refer to what has already said above: typically, tenderers rely on a "*dichiarazione sostitutiva*", i.e. a self-declaration.

19.3.7 Requirements with regard to quality assurance standards

As set forth under art. 43 of Decree No. 163/06, tenderers may be asked to demonstrate their compliance with given quality standards. In such cases they must present certificates issued by independent bodies of any Member State, provided they follow European standards.

As to the recourse to certificates in electronic form, please refer to what has already said above: typically, tenderers rely on a “*dichiarazione sostitutiva*”, i.e. a self-declaration.

19.3.8 Requirements with regard to environmental management standards

Compliance with environmental management standards is requested by Art. 50 of Directive 2004/18, and in Italy under Art 40 of Decree No. 163/06. Under this norm, in case of public contracts on works and services public administrations may ask for a specific certificate. Such certificate is valid if issued by an independent entity and complies with the EMAS system or – as far as quality standards are concerned – with other applicable EU or international norms.

On a practical side, in the electronic section of the Programme (see www.acquistinretepa.it) the Art. 26 conventions which are based on environment friendly requisites (green procurement) are clearly marked by a green icon depicting a leaf.

As to the recourse to certificates in electronic form, please refer to what has already said above: typically, tenderers rely on a “*dichiarazione sostitutiva*”, i.e. a self-declaration.

19.4 Interoperability

Please refer to previous Section 19.2, where the issue of interoperability, with reference to the “*firma digitale*” (digital signature), has been already addressed.

- *Are there any pilot projects in this field?*

At present we have no knowledge about such projects.

- *If there are no eProcurement means for non-nationals, are there any plans or strategies to improve this, e.g. by issuing credentials to non-nationals as well, or by integrating foreign eProcurement solutions into the local systems? Describe in detail, if any solution exists or is being considered.*

At present we have no knowledge about such projects. Of course non-national can be assigned an Italian "*firma digitale*".

19.5 Future trends/expectations

In the near future only minor changes can be reasonably expected regarding the authentication system or signature or certificates, because such issues have already undergone several recent modifications. Consider also that the process of implementation of EU Directives has been already accomplished. On these grounds what is more likely to occur is an effort toward a more stable setting rather than the development of new features.

19.6 Assessment

In general, Italian e-Procurement infrastructure shows to be modern and updated. It is undeniable that great efforts have been made in order to dematerialise procedures, to conform them to European standards, to apply advanced qualified signatures (consider for instance the smart card known as "*carta nazionale dei servizi*", or CNS), to provide administrations with PEC (certified email) for speeding traditional registered mail-based communications, to create a central management for public procurement (Consip), to enhance the skills technical bodies which provide ICT assistance (Cnipa), to promote the participation of SMEs to public competition for public procurement (MEPA), and to stimulate the re-use of software (norms on the re-use of software in public contracts are contained in the Digital administration Code).

Therefore, the progress on the technical side seems to be satisfactory. The next step appears to be rather a cultural one: as a matter of fact it takes long to change the traditional bureaucratic approach, turning it into a dynamic and digital-oriented attitude.

Another significant obstacle is –as can be expected– of economic nature, as unexpected and intermittent shortages of resources are not uncommon. This is for instance the reason why many administrations are still waiting for the delivery of their CNS cards by the central State administration.

As a conclusion, it is too early to adequately assess the state of public procurement in Italy both in general terms and regarding e-Procurement in particular, as some major changes occurred only few months ago. It also seems too early to extract some sort of guidelines for other countries. All that can be said is that the process is still taking shape.

20 Latvia

20.1 Public procurement framework

20.1.1 General framework

Like the European e-Procurement Directives, the Latvian public procurement entails two separate frameworks: one for utility services, and one for traditional sectors.

There are two basic procurement acts in Latvia that regulate general framework of procurement in Latvia. The first act is the Public Procurement Law (in Latvian - Publisko iepirkumu likums) of 4 April 2006 regarding the awarding of public works contracts, public supply contracts and public service contracts. By adopting the Public Procurement Law Latvia has implemented provisions of Directive 2004/18/EC. The second act is the law "On Procurement for Needs of Public Service Providers" (in Latvian – likums "Par iepirkumu sabiedrisko pakalpojumu sniedzēju vajadzībām") of 21 October 2004 regarding procurement procedures of entities operating in the water, energy, transport and postal services sectors. By adopting the law "On Procurement for Needs of Public Service Providers" Latvia has implemented the provisions of Directive 2004/17/EC.

Both of these laws are specified by other legal acts. The Public procurement law is specified by several acts, in particular:

- Regulations No. 364 "Obligation regarding the Margins of Public Procurement Prices" (in Latvian – Noteikumi par publisko iepirkumu līgumcenu robežām), adopted by the Cabinet of Ministers on 2 May 2006;
- Regulations No. 363 "On forms of procurement announcements" (in Latvian - Noteikumi par publisko iepirkumu paziņojumu veidlapu paraugiem), adopted by the Cabinet of Ministers on 2 May 2006;
- Regulations No. 762 "Procedure of handling the procurements in value between LVL 1,000 and LVL 10,000" (in Latvian - Kārtība, kādā veicami iepirkumi, kuru paredzamā līgumcena ir lielāka par 1000 latu, bet mazāka par 10000 latu), adopted by the Cabinet of Ministers on 12 September 2006;
- Regulations No. 179 "Regulations on procedures financed by the contracting authority" (in Latvian - Noteikumi par iepirkuma procedūru pasūtītāja finansētiem projektiem), adopted by the Cabinet of Ministers on 13 March 2007.

The Law "On Procurement for Needs of Public Service Providers" is specified by several acts, in particular:

- Regulation No. 1026 "Regulations on form and content of the procurement announcements for suppliers of public services" (in Latvian - Noteikumi par sabiedrisko pakalpojumu sniedzēju iepirkumu paziņojumu paraugu un saturu) adopted by the Cabinet of Ministers on 14 December 2004;
- Regulations No. 997 "On procurement thresholds" (in Latvian – Noteikumi par līgumcenu robežām), adopted by the Cabinet of Ministers on 30 November 2004.

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These regulations by the Cabinet of Ministers are issued upon delegation from the Public Procurement Law and the law “On Procurement for Needs of Public Service Providers” and their aim is to specify regulations of both procurement laws. Please note that these regulations of the Cabinet of Ministers according to the Latvian constitution are positioned at a lower normative hierarchy than laws.

According to the Public Procurement Law Latvia has established a supervisory body that deals with the procurement matters, namely, Procurement Monitoring Bureau (in Latvian - Iepirkumu uzraudzības birojs) (www.iub.gov.lv). The Procurement Monitoring Bureau is a state institution working under supervision of the Ministry of Finance of Latvia. The main functions of the Procurement Monitoring Bureau is to provide consultations to various state and private entities, supervision of the procurement procedures (act as an appeal body where results of the tender or tender regulations can be appealed) and publication of the procurement announcements.

The Public Procurement Law and law “On Procurement for Needs of Public Service Providers” regulate general framework of all kinds of procurements carried out by the state institutions and municipalities and bodies created by them – state and municipal agencies, municipal institutions, companies owned by the state or municipal authorities. Each of these institutions is obliged to carry out procurement procedures and they have autonomy prescribed by the law to carry out procurement procedures themselves. In general the procurement in Latvia is largely decentralised.

One of the basic principles of the legal framework is the organisation of a competitive environment, including through a prior publication of procurement opportunities. This typically means that an announcement must be published in the web page of the Procurement Monitoring Bureau. Also in compliance with European obligations, procurements with a value exceeding certain thresholds are also published in the Official Journal of the European Communities. Contracting authorities are nevertheless allowed to publish announcements in newspapers or use other measures to increase response rates. For example Latvian energy supplier “Latvenergo” alongside official publication frequently publishes procurement announcements in Latvian newspapers that have considerable amount of readers. It is worth noting that since the announcement platform of the Procurement Monitoring Bureau is centralized for all procurement procedures no additional paper publications are necessary.

According to the general rule all deadlines for submission of tenders, appeal of results are based on the date when certain announcement is published in the internet e.g. term to appeal the tender results according to Public Procurement law is counted from the day when announcement of the winner of the procedure is published in the web page of the Procurement Monitoring Bureau.

In exceptional circumstances a prior publication is not required, and the so-called ‘negotiation procedure without prior publication’ can be followed. This can only be done in a limited number of situations indicated in the law, including urgent procurements which could not have been foreseen, or when only invalid offers have been presented in a prior procurement procedure.

In either case, the publication will indicate the administrative requirements to be met, including by naming certificates and statements to be provided by prospective tenderers, and by indicating the specific administration and/or contact person to whom the finalised offer should be provided. Procurement announcements will provide basic administrative or other requirements that tenderers should meet in order to get the rights to conclude an agreement. However contracting authority must ensure that every potential tenderer can access the full set of procurement documents (tender regulations, draft agreement and other documents if there are any) without any additional fee except the fee that covers the administrative costs for providing the documents, e.g. contracting authority may charge the tenderer for costs related to the copying of the documents.

20.1.2 Certificates and statements

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Both laws prescribe certain administrative requirements that must be satisfied by the tenderer. It must be noted that a contracting authority may not lower these requirements or not apply them. Also these requirements are applicable to all procedures carried out in accordance with either one of the procurement laws. In case a tenderer does not meet at least one of these requirements a contracting authority must dismiss tenderer from further participation in a procurement procedure. The requirements are as follows:

- The tenderer has not been the subject of a judgment for participation in a criminal organization, corruption, fraud in relation to the protection of financial interests;
- By an effective court judgment or by an opinion of another competent authority, on gross violation of rules regulating the respective industry, as well as on gross violation of environmental protection laws, competition or labour laws, no violations of tenderer's professional activities are found during a three years' period preceding the tender receipt date;
- The tenderer has no tax or compulsory state social insurance contributions arrears in Latvia or in the country of its registration;
- The tender has not submitted false information about its qualification or has failed to submit information.

As evidence that the tenderer fulfils these mandatory requirements the contracting authority may request tenderers to submit:

- A certificate (original) issued no earlier than six months before the receipt date of the tender, by the Latvian State Revenue Service or another tax administration authority in Latvia, or an equivalent tax administration authority of another country where the tenderer is registered, which confirms that the tenderer has no tax or compulsory state social insurance contributions arrears in Latvia or in the country of its registration;
- A certificate (original) issued by competent authorities no earlier than six months before the receipt date of the tender, provided the laws of the respective country stipulate public registration of such information, certifying that a tenderer is registered as stipulated by the respective laws, that it is not declared insolvent, is not under process of liquidation or that its affairs are not suspended or terminated;
- A statement from the tenderer that it has no tax or compulsory state social insurance contributions arrears in Latvia or in the country of its registration;
- A statement from the tenderer that it has not submitted false information about its qualification and the tenderer has submitted all necessary information.

The contracting authority is entitled to require less formal documents from tenderers e.g. statements issued by the tenderers, moreover it is possible that the contracting authority verifies satisfaction of these requirements by requiring necessary information from state authorities by its own means. In the tender regulations a contracting authority must clearly indicate which certificates and/or statements must be included in the tender offer.

Foreign tenderers may submit certificates issued by relevant institutions in their countries of registration. In case country of origin of the foreign tenderer does not issue such certificates the requirement is met when any other statement is issued according to laws of the country of origin of the tenderer. The contracting authority has an obligation to check the fulfilment of these mandatory requirements, therefore if contracting authorities do not request any documents evidencing satisfaction of these requirements it may be presumed that contracting authority will check satisfaction of these criteria by its own means.

If a tenderer fails to provide at least one of these documents the contracting authority must exclude the tenderers from further participation in the procurement procedure in case such documents are requested in the tender regulations.

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None of the normative acts that regulate the procurement procedure prescribe that a contracting authority should ask for translations of laws according to which any certificate from foreign country is issued, therefore the contracting authority has no formal obligation to assert whether a certificate issued in a foreign country is issued in accordance with foreign laws. However according to principles of good administrative governance, the contracting authority may not reject a tender of a foreign authority on the reason that certificate has not been issued in accordance with the tender regulations in case such certificate is issued in accordance with foreign law. The contracting authority has rights to ask for specific form of certificate, however the contracting authority may not dismiss a tender without asserting regulations according to whom any certificate or statement is issued. Any decision to dismiss tender from participation in the procurement procedure should be well grounded and transparent.

It must be noted that contracting authorities have the right to ask for additional information from tenderers; therefore, it may be assumed that in any case when an invalid certificate is submitted by a tenderer the contracting authority should ask for additional information. However, the practice regarding the resolution of such situations is somewhat unclear since other tenderers may argue that such actions do not comply with the requirement to ensure equal treatment of the tenderers. Usually contracting authorities are very careful to ask for additional information from tenderers since no clear practice exists on situations when such information may be requested. In general if any certificate does not comply with tender regulations contracting authority will dismiss the tender from participation in the procurement procedure.

With regard to selection criteria (which establish the financial and technical suitability of the tenderer), a different set of supporting documents is typically required. These include most notably:

- Bank statements, balance sheets and annual accounts of the tenderer;
- Global revenue over the last three years;
- Professional and educational qualifications;
- Statements containing references to works/supplies/services provided in the most recent three years, as evidenced by attestations of acceptance;
- Statements detailing the working equipment to be used by the tenderer;
- Statements detailing the average staffing of the tenderer in the last three years;
- Statement detailing technicians or technical services at the tenderer's disposal.

(Sections 40 – 46 of the Public Procurement Law, the law “On Procurement for Needs of Public Service Providers”, provide more freedom for the contracting authorities to choose documents that will be accepted).

There is no formal reason in principle why an electronic copy would not be equally acceptable as a paper copy. From a legal perspective, problems with electronic documents can only arise if the document is required to be an original. However according to the Latvian legal framework a contracting authority is free to choose the form of submission of the tenders and in Latvia it is a strong common practice that all documents should be submitted on paper. According to the provisions of the Public Procurement Law the exchange of the information may be carried out by electronic means. However, in such cases the contracting authority must ensure that a safe electronic communication system is made available.

It is worth noting that to our knowledge there has been no situation when communication between the contracting authorities and the tenderer has been carried out only electronically.

With regard to verification and language issues, there are no formal rules for verifying the validity of an offer. The contracting authority is thus relatively free to assess the validity and value of the provided evidence.

When the tenderer cannot present the required documentation with regards to economical and financial suitability for valid reasons, this may be demonstrated through any other documents that the contracting authority deems suitable.

20.2 E-Procurement initiatives and status

As already said above the European public procurement directives have been transposed into the national legislation through the adoption of two basic procurement laws. Various regulations of the Cabinet of Ministers have also been issued to regulate several matters regarding public procurement and procurement for needs of public service providers.

In Latvia there is no special legal framework regarding e-Procurement. All provisions regarding e-Procurement are regulated by the Public Procurement Law and by the law "On Procurement for needs of Public Service Providers". The only specific legal act regarding the e-Procurement is a decision of the Cabinet of Ministers to create a special agency that will deal with e-Procurement matters and organise an e-Procurement system. Historically the Procurement Monitoring Bureau has developed an e-Procurement platform (*e-Iepirkumu sistēma*). After the system was developed the supervision of the e-Procurement system was handed over to the e-Procurement State Agency (*in Latvian - Elektronisko iepirkumu valsts aģentūra*, www.eprocurement.gov.lv and www.eps.gov.lv). The e-Procurement platform is to be considered as a dynamic procurement system in the sense of the procurement directive.

The e-Procurement platform has implemented the e-tendering, e-awarding, and e-catalogues modules. E-invoicing and e-payments modules are to be implemented in the near future. It must be noted that the e-Procurement platform allows use only to registered contracting authorities. The e-Procurement platform provides various goods (mainly computers and related hardware and various office equipment) from the tenderers that have concluded a framework agreement with the e-Procurement State Agency.

Within the means of the framework agreement contracting authorities are allowed to buy goods offered by tenderers. Therefore the e-Procurement State Agency acts as a central purchasing body. The e-Procurement State Agency concludes framework agreements by using traditional procurement procedures; usually the framework agreement is concluded with 3 to 5 tenderers.

Therefore the e-Procurement platform does not allow fully electronic tendering since the framework agreements with tenderers are concluded relying on tenders submitted in written form.

Foreign tenderers may conclude a framework agreement with the e-Procurement State Agency and therefore in later stages they may provide their goods via the e-Procurement platform. The e-Procurement platform does not use e-Signature modules to verify the documents. Tenderers and contracting authorities access the platform by using their logins and passwords that could be regarded as a very simple form of the electronic signature.

Nevertheless the e-Procurement platform is not the only platform that is used to electronically manage several matters regarding procurement. The Procurement Monitoring Bureau has developed a platform on publication of the procurement announcements. Historically it was developed before the e-Procurement system was launched.

According to the current legislation all procurement announcements of procedures carried in accordance with both procurement laws must be published on the web site of the Procurement Monitoring Bureau. Only the Procurement Monitoring Bureau has access to the announcement database with respect to publishing procurement announcements. When a contracting authority wants to carry out a procurement procedure it must send a procurement announcement to the Procurement Monitoring Bureau via fax or regular mail. Before publishing the announcement, the Procurement Monitoring Bureau checks whether correct and precise information is stated in the procurement announcement. Usually the procurement announcements are published on the same day as the Procurement Monitoring Bureau receives it or on the next day. Nevertheless the procurement announcements are published within three days counting from the day when Procurement Monitoring Bureau receives the procurement announcement.

Although the system that procurement announcements are not published directly by contracting authorities has a disadvantage that procurement announcements are published with some delay, it ensures that all procurement announcements are published with all the necessary information in them. Nevertheless all deadlines regarding submission of the tenders and appeal of the results of a procurement procedure are counted from the day when the relevant announcement is published in the web page of the Procurement Monitoring Bureau. Also all suppliers of goods can rest assured that all procurement announcements are published on one central publishing platform.

It is worth noting that no other announcements are necessary to satisfy the requirements of laws regarding transparency of the procurement procedures. Nevertheless, if a contracting authority wishes to increase the possible amount of tenderers it may publish additional announcements in any other way.

The electronic announcements system is currently implemented and working, moreover the official publication is the publication in the web page of the Procurement Monitoring Bureau, no other paper publications is needed.

The announcement publication platform provides simple search functionality. E-notifications to the tenderers are at low level of functionality since the platform ensures only that all new announcements are sent to the tenderer.

The Procurement Monitoring Bureau also answers questions submitted in electronic form; however this should be regarded only as a form of communication between the Procurement Monitoring Bureau and the contracting authority or tenderer. The function of filing questions by electronic means to the contracting authority has not been implemented.

To summarize the basic description of the e-Procurement platforms in Latvia: two platforms are operational at the moment: the e-Procurement platform and the procurement notification publishing platform.

20.3 Certificates, attestations and declarations

In this section, we will take a closer look at how the common requirements defined by the e-Procurement Directives are typically met in Latvia.

20.3.1 Requirements with regard to the personal situation of the candidate or tenderer – absence of conviction (art. 45 §1 and §2 (c-d) of Directive 2004/18/EC)

Prevalence/actual use in calls

This requirement to the tenderers is prescribed by the law, therefore in calls this requirement is always used by the contracting authorities. Moreover, even if such requirement is not used in a call the contracting authority still has to check whether the tenderer satisfies this requirement.

What document (if any) is used?

Since Latvian authorities do not issue formal statements from penal registers the document used is a statement issued by a tenderer.

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As said above such documents certifying compliance with this requirement is statement from the tenderer. Usually contracting authorities provide a text of the statement in the tender regulations. Usually in the statement tenderers in negative form deny that they match this exclusion criteria.

Electronic certificates

Usually contracting authorities request to provide such statement in the written form. Such statement must be included as a part of tender documents. To our knowledge there has been no precedent when a tenderer tried to submit such certificate as an electronic document.

20.3.2 Requirements with regard to the personal situation of the candidate or tenderer – non-bankruptcy and financial status (art. 45 §2 (a-b) of Directive 2004/18/EC)

Prevalence/actual use in calls

This requirement to the tenderers is prescribed by the law, therefore in calls this requirement is always used by the contracting authorities. Moreover even if this requirement is not used in a call the contracting authority still has to check whether tenderer satisfies this requirement.

What document (if any) is used?

Latvian tenderers are usually required to submit an original of the certificate issued by the Register of Enterprises of the Republic of Latvia (*in Latvian – Latvijas Republikas Uzņēmumu reģistrs* (www.ur.gov.lv)). If the tenderer is registered in a foreign country, a certificate from an equivalent

authority is also accepted. It must also be noted that such certificates cannot be issued more than 6 month prior to the submission of the tender. Such provision is included in the tender regulation to ensure that in recent times no changes have happened to the tenderer. Nevertheless contracting authority may still by its own means gather information from the state authorities.

Certificate form the state authority may be requested at the Register of Enterprises of the Republic of Latvia via phone and it is prepared within 3-5 days.

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The attestation identifies the issuing authority, the requesting party (including official address and unique enterprise number), date and place of issuance, and contains a declaration that the requesting party has not been declared bankrupt and that the issuing authority has no knowledge of insolvency proceedings that have been brought against the requesting party. As already may be noticed such a certificate does not precisely state the satisfaction of this requirement; however, there is no institution that could issue a more precise certificate. In our opinion, a problem with this certificate is that contracting authorities request that such certificates are issued by a commercial register, although in most European countries the court authorities issue such certificate. As described above it should not create additional difficulties to foreign tenderers since contracting authority must take into account local legislations regulating issuance of such certificates.

Electronic certificates

None of the attestations have an electronic equivalent that is provided to the tenderer, and no plans for such an equivalent have currently been announced.

While it might theoretically be possible to replace the paper document with an electronic version that has been digitally signed, one of the main problems is that the originals are stamped by the public official to confirm the official nature of the document. No digital stamping service is currently in common use in Latvia, therefore this attribute is difficult to recreate electronically, even if it could be said to meet legal requirements.

20.3.3 Requirements with regard to the personal situation of the candidate or tenderer – compliance with fiscal and social obligations (art. 45 §2 (e-f) of Directive 2004/18/EC)

Prevalence/actual use in calls

Attestations demonstrating compliance with fiscal and social obligations are mandatory requirements in the Latvian procurements.

What document (if any) is used?

For both requirements an attestation issued by the State Revenue Service of the republic of Latvia exists (*in Latvian - Latvijas Republikas Valsts ieņēmumu dienests* (www.vid.gov.lv)). Usually both attestations are provided in one document since the State Revenue Service is responsible for collection of all taxes and mandatory social security payments.

Both attestations are only available on paper and they are valid if signed by an official of the State Revenue Service and stamped with a seal of the State Revenue Service. This certificate can be requested at any regional institution of the State Revenue Service.

The certificate identifies the issuing authority (including the specific public official), the requesting party (including by enterprise number), date and place of issuance, and the requested information (i.e. compliance with fiscal or social obligations). The document is signed by the public official and stamped.

Electronic certificates

None of the attestations have an electronic equivalent that is provided to the tenderer, and no plans for such an equivalent have currently been announced.

While it might theoretically be possible to replace the paper document with an electronic version that has been digitally signed, one of the main problems is that the originals are stamped by the public official to confirm the official nature of the document. No digital stamping service is currently in common use in Belgium, so that this attribute is difficult to recreate electronically, even if it could be said to meet legal requirements.

20.3.4 Requirements with regard to the suitability to pursue the professional activity

Prevalence/actual use in calls

Usually such requirements are provided in the tender regulations. According to the regulations of the Public Procurement Law a tenderer must be registered according to the legislation of the state of the origin of the tenderer. In Latvia no official electronic register exists that can be used to assert whether a tenderer is registered according to the Latvian laws. Therefore a copy of the certificate of registration is usually requested.

The contracting authority may also request that the tenderer presents a copy of a certificate that testifies that the tenderer is a member of a professional organisation or has rights to provide some kind of service or goods. For example in case the contracting authority is willing to contract a construction contractor according to building regulations the work contractor must have a special certificate to provide construction services. Similar requirements also apply to various kinds of other business activities (e.g. supply of food, medicals or medical devices etc.). The general rule implemented in both

procurement laws is that if a tenderer need a certificate to pursue certain business activities, then this certificate must be also requested by the contracting authority in the tender regulations.

What document (if any) is used?

In most cases tenderers already have certificates that testify to the compatibility with these requirements; therefore, usually it is requested that the tenderer submits a copy of the certificate. Also it is usually requested that the tenderer certifies such a copy. The contents of such certificates are usually determined by the issuers of certificates; in most cases they include information about the issuer of the certificate, and identification information about the company to which the certificate was issued (name and legal form of the company, registration number etc.). No general requirements exist on the contents of such certificates.

Electronic certificates

To our knowledge no electronic certificates exist. The Register of Enterprises of the Republic of Latvia has an electronic database "Lursoft" (www.lursoft.lv); however, since "Lursoft" is a database created and managed by a non-state company the information contained in it cannot be regarded as official. No special electronic certification exists. "Lursoft" is accessible through its website for payment of a fee.

20.3.5 Requirements with regard to economic and financial standing

Prevalence/actual use in calls

Usually evidence with regard to economic and financial standing is asked from tenderers. A common requirement in the tender regulations is that tenderer must have certain amount of turnover in last three years. Where possible, the amount of turnover regarding provision of the current service or supply of goods is required in the tender regulations.

In general contracting authorities do not have a common practice regarding what documents shall be requested. Commonly requested documents are balance sheets and annual accounts of the tenderer, and a statement of global or specific revenue over the last three accounting years. These are documents that the tenderer is typically required to keep at any rate, and are therefore easily available.

Typically copies certified by the tenderer are provided to the contracting authority although it is possible that the contracting authority requests audited documents.

What document (if any) is used?

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The most commonly requested documents are balance sheets and annual reports of the tenderer, and a statement of global or specific revenue over the last three years. These are documents that the tenderer is typically required to keep at any rate, and are therefore easily available.

Usually the tenderers submit copies that are certified by them. The legal value of such certification is that the tenderer ensures that the provided copies are true and that they evidence the same information as the original. It should be mentioned that all annual reports (including balance sheets) are submitted to various state institutions. Nevertheless tenderers are still required to submit the financial documents themselves.

Sometimes contracting authorities request in the tender regulations that the tenderers must submit a document testifying to a certain amount of available liquid funds. Usually the document necessary is either a statement from the bank that the tenderer has a certain amount of money in its bank account or bank has granted any form of credit to the tenderer to ensure availability of the money. This requirement is not common in Latvian procurement practice, however, it is worth mentioning that some contracting authorities regard this as an additional guarantee that the tenderer has certain amount of easily-available money in case any violation of the contract occur after concluding the procurement agreement.

Electronic certificates

No electronic certificates exist, however the State Revenue Service of the Republic of Latvia has introduced its own system of electronic signature (EDS – *Elektroniskās deklarēšanas sistēma* (Electronic Declaration System)) to allow submission of the electronically signed income declarations. Therefore it may be assumed that in future all financial documents that must be submitted to the State Revenue Service could be submitted via EDS and therefore it is possible that the contracting authorities could review applicable financial information on the tenderer directly through EDS.

At the current moment all documents issued by the state authorities regarding the financial standing of the tenderer shall be submitted in paper and they must be signed by the official and stamped with a seal.

20.3.6 Requirements with regard to technical and/or professional ability

Prevalence/actual use in calls

The requirement to demonstrate technical and/or professional ability is a common (though not mandatory) requirement in Latvian procurements. However, specific certificates are rarely required.

What document (if any) is used?

Typically, tenderers are required to demonstrate technical and/or professional ability by indicating the profiles of its personnel, their qualifications and past realisations. This information is usually provided in

the text of the tender and usually tenderers are required to submit copies of documents evidencing the qualification and professional ability of the tenderer or its employees. When any accompanying document is required usually tenderers are required to submit a certified copy of the relevant certificates.

Contents

Contents vary depending on the requirements. As noted above, typical examples include qualifications, diplomas, product/service descriptions and past realisations.

Electronic certificates

Since there is no systematic practice of requesting certain certificates, it is difficult to assess if electronic certificates are legally acceptable.

However, it should be noted that in most cases paper copies of the original certificates or statements are sufficient. There seems to be no reason why electronic copies of such documents would not be equally acceptable. If the contracting authority requires the certificates or attestations to be signed, a qualified signature seems most suitable to ensure this functionality.

As stated above, in practice this information is usually integrated into the main body of the offer in the form of resumes and/or project references rather than separate authentic documents, and no separate signature is thus required.

20.3.7 Requirements with regard to quality assurance standards

Prevalence/actual use in calls

The requirement to demonstrate compliance with quality assurance standards is an uncommon requirement in Latvian procurements, being mostly limited to procurement with a higher value and/or specific technical nature.

What document (if any) is used?

If included in the call, tenderers are usually required to provide a certificate from an independent accreditation authority. The most common requirement is that the tenderer demonstrates the compliance of his/her products or services through an attestation provided by an accredited organisation.

Certification duration and cost can vary from organisation to organisation.

Contents

The resulting certificate is typically a paper document identifying the origin (the accreditation agency), the recipient, the nature of the certificate (including the assessed standard), date of testing and issuance, duration of the accreditation, and finally a signature on behalf of the accreditation bureau.

Electronic certificates

The provided certificates are usually delivered in paper form, or in unsigned PDF-form. Whether electronic versions can be considered authentic is doubtful, since there is no way of verifying the origin. Nonetheless, in practice certified copies of the certificate are typically deemed sufficient.

20.4 E. Interoperability

As described above two independent e-Procurement platforms are functional in Latvia, namely the electronic database of the notifications and the e-Procurement platform. At the current moment the future trends for the e-Procurement platform include increasing of the product scope accessible via e-Procurement platform. Also for the nearest future it is expected that e-Invoicing and e-Payments via e-Procurement modules will be implemented for the e-Procurement platform. Currently electronic database for publishing the procurement announcements is accessible to all users including persons from foreign countries. For example, a tenderer in a foreign country may acquire information about procurement procedures initiated by the Latvian contracting authorities.

Further future trends may be closely connected to the development of the e-Signature, since it is considered that system, when all necessary documents are submitted electronically, is envisaged, however, it must be noted that no specific projects are started or considered at this moment.

20.5 Future trends/expectations

As indicated above the current future trends are closely linked to further expansion of the e-Procurement system. The main aim for the future implementation of the e-Procurement platform is closely linked to expansion of scope of the products offered through e-Procurement platform, also e-Invoicing and e-Payments are considered for future implementation. Likewise popularisation of the e-Procurement platform among various contracting authorities (especially municipalities) is considered a priority.

It is also expected that e-Auction will be introduced at some point to maximise the effectiveness of the overall e-Procurement system. However, no specific deadline for implementation of this application is provided since it is a technically complicated matter to ensure a reliable e-Auctioning system. Since

Latvia has adopted various laws that ensure that electronic documents are accepted in state institutions, it could be predicted that at some point all communications between the contracting authority and the tenderer will be carried out electronically.

20.6 Assessment

From the legal point of view the necessary e-Procurement regulations are adopted in Latvia, therefore there are no legal barriers regarding implementation of the e-Procurement system. Nevertheless the common practice of current procurement procedures is that all documents are requested in paper form, therefore it would take some time for the contracting authorities to get use to the fully electronic procedures. It remains to be seen whether the future implementation will meet the end users' needs, and in particular if and how the system will be made accessible to non-nationals.

Specifically with regard to certificates and statements, Latvian procurements are characterised as flexible, in the sense that the contracting authority has a substantial freedom in determining which certificates and statements are required, and in determining if provided originals or copies (including foreign documents) meet these requirements. However, some contracting authorities tend to be very formal when evaluating validity of documents provided by the tenderers, especially when procurement procedure is conducted by municipal authorities. More flexibility and understanding of the situation as well as assessment of the market before the procedure is initiated, is needed for more open and flexible procedures.

It must be noted that in the past there were some difficulties for the foreign tenderers to understand common practices, which was hindered further by a very formal approach of the contracting authorities. For example, in many cases tender regulations are available only in Latvian, therefore foreign tenderers have additional costs and difficulties when preparing procurement documentations.

In summary, the Latvian e-Procurement framework is still incomplete as it stands, and it remains to be seen if sufficient attention has been given to foreign tenderers.

21 Liechtenstein

21.1 Public procurement framework

21.1.1 General framework

The legal framework for public procurement in Liechtenstein is composed of the following documents:

- Act of 19 June 1998 on Public Procurement (*Gesetz vom 19. Juni über die Vergabe öffentlicher Bau-, Liefer- und Dienstleistungsaufträge (Gesetz über das öffentliche Auftragswesen, ÖAWG), LR 172.051*), as last amended²⁵¹;
- Regulation of 3 November 1998 on Public Procurement (*Verordnung vom 3. November 1998 über die Vergabe öffentlicher Bau-, Liefer- und Dienstleistungsaufträge (Verordnung über das öffentliche Auftragswesen, ÖAWV), LR 172.051.1*), as last amended²⁵²;
- Announcement of 20 December 2005 regarding the thresholds in accordance with EEA provisions and the WTO agreement (*Kundmachung vom 20. Dezember 2005 der Schwellenwerte nach dem Abkommen über den Europäischen Wirtschaftsraum (EWRA) sowie nach dem Übereinkommen über das öffentliche Beschaffungswesen (WTO-Übereinkommen), LR 172.951.11*), as last amended²⁵³;
- Regulation of 8 November 2005 regarding Public Procurement in the Utilities Sectors (*Verordnung vom 8. November 2005 über die Vergabe öffentlicher Bau-, Liefer- und Dienstleistungsaufträge im Bereich der Wasser-, Liefer- und Verkehrsversorgung sowie im Telekommunikationssektor (Verordnung über das Öffentliche Auftragswesen im Bereich der Sektoren, ÖAWSV), LR 172.052.1*), as last amended²⁵⁴;

251 See <http://www.gesetze.li/DisplayLGBl.jsp?LGBl=1998135.xml&Searchstring=%F6ffentliche+Auftragswesen&showLGBl=true>

252 See <http://www.gesetze.li/DisplayLGBl.jsp?LGBl=1998189.xml&Searchstring=%F6ffentliche+Auftragswesen&showLGBl=true>

253 See <http://www.gesetze.li/DisplayLGBl.jsp?LGBl=2005264.xml&Searchstring=%F6ffentliche+Auftragswesen&showLGBl=true>

254 See <http://www.gesetze.li/DisplayLGBl.jsp?LGBl=2005223.xml&Searchstring=%F6ffentliche+Auftragswesen&showLGBl=true>

- Announcement of 20 December 2005 regarding the thresholds within the Utilities Sectors in accordance with EEA provisions and the WTO agreement (*Kundmachung vom 20. Dezember 2005 der Schwellenwerte im Bereich der Sektoren nach dem Abkommen über den Europäischen Wirtschaftsraum (EWRA) sowie nach dem Übereinkommen über das öffentliche Beschaffungswesen (WTO-Übereinkommen), LR 172.952.11*), as last amended²⁵⁵.

This legal framework is in principle applicable to all public procurements, including the national government and communes, and any associations established by these (article 2 ÖAWG).

One of the basic principles of the legal framework is the organisation of a competitive environment, including through a prior publication of procurement opportunities (article 11 and following ÖAWG). In compliance with European obligations, procurements with a value exceeding certain thresholds established by Royal Decree are also published in the Official Journal of the European Communities (on-line version: see Tenders Electronic Daily, <http://ted.publications.eu.int>).

The publication will indicate the administrative requirements to be met, including by naming certificates and statements to be provided by prospective tenderers, and by indicating the specific administration and/or contact person to whom the finalised offer should be provided.

The legal framework has not yet been adapted to the Public Procurement Directives 2004/17 and 2004/18, and does not yet include any provisions with regard to electronic procurement.

21.1.2 Certificates and statements

Article 35a and 35b ÖAWG contain the basic rule that contracting authorities are in principle free to stipulate in each invitation to tender which evidence documents need to be provided. Failure to provide such documents will result in exclusion (article 35b 1).

Article 35b 2) defines the exclusion requirements to be met by the tenderer, which include²⁵⁶:

- a) the existence of a bankruptcy or winding up proceedings;
- b) liquidation or cessation of professional activity;
- c) the existence of a conviction by a definitive ruling of a crime impairing his professional integrity;

²⁵⁵

See

<http://www.gesetze.li/DisplayLGBL.jsp?LGBL=2005265.xml&Searchstring=%F6ffentliche+Auftragswesen&showLGBL=true>

²⁵⁶ The enumeration is valid only for procurements in traditional sectors, but not for procurements in the utilities sectors, where contracting authorities have more liberty to determine suitable evidentiary documents (article 35 c ÖAWG).

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- d) serious wrongdoings within the framework of professional activities;
- e) substantial misinformation being provided with regard to professional suitability
- f) nonpayment of social security contributions;
- g) nonpayment of taxes; and
- h) engaging in activities which endanger a fair competition within the procurement during the preparation of the offer or the tender documents.

Article 35b 3) states that the contracting authority can require specific evidence documents, including:

- a) for points a-c above, an excerpt from the Public Register, an extract from the Penal Register or, in the absence of such, an equivalent originating from a court or competent administrative authority from the country of origin of the tenderer from which it follows that these requirements are fulfilled;
- b) for points f and g above, the contracting authority must recognize as valid any certificate issued in an EEA state from which it follows that these requirements are fulfilled.

If no such certificates are issued in the tenderer's country of origin, then the document in question can be replaced by a declaration under oath before the competent authority of the country of origin of the tenderer.

Thus, the legal framework in Liechtenstein is relatively flexible, since the contracting authority is relatively free to request the documents that it sees necessary, and as foreign tenderers can replace these by declarations under oath if no suitable documents are available. It is worth noting that the contracting authority is free to indicate that it is willing to accept less formal documents as evidence, including declarations on honour.

With regard to selection criteria (which establish the financial and technical suitability of the tenderer), a different set of supporting documents is typically required, as specified in article 35 and 36 ÖAWV. These include most notably:

- Bank statements;
- Proof of professional liability insurance;
- Balance sheets and annual accounts of the tenderer, if the publication of balance sheets is mandatory in the tenderer's country of origin;
- Global revenue over the last three accounting years. (article 35 ÖAWV)

When the tenderer cannot present the required documentation with regards to economical and financial suitability for valid reasons, this may be demonstrated through any other documents which the contracting authority deems suitable.

With regard to technical capability, article 36 ÖAWV states that the contracting authority can require inter alia the following documents:

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- a) the proof that it is certified in its country of origin for the execution of the works concerned (extract from a register)
- b) Professional and educational qualifications;
- c) Statements containing references to works/supplies/services provided in the most recent five years, as evidenced by attestations of acceptance;
- d) Statements detailing the working equipment to be used by the tenderer;
- e) Statements detailing the average staffing of the tenderer in the last three years;
- f) Statement detailing technicians or technical services at the tenderer's disposal.

It is worth noting that the documents pertaining to selection criteria mentioned above are usually²⁵⁷ not originals in the sense that they carry no signature or seal demonstrating their authenticity. Copies of such documents (which carry no signature or seal themselves) are often submitted in procurement proceedings, and such copies are typically accepted by the contracting authority. This situation is different from most of the exclusion criteria documents (most notably the attestations from penal registers, social security and fiscal documents), which are typically required to be originals, i.e. signed and/or stamped.

This is relevant because there is no reason in principle why an electronic copy would not be equally acceptable as a paper copy. From a legal perspective, problems with electronic documents can only arise if the document is required to be an original.

With regard to verification and language issues, there are no formal rules for verifying the validity of an offer; the only language related provision is article 19, i) ÖAWV, which stipulates that the invitation to tender will stipulate the languages which the tenderer may use; the announcement itself is always in German.

The contracting authority is thus relatively free to assess the validity and value of the provided evidence.

However, as for all decisions, the authority must respect the basic principles of good administrative governance. In practice, that means that any decision to reject certain evidentiary documents must be motivated and transparent. Additionally, the decision must be proportionate. When a contracting authority considers that the provided certificates are incomplete, ambiguous or unclear, it may request clarification from the tenderer rather than rejecting an offer outright. In this way, arbitrary decision making is avoided.

21.2 Certificates, attestations and declarations

²⁵⁷ Notwithstanding the contracting authority's right to request original documents, e.g. balance sheets or revenue statements which have been certified by an independent auditor.

In this section, we will take a closer look at how the common requirements defined by the Public Procurement Directives are typically met in Liechtenstein.

As noted above, no framework for electronic procurement currently exists in Liechtenstein, and none of these documents is currently available in an electronic form.

21.2.1 Requirements with regard to the personal situation of the candidate or tenderer – absence of conviction (art. 45 §1 and §2 (c-d) of Directive 2004/18/EC)

What document (if any) is used?

Tenderers are usually required to submit an extract from the penal register (*Bescheinigung aus dem Strafregister*). If the contracting authority allows it, a declaration under oath can also be accepted.

21.2.2 Requirements with regard to the personal situation of the candidate or tenderer – non-bankruptcy and financial status (art. 45 §2 (a-b) of Directive 2004/18/EC)

What document (if any) is used?

Tenderers are usually required to submit an extract from the Public Register (*Öffentlichkeitsregister*). If the contracting authority allows it, a declaration under oath can also be accepted.

21.2.3 Requirements with regard to the personal situation of the candidate or tenderer – compliance with fiscal and social obligations (art. 45 §2 (e-f) of Directive 2004/18/EC)

What document (if any) is used?

No specific attestation exists²⁵⁸; declarations under oath are usually required. From foreign tenderers, official certificates are of course accepted.

21.2.4 Requirements with regard to the suitability to pursue the professional activity

What document (if any) is used?

Official declarations can be asked by the contracting authority, such as declarations with regard to enrolment in a professional register (e.g. as an architect for building requirement). No typical certificate exists.

21.2.5 Requirements with regard to economic and financial standing

What document (if any) is used?

The most commonly requested documents are balance sheets and annual accounts of the tenderer, and a statement of global or specific revenue over the last three accounting years. No typical certificate exists.

21.2.6 Requirements with regard to technical and/or professional ability

What document (if any) is used?

Typically, tenderers are required to demonstrate technical and/or professional ability by indicating the profiles of its personnel, their qualifications and past realisations. However, this information is usually integrated into the main body of the offer in the form of resumes and/or project references. Authentic documents (such as certified diploma's, certified descriptions of products/service or certified references) are significantly less common. In such cases a paper copy is usually provided, and the contracting authority may require the tenderer to sign/initialise it to warrant its authenticity.

²⁵⁸ Citizens in Liechtenstein do have an insurance pass with an eight digit personal number, but this is not very suited for public procurements since it only covers natural persons and provides no information on social security payments.

21.2.7 Requirements with regard to quality assurance standards

What document (if any) is used?

If included in the call, tenderers are usually required to provide a certificate from an independent accreditation authority. The most common requirement is that the tenderer demonstrates the compliance of his/her products or services with certain standards, such as e.g. ISO standards.

21.2.8 Requirements with regard to environmental management standards

What document (if any) is used?

If included in the call, tenderers are usually required to provide a certificate from an independent accreditation authority, or a description of the processes used in their undertakings.

21.3 Interoperability

As noted above, Liechtenstein does not have any specific e-Procurement system in place yet, and interoperability is therefore not yet a concern. Since free competition and market access for foreign tenderers are basic principles of the legislation in Liechtenstein, (see article 3 ÖAWG), this will be taken into account for future initiatives. It should be noted that the public procurement regulations in Liechtenstein are already quite flexible and do not contain any barriers for market access.

21.4 Future trends/expectations

The main expectation is the implementation of the Public Procurement Directives and the creation of an e-Procurement platform, which is currently planned for late 2008-2009. No specific details are available yet at this time.

21.5 Assessment

Liechtenstein has no specific e-procurement initiatives in place yet, and it is thus too early for any assessment in this field. However, it can be noted that the regulation in Liechtenstein is presently already quite flexible and open to foreign tenderers, including with regard to certificates and statements.

The contracting authority has a substantial freedom in determining which certificates and statements are required, and in determining if provided originals or copies (including foreign documents) meet these requirements. Inversely, tenderers may submit equivalent certificates from their countries of origin, or declarations under oath if no such certificates are available to them.

In summary, there is no framework yet for e-Procurement or electronic certificates and attestations in Liechtenstein.

22 Lithuania

22.1 Public procurement framework

22.1.1 General framework

The basic applicable law regulating public procurement in the Republic of Lithuania is the Law on Public Procurement of the Republic of Lithuania as of 13 August 1996 No I-1491 (the new version was adopted on 22 December 2005 and entered into force on 31 January 2006)²⁵⁹ (the Law). The Law is the main legal act in the field and is further detailed by a number of implementing regulations – Governmental decrees, orders of the ministers of different Ministries of the Republic of Lithuania and orders of the Director of the Public Procurement Office. The Law establishes the procedure of public procurement, the rights, obligations and responsibility of entities of procurement, the procedure for the control of public procurement and settling of disputes. It is applicable to all public procurement performed in the Republic of Lithuania (by governmental institutions, as well as local authorities).

The Law has been harmonised with the EU legal acts; the adoption of the new version (as mentioned above) was aimed to harmonize public procurement regulation in Lithuania with the EU legal acts.

The Public Procurement Office under the Government of the Republic of Lithuania²⁶⁰ (the Office) (<http://www.vpt.lt/index.php?lan=EN>) is an institution which co-ordinates the activities of procurement, supervises compliance of procurement activities with the Law and the implementing legislation. The mission of the Office is to implement the state policy in the field of saving of funds by coordinating public procurement operations and monitoring public procurement procedures together with ministries and other state authorities.

Within the limits of its competence the Office drafts and adopts legal acts regulating procurement, carries out measures to prevent violations of the laws, provides methodological assistance, draws up recommendations necessary for implementing the Law, lays down the guidelines, collects, stores and analyses information about intended public procurement or public procurement in process, identifies violations of public procurement procedures, communicates such information, except the confidential information, to the state or local authorities and makes public announcement thereof, etc. The Office also analyses and assesses the procurement system, draws up proposals for its improvement, prepares and submits to the Commission of the European Communities annual statistics on procurement of supplies, services and works as well as any other information. The Office is responsible for forwarding the notices of the contracting authority to the Office of Official Publications of the European Communities for publication and ensuring publication of the notices and other relevant

²⁵⁹ In Lithuanian *Lietuvos Respublikos Viešųjų pirkimų įstatymas*. The English version can be accessed at http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=273790.

²⁶⁰ In Lithuanian *Viešųjų pirkimų tarnyba prie Lietuvos Respublikos Vyriausybės*.

information submitted by the contracting authorities, and fulfils other functions established in the legislation.

According to the Law, notices (information notices, contract notices, contract award notices, etc.) must be published in the supplement to the official gazette “*Valstybės žinios*” (eng. *State news*) called “*Informaciniai pranešimai*” (eng. *Information Notices*) and in the Central Portal of Public Procurement. Procurement with a value exceeding certain thresholds are also published in the Official Journal of the European Communities. Please note that all notices that have to be published in the above mentioned sources have to be submitted to the Office, which is responsible for proper publication of such notices. The manner of submission of such notices is specified by the Office. In addition, the notices may be published on the Internet website of the contracting authority, in other publications, as well as elsewhere on the Internet. Notwithstanding, publications in these sources cannot appear earlier than they are published in the official gazette “*Valstybės žinios*”. In case of international procurements (exceeding a certain value), publications in other sources cannot appear earlier than the date of dispatch of the notice to the Office of Official Publications of the European Communities.

In exceptional circumstances prior publication is not required, and the so called ‘negotiation procedure without prior publication’ can be followed. This can only be done in a limited number of situations indicated in the Law.

In either case, the publication must fulfil all requirements established in the applicable legislation.

22.1.2 Certificates and statements

The Law establishes that the contracting authority must verify whether a tenderer is competent, reliable and capable of executing the contract. Therefore, the contracting authority may define in the contract documents the minimum requirements for the qualification of tenderers (right to engage in a certain activity, financial, economic, technical and production capability) and request that tenderers provide the information and documents proving their qualification as specified in the contract documents.

The minimum levels of qualification requirements for tenderers fixed by the contracting authority must not have a restrictive effect on competition, and must be reasonable, clear and precise. The contracting authority may request from the tenderers only the information that is necessary to identify whether the tenderer meets the financial, economic and technical requirements. The requirements may not prejudice the tenderer's right to protect its intellectual property, production or trade secrets. Upon request of the competent state or local authorities, the contracting authority must provide a justification of the qualification requirements.

If necessary, in a specific procurement the tenderer may rely on the capacities of other economic entities regardless of its legal relations with them. In such case the tenderer must prove to the contracting authority that the tenderer will have at its disposal the resources for the execution of the contract.

It must be mentioned that if a tenderer for any valid reason is not able to provide the documents requested by the contracting authority, the tenderer may prove its economic or financial standing by

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any other documents or evidence to the satisfaction of the contracting authority. In the event the tenderer provided incomplete and imprecise qualification information, the contracting authority may request, without prejudice to the public procurement principles, that the tenderer supplement or explain the data within a reasonable period of time. In case the tenderer's qualification is below the minimum level of qualification established in the contract documents, or if the tenderer failed to respond to the request of the contracting authority to revise the imprecise or incomplete information about its qualification, the contracting authority must reject the request to participate in the tender.

The contracting authority must reject a tender and a request if the tenderer has a continuing or not revoked conviction for the following criminal acts (as defined in the Directive 2004/18/EC):

- participation in a criminal organisation;
- corruption;
- fraud;
- money laundering.

It must be emphasised that this is the only imperative requirement for the contracting authority established in the Law under which the contracting authority must reject a tender and a request. The other exclusion criteria are optional and contracting authorities are free to decide whether they should be included in the tender documents.

The tenderer, which is required to prove that it is in absence of conviction, must present an extract from the judicial record or a certificate from the Informatics and Communications Department under the Ministry of Interior of the Republic of Lithuania²⁶¹ regarding conviction (non-conviction) of tenderers - natural persons or judgments adopted against the tenderers - legal persons or equivalent documents issued by a competent judicial or administrative authority in the country of registration or the country where that person resides showing that the requirements have been met.

In addition, submission of the following documents could be requested by the contracting authority with regard to exclusion criteria (to be analyzed more in detail in section 22.4 of the Study):

- an extract from the judicial record or State Enterprise Center of Registers²⁶², or certificate from Informatics and Communications Department is requested to prove that a tenderer is not bankrupt, in liquidation, has not entered into arrangements with creditors, suspended or limited business activities, is not subject to court or out of court proceedings for a declaration of bankruptcy or for compulsory liquidation, has no continuing or not revoked conviction for any offence concerning his professional conduct.
- a certificate issued by the competent authority of the Republic of Lithuania or the tenderer's country of registration proving that the tenderer has fulfilled its obligations relating to the payment of social security contribution;
- certificate issued by the competent authority of the Republic of Lithuania or the tenderer's country of registration proving that the tenderer has fulfilled its obligations relating to the payment of taxes.

The contracting authority is also entitled to reject a tender and a request if it can prove (by any legal means) that a tenderer has engaged in grave professional misconduct.

²⁶¹ In Lithuanian *Informatikos ir ryšių departamentas prie Lietuvos Respublikos Vidaus reikalų ministerijos*.

²⁶² In Lithuanian *Valstybės įmonė registrų centras*.

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A tenderer may be required to prove it has the right to pursue the activity which is necessary for performing the public contract. In such case the tenderer may be required to submit any of the following documents evidencing the tenderer's right to pursue the appropriate activity: a certificate issued by the administrators of the relevant professional or activity registers, institutions authorised by the state, as prescribed in the member state or by the country in which a tenderer is registered; a special statement or reference; or a declaration on oath.

With regard to selection criteria (which establish the financial and technical suitability of the tenderer), the following documents are typically required:

- professional risk insurance;
- balance-sheets or extracts from the balance-sheets, where publication of the balance-sheet is required under the law of the country in which the economic entity is registered;
- a statement of the overall turnover and, where appropriate, of turnover in the area covered by the contract for a maximum of the last 3 financial years available or since the date of registration or commencing the activity in the area concerned, where the undertaking was registered or commenced activity less than 3 years ago;
- a list of the works carried out over the past five years, accompanied by certificates of satisfactory execution for the most important works;
- a list of the principal deliveries effected or the main services provided in the past three years, indicating the dates, sums and recipients;
- a description of the technical facilities and measures used by the supplier or service provider for ensuring quality and the undertaking's study and research facilities;
- the educational and professional qualifications of the service provider or contractor and/or those of the undertaking's managerial staff and, in particular, those of the person or persons responsible for providing the services or managing the work.

Please note that above list is not exhaustive.

It is worth noting that according to the Methodical Recommendations on Assessment of Qualification of Suppliers²⁶³, approved by the Order No. 1S-25 of the Director of the Office on 21 June 2007 (the new version of recommendations was approved), it is recommended to request copies of the documents, but not originals²⁶⁴. In practice, copies of such documents, approved by an authorized person of a tenderer, are often submitted in procurement proceedings, and such copies are typically accepted by the contracting authorities. Notwithstanding, the contracting authority retains a right to require submission of original documents.

In practice, it means that any decision to reject certain evidentiary documents must be motivated and transparent. Additionally, the decision must be proportionate. When a contracting authority considers that the provided certificates are incomplete, ambiguous or unclear, it may request clarification from the tenderer rather than reject an offer outright.

With regard to verification and language issues in case the documents are issued by foreign institutions, there are no formal rules established in the legislation. In practice, tender documents

²⁶³ In Lithuanian *Tiekėjų kvalifikacijos vertinimo metodinės rekomendacijos*.

²⁶⁴ Please note that this document is of recommendatory nature and not mandatory to the contracting authorities.

usually establish that all documents have to be submitted in local language (except for technical documentation). In cases of major tenders, documents in other languages are accepted (as a rule, in English language). Documents issued by official foreign institutions, should be legalized or bear an apostille (according to Hague Convention adopted in 1961).

22.2 E-Procurement initiatives and status

The new version of the Law was adopted with the aim to implement the EU directives. The Law provides that communication and information exchange between the contracting authority and tenderers may be performed, *inter alia*, by electronic means provided that certain conditions, indicated in the Law and discussed more in detail below, are fulfilled.

According to the Law, communication and information exchange between the contracting authority and tenderers must be carried out in such a way that the integrity of data and the confidentiality of tenders and of all information supplied by economic entities is ensured. It is also imperative to ensure that the contracting authorities examine the content of tenders only after the expiration of the time limit for their submission. The means of communication chosen must be generally available and not restrict the tenderers' access to the procurement procedures.

The Law establishes that the tools to be used for communicating by electronic means as well as their technical characteristics must be non-discriminatory, generally available and interoperable with the information and communication technology products in general use.

The following rules established in the Law must be applied to devices for the electronic transmission and receipt of tenders and to devices for the electronic receipt of requests to participate:

- information regarding the specifications necessary for the electronic submission of tenders and requests to participate, including encryption, must be available to interested parties;
- electronic tenders must be accompanied by an advanced electronic signature in conformity with the requirements set in legal acts;
- tenderers must undertake to submit before the expiry of the time limit laid down for submission of tenders or requests to participate, the documents, certificates, or declarations if they do not exist in electronic form.

Devices for the electronic receipt of plans, requests for participation and plans and projects in contests must at least guarantee, through technical means, and appropriate procedures, that:

- electronic signatures relating to tenders, requests to participate and the forwarding of plans and projects comply with national provisions adopted pursuant to the Law of the Republic of Lithuania on Electronic Signature²⁶⁵;
- the exact time and date of the receipt of tenders, requests to participate and the submission of plans and projects can be determined precisely;

²⁶⁵ In Lithuanian *Lietuvos Respublikos elektroninio parašo įstatymas*.

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- it may be reasonably ensured that, before the expiration of time limits laid down, no one can have access to transmitted data;
- if that access prohibition is infringed, it must be reasonably ensured that the infringement of this prohibition is clearly detectable;
- only authorised persons may set or change the dates for opening data received;
- during the different stages of the contract award procedure or of the contest access to all data submitted, or to part thereof, must be possible only through simultaneous action by authorised persons;
- simultaneous action by authorised persons must give access to data transmitted only after the prescribed date;
- data received and opened in accordance with these requirements must remain accessible only to persons authorised to acquaint themselves therewith.

Despite the fact that the Law lays down basic principles for e-procurement, in practice such system did not become the reality yet. On the other hand, certain measures have been already implemented. Guidelines for further development are drawn up as well.

In 2004 the Office conducted a public procurement of the service "to create the Central Portal of Public Procurement" (CPPP). The CPPP was put into operation in 2005. It serves to implement new public procurement opportunities for entities of public and private sectors. The following opportunities are provided for contracting authorities:

1. tenderers' polling in cases when goods/services/works are purchased in the way of usual commercial practice (all tenderers registered with CPPP may be polled);
2. publishing of procurement documents in electronic media (each contracting authority may publish its procurement documents and additional documents in electronic form on the portal).

The following opportunities are provided for tenderers (whether legal or natural persons):

1. possibilities to receive information about public procurement (subscription to public procurement announcements, receipt of procurement documents);
2. possibilities to register on CPPP, to place information about their activities, range of offered supplies, services or works and to participate in public procurement by means of usual commercial practice.

Registration with CPPP and all other services available on the portal for contracting authorities, tenderers and other visitors is free. According to the statistics, every month ca. 25 new tenderers are registered with CPPP on average.

The key objective of CPPP is to become a meeting place for the electronic performance of national public procurement using all the types of public procurement envisaged in the Law. To this effect, on 12 October 2005 a trilateral agreement was signed on the implementation of project Development of the Public Procurement Information System.

To conclude, in Lithuania currently public procurement may be exercised electronically only in cases when goods/services/works are purchased in the way of usual commercial practice. Due to the existence of the CPPP the tenderers may receive information about public procurement on-line (including subscription to public procurement announcements, receipt of procurement documents, placing their information about activities, range of offered supplies, services or works and participation in public procurement when they are performed by the way of usual commercial practice).

It should also be noted that during the year 2006 the Office has improved its informational monitoring system, started analyzing and evaluating the quality of consultations and teaching, and has expanded the number of consultations provided on the Internet.

22.3 Certificates, attestations and declarations

In this section, we will take a closer look at how the common requirements defined by the e-Procurement Directives are typically met in Lithuania.

22.3.1 Requirements with regard to the personal situation of the candidate or tenderer – absence of conviction (art. 45 §1 and §2 (c-d) of Directive 2004/18/EC)

Prevalence/actual use in calls

As indicated above, this is a mandatory requirement in Lithuanian public procurement.

What document (if any) is used?

The tenderer required to prove that it is in absence of conviction must present an extract from the judicial record or certificate from the Informatics and Communications Department (in practice, certificates from the Informatics and Communications Department are presented by tenderers, but not extracts from the judicial record) regarding conviction (non-conviction) of tenderers - natural persons or judgments adopted against the tenderers - legal persons or equivalent documents issued by a competent judicial or administrative authority in the country of registration or the country where that person resides proving that the requirements have been met.

The extract is issued by the Informatics and Communications Department within 10 working days from the submission of the request free of charge.

Contents

An extract from the judicial record or a certificate identifies the issuing authority, the requesting party, date and place of issuance, and relevant decisions. The document must be signed and stamped by the issuing authority.

There is no formal validation procedure of the extract and/or certificate after receipt by the contracting authority. In case of ambiguity, the contracting authority is free to request additional information from the tenderer. According to the information at our possession, the contracting authority may not directly contact the respective authority in order to obtain this certificate without the tenderer's intervention.

Electronic certificates

An extract from the judicial record or certificate from the Informatics and Communications Department is issued in paper form. Currently receipt of the relevant document in an electronic form is not possible due to the fact that these documents have to be signed and sealed, while the electronic signature system has not been developed widely in Lithuania yet.

22.3.2 Requirements with regard to the personal situation of the candidate or tenderer – non-bankruptcy and financial status (art. 45 §2 (a-b) of Directive 2004/18/EC)

Prevalence/actual use in calls

This is a common (though not mandatory) requirement in Lithuanian procurements.

What document (if any) is used?

According to the effective legislation, a contracting authority is entitled to request a tenderer to submit evidence that the tenderer is not bankrupt, is not in liquidation, has not entered into arrangements with creditors or has not suspended or limited business activities or it is not in any analogous situation arising from a similar procedure under the laws of the country of registration and is not subject to court or out of court proceedings for a declaration of bankruptcy or for compulsory liquidation or for an arrangement with creditors or of any other similar proceedings under the laws of its country of registration.

In practice, submission of: i) an extract from the judicial record; or ii) an extract from the State Enterprise Centre of Registers; or iii) a certificate from the Informatics and Communications Department or equivalent documents issued by a competent judicial or administrative authority in the country of registration or the country where that person resides at evidencing that the requirements have been met is usually requested to prove that above mentioned criteria are complied with.

The extract is issued by the State Enterprise Centre of Registers within 5 working from submission of the request days free of charge. The extract is issued by Informatics and Communications Department within 10 working days from submission of the request free of charge.

Contents

An extract from the judicial record or the State Enterprise Centre of Registers or a certificate from the Informatics and Communications Department identifies the issuing authority, the requesting party, date and place of issuance, and respective declaration. It must be signed and bear a stamp of respective institution.

Electronic certificates

As indicated above, receipt of the relevant document in the electronic form is not possible due to the fact that these documents have to be signed and sealed, while the electronic signature system has not been developed widely in Lithuania yet.

The contracting authority may have an access to the Register of Legal Entities²⁶⁶, managed by the State Enterprise Centre of Registers. However, it has no duty to obtain the documents itself.

22.3.3 Requirements with regard to the personal situation of the candidate or tenderer – compliance with fiscal and social obligations (art. 45 §2 (e-f) of Directive 2004/18/EC)

Prevalence/actual use in calls

Submission of certificates demonstrating due fulfilment of fiscal and social obligations are common requirements in Lithuanian procurement.

What document (if any) is used?

For evidencing due fulfilment of both social and fiscal obligations certificates are used. A certificate regarding payment of social obligations is issued by the territorial units of the State Social Insurance Fund Board of the Republic of Lithuania under the Ministry of Social Security and Labor²⁶⁷, and certificate of payment of taxes is issued by the territorial units of the State Tax Inspectorate under the Ministry of Finance of the Republic of Lithuania²⁶⁸.

Certificates regarding payment of social insurance contributions are issued within 3 working days and certificates regarding payment of taxes are issued within 5 working days from the submission of the request free of charge.

Contents

Certificates identify the issuing authority, the requesting party, date and place of issuance and information regarding payment (failure to pay) of social contributions and taxes. A certificate must be signed and sealed by the issuing authority.

Electronic certificates

²⁶⁶ In Lithuanian *Juridinių asmenų registras*.

²⁶⁷ In Lithuanian *Valstybinio socialinio draudimo fondo valdyba prie Lietuvos Respublikos socialinės apsaugos ir darbo ministerijos*

²⁶⁸ In Lithuanian *Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos*.

Certificates can be ordered electronically. However, they are issued in paper format, and to the best of our knowledge, no changes in this respect are anticipated in the nearest future.

22.3.4 Requirements with regard to the suitability to pursue the professional activity

Prevalence/actual use in calls

A contracting authority in contract documents may request the tenderer to submit evidence that it has the right to pursue the activity which is necessary for performing the public contract. In practice, a copy of a registration certificate of a legal entity, as well as license (if necessary for certain activities) is required.

What document (if any) is used?

For evidencing the tenderer's right to pursue the particular activity the following documents may be requested: a certificate issued by the administrators of the relevant professional or activity registers, institutions authorised by the state, as prescribed in the member state or by the country in which a tenderer is registered; a special statement or reference; a declaration on oath a declaration on oath.

Submission of a certificate issued by the administrators of the relevant professional or activity registers, institutions authorised by the state, as prescribed in the member state or by the country in which a tenderer is registered, or to provide a special statement or reference evidencing its right to pursue the relevant professional activity or to provide a declaration on oath or certificate or a declaration on oath evidencing the tenderer's right to pursue the appropriate activity could be requested.

As mentioned above, in Lithuania a copy of a registration certificate of a legal entity, as well as licenses (if necessary for certain activities) are required. Such documents are usually owned by the tenderer itself.

In procedures for the award of public service contracts, insofar as tenderers have to possess a particular authorisation or to be members of a particular organisation in order to be able to perform the service concerned in their country of origin, the contracting authority may require them to prove that they hold such authorisation or membership.

Contents

The certificate contains information on the name, company code, date of registration of the tenderer. Licenses usually contain information on the holder, licensed activities, date of issuance and expiration.

Electronic certificates

The documents listed in this section of the Study have no electronic equivalent, and no plans for introducing such an equivalent have currently been announced.

22.3.5 Requirements with regard to economic and financial standing

Prevalence/actual use in calls

This is a common (though not mandatory) requirement in Lithuanian public procurement. Type of documents requested depends mainly on the object of the procurement and, respectively, targeted tenderers.

Typically, copies of respective documents are requested.

What document (if any) is used?

Lithuanian tenderers are usually required to submit any of the following documents:

- professional risk insurance;
- balance-sheets or extracts from the balance-sheets, where publication of the balance-sheet is required under the law of the country in which the economic entity is registered;
- a statement of the overall turnover and, where appropriate, of turnover in the area covered by the contract for a maximum of the last 3 financial years available or since the date of registration or commencing the activity in the area concerned, where the undertaking was registered or commenced activity less than 3 years ago.

Documents are usually already owned by the tenderer.

Contents

The above mentioned documents generally contain information on the tenderer (full name, legal form, company code) and other information typical for documents in kind.

Electronic certificates

No official certificates exist.

22.3.6 Requirements with regard to technical and/or professional ability

Prevalence/actual use in calls

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The requirement to demonstrate technical and/or professional ability is a common (though not mandatory) requirement in Lithuanian procurement. In practice, submission of a list of the works carried out over the past five years, accompanied by certificates of satisfactory execution for the most important works, a list of the principal deliveries effected or the main services provided in the past three years, an indication of the technicians or technical bodies to be involved are usually required.

What document (if any) is used?

Typically, tenderers are required to demonstrate technical and/or professional ability by indicating the profiles of its personnel, their qualifications and previous experience. Nevertheless, the Law establishes the list of documents that the contracting authority is entitled to require. These documents are:

- a list of the works carried out over the past five years, accompanied by certificates of satisfactory execution for the most important works; these certificates must indicate the value, date and site of the works and specify whether they were carried out according to the requirements of rules regulating the performance of works and properly completed; where appropriate, the contracting authority may receive such certificates directly from the contractors;
- a list of the principal deliveries effected or the main services provided in the past three years, indicating the dates, sums and recipients, as well as information whether the recipient was a contracting authority, or not;
- an indication of the technicians or technical bodies involved, whether or not belonging directly to the tenderer's undertaking, especially those responsible for quality control;
- a description of the technical facilities and measures used by the tenderer for ensuring quality and the undertaking's study and research facilities;
- the educational and professional qualifications of the service provider or contractor and/or those of the undertaking's managerial staff and, in particular, those of the person or persons responsible for providing the services or managing the work;
- for public works contracts and public services contracts, and only in appropriate cases, an indication of the environmental management measures that the economic entity will be able to apply when performing the contract;
- a statement of the average annual manpower of the tenderer and the number of managerial staff for the last three years;
- a statement of the tools, plant or technical equipment available to the tenderer for carrying out the contract;
- an indication of the proportion of the contract, which the tenderer intends possibly to subcontract;
- certificates issued by official quality control institutions, agencies of recognised competence attesting the conformity of products clearly identified by references to specifications or standards. The contracting authority must recognise the certificates issued by competent bodies accredited in the EU Member States, attesting the quality of products, services or works.

Please note that above provided list is not exhaustive.

Contents

Contents vary depending on the specific requirements.

Electronic certificates

Since there is no systematic practice of requesting certain certificates, it is difficult to assess if electronic certificates are legally acceptable. Notwithstanding it should be again noted that in case documents bearing signatures of authorized persons (either originals, or certified copies) have to be submitted, acceptance of the relevant document in the electronic form will not be possible due to the fact that electronic signature system has not been developed widely in Lithuania yet.

22.3.7 Requirements with regard to quality assurance standards

Prevalence/actual use in calls

According to the Law, a contracting authority has the right to require the tenderer to submit certificates issued by independent body attesting the compliance with certain quality assurance standards. Nonetheless, the requirement to demonstrate compliance with quality assurance standards should be regarded as an uncommon requirement in Lithuanian procurement.

The contracting authority is obliged to refer to quality assurance systems, which is based on the relevant European standards series certified by the accredited European institutions. The contracting authority is obliged to recognize equivalent certificates from bodies established in other Member States accept other evidence of equivalent quality assurance measures from tenderers.

What document (if any) is used?

If such requirement is included in the tender documents, tenderers are usually required to provide a certificate from an independent accreditation authority.

Contents

The resulting certificate is typically a paper document identifying the issuing authority (the accreditation agency), the recipient, the nature of the certificate (including the assessed standard), date of testing and issuance, duration of the accreditation, and, finally, a signature on behalf of the accreditation bureau.

Electronic certificates

The provided certificates are usually delivered in paper form. It is doubtful whether electronic versions can be considered authentic, since there is no means for verification of their origin.

22.3.8 Requirements with regard to environmental management standards

Prevalence/actual use in calls

The requirement to demonstrate compliance with environmental management standards is an uncommon requirement in Lithuanian procurement, being limited mostly to procurement with a higher value and/or specific technical nature.

What document (if any) is used?

If such requirement is included in the tender documents and the tenderers are required to provide certificates issued by independent bodies attesting compliance of the tenderer with certain environmental management standards, the tender documents should refer to the Community Eco-Management and Audit Scheme (EMAS) or to environmental management standards based on the relevant European or international standards certified by bodies conforming to Community law or the relevant European or international standards concerning certification. The contracting authorities are obliged to recognise equivalent certificates from bodies established in other Member States and accept other evidence of equivalent environmental management measures.

Contents

The resulting certificate is typically a paper document identifying the issuing authority (the accreditation agency), the recipient, the nature of the certificate (including the assessed standard), date of testing and issuance, duration of the accreditation, and, finally, a signature on behalf of the accreditation bureau.

Electronic certificates

The provided certificates are usually delivered in paper form. It is doubtful whether electronic versions can be considered authentic, since there is no means for verification of their origin.

22.4 Interoperability

As described above, the main e-procurement system in Lithuania is the CPPP platform, which currently enables to exercise public procurement electronically in cases when goods/services/works are purchased in the way of usual commercial practice and which enables tenderers to receive information about public procurement on-line (including subscription to public procurement announcements,

receipt of procurement documents, placing their information about activities, range of offered supplies, services or works and participation in public procurement when they are performed by the way of usual commercial practice). CPPP is fully accessible to non-nationals (provided that they know the Lithuanian language). There seems to be no major legal or technical obstacles why foreigners would not be able to participate in Lithuanian public procurement.

22.5 Future trends/expectations

The main expectation is the full implementation of the electronic public procurement system under which all types of public procurement could be performed electronically. It must be mentioned that Lithuania is expecting to fully implement electronic public procurement system by 2010.

22.6 Assessment

Lithuania's e-procurement legal regulation is still in an early stage; new legal framework has recently entered into force and the CPPP platform has just recently been launched. Notwithstanding, basement for performance of all types of public procurement by electronic means has been laid down and success of reaching this aim is in the hands of the Office, as well as contracting authorities and tenderers.

Specifically with regard to certificates and statements, on 21 June 2007 the Director of the Office approved new version of the Methodical Recommendations on Assessment of Qualification of Suppliers. This document sets out recommendations for contracting authorities in relation to assessment of the competence, reliability and capability of a tenderer, and brings clarity to the contracting authorities and tenderers with respect to the documents submission of which could be required as evidence of compliance with certain qualification requirements.

23 Luxembourg

23.1 Public procurement framework

23.1.1 General framework

The legal framework for public procurement in Luxembourg is mainly governed by the Act on Public Procurement of 30 June 2003, as modified²⁶⁹, which consists of three main books (*livres*):

- The first book is applicable to all public procurements, regardless of whether or not they exceed the threshold for the applicability of the European framework. It contains the generally applicable regulation.
- The second book transposes the European regulation with regard to procurements of works, goods and services in general. It is exclusively applicable to procurements exceeding the threshold for the applicability of the European framework. It contains only specific regulations; issues which are not regulated in this book remain subject to the provisions of book 1.
- Finally, the third book transposes the European regulation with regard to procurements in the fields of telecommunications, water, energy and transportation. As with the second book, it is exclusively applicable to procurements exceeding the threshold for the applicability of the European framework. It contains only specific regulations; issues which are not regulated in this book remain subject to the provisions of book 1.

The separation between three books is of course a consequence of the European regulatory framework, transposed in Luxembourg through the Act on Public Procurement and through the Grand-Ducal Decree of 7 July 2003 executing this Act ('the Execution Decree').

However, the two most recent procurement directives 2004/17 and 2004/18 have not yet been transposed into Luxembourg law.

The European threshold is published at the beginning of every even year in the *Mémorial B* in the form of an announcement of the Ministry of Public Works, which is competent in this matter.

Article 1 of the Act on Public Procurement declares it to be applicable in principle to all procurements engaged in by public contracting authorities. The latter are defined in article 2 of the Act, and include:

1. Organs, administrations and services of the State ;
2. Territorial bodies;
3. Organisms of public law, understood to be organisms

²⁶⁹ Loi modifiée du 30 juin 2003 sur les marchés publics (Mémorial A n° 93 du 10 juillet 2003 page 1669 ; Mémorial A n° 204 du 28 décembre 2004 page 3001) ; see <http://www.legilux.public.lu/leg/a/archives/2003/0931007/index.html>

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- a. Created specifically with a view of meeting a public need and having a character that is not industrial or commercial; and
- b. Which is endowed with legal personality; and
- c. Whose activities are financed mainly by the State, territorial bodies or other organisms of public law; or whose governance is entrusted to such entities; or whose administrative, management or supervisory bodies are composed mainly of members who are indicated by the State, territorial bodies or organisms of public law.

Thus, the legal framework is in principle applicable to all public procurements, including the state government, communes, and any associations established by these. Local administrations thus have no regulatory autonomy; any contracting authority wishing to organise a public procurement must adhere to the general legal framework.

The basic principles of public procurement are explicitly mentioned in article 4 of the Act on Public Procurement, and include transparency and non-discrimination, including through a prior publication of procurement opportunities. This typically means that an announcement must be published. Currently, procurement opportunities are bundled on the Public Procurement Portal of the Grand Duchy of Luxembourg (*Portail des marchés publics du Grand Duché de Luxembourg*); see <http://saturn.etat.lu/simap/public/>). This electronic publication is official as a result of the so called 'Modalities of electronic publication' established by the Council of Government on 22 March 2006²⁷⁰.

In compliance with European obligations, procurements with a value exceeding the European threshold are also published in the Official Journal of the European Communities (on-line version: see Tenders Electronic Daily, <http://ted.publications.eu.int>), using the model announcements published in annex to the Execution Decree²⁷¹. Notwithstanding this obligation, contracting authorities are of course allowed to publish the procurement through other channels to increase response rates, including by directly contacting potential tenderers, although such announcements may not take place before the legally required publication or contain more/other information, to ensure fair competition.

In exceptional circumstances (article 8 of the Act) prior publication is not required, and a negotiation procedure without prior publication (*marché négocié*) can be followed. This can only be done in a limited number of situations indicated in the law, including in procurements beneath a threshold value set by Grand-Ducal Decree, urgent procurements which could not have been foreseen, or when only invalid offers have been presented in a prior procurement procedure.

In either case, the publication will indicate the administrative requirements to be met, including by naming any certificates and statements to be provided by prospective tenderers, and by indicating the specific administration and/or contact person to whom the finalised offer should be provided.

²⁷⁰ Modalités relatives à la publication par voie électronique des avis de marché fixées par le Conseil de Gouvernement dans sa séance du 22 mars 2006 en exécution de l'article 38 (4) du règlement grandducal du 7 juillet 2003 portant exécution de la loi modifiée du 30 juin 2003 sur les marchés publics. (Mémorial B n° 41 du 2 juin 2006, page 456). See <http://www.legilux.public.lu/adm/b/archives/2006/0410206/0410206.pdf#page=16>

²⁷¹ See <http://www.legilux.public.lu/leg/a/archives/2003/0931007/index.html>

23.1.2 Certificates and statements

The administrative requirements to be met are defined in article 221 and following of the Execution Decree. While these vary depending on the type of procurement (works, supplies or services), the tenderer is commonly required to provide documents with regard to the exclusion criteria (which establish a tenderer's eligibility to participate in a call). First of all, the contracting authority may ask the tenderer to demonstrate that he:

- is not in a state of bankruptcy, being wound up or similar status;
- has not filed for a state of bankruptcy, being wound up or similar status;
- has not been convicted by a definitive ruling of a crime impairing his professional integrity.
- has not made serious errors in the performance of his professional obligations, or has made serious false statements when providing information.
- complies with obligations under social law in Luxembourg or in the country of establishment;
- complies with obligations under fiscal law in Luxembourg or in the country of establishment;

(art. 221) of the Execution Decree).

With regard to non-bankruptcy or non-conviction (i.e. the first three points above), the contracting authority must accept an extract of the penal register (*casier judiciaire*) as sufficient proof (art. 222 of the Execution Decree). There are no formal rules with regard to the other requirements. Tenderers established outside of Luxembourg may provide any equivalent document delivered in their country by an administrative or judiciary authority. When such a document does not exist, a declaration under oath also suffices; or if this doesn't exist either, a solemn declaration before an administrative or judicial authority, a notary public or professional organisation can also be accepted (art.223 of the Decree).

With regard to selection criteria (which establish the financial and technical suitability of the tenderer), a different set of supporting documents is typically required. These include most notably²⁷²:

- Specific authorisations or memberships, if these are required to perform a specific service in the tenderers country of establishment; and enrolment in a professional trade register (articles 224-225 of the Decree)
- Bank statements, professional insurance, balance sheets and annual accounts of the tenderer if the publication of balance sheets is mandatory in the tenderer's country of origin; and a statement of revenue over the last three accounting years (either global or with regard to revenue related to the procurement) (article 226 of the Decree).
- Professional and educational qualifications;
- Statements containing references to works/supplies/services provided in the most recent five years, as evidenced by attestations of acceptance;
- Statements detailing the working equipment to be used by the tenderer;
- Statements detailing the average staffing of the tenderer in the last three years;
- Statement detailing technicians or technical services at the tenderer's disposal.

(art. 229-231 of the Decree).

²⁷² The enumeration is legally binding only for procurements in traditional sectors, but not for procurements in the utilities sectors, where contracting authorities have more liberty to determine suitable evidentiary documents.

It is worth noting that the contracting authority is not required to ask for these documents as evidence, and that it may not ask for different documents or for more extensive documents (e.g. balance sheets covering more than three years)²⁷³.

Finally, article 234 stipulates that, if the contracting authority requires the production of certificates from professional organisation attesting to the quality of a good or service, it must base itself on the European quality assurance standards series EN.29000 and EN.45000. Furthermore, it must accept equivalent certificates from other Member States, or any similar documents produced by tenderers who do not have access to such certificates.

It is worth noting that the documents pertaining to selection criteria mentioned above are usually²⁷⁴ not originals in the sense that they carry no signature or seal demonstrating their authenticity. Copies of such documents (which carry no signature or seal themselves) are often submitted in procurement proceedings, and such copies are typically accepted by the contracting authority. This situation is different from the extract from penal registers, which are typically required to be originals, i.e. signed and/or stamped.

This is relevant because there is no reason in principle why an electronic copy would not be equally acceptable as a paper copy. From a legal perspective, problems with electronic documents can only arise if the document is required to be an original.

With regard to verification and language issues for the certificates, there are no formal rules for verifying the validity of an offer. The contracting authority can specify the language in which the offer as such has to be presented, but this does not include the certificates. The contracting authority is thus relatively free to assess the validity and value of the provided evidence; there are no formal rules in this regard.

However, as for all decisions, the authority must respect the basic principles of good administrative governance. In practice, that means that any decision to reject certain evidentiary documents must be motivated and transparent. Additionally, the decision must be proportionate. When a contracting authority considers that the provided certificates are incomplete, ambiguous or unclear, it may request clarification from the tenderer rather than rejecting an offer outright (see art.235). In this way, arbitrary decision making is avoided.

23.2 E-Procurement initiatives and status

²⁷³ See the Circular of the Ministry of Public Works of 7 October 2004, p. 3: http://www.marches.public.lu/procedures/dadjudication/attribution/circulaire_2004_10_07_pdf.pdf

²⁷⁴ Notwithstanding the contracting authority's right to request original documents, e.g. balance sheets or revenue statements which have been certified by an independent auditor.

23.2.1 General e-Procurement framework and initiatives

As stated above, the act currently in force is the Act on Public Procurement of 30 June 2003, as detailed and executed mainly through the Grand-Ducal Decree of 7 July 2003 executing this Act ('the Execution Decree'). There is no specific framework for electronic procurement or for electronic certificates and attestations yet, also since the new Directives 2004/17 and 2004/18 have not yet been transposed into Luxembourg law.

None the less, a series of initiatives have been taken to create a full e-Procurement platform in compliance with the Directives, in particular through the Public eProcurement portal (www.marches.public.lu).

The Public eProcurement portal was created in February 2006, and is currently mainly used as a dissemination tool for notifications of new procurements and for general information on procurement procedures (see <https://saturn.etat.lu/simap/public/>).

The portal is addressed both to the public authorities subject to the provisions of the Act on Public Procurement as described above and to potential tenderers. To this end, the portal also contains a set of standard clauses and standard procurement descriptions (*cahiers de charge*)²⁷⁵ for a number of specialised technical procurements, as instituted by the Grand-Ducal Decree of 8 July 2003. Similarly, it also contains a set of standardised procurement announcement forms²⁷⁶, which public authorities that have acceded to the portal can use to publish new procurements.

Apart from the dissemination of general information, it also provides enterprises with a search and notification tool²⁷⁷ about new opportunities arising from the public sector. This functionality is publicly accessible; however, users can also choose to create a user account, which allows them additional functionality, including the possibility to subscribe to an automated notification services. This subscription is freely available to anyone, including foreign entities.

Contracting authorities (both on a national and local level) can accede to the platform voluntarily, which brings the direct benefit for them of cost free publication of procurements. A full list of acceded authorities can be consulted on-line: <http://www.marches.public.lu/organismesaffilies/index.html>

The Ministry of Public Works is responsible for the implementation of the project in collaboration with the State IT Centre (*Centre Informatique de l'Etat*, see <http://www.cie.public.lu/>). The realisation of any functionality apart from e-notification has not yet been implemented, and is not expected to become functional until 2008. Thus, the portal does not allow for the electronic submission of offers, nor for the electronic submission of certificates.

²⁷⁵ See <http://www.marches.public.lu/clausescontractuelles/index.html>

²⁷⁶ See <http://www.marches.public.lu/legislation/nouveauxformulaire/index.html>

²⁷⁷ See <https://saturn.etat.lu/simap/public/search/InitAdvanceSearch.do?menuId=6>

While the general legal framework for electronic signatures and e-commerce in Luxembourg (specifically the eCommerce Act of 14 August 2000 laying down a legal framework for electronic signatures, certification services and consumer protection²⁷⁸; and the regulation of 1 June 2001 on electronic signatures, electronic payments and the creation of an electronic commerce committee²⁷⁹) seems to allow the valid submission of electronic offers as such, in practice tender specifications require that the offer is sent in by registered mail or delivered by hand. This is also a requirement of the Act on Public Procurement, which states emphatically:

“Art. 62. 1) Offers may be sent in by registered mail or submitted by the tenderer in person or via a mandate holder at an office designated in the request for offers. Only offers which arrive or are submitted before the date and time indicated in the request for offers will be taken into account.

[...]

Art. 63. Under penalty of nullity, offers must be enclosed in an envelope of which the main edges are sealed in a manner permitting the president of the opening session to verify its integrity, and bearing the statement “Submission for...”

Art. 64. For offers sent in by mail, this same envelope must under penalty of nullity be put into a second envelope to be sent by registered mail [...]

Thus, it is clear that the legal framework for public procurement in Luxembourg is still substantially aimed at paper procedures.

Also, since electronic certificates are not in use at this time, it is difficult to envisage how the fulfilling of e.g. the exclusion criteria could be done electronically, even if the offer itself could be submitted electronically.

This could change in the near future, with electronic signatures expected to become increasingly popular in Luxembourg eGovernment applications after the creation of LuxTrust S.A. as a public-private partnership CSP involving i.a. the Luxembourg government and the Luxembourg Chambers of Commerce. LuxTrust was created in 2003 to manage the development of a common Public Key Infrastructure (PKI) in order to secure eCommerce and eGovernment in Luxembourg.

LuxTrust has presented in July 2006 the consortium which was awarded the contract concerning the setting up of a PKI. It is expected to begin issuing smart cards to private persons in the course of 2007, and these cards are expected to become a frequently used authentication solution in eGovernment applications. Apart from LuxTrust, there are no other CSPs providing certification services which are used in eGovernment applications. LuxTrust has already been identified²⁸⁰ as one of the partners who will be supported by the extended platform; no other candidates have been identified yet.

²⁷⁸ See <http://www.legilux.lu/leg/a/archives/2000/0960809/2000A21761.html>

²⁷⁹ See <http://www.legilux.lu/leg/a/archives/2001/0712206/2001A14291.html>

²⁸⁰ See <http://www.marches.public.lu/procedures/hmarpubl/index.html>

23.3 Certificates, attestations and declarations

In this section, we will take a closer look at how the common requirements defined by the e-Procurement Directives are typically met in Luxembourg.

23.3.1 Requirements with regard to the personal situation of the candidate or tenderer – absence of conviction (art. 45 §1 and §2 (c-d) of Directive 2004/18/EC)

Prevalence/actual use in calls

As indicated above, this is a common (though not mandatory) requirement in Luxembourg procurements.

What document (if any) is used?

With regard to non-bankruptcy or non-conviction, the contracting authority must accept an extract of the penal register (*casier judiciaire*) as sufficient proof (art. 222 of the Execution Decree).

Apart from procurements, the certificate is often requested during job application procedures.

The certificate can be asked in person at the clerks of the Ministry of Justice in the Palace of Justice in Luxembourg. Blank extracts are free of charge; if any convictions are found a tax is levied. See http://www.mj.public.lu/services_citoyens/casier_judiciaire/index.html

Contents

The certificate identifies the issuing authority, the requesting party, date and place of issuance, and relevant decisions. The latter includes criminal convictions (which have not been revoked through grace, pardon or rehabilitation), internments, and dispossession of parental authority (by date, jurisdiction, description of facts and final decision). The document is signed by the public official and stamped.

There is no formal validation procedure of the certificate after receipt by the contracting authority.

Electronic certificates

As indicated above, procurements are presently done on paper, and no electronic extract of the penal register presently exists.

23.3.2 Requirements with regard to the personal situation of the candidate or tenderer – non-bankruptcy and financial status (art. 45 §2 (a-b) of Directive 2004/18/EC)

Prevalence/actual use in calls

As indicated above, this is a common (though not mandatory) requirement in Luxembourg procurements.

What document (if any) is used?

As noted above, both for non-conviction and non-bankruptcy, the contracting authority must accept an extract of the penal register (*casier judiciaire*) as sufficient proof (art. 222 of the Execution Decree).

Thus, the same comments as directly above apply.

Contents

See directly above.

Electronic certificates

See directly above.

23.3.3 Requirements with regard to the personal situation of the candidate or tenderer – compliance with fiscal and social obligations (art. 45 §2 (e-f) of Directive 2004/18/EC)

Prevalence/actual use in calls

Attestations demonstrating compliance with fiscal and social obligations are required, but only after a tenderer's bid has been chosen as an eligible bid; not as a part of the preparation of offer. In this case,

the contracting authority must ask the tenderers who have submitted a valid bid within a period of 15 days to submit the appropriate certificates²⁸¹ (article 86 of the Act on Public Procurement).

What document (if any) is used?

The Act on Public Procurement specifies the exact certificates to be provided, namely:

1. A certificate from the Centre of Information, Affiliation and Collection of Common Contributions of Social Security (*Centre d'informatique, d'affiliation et de perception des cotisations communs aux institutions de sécurité sociale*); see <http://www.ccss.lu/site.htm>
2. A certificate from the Administration of Direct Taxes (*Administration des contributions directes*); see <http://www.impotsdirects.public.lu/>
3. A certificate from the Administration of Registration and Domains (*Administration de l'enregistrement et des domaines, AED*); see <http://www.aed.public.lu/tva/attestations/index.php>.

The certificate must apply to the semester preceding the semester during which the submission was opened (article 86 of the Act on Public Procurement). Foreign tenderers must produce equivalent certificates emanating from their fiscal and social administrations.

The certificates in question are only available on paper, stamped and carrying a hand written signature; although the AED allows certificates to be requested via the internet.

Contents

The certificates identify the issuing authority, the requesting party, date and place of issuance, and the requested information (i.e. compliance with fiscal or social obligations). The document is signed by the public official and stamped.

Electronic certificates

None of the attestations have an electronic equivalent that is provided to the tenderer, and no plans for such an equivalent have currently been announced.

23.3.4 Requirements with regard to the suitability to pursue the professional activity

Prevalence/actual use in calls

²⁸¹ See <http://www.marches.public.lu/procedures/dadjudication/examen/index.html>

Generic suitability to pursue a professional activity as indicated through enrolment in a trade/professional register is not as often asked for in Luxembourg procurements as the previous requirements, except in case of specific assignments where membership of a specific professional organisations is required.

What document (if any) is used?

This is stipulated on a case by case basis, depending on the scope of the project.

Contents

Depends on the required document.

Electronic certificates

While electronic certificates might exist in certain cases, they do not offer much benefit since procurements are done on paper.

23.3.5 Requirements with regard to economic and financial standing

Prevalence/actual use in calls

Evidence with regard to economic or financial standing is commonly asked for, in particular by requesting a summary of the turnover (possibly limited to relevant assignments only) or by requesting a copy of the balance sheets, both usually for a period of e.g. the most recent three years. Other possibilities such as bank statements or insurance extracts are also conceivable.

Typically, unsigned copies are provided, although it is possible to request audited or initialled documents.

What document (if any) is used?

The most commonly requested documents are balance sheets and annual accounts of the tenderer, and a statement of global or specific revenue over the last three accounting years. These are documents that the tenderer is typically required to keep at any rate, and are therefore easily available.

Other documents (bank statements, balance sheets) are also occasionally requested, and also tend to have the status of unauthenticated documentation.

Contents

This depends on the document type. Typical information includes:

- Full name and legal form;
- Seat of establishment and date of establishment;
- Management details, including general managers and daily management, and period of appointment;
- Identification of any external auditor or accountant;
- Full balance sheets and financial/fiscal results, or account/insurance status.
- Date of approval of the annual account by the management and period covered by the account;

As stated above, stamps or signatures are typically absent from these documents.

Electronic certificates

While electronic certificates might exist in certain cases, they do not offer much benefit since procurements are done on paper.

23.3.6 Requirements with regard to technical and/or professional ability

Prevalence/actual use in calls

The requirement to demonstrate technical and/or professional ability is a common (though not mandatory) requirement in Luxembourg procurements. However, specific certificates are rarely required.

What document (if any) is used?

Typically, tenderers are required to demonstrate technical and/or professional ability by indicating the profiles of its personnel, their qualifications and past realisations. However, this information is usually integrated into the main body of the offer in the form of resumes and/or project references. Authentic documents (such as certified diplomas, certified descriptions of products/service or certified references, or memberships of professional organisations) are significantly less common. In such cases a paper copy is usually provided, and the contracting authority may require the tenderer to sign/initialise it to warrant its authenticity.

The acquisition time and costs of any required document of course varies from requirement to requirement.

Contents

Contents vary depending on the requirements. As noted above, typical examples include qualifications, diplomas, product/service descriptions and past realisations.

Electronic certificates

Since there is no systematic practice of requesting certain certificates, it is difficult to assess if electronic certificates are legally acceptable.

However, it should be noted that in most cases paper copies of the original certificates or statements are sufficient, and these are usually not signed. There seems to be no reason why electronic copies of such documents would not be equally acceptable.

As stated above, since there is no real practice of electronic procurement, the validity of electronic documents is of limited relevance.

23.3.7 Requirements with regard to quality assurance standards

Prevalence/actual use in calls

The requirement to demonstrate compliance with quality assurance standards is an uncommon requirement in Luxembourg procurements, being mostly limited to procurement with a higher value and/or specific technical nature.

Article 234 of the Act on Public Procurement stipulates that, if the contracting authority requires the production of certificates from professional organisation attesting to the quality of a good or service, it must base itself on the European quality assurance standards series EN.29000 and EN.45000. Furthermore, it must accept equivalent certificates from other Member States, or any similar documents produced by tenderers who do not have access to such certificates.

What document (if any) is used?

If included in the call, tenderers are usually required to provide a certificate from an independent accreditation authority. The most common requirement is that the tenderer demonstrates the compliance of his/her products or services with certain standards, as noted above.

Certificates are usually provided by independent accreditation authorities; typically in paper form.

Contents

Depends on the document requested.

Electronic certificates

While electronic certificates might exist in certain cases, they do not offer much benefit since procurements are done on paper.

23.3.8 Requirements with regard to environmental management standards

Prevalence/actual use in calls

Protection of the environment is a fundamental principle which has been inscribed in article 4 of the Act on Public Procurement. In practice, contracting authorities have significant margin of appreciation when drafting specific requirements to determine how compliance with this requirement may be demonstrated.

The requirement to demonstrate compliance with environmental management standards is an uncommon requirement, being mostly limited to procurement with a higher value and/or specific technical nature.

What document (if any) is used?

Contracting authorities are free to determine which kind of document (if any) they require²⁸².

If included in the call, tenderers are usually required to provide a certificate from an independent accreditation authority, or a description of the processes used in their undertakings. Other possibilities are requiring ISO 14001 certification, or certifications of EMAS audits in conformity with Regulation (EEC) No 761/2001 of the European Parliament and of the Council of 19 March 2001 allowing voluntary participation by organisations in a Community eco-management and audit scheme (EMAS)²⁸³.

Contents

²⁸² See also <http://www.marches.public.lu/procedures/dadjudication/protection/index.html>

²⁸³ See <http://europa.eu/scadplus/leg/en/lvb/l28022.htm>

The resulting certificate is typically a paper document identifying the origin (the accreditation agency), the recipient, the nature of the certificate (including the assessed standard), date of testing and issuance, duration of the accreditation, and finally the a signature on behalf of the accreditation bureau.

Electronic certificates

The provided certificates are usually delivered in paper form, or in unsigned PDF-form. Whether electronic versions can be considered authentic is doubtful, since there is no way of verifying the origin. In practice copies of the certificates may be deemed sufficient.

23.4 Interoperability

As described above, the main e-Procurement system in Luxembourg is the Public Procurement platform. While its current functionality (automated notification) is fully accessible to non-nationals, the interoperability of future functionality will depend on the technology (and specifically the signature technology) being used. Currently, it seems likely that the platform will eventually embrace the LuxTrust PKI technology, which is open to use by non-nationals. It is of course also conceivable that other signature solutions could be considered.

With regard to certificates, no specific information is available yet, since there is no framework or administrative practice yet for the use of electronic certificates.

23.5 Future trends/expectations

As indicated above, the main expectation is the extension of the functionality of the platform, to include the functionality described in the new Procurement Directives, likely relying on the LuxTrust PKI solution model.

23.6 Assessment

Luxembourg's e-procurement initiatives are still in an early stage, since the public procurement platform does not yet allow for much of the functionality prescribed in the new Procurement Directives. It remains to be seen whether the future implementation will meet the end users' needs, and in particular if and how the system will be made accessible to non-nationals.

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Specifically with regard to certificates and statements, Luxembourg procurements may be hampered by the fact that present legislation still requires the use of traditional registered mail or personal hand-offs, which limits the usefulness of electronic certificates and statements.

In summary, the Luxembourg e-Procurement framework is still incomplete as it stands, and it remains to be seen if sufficient attention will be given to foreign tenderers.

24 Malta

24.1 The Public Procurement System in Malta

24.1.1 Department of Contracts

Historically, the Department of Contracts forms part of the Ministry of Finance. It was established as a prelude to the Public Service (Procurement) Regulations of 1996. These regulations were later revised in 2003 and 2005 as a consequence of Malta's decision to join the European Union and specifically for the adoption of EC Directives 2004/17/EC and 2004/18/EC. These regulations were amended in November 2005 by means of Legal Notice 382 of 2005, in January 2006 by Legal Notice 11 and 12 of 2006 and again in June 2006 by Legal Notice 130 and 131 of 2006.

The Director General is assisted by two Directors who are responsible for the operations of the department and compliance respectively. The Department of Contracts is responsible for the normal public procurement; the award of contracts funded by EU pre-accession funds; and for all contracts funded by the EU post-accession funds. The Department is responsible for all tenders having an estimated value of Lm20,000²⁸⁴ and over. Tenders are opened and scheduled in public by the members of the General Contracts Committee with the names of the bidders and prices quoted being published. All documents relating to opened tenders are referred to the client departments and corporations who evaluate the offers and submit their recommendations for the award of the contracts to the Director General, Department of Contracts. The Director General refers these recommendations to the General Contracts Committee who in agreement with the Director General awarded the contracts that are publicly announced every Wednesday and Friday. Furthermore, any bidder who disagrees with any recommendation for an award has ten days, from the date of its publication, to submit an objection in terms of the Regulations.

All objections are dealt with by the Appeals Board in a public hearing. The Appeals Board decisions are final. However, the bidders concerned (whether the originally recommended one or a successful complainant) can still seek further redress in Court in the form of damages if they successfully argue that the Appeals Board's decision had been incorrect.

24.1.2 Vision and Mission

The mission of the Department of Contracts primarily relates to ensuring fairness, transparency and equitability in the award of public contracts by Government Departments, Public Corporations or

²⁸⁴ Malta is part of ERM II and hence Lm 1 is equivalent to Euro 2.329373.

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Entities and Public bodies governed by public law. This is achieved through efforts to ensure conformity with the rules and regulations governing the issue of calls for tenders, their evaluation and the final adjudication process. The Department, through the application of the procedure for the submission of objections, also provides the necessary framework for the granting of redress to those bidders who may feel aggrieved by decisions leading to the award of contracts. This procedural aspect of public tendering is undoubtedly the critical principal on which the Department's mission is defined. This fundamental principle has been reinforced through the creation of a Public Contracts Appeals Board in April 2002.

As a consequence of Malta's entry into the European Union, the procurement role of the Department of Contracts has expanded from dealing with national public procurement to include the procurement for all projects co-funded by the EU. These include projects funded under the umbrella of Structural Funds and the Cohesion Fund for 2004-2006 which approximately amount to Euro 125 million. The Department has also commenced the contracting process for the new EU Budget 2007-2013 which amounts to Euro 855 million. The vision of the Department of Contracts is heavily influenced by the expansion of its operational procurement activities.

Therefore, the vision of the Department of Contracts is to introduce procedures that are aligned with Government's eServices objectives, particularly those related to facilitating the commercial community's ability to conduct its business in an efficient and effective manner. This will ensure that the public procurement process will act as an important catalyst in opening the market place to local and international bidders on a level playing field, and concurrently increase the industry's competitiveness through a lowering of compliance costs in doing business with Government, and in turn for Government to benefit through reduced prices as a result of the expanded supplier base.

24.1.3 Strategic Objectives

The Department of Contracts is the Central Purchasing Unit for all Contracts that exceed the thresholds established by law. This service is provided free of charge to 133 organisations. Traditionally, public procurement has always been one of the most delicate Government activities since it encompasses a wide range of financial, economic, social and political aspects. Government, through its public spending process must ensure that it obtains and be seen to obtain value for money. Hence, it is essential that the public procurement process is conducive to achieving reduced operational costs and best prices; and concurrently, be transparent by permitting all stakeholders to observe its correct operation in the spending of public funds. Hence, the strategic objectives and responsibilities of the Department of Contracts are directly linked to the principals of attaining value for money through an ethical, honest and trustworthy public procurement process. The strategic objects and responsibilities of the Department of Contracts include:

- (a) Developing the Government's procurement policy, and drafting primary and secondary legislation;
- (b) Developing standard tendering procedures, and the preparation of guidelines and instructions;
- (c) Granting authorisation for the use of special procedures in complex projects and for the use of exceptions, extensions, variations and extra works as well as the use of accelerated tender procedures;

- (d) Controlling the national contribution to the Government Procurement Agreement in collaboration with the Economic Policy Department and Ministry of Foreign Affairs;
- (e) Drafting tender and contract documents in collaboration with contracting authorities;
- (f) Administrating the national public procurement bulletin, including its publication and checking of contract notices;
- (g) Advertising of all national tenders over the EU threshold in the Official EU Journal (SIMAP – the electronic information system for Europe wide tendering);
- (h) Compiling an annual report related to the functioning of the public procurement system and presenting the findings to government;
- (i) Compiles statistical reports and other data on Maltese public procurement both to the National Statistics Office and to the European Commission.

24.1.4 Functional Organisation Structure

The Department of Contracts is divided into five major divisions, namely, Pre-Contracts, Post Contracts, the European Union Unit, General Administration and the Secretariat to the General Contracts Committee. The Pre-Contracts section caters for all administrative procedures, from the drafting of the tender document, the publication of the contract notice up to the issuing of the letter of acceptance or the signing of the contract. The Post Contracts Section caters for any issues arising during the implementation of the contract including litigation. The European Union Unit is responsible for all procurement financed through EU Funds. The General Administration deals with all of the Department of Contracts' accounting and Human resources. The Secretariat of the General Contracts Committee is responsible for vetting the Evaluation reports prior to their submission to the Committee, as well as debriefing unsuccessful bidders.

24.1.5 Legal Framework

In the past few years the legal framework governing public procurement in Malta was extensively revised in line with EU prerequisites. The legislative changes mirror the EU Directives which have the main aim of facilitating an open public procurement, hence resulting in an improved functioning of the Internal Market. This in turn will enable the EU to reap the full benefits from an enlarged Internal Market. Linked with these legal amendments is the implementation of new templates used for the drafting of the tender documents. These templates merged the local tendering process with that of the new and enhanced EU public procurement procedures. The Department of Contracts is committed to carry out on an ongoing basis a revision of these templates. The legislative amendments also resulted in the introduction of new award procedures, such as the competitive dialogue, framework agreements, dynamic purchasing systems as well as allowing access to electronic procurement which is currently being developed.

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The legal framework restructuring commenced in 2003 with the revision of the Public Service (Procurement) Regulations of 1996. In 2005, further revisions were made to the public contracts regulations and public procurement entities operating in the Water, Energy, Transport and Postal Services Sectors Regulations to prepare for Malta's entry into the European Union and thus adopt EU Directives 2004/17/EC and 2004/18/EC. The legislative amendments have been transposed under the Financial Administration and Audit Act (CAP. 174) of the Laws of Malta. These regulations came into force on the 3rd June 2005 bringing the regulatory framework governing public procurement in Malta in line with the relevant EU Directives.

There are differences in procurement depending on which schedule regulates the purchaser. In the current system, Schedule 1 lists all public sector Contracting Authorities. These are subsequently divided into those listed under Schedules 2 and 3.

- For Contracting Authorities listed under Schedule 2 (which include all Ministries and Government Departments and most government entities/agencies) the Central Contracting Authority (the Department of Contracts) is responsible for publishing and general administration leading to the award of contracts valued over Lm 20,000. Contracts valued under Lm 20,000 are administered directly by the various public purchasers.
- For Contracting Authorities listed under Schedule 3 (e.g. Local Councils, certain government entities/agencies) the entire contracting procedure is carried out in accordance with regulation by administered within their own remit.
- There are a number of companies with significant government shareholding which do not fall within the scope of Schedule 2 and 3 but are still expected to follow general procurement regulation. The spirit of the regulation must also be followed by voluntary organizations when benefiting from Public funds (National and/or EU).

The resultant legal framework stipulate that contracting authorities who desire to procure either supplies, works or services must abide by the following basic rules:

- (a) Where the estimated value does not exceed Lm1,000, the equipment, stores, works or services may be procured departmentally either after obtaining quotations or direct from the open market at the discretion of the Head of Department taking into consideration the amount involved, the urgency attached to the procurement and restrictions of choice and availability;
- (b) Where the estimated value exceeds Lm1,000 but does not exceed Lm2,500, the equipment, stores, works or services may be procured departmentally after a call for tenders, or after obtaining quotations, or direct from the open market, taking into consideration the amount involved, the urgency attached to the procurement and restrictions of choice and availability, and shall be approved by the Minister responsible for that department, or by such member of the department as may be authorised by that Minister;
- (c) Purchases of the same or closely similar material in different lots under paragraphs (a) and (b) during a period of six months shall not exceed a total value of Lm10,000;

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- (d) Where the estimated value exceeds Lm2,500 but not Lm20,000, the equipment, stores, works or services may be procured after a departmental call for tenders. The tenders shall be opened in public by three senior officers of the said department and the prices quoted.

Furthermore, the legal framework envisages two basic procedures by which tenders are to be submitted:

- (a) The single envelope system whereby all documents including the financial offer are inserted in a single envelope and all the elements are opened at the same time;
- (b) In respect of tenders whose estimated value exceeds the threshold of Lm250,000 it is mandatory that the three package procedure is used. In this case the tender consists of three packages with package one containing the Bid Bond, package two the technical specifications, supportive documents and samples, and package three the price schedules, payment terms and other commercial details. The packages are opened in public in the above sequence, provided that if at any stage the bidder fails to comply with the procedural requirements or with the technical specifications, the remaining packages in his tender are discarded unopened.

In respect of redress, the legal framework envisages two procedures based on the estimated value of the contract. In respect of contracts whose estimated value does not exceed the Lm20,000 threshold, the complaint is examined by the General Contracts Committee (GCC), while in the case of contracts whose estimated value exceeds the Lm20,000, the complaint is handled by the Public Contracts Appeal Board.

24.1.6 Current Publication of Procurement Opportunities

A significant number of websites currently provide functionality that enables prospective bidders to view and download tender documents. Other websites have limited their functionality to being information providers. Hence, these websites provide information regarding the publication of tenders; however, the prospective bidder must collect a hardcopy of the tender documents personally from the relevant office. Moreover, the Department of Information (DOI) (www.doi.gov.mt) website displays most (but not all) of the tenders published by Government entities and offers an email notification service which informs prospective bidders that tenders have been published. However, the DOI site does not offer a download facility for prospective bidders. In effect this means that a prospective bidder must make several visits to different websites to obtain a general idea of the spectrum of tenders that are on offer by the public sector at any particular point in time. For the business community it is a tedious process to monitor these websites particularly given the situation whereby some organisations have regular tender publications (e.g. Government Pharmaceutical Services publish a quantity of tenders every Friday) while others issue tenders on an irregular basis.

A significant recent development is the Government's e-Procurement system which is administered by MITTS Ltd for the purchase of IT desktop equipment that cost less than Lm2,500. This website has the facility for e-Procurement online submissions and is widely utilised by Public Service entities. This website is considered to be a model that should be emulated to procure a wider range of products.

The research into the ICT procurement systems in use in the Public Sector identified the following major applications:

- (a) *Department of Contracts* (www.contracts.gov.mt): The Department is responsible for all tenders having an estimated value of Lm20,000 and over. Therefore, all tenders within this value category are advertised through the www.contracts.gov.mt website. This publication is provided in the form of an extract from the government gazette in *pdf* format. Although the website was developed to be informative and helpful to suppliers, its major weakness is that the interface with prospective bidders is based on manual interaction. Hence, prospective bidders may only obtain limited information from the website. Furthermore, the website lacks user friendly functionalities such as searching and categorisation of tenders, making it cumbersome for prospective bidders to selectively obtain the information pertaining to their interests. This website provides users with the facility to view extracts of the Government Gazette in which Tender notices have been published but does not allow the user any download facilities or provide extended description of the tender in question. Tender documents must be collected from the Department of Contracts in hardcopy format.

The website also provides information on contracts that have been awarded with subject details, the award price and contractor details. This is loaded onto the website on a monthly basis and information logically grouped by month. An archive of past tender awards is also maintained and dates back to January 2003. Another area of interest is the publication of Appeals regarding awarded contract. These are listed in chronological order with an archive being maintained. To complement this facility, the Contracts Department also publishes the final decision of the Public Contracts Appeals Board with the full narrative of the decision. A summary of the committee recommendation is also made available through this website. To address the shortcomings of the current website, the Contracts Department has issued a tender to revamp this website with the objective of providing extended functionality, including the downloading of tender documents complemented with additional back office functionality.

- (b) *Government e-Procurement System* (<https://secure.gov.mt/e-procurement/default.asp>): The Government e-Procurement system has been in operation since 2004. Initially, the system was developed to issue a request for quotation for PC's and related equipment; obtain quotations from a preset list of preferred suppliers; and award the sale to the most advantageous quotation. To support the system an e-Procurement Framework was developed and implemented to govern the decentralisation of the procurement standard both in terms of hardware standards and the Government Financial regulations. The e-Procurement framework provides for the establishment of a pool of suppliers who after a qualifying period of six months are awarded a quality mark. Hence, the website is intended for use by Quality Mark Suppliers, and Purchasing Officers from Government Ministries, Departments and Public Sector entities connected to the MAGNET. These purchasing officers may request quotations for the required equipment with suppliers submitting their quotations electronically into the e-Procurement system.

Under the e-Procurement framework a Performance Monitoring Board has been established to monitor supplier's performance and the validity of the Quality Mark, and approve *authorised suppliers* according to the selection criteria. Failure to achieve the required standard and a record of poor performance will result in the Quality Mark being retracted from the defaulting suppliers. Furthermore, a number of quality checks are made by the MITTS QA department on the hardware that is being supplied. These checks are carried out on a monthly basis to ensure that hardware has been delivered according to specifications and to the desired quality.

The website provides an array of functionality to enable the Government to procure hardware from the private sector in a cost effective manner. The main functionalities include: registration of authorised suppliers; publication of tenders/quotations; electronic submission of quotations by supplier; approval process; evaluation process; status report; search facilities; reports to query order status; and administration screens add/remove equipment lists and supplier status. The system uptake is relatively good with fifty suppliers currently registered to quote through the system. Over 1,240 quotations have been published, with 5,187 bids being received for these quotations from the authorised suppliers during the period 1st January 2006 to 1st April 2007.

- (c) *Enemalta Website* (www.emcservices.gov.mt): Enemalta provides a service to prospective bidders that allow them to download tender documents online. The tenders are normally published on a Friday. The website currently only allows the download of documents and does not allow suppliers to submit bids online. Furthermore, prospective bidders must first register for an account through the Enemalta website after which they are able to download any of the tender documents that may be available through the website. Documents are categorised according to estimated price thresholds and these are:

- Quotations : between Lm 500 and Lm 2,500
- Tenders Category A: between Lm2,501 and Lm 5,000
- Tenders Category B: between Lm5,001 to Lm20,000
- Tenders Category C: between Lm20,001 to EU Threshold (Euro400,000)
- Tenders Category D: between EU Threshold (Euro400,001) to Lm249,999
- Tenders Category E: above Lm 250,000 - 3 envelope procedure

Prospective bidders are able to gain information on the tender prior to purchasing the tender document through a summary that is linked to the tender. This gives the bidder a good idea of the content of the tender and whether it is applicable to them or not. The tender document may be purchased through the website and downloaded immediately on confirmation of the electronic purchase transaction. Enemalta publishes all of their tenders through this website and according to the web site administrator they have never encountered a situation whereby the tender could not be published through this medium due to the complexity of the document.

As an incentive for prospective bidders to purchase and download tender documents online, Enemalta offers a 10% discount on the tender documents purchase price. This appears to have a positive effect since about 20% to 30% of tender documents are currently purchased online. Between May 2006 and March 2007 a total of 495 purchases have been made with a peak of 87 being encountered during the month of June 2006. There are currently 197 bidders who have registered since the launching of the service. The website has recently been enhanced to provide an electronic receipt (for payment) to the purchaser of tender documents. This receipt needs to be attached to the tender document and is an integral part of the suppliers bid. This procedure ensures that the original tender document has been purchased by the supplier and is not merely a copy. No concrete plans are in hand for additional enhancements to the business process.

- (d) *Government Pharmaceutical Services* (<http://www.sahha.gov.mt>): The mission statement of the Healthcare Procurement and Supplies Services [HPSS] within the Ministry for Health, the Elderly and Community Care is the provision of good quality medicines, pharmaceutical preparations and medical devices which are safe and effective, in a timely, quality - approved and cost-effective manner, with the aim of achieving optimal and effective pharmaceutical care in relation to cost. The main functions of the HPSS target the purchase, storage and distribution of pharmaceutical supplies in line with EU directives concerning good storage and distribution practise and

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wholesale dealing. The HPSS currently procures and distributes about 10,000 different healthcare-related products.

The Government Pharmaceutical Services (GPS) has identified the use of electronic eServices as facilitating the issue and publication of the majority of the tenders (all below Lm20,000) and requests for quotations issued by the department. The system was launched in 2004 and after an initial trial period the department discontinued to issue tenders which are published through the website in hardcopy format. Initially, there was some initial resistance this procedure. However prospective bidders realised the benefits of having all the tender documents available electronically and complied in using the new system. Tender documents are published through the website every Tuesday and Friday.

Prior to the introduction of the system, GPS were required to print a voluminous quantity of tenders. Prospective bidders would collect what was termed as a 'pack' of tender documents from the department and select those that were relevant to them. This practice was aggravated by the fact that GPS did not charge a tender fee for their documents. Tender documents currently published through the website are classified as: Medical Stores Tenders (MST); Medical Stores Quotations; Proforma Invoices; and Miscellaneous Quotes. Tenders with an estimated value of over Lm20,000 are not published through this site but are handled by the Department of Contracts.

GPS additionally request that prospective bidders register their email address through the website so that they may receive email alerts whenever there are changes to a tender document, quotation or any other GPS notice. The department considers the service to be successful and cite that they have made considerable savings on stationery and human resources that were previously required for printing and dissemination of tender documents in hardcopy format. No further enhancements are currently planned although the department is looking towards Government to provide a corporate e-Procurement service that would provide for extended functionality and additionally include tender documents that are over the Lm20,000 threshold limit.

- (e) *Department of Information* (<http://www.doi.gov.mt/EN/tenders/2007/04/default.asp>): On its website, the Department of Information provides details of all published tenders and makes available email notifications of calls for tenders issued by Government Departments, Department of Contracts, Local Councils and Government Corporations. The website is defined in a manner that the information is accessible through the publication date. The website does not provide a functionality to download tender documents but directs the prospective bidder to a source where the document can be acquired (be it a website or the physical address of the department concerned).
- (f) *Other Websites*: A number of other sites owned by public service and public sector organisations provide different levels of e-Procurement services to prospective bidders. These services vary from downloadable documents to static information regarding the publication of a tender. Examples of these websites include:
 - o MIIT website (<http://www.miti.gov.mt/site/page.aspx?pageid=8>). This website provides downloadable tender documents that are issued by the Ministry. These tender documents are available at no cost.

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- Government Property Division (<http://www.gpd.gov.mt/gpdtenders.htm>). This website is intended to provide easy access to the Invitation-To-Tenders (ITT) published by the Government Property Division regarding the disposal of government immovable property and other services provided or required by the Department. Documents may be downloaded at no cost while hardcopy documents collected from the department carry an administration fee.
- Planning & Priorities Co-ordination Division provides information and downloadable tender documents under the heading of "Latest News and Information" (<http://www.ppcd.gov.mt/english/links/main.htm>).
- Malta Maritime Authority (<http://www.mma.gov.mt/tenders.asp>). This entity has a web page specifically for Tenders. Only some tenders are downloadable. Those tenders that are not downloadable entail the payment of a fee.
- A number of other websites are available that provide a mixture of downloadable documents or post an advertisement to notify prospective bidders of the publication of a tender. Some examples of these websites include:

MCAST - http://www.mcast.edu.mt/news_tenders.asp

Ministry for Gozo - <http://www.gozo.gov.mt/pages.aspx?page=1346>

Heritage Malta - <http://www.heritagemalta.org/tenders.html>

Lotteries and Gaming Authority. - <http://www.lga.org.mt/>

MIA - <http://www.maltairport.com/page.asp?n=newsdetails&i=2582>

Water Services Corporation - <http://www.wsc.com.mt/default.aspx?FOPT=7>

Freeport - <http://www.freeport.com.mt/tenders.asp>

24.1.7 Declarations and Statements under the current procurement site

Under the current system and with a view to determine the suitability of the tenderer/s, the latter is expected to provide declarations (templates can be downloaded from the intra-governmental website) signed by every consortium partner stating that they have examined and accept without reserve or restriction the entire contents of the tender dossier. Another declaration is to the effect that the tender may be excluded if any of the experts proposed have been involved in the preparation of the project or preparation of the tender. Provision is also made for a declaration in which the tenderer must endorse that he is abiding by the ethics clauses enshrined in the instructions to tenderers and in particular, has no potential conflict of interest or any relation with the other candidates or parties in the tender procedure at the time of submission of the tender.

The tenderer must also sign a statement of exclusivity and availability declaring that he is able to work for the period foreseen for the position for which his CV has been included in the event that the tender is successful.

24.2 E-Procurement Initiatives and Status

24.2.1 EU Legal Framework for Public Sector e-Procurement and Maltese Transposition

The EU Commission proposed that each Member State prepare an Action Plan for the implementation of the new legal framework for electronic public procurement adopted in April 2004 as part of the legislative package of Procurement Directives, 2004/18/EC and 2004/17/EC. The directives provide the framework for conducting e-Procurement in an open, transparent and non-discriminatory way, establish rules for tendering electronically and establish the conditions for purchasing through electronic means.

To make European public procurement markets more open and competitive the Commission proposes measures along three axes:

- Ensure a well functioning Internal Market when conducting public e-Procurement;
- Achieve greater efficiency in procurement and improve governance;
- Work towards an international framework for public e-Procurement.

Malta, like other member States has committed itself to carry out 100% of its procurement electronically (where legally permissible) and to ensure that at least 50% of public procurement above the EC threshold (€50K to €6 Million) is carried out electronically by 2010. Towards this purpose, legislative amendments have been transposed under the Financial Administration and Audit Act (CAP. 174) of the Laws of Malta. These regulations came into force on the 3rd June 2005 bringing the regulatory framework governing public procurement in Malta in line with the relevant EU Directives and provide the Contracting Authorities with the possibility to use electronic auctions and dynamic purchasing systems. The Electronic Commerce Act of 2001 (as amended by Act III of 2001, Act XXVII of 2002, Act IV of 2004 and Act XIII of 2005) and Subsidiary Legislation 2006 provides the legal framework for the formation of electronic contracts.

24.2.2 Current Examples of E-Procurement Initiatives in Malta

In 2004, the former Central Information Management Unit (CIMU) within the Office of the Prime Minister invested its resources in the development of an e-procurement framework²⁸⁵ and a supporting e-Procurement software system. As from 1st October 2005, Malta Information Technology and Training Services Ltd. ([MITTS Ltd.](#)) assumed the responsibilities for Government ICT policies which were previously the responsibility of CIMU. As from 15th November 2005, new ICT policies will be approved through the Government's CIO Council's Policies and Standards Committee. MITTS Ltd. is

²⁸⁵ A copy of the Framework can be found in the e-Procurement system available on www.e-procurement.gov.mt

also the administrator of this website for the e-Procurement by Public Service entities of IT desktop equipment which costs less than Lm2,500.00 (€5,823.43). Requests for quotations exceeding this amount can be made as long as this is supported by prior authorisation from the Permanent Secretary. The e-Procurement system will be reviewed and enhanced to include other functionalities including a payment gateway in the near future.

The framework supports the decentralisation of the procurement of standard office automation hardware and software for the Public Service of the Government of Malta. This latest initiative is aimed at increasing transparency, achieving better value for money for Government on its procurement expenditure, reducing cost of doing business for both Government and local industry, reducing duplication of effort, bringing about more efficient purchasing and increasing the ability to capture strategic information on procurement, including purchasing patterns.

It is intended for use by Quality Mark Suppliers, and Purchasing Officers from Government Ministries, Departments and Public Sector entities connected to the MAGNET, who may request quotations for the required equipment. The suppliers may then submit their quotations. This transfers the responsibility of OA Hardware and Software procurement to the Public Service entities, making it more efficient. Interested parties may apply to become Authorised Suppliers. Applications are vetted by MITTS Ltd. and if approved, will receive a login and password which will enable access to the system. Following successful completion of a probation period, the entity concerned will be awarded a Quality Mark and thereafter become a Quality Mark Supplier.

In terms of security, this e-procurement is publicly available on the internet, incorporating access controls and restrictions. Non-public website areas are protected with a level of passwords, logins and usernames to be specifically assigned to the Information Management Officers, Purchasing Officers, Directors of Corporate Services (DCS) and Quality Mark Suppliers. Each of these users shall have all the access rights assigned to them enabling them to only access and make use of their portion of the e-Procurement System. An Authorised Supplier is a supplier who has signed the **Declaration of Conformance**, accepted the terms and conditions of the Framework, and has agreed to undertake a probation period of six (6) months in which MITTS Ltd. in its role as administrator of this system verifies whether the supplier has the quality requirements described in the Framework.

24.2.3 Functionality provided by ICT Procurement Applications

With the exception of Government's e-Procurement Framework on Standard Office Automation Hardware and Software, on a general level, the status for automating phases in Malta area as follows:

- Notification about tenders and publication of tenders have been automated to a large extent;
- Requests for clarifications and other questions can be filed to the Contracting Authorities via electronic means;
- The Management of receipt/submission of tenders and evaluation of tenders have not been automated to date;
- Ordering has been automated to some extent, but expected to be increased over the coming years, pending full implementation of e-Procurement;
- Dynamic purchasing systems and electronic auctions have not been utilized to date.

24.2.4 Addressing Current Functionality Limitations and opening e-Procurement to non-Nationals

Malta has mobilized an e-Procurement Implementation Task Force that is currently drafting a **Strategy for the Implementation of e-Procurement in the Public Sector**.²⁸⁶

24.2.5 Scope and Objectives of the e-Procurement Task Force

In May 2006 the Permanent Secretary, Ministry of Finance established an e-Procurement Task Force within the Ministry of Finance to define a strategy for the long-term implementation of the e-Procurement initiatives being promoted by the EU Commission. This document has the objective of providing the strategy for the long-term realisation of e-Procurement within the public sector that encompasses the required organisational framework, and operational and technological mechanisms for the resultant change management process. To gain the maximum benefits, e-Procurement is viewed as covering the full spectrum of the virtual procurement services, including: ePublication; eTendering; eAuctions; eCatalogues; eOrdering; eInvoicing; and ePayments. Furthermore, the public sector is seen as including: central Government authorities; contracting authorities; and contracting entities. Hence, the project domain is seen as covering the full spectrum of e-Procurement services to the wider meaning of the Public Sector.

The scope and objectives of Government's e-Procurement implementation strategy as part of the holistic eGovernment strategy include:

- (a) Promoting eCommerce and facilitating the participation of all current and potential suppliers (both local and foreign) interested in accessing procurement opportunities in the public sector;
- (b) Providing the opportunity for cooperation among central Government authorities, contracting authorities and contracting entities in the procurement process, thus creating synergies through economies of scale and greater efficiencies;
- (c) Lowering business sector transaction cost when dealing with Government procurement and ensuring that the solution adopted is compatible with corporate sector practices;
- (d) Utilising Government's ICT infrastructure by taking advantage of the benefits provided by the Web and other technologies;
- (e) Making use of the best international procurement practices and creating innovative procurement strategies;

²⁸⁶ The information given in this paper is based on interviews with civil servants working in the Ministry of Finance under whose remit lies the Department of Contracts. The Strategy has not yet been made public. It should be published by the 3rd Quarter of 2007.

- (f) Improving knowledge management and fostering transparency;
- (g) Creating a secure and private environment in which to conduct business both on a national and international level.

Therefore, the e-Procurement implementation strategy will act as a road map for the acquisition and implementation of the e-Procurement solution to ensure the attainment of these objectives; support a strategic approach to public procurement; and facilitate the management of change associated with any proposed e-Procurement process. E-Procurement advantages are not limited to just saving money but also to the simplification of the whole procurement process. The optimised plans can be communicated quickly to suppliers thereby reducing cost and wastages usually involved in the supply chain. This e-Procurement strategy document examines whether it is economically feasible to implement the full or partial spectrum of the e-Procurement services.

A significant concern is the level of security required. The requirements for Digital Signatures and the security issues they incorporate are still a grey area which needs additional clarification. The use of eSignatures is central to establishing operational e-Procurement systems across the EU. E-Procurement is expected to constitute one of the major fields of eSignature application, especially the more advanced ones. The challenge lies in implementing eSignatures across Europe for e-Procurement without creating barriers to cross-border trade.

Towards this purpose, there is a need to review the digital signature acquirement procedures with the objective of simplifying them. The current procedure to obtain a digital signature is too cumbersome and requires a thorough review. One should note that e-Procurement has the objective of opening the market. Hence, foreign suppliers, particularly those within EU member states will need to acquire a digital signature from the Maltese authorities. No decision has been taken as to the level of signature necessitated (simple, advanced, advanced using qualified certificate, qualified signature or any other type). Also, a decision still has to be made in relation to the recovery of administrative costs associated with the monitoring and attainment of digital signatures. With regard to verification and language issues of foreign documents, there are no formal rules for verifying the validity of an offer. Hence the contracting authority is relatively free to assess the validity and value of the provided evidence if they comply with the procurement documentation.

24.3 Certificates, declarations and attestations

With a view to determine the suitability of the tenderer, a tender document must contain a series of declarations/statements/certificates/attestations. The documentary templates are downloadable from the government's intra-governmental website (www.intra.gov.mt) by the tenderer, who can print these out and sign them on paper. There is currently no way of using them in electronic form yet, and they are not yet used in electronic procurements. The following requirements must be met in public procurements:

24.3.1 Personal situation as an economic operator

In submitting a tender, a tenderer must provide information relating to his *personal situation as an economic operator*, including requirements relating to enrolment on professional or trade registers:

- (1) All candidates will be required to produce a certificate or declaration demonstrating that they are not bankrupt or the subject of an administration order, are not being wound-up, have not granted a trust deed, are not the subject of a petition presented for sequestration of their estate, have not had a receiver, manager or administrator appointed and are not otherwise apparently insolvent.
- (2) All candidates will be required to produce a certificate or declaration demonstrating that the candidate, their directors, or any other person who has powers of representation, decision or control of the candidate has not been convicted of conspiracy, corruption, bribery, or money laundering. Failure to provide such a declaration will result in the candidate being declared ineligible and they will not be selected to participate in this procurement process.
- (3) All candidates will be required to produce a certificate or declaration demonstrating that they have not been convicted of a criminal offence relating to the conduct of their business or profession.
- (4) All candidates will be required to produce a certificate or declaration demonstrating that they have not committed an act of grave misconduct in the course of their business or profession.
- (5) All candidates must comply with the requirements of the State in which they are established, regarding registration on the professional or trade register.
- (6) Any candidate found to be guilty of serious misrepresentation in providing any information required, may be declared ineligible and not selected to continue with this procurement process.
- (7) All candidates will have to demonstrate that they are licensed, or a member of the relevant organisation, in the State where they are established, when the law of that State prohibits the provision of the services, described in this notice, by a person who is not so licensed or who is not a member of the relevant organisation.
- (8) All candidates will be required to produce a certificate or declaration demonstrating that they have fulfilled obligations relating to the payment of social security contributions under the law of Malta or of the relevant State in which the candidate is established.
- (9) All candidates will be required to produce a certificate or declaration demonstrating that they have fulfilled obligations relating to the payment of taxes under the law of Malta or of the relevant State in which the economic operator is established.

24.3.2 Economic and financial capacity:

- (1) All candidates will be required to provide a reference from their bank.
- (2) All candidates will be required to provide evidence of relevant professional risk indemnity insurance.
- (3) All candidates will be required to provide a statement, covering the 3 previous financial years including the overall turnover of the candidate and the turnover in respect of the activities which are of a similar type to the subject matter of this notice.
- (4) All candidates will be required to provide statements of accounts or extracts from those accounts relating to their business.

24.3.3 Technical capacity:

- (1) A statement of the candidate's average annual number of staff and managerial staff over the previous 3 years.
- (2) Details of the educational and professional qualifications of their managerial staff; and those of the person(s) who would be responsible for providing the services or carrying out the work or works under the contract;

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- (3) All candidates will be required to provide certification from an independent body attesting conformity to environmental management standards in accordance with the Community Eco-Management and Audit Scheme (EMAS); or the European standard BS EN ISO 14001.
- (4) All candidates will be required to provide certification drawn up by an independent body attesting the compliance of the economic operator with quality assurance standards based on the relevant European standards.
- (5) Samples, descriptions and/or photographs, the authenticity of which must be certified if the contracting authority so requests.
- (6) A statement of the principal goods sold or services provided by the supplier or the services provider in the past 3 years, detailing the dates on which the goods were sold or the services provided; the consideration received; the identity of the person to whom the goods were sold or the services were provided.
- (7) A check may be carried out by the contracting authority or by a competent official body of the State in which the candidate is established, to verify the technical capacity of the candidate; and if relevant, on the candidates study and research facilities and quality control measures.
- (8) A statement of the candidate's technical facilities; measures for ensuring quality; and their study and research facilities.
- (9) An indication of the proportion of the contract which the services provider intends possibly to subcontract.
- (10) A statement of the technicians or technical services available to the candidate to carry out the work under the contract; or be involved in the production of goods or the provision of services under the contract; particularly those responsible for quality control, whether or not they are independent of the candidate.
- (11) A statement of the tools, plant or technical equipment available to the service provider or contractor for carrying out the contract.
- (12) A list of works carried out over the past 5 years, detailing the value of the consideration received; when and where the work or works were carried out; and whether they were carried out according to the rules of the trade or profession and properly completed.

Moreover, in the case of service tenders, legal entities have to indicate the names and professional qualifications of the staff responsible for the execution of the service.

These conditions apply to Maltese entities and foreign ones, both natural and legal alike and the provision of such documents is mandatory, given that it is one of the conditions for passing the administrative compliance gateway assessment. Failure to produce such documentation may preclude the tender from being considered in the next step, which is that of evaluation.

To date this process has not been automated and hence, no electronic interactive version is as yet available. The document templates are however downloadable from the intergovernmental website by the tenderer, who can print them out and submit signed paper versions. These documents are presented together with the tendering documents and come at no cost. However, there is no way yet of using them. Moreover, the draft **Strategy for the Implementation of the e-Procurement in the Public Sector** does not, to date, give details as to how such documents will be developed into electronic documents when e-Procurement is fully implemented.

24.4 Interoperability

Even though technical details relating to the management of e-Procurement security is still not forthcoming, if the current system is anything to go by, it is highly likely that the Maltese Government will do anything in its potential to ensure that the full-fledged e-Procurement system will be accessible to non-nationals. However, the implementation details will eventually determine the extent to which foreigners will be able to benefit from this system. Currently, various signature solutions are still being explored.

24.5 Future Trends/Expectations

Currently the Contracts Department is not organisationally oriented towards e-Procurement. Hence, to successfully implement an e-Procurement solution the Contracts Departments needs to be structured to embrace and reflect the e-Procurement concept. Furthermore, the employees within the new structure will need to have an aptitude for the proposed e-Procurement function and receive adequate training to build the appropriate level of e-Procurement skills.

As stated previously e-Procurement consists of a number of functionalities, such as, eCatalogues, eAuctions, eOrdering, eInvoicing, ePayments and others. It is also noted that these e-Procurement functions will likely to be implemented in a phased mode, with the speed of implementation being dependent on the knowledge and skill absorption rate of the stakeholders utilising the e-Procurement system. Hence, the organisation structure to cater for these services will need to be regularly reviewed and expanded as functionalities and volume of clients (buyers and suppliers) using the system grows and intensifies.

Therefore, the proposed organisation structure should be viewed as meeting the initial set-up mode for e-Procurement. Furthermore, as the e-Procurement uptake increases there may be a need to review the full Contracts Department's organisation structure with the objective of downsizing and eliminating certain sections and strengthening others. This approach would ensure that the overall organisation structure evolves over time and is supported with the appropriate processes, without the trauma that such changes bring to an organisation.

Moreover, the organisation structure will also depend on the e-Procurement solution being adopted. For instance, if a service provider or PPP solution is selected then ICT application systems support would be outsourced and the Contracts Department would not need to have its own ICT supporting function. From a practical view point the organisation structure being proposed is assuming the outsourcing of the e-Procurement ICT application support function.

The proposed e-Procurement Section would be responsible to the Operations Directorate and headed by an Assistant Director. The proposed e-Procurement function would consist of two Units, namely the Central e-Procurement and e-Procurement Support Units. The Central Procurement Unit would have the responsibilities of formulating framework agreements; maintaining eCatalogues and executing eAuctions. Furthermore the Unit would also conduct and monitor the following functionalities, eOrdering; eInvoicing; and ePayments. Hence, the Unit's major responsibilities are mainly operational. The major responsibility of the e-Procurement Support Unit would be related to the introduction and implementation of e-Procurement across the Government. It would take on a consulting role, with actual procurement being centrally carried out by the Central Procurement Unit. Other responsibilities of this unit would consist of:

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- Promoting e-Procurement with Central Government Authorities, contracting Authorities and Contracting Entities;
- Assisting Central Government Authorities, Contracting Authorities and Contracting Entities in setting up their e-Procurement capability and acquiring the necessary training, knowledge and skills;
- Assisting Central Government Authorities, Contracting Authorities and Contracting Entities during implementation of e-Procurement and providing ongoing support with respect to the e-Procurement solution.

The restructuring exercise is to take a holistic approach and consider the following:

- (a) Human Resources: Additional resources are likely to be required to cater for the increase in the number of EU funded projects; and the formal adoption of Resource Planning through possibly a Materials Requirements Planning System (MRPS).
- (b) Training Requirements: Specialised training should be undertaken by the Department of Contracts to develop Procurement Professionals. This may be achieved possibly through diploma or degree level academic training for Procurement Professionals with the Institute of Public Administration, University of Malta or through the MFIN training initiative to be launched shortly.
- (c) Logistics: The Department of Contracts will require additional office space for the anticipated increase in workload. There is a need to examine the physical structure of the current premises with the aim for better utilisation or possible replacement.
- (d) Financial: Funds would need to be made available for the specialised training; modification of the Department of Contracts premises; and recruitment of the necessary human resources.

Consideration of the above would reduce project risk and increase the probability of success in the implementation of e-Procurement.

In implementing e-Procurement in Government there is a need to enact policy and organisational changes to drive the acceptance and implementation of e-Procurement. The benefits from the implementation of e-Procurement include:

- Cost reduction through its impact on process efficiency and the direct decrease in administrative costs particularly the cost to conduct transactions;
- Higher productivity through the improvement of procurement, accounting, and other corporate functions over the traditional buying methods;
- Increased spend-under-management helps to ensure that the organisation achieves maximum spending leverage in supply negotiations;
- Facilitates governance through better transparency, accountability, integrity and public confidence;

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- Increased effectiveness in terms of efficiency, informed management, quality and value-for-money outcomes. Procurement aggregation enabled organisations to obtain higher value contracts at much better prices;
- Growth in economic development in terms of business development, competitiveness, technological enablement, market access, the strengthening of fraud control and decrease in corruption.

To facilitate the implementation of e-Procurement in public authorities there is a need for strong political intent and the commitment of resources; particularly if a Government wide procurement aggregation policy is to be adopted. Since the necessary ICT investment is in place, ICT improvements should be geared at supporting new or redesigned business processes. Furthermore, understanding the needs of the client (the buyer and supplier of goods and services) is essential and is achieved by assessing the demand for the services to be provided and delivering them. Moreover, having a user friendly system will ensure a high penetration rate.

To successfully implement an e-Procurement solution the Contracts Departments needs to be structured to embrace and reflect the e-Procurement concept with employees having the appropriate aptitude and adequate training for the proposed e-Procurement environment. E-Procurement functions are likely to be phased with the speed of implementation being dependent on the knowledge and skill absorption rate of the stakeholders utilising the e-Procurement system. Hence, the organisation structure to cater for these services will need to be regularly reviewed and expanded as functionalities and volume of clients (buyers and suppliers) using the system grows and intensifies. As the e-Procurement uptake increases there may be a need to review the full Contracts Department's organisation structure with the objective of downsizing and eliminating certain sections and strengthening others. This approach would ensure that the overall organisation structure evolves over time and is supported with the appropriate processes, without the trauma that such changes bring to an organisation.

The Central Procurement Unit would have operational responsibilities whereas the e-Procurement Support Unit would provide support in the implementation of e-Procurement across the Government. e-Procurement will have a significant impact on purchasing expenditure. It is estimated that the accumulated gross savings for Government Departments may range from Lm1.33 million to Lm2.61 million per annum. These savings do not include other cost reductions in administration, transactional and other associated costs.

Furthermore, the choice of e-Procurement system to be selected must adhere five key principles: the system should be externally and not internally focused; emphasis should be to add value to the services being provided and not cost reduction; understanding and meeting the clients' needs; system must be business driven; and utilising information gained from the system for decision making purposes to minimise risk, add value, create new reality and achieve lower costs as a by-product of the e-Procurement method. Moreover, the analysis of systems development options suggests that the best overall option is to procuring an already developed system from a software supplier vendor and having the system amended and enhanced to meet as much as possible the specific needs of the clients. In relation to the best mode of system operation and support, the analysis indicates that having an e-Procurement service provider or a Private Public Partnership (PPP) Service Provider would provide a better financial solution in terms of initial capital investment and subsequent recurrent expenditure. Furthermore, a PPP is likely to provide the lowest cost solution provided that the partner selected has the prerequisite experience in e-Procurement service provision and has a well established e-Procurement user base. Finally, the e-Procurement application must meet the key

criteria of: functionality; ease of use; performance in terms of response time; compatibility with the existing systems; security; reliability; long-term support; and extensibility in terms of future enhances in line with global procurement trends.

24.6 Assessment

The experience of various countries indicated that e-Procurement will have a tremendous impact on the way the Public and Private Sector will conduct business. The outcome of this impact as suggested by the research is an increase in operational effectiveness, lowering prices, increase in the competitive position of suppliers, and an expansion in economic development. However, change is neither simple nor painless. New methods will need to be introduced which will alter the way people work. SMEs are vulnerable to these new methods, particularly in relation to the aggregation of procurement. However, given the right investment (which is not large for individual SMEs) and training they have a tremendous opportunity to participate in Government procurement, particularly if they join forces and apply the "consortium" approach of bidding. Therefore, e-Procurement should be viewed as an opportunity not as a threat for this business sector.

Furthermore, unless the User Departments (and Suppliers alike) do not conduct a business process reengineering exercise the identified benefits will not materialise. Placing new ICT e-Procurement systems on top of outdated and inefficient procedures will not yield the benefits but will only sustain the costs. Care must be taken in selecting the e-Procurement solution option and operational mode. The analysis suggests that the best overall option is to procuring an already developed system from a software supplier vendor and having the system amended and enhanced to meet as much as possible the specific needs of the clients. Moreover, in terms of the operational mode two alternatives are indicated, either having an e-Procurement service provider or a Private Public Partnership (PPP) venture. Both may provide better value for money, particularly PPP.

There is no doubt that the e-Procurement solution cannot be sustained and supported unless the Department of Contracts is organised to cater for the e-Procurement services and functionalities. The e-Procurement investment would be money down the drain if this does not happen. Furthermore, the risk analysis suggests that the success of implementing the e-Procurement solution depends upon the following general success factors:

- Proper e-Procurement solution;
- Best practice project management methodology;
- High internal project commitment and ownership;
- High operational commitment;
- Effective communication strategy;
- High stakeholder involvement and participation.

To ensure that the e-Procurement is a success there is a need to address five issues: (a) there is a need to implement a proper and professional project management structure for the duration of the project implementation process; (b) unless the Ministry of Finance makes a strong commitment to allocate the necessary funds then the project should not be undertaken. Trickling of funds is not a solution; it is either full funding or no project; (c) there is a need to manage false expectations. ICT will help resolve the procurement concerns but e-Procurement applications require trained individuals for

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the efficient application and effective utilisation; (d) public and private sector organisations must find ways of optimising the use of technology, thus leveraging their ICT investment; and (e) the e-Procurement systems to be implemented must be designed to operate independent of the way the various enterprises are organised. There is a need to breakdown organisational boundaries by fostering closer inter and intra departmental collaboration within and between Ministries and other relevant organisations.

Finally, a few words about the way forward. The current e-Procurement Task Force has completed its undertaking to produce a strategy for the implementation of e-Procurement in the Public Sector. Once the strategy is approved an e-Procurement Project Organisation should be established. This Task Force should be chaired by the Director General, Department of Contracts (or the Director Operations within this Department) as the owner of the project. This Task Force would need to be formally given the authority and have the mandate to implement the e-Procurement project, in other words the approved strategy referred to above.

25 The Netherlands

25.1 Public procurement framework

25.1.1 General framework

The Netherlands does not have a special Public Procurement authority, although during the summer of 2007 again²⁸⁷ it has been argued by some this would be a good idea. Up until now there is actually no Dutch entity that verifies compliance with the Public Procurement regulations.

The basic applicable law is the General Framework Act on European Economic Community regulations of 31 March 1993²⁸⁸. The law of 31 March 1993 contained only 6 Articles and basically created a basis for the execution of Royal Decrees, including in particular:

- the Royal Decree of 6 April 1993 abbreviated as BAN²⁸⁹ regarding public procurement of works, supplies and services in the water, energy, transport and communications sectors; this contains specific procedures and regulations for the granting of procurements in the utilities sectors;
- the Royal Decree of 4 June 1993 abbreviated as BOA²⁹⁰ regarding public procurement of works, supplies and services and concessions for public works; this contains specific procedures and regulations for the granting of procurements in the traditional sectors.

This legal framework is in principle applicable to all public procurements, including the federal government, communities, regions, provinces, communes, and any associations established by these. Local administrations thus have no regulatory autonomy; any contracting authority wishing to organise a public procurement must adhere to the national framework.

The Act of 1993 is currently being replaced by a new Act simply called the Procurement Act.²⁹¹ The Procurement Act implements the e-Procurement Directives and has already passed the Parliament, and is under review of the Senate.²⁹²

²⁸⁷ Previously for example by the Dutch Small and Medium enterprises in November 2004 (see e.g., <http://www.accountingweb.nl>). This summer due to some recent scandals by amongst others John van Pelt (<http://www.wereldomroep.nl>).

²⁸⁸ Wet tot uitvoering van EEG-maatregelen inzake het plaatsen van opdrachten voor de levering van producten, de uitvoering van werken en de verrichting van diensten, *Stb.* 1993, 212.

²⁸⁹ Besluit Aanbestedingen Nutssector, *Stb.* 1993, 214.

²⁹⁰ Besluit Overheidsaanbestedingen, *Stb.* 1993, 305.

The new Act allows for additional or clarifying rules at the national level. The draft foresees in an obligatory integrity check of tenderers in the light of earlier criminal convictions for infringement of competition law. The check is carried out by a central organ of the Ministry of Justice²⁹³. It also aims at preventing unreasonable tender specifications and lowering administrative burdens. Herewith, the Dutch legislator opted for a legal framework at the level of the tendering administration and not at the national level. Dutch lawyers already criticised the implementation text for incompleteness and for actually taking away the incentive for e-procurement.

The new Act is set up as a legal framework. Executive measures are currently laid down in two decisions of 2005, referred to as BAO and BASS.²⁹⁴ These decisions entered into force on 1 December 2005. As soon as the new Act is adopted, the BAO and BASS decisions will be subordinated to this Act and BAO and BASS will reflect the principles of the new Act, such as integrity requirements for the tenderer. BAO and BASS replace the previous BAN and BOA.²⁹⁵

According to Articles 42, 8 BAO and 49, 8 BASS, the contracting authority may make the use of an advanced electronic signature mandatory as laid down in the Dutch Civil Code.²⁹⁶ Also, on the basis of Articles 42, 11 BAO and 49, 11 BASS, the contracting authority may introduce or keep voluntary accreditation arrangements in the framework of the advanced electronic signature. It would have been in the interest of e-Procurement if the advanced electronic signature had been made obligatory for all contracting authorities. Unfortunately this opportunity has not been taken. Because of the wording of the said articles in BAO and BASS, one can question whether the implementation was correct because the articles of the Directives are aimed at Member States and not the tendering administrations themselves. This will also lead to the development of several kinds of advanced electronic signatures.

25.1.2 Certificates and statements

The administrative requirements to be met are defined in BAO and BASS. While these vary depending on the type of procurement (works, supplies or services), the tenderer is commonly required to provide the following documents with regard to the exclusion criteria (which establish a tenderer's eligibility to participate in a call):

²⁹¹ Regels voor het gunnen van overheidsopdrachten door aanbestedende diensten en opdrachten door speciale-sectorbedrijven (Aanbestedingswet), *Kamerstukken* 30.501.

²⁹² Passed the Parliament on 20 September 2006. The Senate has received the answer by the Minister of Economic Affairs on 10 July 2007 and determines on 11 September 2007 how to proceed, probably setting a date for voting on this Act.

²⁹³ Centraal Orgaan Verklaringen omtrent het Gedrag (COVOG)

²⁹⁴ Besluit van 16 juli 2005, houdende regels betreffende de procedures voor het gunnen van overheidsopdrachten voor werken, leveringen en diensten (Besluit aanbestedingsregels voor overheidsopdrachten - BAO), *Stb.* 2005, 408. Besluit van 16 juli 2005, houdende regels betreffende de procedures voor het gunnen van opdrachten in de sectoren water- en energievoorziening, vervoer en postdiensten (Besluit aanbestedingen speciale sectoren - BASS) *Stb.* 2005, 409.

²⁹⁵ Note the difference, BAO and BOA.

²⁹⁶ Implementation of the EU Directive on Artikel 3:15a BW

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- A statement from the court competent in insolvency matters showing that the tenderer:
 - is not in a state of bankruptcy, being wound up or similar status;
 - has not filed for a state of bankruptcy, being wound up or similar status.
- A statement of behaviour issued by the Ministry of Justice showing that the tenderer
 - has not been convicted by a definitive ruling of a crime impairing his professional integrity
 - has not made serious errors in the performance of its professional obligations.
- Attestation of compliance with obligations under social law;
- Attestation of compliance with obligations under fiscal law;

For foreign tenderers, the applicable rules provide that in case no equivalent documents are delivered by the competent judiciary or governmental body from the country of origin, a declaration under oath or a solemn declaration before a judiciary or governmental body, a public notary or a competent professional organisation will also be deemed acceptable.

With regard to selection criteria (which establish the financial and technical suitability of the tenderer), a different set of supporting documents is typically required. These include most notably²⁹⁷:

- Bank statements, balance sheets and annual accounts of the tenderer, if the publication of balance sheets is mandatory in the tenderer's country of origin;
- Insurance policies;
- Global revenue over the last three accounting years;
- Professional and educational qualifications;
- Statements containing references to works/supplies/services provided in the most recent five years, as evidenced by attestations of acceptance;
- Statements detailing the working equipment to be used by the tenderer;
- Statements detailing the average staffing of the tenderer in the last three years;
- Statement detailing technicians or technical services at the tenderer's disposal.

When the tenderer cannot present the required documentation with regards to economical and financial suitability for valid reasons, this may be demonstrated through any other documents which the contracting authority deems suitable.

The legal rules do not explicitly provide for any of the documents, including the exclusion criteria documents (most notably the attestations from penal registers, social security and fiscal documents), that they must be originals, i.e. signed and/or stamped. Documents pertaining to selection criteria mentioned above are usually²⁹⁸ not originals in the sense that they carry no signature or seal demonstrating their authenticity.

²⁹⁷ The enumeration is legally binding only for procurements in traditional sectors, but not for procurements in the utilities sectors, where contracting authorities have more liberty to determine suitable evidentiary documents.

²⁹⁸ Notwithstanding the contracting authority's right to request original documents, e.g. balance sheets or revenue statements which have been certified by an independent auditor.

With regard to verification and language issues, there are no formal rules for verifying the validity of an offer. The contracting authority is thus relatively free to assess the validity and value of the provided evidence. In case of foreign offers or certificates, art. 47 BAO allows the contracting authority to demand to produce a copy of the tenderer's bylaws.

However, as for all decisions, the authority must respect the basic principles of good administrative governance. In practice, that means that any decision to reject certain evidentiary documents must be motivated and transparent. Additionally, the decision must be proportionate. When a contracting authority considers that the provided certificates are incomplete, ambiguous or unclear, it may request clarification from the tenderer rather than rejecting an offer outright. In this way, arbitrary decision making is avoided.

The Regulation for Works Procurement 2005²⁹⁹ (*Aanbestedingsreglement Werken 2005, ARW*) contains a significantly more flexible rule than the rules laid down in BAO and BASS, by allowing contracting authorities to require a so-called 'own declaration with a public procedure' (*eigenverklaring bij een openbare procedure*), a standardised document³⁰⁰ in which the tenderer formally declares to be in compliance with the requirements for which the BAO requires a certificate, and in which he agrees to provide the relevant certificate if the contracting authority asks for it (section 2.14 ARW). In this way, the cost and effort can be reduced significantly for tenderers, and the problem of converting these certificates to an electronic form can also be scaled down: certificates are (at least until after the awarding of the tender) replaced by a formal declaration.

For procurements in the construction, environment and IT sectors, the so-called BIBOB-law (Promotion of Integrity Assessments by Public Administrations, *Bureau Bevordering Integriteitsbeoordelingen door het Openbaar Bestuur*) is in effect in tenders with significant societal or economical value. This law permits government agencies to conduct autonomous inquiries into the reliability of their business partners, if there are reasons to doubt this. A BIBOB-advice can be requested from the BIBOB-agency (*Bureau BIBOB*; see <http://www.justitie.nl/bibob/>), which can be used as additional information to weigh the exclusion criteria. However, if this is to occur, the involvement of the BIBOB agency must be mentioned and described in the tender specifications. Thus, the BIBOB regulation is intended to work as a deterrent against criminal organisations³⁰¹.

25.2 E-Procurement initiatives and status

25.2.1 General e-Procurement framework and initiatives

²⁹⁹ See <http://www.aanbestedingskalender.nl/download.aspx?id=423&ext=pdf>

³⁰⁰ See <http://www.aanbestedingskalender.nl/download.aspx?id=462&ext=doc>

³⁰¹

See http://www.justitie.nl/images/Informatiememo%20aanbestedingen%20incl.%20beleidslijn_25%20juni%202003_tcm34-9243.pdf

Report on comparison and assessment of eID management solutions interoperability

In 2005 the Dutch Association for Employers (VNO/NCW) has issued a very critical report on procurement³⁰². Over 60 % of the companies considered the demands of government so out of line that they no longer considered the government as a serious client. This report did not focus, however, on e-procurement. Such a procedure is inherently more transparent and may take away existing concerns.

A special daily overview of tenders as well as assigned projects is offered via the website www.aanbestedingskalender.nl. This site also supports the sending of information directly to the European Union's Publication Office in Luxembourg, so that three working days later this is published on [TED](http://ted.publications.eu.int) (Tenders Electronic Daily). Municipalities, as well as regional and national government agencies can post their tenders as well as assigned projects on this site. There is no electronic signature used on this site for contracting purposes, the site has a pure informing nature.

In 2006 a new site was launched, www.tenderned.nl. This site co-ordinates electronic Public Procurement on a national level and is in particular interesting for the current study because electronic signatures are used. The site [Tenderned](http://www.tenderned.nl) is linked to the aforementioned www.aanbestedingskalender.nl. In the description below we will focus on the functionalities of [Tenderned.nl](http://www.tenderned.nl).

[Tenderned](http://www.tenderned.nl) is a spin-off of an application used for the Dutch Rail road infrastructure (ProRail), www.aanbesteden.prorail.nl. It is an initiative of amongst others The Ministry of Transport, Public Works and Water Management (<http://www.verkeerenwaterstaat.nl/english/>). In the summer of 2006 ProRail transferred its Public Procurement site to the Ministry of Economic Affairs (www.minez.nl). PIANOo (Dutch abbreviation for: Professioneel en Innovatief Aanbesteden, Netwerk voor Overheidsopdrachtgevers, see www.ovia.nl) is the organisation within the Ministry of Economic Affairs that manages the site [Tenderned](http://www.tenderned.nl) and aims to fully integrate [Tenderned](http://www.tenderned.nl) with www.aanbestedingskalender.nl.

[Tenderned](http://www.tenderned.nl) covers all aspects of Procurement. For instance, [Tenderned](http://www.tenderned.nl) can be used for goods, services and works, within all sectors, and for all phases of the tendering process.

In compliance with European obligations, procurements with a value exceeding certain thresholds are also published in the Official Journal of the European Communities (on-line version: see [Tenders Electronic Daily](http://ted.publications.eu.int), <http://ted.publications.eu.int>). Notwithstanding this obligation, contracting authorities are of course allowed to publish the procurement through other channels to increase response rates, including by directly contacting potential tenderers, although such announcements may not take place before the legally required publication or contain more/other information, to ensure fair competition.

In exceptional circumstances prior publication is not required, and the so called 'negotiation procedure without prior publication' can be followed. This can only be done in a limited number of situations indicated in article 31 BAO. In case of non public procedures, there must be at least 5 candidates. The contracting authority may set minimum requirements regarding financial strength and competences. Such specifications must be mentioned in the publication.

³⁰² *Overheidsopdrachten? Vergeet het maar!* Available via <http://www.vno-ncw.nl/>

The website requires one time registration. The website not only allows to upload tenders. It is also possible to ask questions via the web site, and subscribe to a tender. The system also allows "reverse auction".

The signatures should comply with the legal requirements for qualified signatures.

25.2.2 Electronic Public Procurement: TENDERED

25.2.2.1 Technical aspects

All parties using Tendered need to use an electronic signature with a smart card or USB token. The subscriptions are signed with a qualified electronic signature. Governmental organisations need to use PKIoverheid. The regulatory framework states that companies can use any qualified signature; but currently only certificates from accredited CSPs Diginotar and PinkRocade can be used³⁰³.

25.2.2.2 Organisational aspects

The site has a subscription procedure that is supported by Diginotar, one of the Dutch Qualified Certification Providers. Diginotar provides a secure website for TenderNed for the tendering process in which all acts by tenderers are safely stored, including time stamps.

25.2.2.3 Interoperability

From a regulatory perspective, any qualified signature issued by a CSP of an EU member state (or a similar level of security from providers outside the EU) suffices for using the services offered by TenderNet; but currently only certificates from accredited CSPs Diginotar and PinkRocade can be used³⁰⁴.

25.2.2.4 Miscellaneous

On October 31 2006 the first tender was published on TenderNed.

Application/Service Classification	
Application/Service Name	TenderNed
Application/Service Type	A2B

³⁰³ See <http://www.tendered.nl/boa.application/deelnametendered.m>

³⁰⁴ See <http://www.tendered.nl/boa.application/deelnametendered.m>

Concerned sector	All
Application/Service Cross-Border Type	All foreign tenderers can use the system but currently only certificates from accredited CSPs Diginotar and PinkRocade can be used ³⁰⁵ .
Level of Online Sophistication Type	Stage 3: Two-way Interaction: Processing of forms inclusive authentication
Intended "clients"	All contracting authorities (Directive 2004/18/EG), all 'special sectors' (Directive 2004/17/EG) and all tenderers.
Abstract Description	The system supports contracting authorities (and special sectors) and tenderers all phases of contracting from publication of notices till contracting.
Procedural Details	Filing tenders and subscribing to tenders
Current status	Pilot phase, it is operational for a dozen contracting entities.
Expected future developments	The system will be fully operational in 2008. One module of this system will become compulsory, namely the publication of notices.

Responsible Organisation	
Organisation Name	PIANOO, [Network for Contracting Authorities] part of Ministry of Economic Affairs
Organisation Type	National level
Contact information (name, position, phone, e-mail)	<p>Ir. H.L.J.M. Wijnen Professioneel en Innovatief Aanbesteden, Netwerk voor Overheidsopdrachtgevers</p> <p>-----</p> <p>Bezuidenhoutseweg 10-12 Postbus 20101, ALP K/040 2500 EC Den Haag 070 - 349 07 77 06 - 46 15 22 99 www.PIANOO.nl www.TenderNed.nl</p>

³⁰⁵ See <http://www.tenderned.nl/boa.application/deelnametenderned.m>

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Application/Service System Details	
Communications Information	Web based
External interface	Any web browser
Data structures processed by the application	All material that needs to be provided in case of tenders, including the signing of the contracts and a Virtual Company Document

25.2.2.5 eSignature details

Legal aspects	
Does the system rely on a simple / advanced / qualified / other signature?	Qualified
Is the signature required/recommended?	Required for contracting authorities and for tenderers.
Which strategies are planned for the future? Should different types of the electronic signature be supported, or are the strategies only related to the wide distribution/extension/circulation of the qualified electronic signature?	The nature of the information exchanged in Tender procedures is considered confidential, therefore secured websites and qualified signatures are used.
What is the legal basis (law, decree,...) for this application?	A forthcoming National Procurement Act
How is liability/responsibility regulated? Does the national legal framework regulate more than the minimum demand of the directive 1999/93 EC?	No

Technical aspects	
What are the parties involved in the signature process?	The Government that published the tender as well as interesting parties
What kind of token or credentials are used (smart cards, software)	Smart cards and USB tokens

certificates, paper tokens ...)?	
What are the hardware requirements on the client side (e.g. smartcard reader/USB tokens) for the use of eSignature?	A reader when smart cards are used
What are the software requirements on the client side (e.g. OS/specific driver/middleware) for the use of eSignature?	Just standard signature software: Software drive, SafeSign, Java VM
What information is signed by the user and what is the objective of the signature?	Several documents has to be signed: - Contracting authorities: Notices, 'Eigen verklaring' (Own Certificate), Contracts - Tenderers: tender Objective of the signature is a high degree of authenticity.
Is this an application with multiple signatures for the same data and, if yes, what is the relationship between the signatures?	No
What are the relevant policies (CPS, certificate policy, signature policy)?	Standard
What information is included in the certificate, and what is the role of this information in the functioning of the application?	Who is responsible for signing
Does the application rely on an existing generic eSignature framework (i.e. a set of commonly agreed standards)? If yes, describe the framework in the country general profile. If no, specify which standards have been implemented in the eSignatures application? Depending on the signature type, this may include standards regarding certificates, signature formats, signature algorithms, token formats, other information security standards, etc.	Yes

25.2.2.6 Interoperability

Interoperability aspects	
Is the system accessible to non-nationals, and if so, how? If not, can the system be upgraded for cross-border interaction?	Yes, if a foreign tenderer has a qualified electronic signature, the system will be made accessible for this tenderer.

25.2.2.7 Miscellaneous

Miscellaneous	
Are there any statistics on the actual use of electronic signatures for this application (if not: please provide an estimation)?	100-200
Are there any legal/technical/organisational difficulties regarding the way in which electronic signatures are used in this application;	Yes, installing software at the client pc limits a quick roll-out

25.3 Certificates, attestations and declarations

As noted above, the main provisions with regard to certificates, attestations and declarations can be found in the BAO³⁰⁶ and BASS³⁰⁷, which detail the certificates to be delivered.

However, the Regulation for Works Procurement 2005³⁰⁸ (*Aanbestedingsreglement Werken 2005, ARW*) contains a significantly more flexible rule, by allowing contracting authorities to require a so-called 'own declaration with a public procedure' (*'eigenverklaring bij een openbare procedure'*), a standardised document³⁰⁹ in which the tenderer formally declares to be in compliance with the requirements for which the BAO requires a certificate, and in which he agrees to provide the relevant certificate if the contracting authority asks for it (section 2.14 ARW). In this way, the cost and effort can

³⁰⁶

See <http://www.ovia.nl/dsc?c=getobject&s=obj&objectid=8626&!dsname=CADMZ&sitename=PIANOo&name=Besluit+Aanbestedingsregels+voor+Overheidsopdrachten+%28Bao%29.pdf>

³⁰⁷

See <http://www.ovia.nl/dsc?c=getobject&s=obj&objectid=8580&!dsname=CADMZ&sitename=PIANOo&name=Besluit+Aanbestedingsregels+Speciale+Sectoren+%28Bass%29.pdf>

³⁰⁸ See <http://www.aanbestedingskalender.nl/download.aspx?id=423&ext=pdf>

³⁰⁹ See <http://www.aanbestedingskalender.nl/download.aspx?id=462&ext=doc>

be reduced significantly for tenderers, and the problem of converting these certificates to an electronic form can also be scaled down: certificates are (at least until after the awarding of the tender) replaced by a formal declaration.

For procurements in the construction, environment and IT sectors, the so-called BIBOB-law (Promotion of Integrity Assessments by Public Administrations, *Bureau Bevordering Integriteitsbeoordelingen door het Openbaar Bestuur*) is in effect in tenders with significant societal or economical value. This law permits government agencies to conduct autonomous inquiries into the reliability of their business partners, if there are reasons to doubt this. A BIBOB-advice can be requested from the BIBOB-agency (*Bureau BIBOB*; see <http://www.justitie.nl/bibob/>), which can be used as additional information to weigh the exclusion criteria. However, if this is to occur, the involvement of the BIBOB agency must be mentioned and described in the tender specifications. Thus, the BIBOB regulation is intended to work as a deterrent against criminal organisations³¹⁰.

25.3.1 Requirements with regard to the personal situation of the candidate or tenderer – absence of conviction (art. 45 §1 and §2 (c-d) of Directive 2004/18/EC)

Prevalence/actual use in calls

This is a mandatory requirement in Dutch tenders, as article 45 of the BAO specifies a list of crimes of which the tenderer may not be convicted by final ruling, such as fraud, forgery and bribery of public officials. The contracting authority may decide to forfeit this requirement in the tender specifications for reasons of public interest.

What document (if any) is used?

In accordance with article 46 of the BAO, the Minister of Justice is competent to deliver the required declaration.

If the tenderer's country does not have an equivalent certificate, a declaration under oath or solemn declaration before a competent judicial or administrative body, notary public or competent professional organisation will also be accepted.

In practice, this document is often replaced by a signed 'own declaration', as described above.

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See http://www.justitie.nl/images/Informatiememo%20aanbestedingen%20incl.%20beleidslijn_25%20juni%202003_tcm34-9243.pdf

Electronic certificates

No equivalent electronic certificate exists. However, the use of 'own declarations' can mitigate this problem somewhat, since electronically signed own declarations would be possible.

25.3.2 Requirements with regard to the personal situation of the candidate or tenderer – non-bankruptcy and financial status (art. 45 §2 (a-b) of Directive 2004/18/EC)

Prevalence/actual use in calls

This is a mandatory requirement in Dutch tenders, as article 45.3 of the BAO requires that the tenderer may not be in a state of bankruptcy, winding up or similar status.

What document (if any) is used?

In accordance with article 46 of the BAO, the clerk of the court that is competent to make rulings on bankruptcy is also competent to deliver the required declaration.

If the tenderer's country does not have an equivalent certificate, a declaration under oath or solemn declaration before a competent judicial or administrative body, notary public or competent professional organisation will also be accepted.

In practice, this document is often replaced by a signed 'own declaration', as described above.

Electronic certificates

No equivalent electronic certificate exists. However, the use of 'own declarations' can mitigate this problem somewhat, since electronically signed own declarations would be possible.

25.3.3 Requirements with regard to the personal situation of the candidate or tenderer – compliance with fiscal and social obligations (art. 45 §2 (e-f) of Directive 2004/18/EC)

Prevalence/actual use in calls

This is a mandatory requirement in Dutch tenders, as article 45.3.e-f. of the BAO requires that the tenderer must be in full compliance with fiscal and social obligations in the Netherlands or in his place of establishment.

What document (if any) is used?

A single declaration of the receiving authority for taxes is used for this purpose.

If the tenderer's country does not have an equivalent certificate, a declaration under oath or solemn declaration before a competent judicial or administrative body, notary public or competent professional organisation will also be accepted.

In practice, this document is often replaced by a signed 'own declaration', as described above.

Electronic certificates

No equivalent electronic certificate exists. However, the use of 'own declarations' can mitigate this problem somewhat, since electronically signed own declarations would be possible.

25.3.4 Requirements with regard to the suitability to pursue the professional activity

Prevalence/actual use in calls

Generic suitability to pursue a professional activity as indicated through enrolment in a trade/professional register is not as often asked for in Dutch procurements as the previous requirements, except in case of specific assignments where membership of a specific professional organisations is required.

What document (if any) is used?

This is stipulated on a case by case basis, depending on the scope of the project. Typically a formal declaration is sufficient, although article 47 of the BAO also permits the contracting authority to request declarations under oath or attestations.

In practice, this document is often replaced by a signed 'own declaration', as described above.

Electronic certificates

No equivalent electronic certificate exists. However, the use of 'own declarations' can mitigate this problem somewhat, since electronically signed own declarations would be possible.

25.3.5 Requirements with regard to economic and financial standing

Prevalence/actual use in calls

Evidence with regard to economic or financial standing is commonly asked for but not mandatory, as detailed in article 48 BAO, in particular by requesting a summary of the turnover (possibly limited to relevant assignments only) or by requesting a copy of the balance sheets, both usually for a period of e.g. the most recent three years. Other possibilities such as bank statements or insurance extracts are also conceivable.

Typically, unsigned copies are provided, although it is possible to request audited or initialled documents.

What document (if any) is used?

The most commonly requested documents are balance sheets and annual accounts of the tenderer, and a statement of global or specific revenue over the last three accounting years. These are documents that the tenderer is typically required to keep at any rate, and are therefore easily available.

Other documents (bank statements, balance sheets) are also occasionally requested, and also tend to have the status of unauthenticated documentation.

In practice, this document is often replaced by a signed 'own declaration', as described above.

Contents

This depends on the document type. Typical information includes:

- Full name and legal form;
- Seat of establishment and date of establishment;
- Management details, including general managers and daily management, and period of appointment;
- Identification of any external auditor or accountant;

Report on comparison and assessment of eID management solutions interoperability

- Full balance sheets and financial/fiscal results, or account/insurance status.
- Date of approval of the annual account by the management and period covered by the account;

As stated above, stamps or signatures are typically absent from these documents.

Electronic certificates

No equivalent electronic certificate exists. However, the use of 'own declarations' can mitigate this problem somewhat, since electronically signed own declarations would be possible.

25.3.6 Requirements with regard to technical and/or professional ability

Prevalence/actual use in calls

The requirement to demonstrate technical and/or professional ability is a common (though not mandatory) requirement in Dutch procurements (see art.47.2 and 49 BAO). However, specific certificates are rarely required.

What document (if any) is used?

This is stipulated on a case by case basis, depending on the scope of the project. Typically a formal declaration is sufficient, although article 47 of the BAO also permits the contracting authority to request declarations under oath or attestations.

Tenderers are often required to demonstrate technical and/or professional ability by indicating the profiles of its personnel, their qualifications and past realisations (article 49 BAO). However, this information is usually integrated into the main body of the offer in the form of resumes and/or project references. Authentic documents (such as certified diplomas, certified descriptions of products/service or certified references, or memberships of professional organisations) are significantly less common. In such cases a paper copy is usually provided, and the contracting authority may require the tenderer to sign/initialise it to warrant its authenticity.

In practice, this document is often replaced by a signed 'own declaration', as described above.

Electronic certificates

No equivalent electronic certificate exists. However, the use of 'own declarations' can mitigate this problem somewhat, since electronically signed own declarations would be possible.

25.3.7 Requirements with regard to quality assurance standards

Prevalence/actual use in calls

The requirement to demonstrate compliance with quality assurance standards is an uncommon requirement in Dutch procurements, being mostly limited to procurement with a higher value and/or specific technical nature.

Article 50 of the BAO stipulates that, if the contracting authority requires the production of certificates from professional organisation attesting to the quality of a good or service, it must base itself on European quality assurance standards series. Furthermore, it must accept equivalent certificates from other Member States, or any similar documents produced by tenderers who do not have access to such certificates.

What document (if any) is used?

If included in the call, tenderers are usually required to provide a certificate from an independent accreditation authority. The most common requirement is that the tenderer demonstrates the compliance of his/her products or services with certain standards, as noted above.

Certificates are usually provided by independent accreditation authorities; typically in paper form.

Contents

Depends on the document requested.

Electronic certificates

The provided certificates are usually delivered in paper form, or in unsigned PDF-form.

In practice, copies of the certificate are typically deemed sufficient, so that the absence of a signature on the provided document need not be a barrier.

25.3.8 Requirements with regard to environmental management standards

Prevalence/actual use in calls

Contracting authorities may choose to demand compliance with environmental management standards under article 51 BAO.

The requirement to demonstrate compliance with environmental management standards is an uncommon requirement, being mostly limited to procurement with a higher value and/or specific technical nature.

What document (if any) is used?

Article 51 BAO states that contracting authorities must refer to European or international norms (an implicit reference to Regulation (EEC) No 761/2001 of the European Parliament and of the Council of 19 March 2001 allowing voluntary participation by organisations in a Community eco-management and audit scheme (EMAS)³¹¹). Any certification to this effect by certification bodies must be accepted, including from foreign bodies attesting to compliance with different but equivalent norms.

Contents

The resulting certificate is typically a paper document identifying the origin (the accreditation agency), the recipient, the nature of the certificate (including the assessed standard), date of testing and issuance, duration of the accreditation, and finally the a signature on behalf of the accreditation bureau.

Electronic certificates

The provided certificates are usually delivered in paper form, or in unsigned PDF-form. Whether electronic versions can be considered authentic is doubtful, since there is no way of verifying the origin. None the less, in practice copies of the certificate are typically deemed sufficient, so that the absence of a signature on the provided document need not be a barrier.

25.4 Interoperability

The Tendered application aims to accept any qualified signature issued in the EU as legally valid; thus, foreign tenderers will be free to use the system, after undergoing the registration procedure

³¹¹ See <http://europa.eu/scadplus/leg/en/lvb/l28022.htm>

described above. Provisionally however, only certificates from accredited CSPs Diginotar and PinkRoccade can be used³¹². Of course, like Dutch tenderers, foreign tenderers will also need to use a qualified certificate issued after face to face identification and stored on a smart card or USB stick allowing sole control.

With regard to electronic certificates being added to the tender, no specific provisions exist; thus, the same rule of informal verification applies in electronic procedures as in paper procedures.

25.5 Future trends/expectations

Future trends will likely focus on the further extension of the Tendered platform, to increase the uptake and functionality, and to extend the acceptability of other signatures. In February a pilots with a dozen public sector bodies (a.o. ProRail, Ministry of Transport, Public Works and Water Management, Ministry of Agriculture, Nature and Food Quality, Ministry of Economic Affairs, Municipalities of Rotterdam, Eindhoven, Amsterdam and Renkum, Provinces South-Holland and North-Brabant) started. The outcome of this pilot decides at what moment Tendered will become available nationwide for all procurements.

25.6 Assessment

The Tendered application is still under development but promises to become a vital part of Public procurement at all governmental levels (national, regional, local) as well as for all interesting parties both inside and outside Netherlands. The use of the so-called 'own declaration for public procurements' will serve to minimise problems with the use and verification of certificates, by replacing their use during the tendering process with a signed declaration. Thus, the problem of cross border use of electronic certificates is essentially reduced to the cross border use and validation of electronic signatures in general.

³¹² See <http://www.tendered.nl/boa.application/deelnametendered.m>

26 Norway

26.1 Public procurement framework

26.1.1 General framework

Like the European e-Procurement Directives, the Norwegian public procurement regulations entails two separate frameworks: one for utility services, and one for traditional sectors, with the former being somewhat more flexible.

The Norwegian rules on public procurement are based on the EC procurement directives³¹³ as one of Norway's obligations under the EEA Agreement.

The basic applicable law is the Public Procurement Act of 16 July 1999, which contains the general public procurement principles for both the utilities sector and the traditional sectors.

The Public Procurement Regulation of 7 April 2006 No 402 contains the more detailed provisions on public procurement on the traditional sectors.³¹⁴ This regulation is based on the EC directive on public procurement.³¹⁵

The Utilities Regulation of 7 April 2006 No 403³¹⁶ contains the more detailed provisions on public procurement within the utilities sectors. This regulation is based on the EC utilities directive.³¹⁷

This legal framework is in principle applicable to all public procurements, including the government, county municipalities, municipalities, and any associations established by these. Local administrations thus have no regulatory autonomy; any contracting authority wishing to organise a public procurement must adhere to the national framework.

One of the basic principles of the legal framework is the organisation of a competitive environment, including a prior publication of procurement opportunities. This typically means that an announcement

³¹³ Directive 2004/17/EC and Directive 2004/18/EC

³¹⁴ Forskrift av 7. april 2006 nr. 402 om offentlige anskaffelser, published at <http://www.lovdata.no/for/sf/fa/xa-20060407-0402.html>

³¹⁵ Directive 2004/18/EC

³¹⁶ Forskrift av 7. april 2006 nr. 403 om innkjøpsregler i forsyningssektorene (vann- og energiforsyning, transport og posttjenester), published at <http://www.lovdata.no/for/sf/fa/xa-20060407-0403.html>

³¹⁷ Directive 2004/17/EC

must be published in the Database of Public Procurements (DOFFIN – *Database for offentlige innkjøp*, www.doffin.no.) In compliance with European obligations, procurements with a value exceeding certain thresholds established by the abovementioned regulations are also published in the Official Journal of the European Communities (on-line version: see Tenders Electronic Daily, <http://ted.publications.eu.int>). This is done by Doffin when requested by the contracting authority. Notwithstanding this obligation, contracting authorities are of course allowed to publish the procurement through other channels to increase response rates, including by directly contacting potential tenderers, although such announcements may not take place before the legally required publication or contain more/other information, to ensure fair competition.

In exceptional circumstances prior publication is not required, and the so called 'negotiation procedure without prior publication' can be followed. This can only be done in a limited number of situations indicated in the law, including in procurements beneath a threshold value set by the regulations, currently NOK 500.000,- (VAT-exclusive) at the traditional sectors, urgent procurements which could not have been foreseen, or when only invalid offers have been presented in a prior procurement procedure.

In either case, the publication will indicate the administrative requirements to be met, including by naming certificates and statements to be provided by prospective tenderers, and by indicating the specific administration and/or contact person to whom the finalised offer should be provided.

26.1.2 Certificates and statements

The administrative requirements to be met are defined in the Procurement Regulation. The tenderer is commonly required to provide the following documents with regard to the exclusion criteria (which establish a tenderer's eligibility to participate in a call):

- Statement that the tenderer complies with HSE (Health, Security and Environment) requirements, see the Procurement Regulations section 8-7 and 17-14.
- Attestation of compliance with obligations to pay taxes and duties, see the Procurement Regulations section 8-8 and 17-15. Such attestation is issued by the tax collector's office.

It is worth noting that the contracting authority is obliged to require the abovementioned documents, and to exclude any providers who fail to submit them, see the Procurement Regulations section 11-10 and 20-12. However, the contracting authority may choose to extend the time-limit for submission of such documents, but only once, see the Procurement Regulations section 12-3 and 21-3.

For foreign tenderers, the Procurement Regulation section 11-10 (3) and section 20-12 (3), provides that equivalent documents delivered by the competent judiciary or governmental body from the country of origin will also be accepted if they adequately demonstrate that the goal of the Regulation was met. When the tenderer's country of origin does not deliver such documents, a declaration under oath or a solemn declaration before a judiciary or governmental body, a public notary or a competent professional authority will also be deemed acceptable.

With regard to selection criteria (which establish the financial and technical suitability of the tenderer), a different set of supporting documents is typically required. These include most notably:

- Bank statements, balance sheets and annual accounts of the tenderer;
- Credit reports (D&B or similar)
- Global revenue over the last three accounting years;
- Professional and educational qualifications;
- Statements containing references to works/supplies/services provided in the most recent three or five years;
- Statements detailing the average staffing of the tenderer in the last three years;

(see the Procurement Regulations sections 17-8 to 17-13).

When the tenderer cannot present the required documentation with regards to economical and financial suitability for valid reasons, this may be demonstrated through any other documents which the contracting authority deems suitable.

It is worth noting that the documents pertaining to selection criteria mentioned above are usually not originals in the sense that they carry no signature or seal demonstrating their authenticity. Copies of such documents (which carry no signature or seal themselves) are often submitted in procurement proceedings, and such copies are typically accepted by the contracting authority.

This situation is different from most of the exclusion criteria documents (most notably the fiscal documents and the HSE-statement), which are typically required to be originals, i.e. signed and/or stamped.

However, as for all decisions, the authority must respect the basic principles of good administrative governance. In practice, that means that any decision to reject certain evidentiary documents must be motivated and transparent. Additionally, the decision must be proportionate. When a contracting authority considers that the provided certificates are incomplete, ambiguous or unclear, it may request clarification from the tenderer rather than rejecting an offer outright; see also the Procurement Regulations sections 21-3 and 21-4. In this way, arbitrary decision making is avoided.

26.2 E-Procurement initiatives and status

26.2.1 General e-Procurement framework and initiatives

The Public Procurement Directives have been fully transposed through the Public Procurement Act and the Procurement Regulations.

All procurements shall be published electronically in the Database of Public Procurements (DOFFIN – *Database for offentlige innkjøp*, www.doffin.no) which is the official version of such announcements.

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Doffin is provided by the eProcurement Secretariat, a department of the Ministry of Government Administration and Reform.

Information in Doffin is freely available. Tenderers may register their contact details (name, address, phone, e-mail, etc.) and indicate specific fields of interest, including e.g. by category of procurement (works, supplies or services). Doffin can then automatically notify the tenderer when a new procurement of potential interest becomes available. This service is subject to a fee.

The eProcurement Secretariat also provides another platform, ehandel.no, with an e-business platform and tools for ordering and invoice handling that make it possible to implement efficient electronic routines. In addition the secretariat is about to establish services for passing on e-invoices. The Norwegian electronic public procurement portal ehandel.no was established in 2002 in order to attain a critical user mass of electronic public procurement. Participation in ehandel.no activities is open for central, regional and local authorities and their suppliers.

As from 1 December this year, public procurers will have access to framework agreements on eProcurement services for carrying out procurement processes. The Ministry of Government Administration and Reform and the Norwegian Association of Local and Regional Authorities (KS) have been conducting a tender process to this effect. The eProcurement Secretariat was administering the competition on behalf of the two institutions, and the aim was to achieve a set of agreements covering a wide range of needs for the "professional user" as well as the "not-so-professional user". This will equip most public procurers with a tool box of electronic means that will enable them to implement safer, better documented and more efficient procurement processes.

Framework agreements have been entered into with two suppliers. Current or prospective users of the Electronic Public Procurement Portal, Ehandel.no will then have the opportunity to choose amongst the relevant suppliers.

Fully electronic tendering is expected to be available on the new eProcurement platforms ultimo 2007. The new eProcurement platforms shall support the functionality necessary to comply with the requirements for electronic signature and digital certificates described below. The eProcurement platforms shall interoperate with a certificate validation service.

The Procurement Regulations defines the concepts 'written document' and 'electronic means'. A written document is defined as any expression consisting of words or numbers that can be read, reproduced and subsequently communicated. It may include electronic messages when the information in the message is accessible for subsequent reference. An electronic means is defined as a means using electronic equipment for data processing (including digital compression) and data storage, as well as distribution, transmission and receipt by cable, radio, optic or other electromagnetic means.

eProcurement, or more precisely, the use of electronic communication in public procurement, is subject to the requirements of section 7-3 of the Procurement Regulations. This section addresses the use of electronic signature and other security measures that should be implemented when electronic communication is being used.

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Pursuant to section 7-3 of the regulations, “security services and security products that shall be used when receiving offers or applications to participate in electronic form, shall as a minimum fulfil the following requirements”:

- a) The electronic signature shall fulfil the requirements in Regulations 21 November 2005 No 1296³¹⁸ on voluntary self declaration arrangements section 3, 4 or 5, and shall be published on a list pursuant to section 11;
- b) The precise time of receipt by the addressee can be accurately determined;
- c) It can be reasonably ensured that nobody can access any sent requests for participation or proposals before the chosen publication time; and that any violation of this access limitation can be reasonably detected;
- d) Only authorised persons can determine or change the exact moment of opening of the produced data (i.e. the offer);
- e) Access to the produced data at any stage of the procurement process is only possible if all authorised persons act jointly, and at the time that has been chosen;
- f) Information received and accessed pursuant to these requirements shall only be accessible to persons who are authorised to get knowledge of them.

Tenderers shall undertake to submit, before expiry of the time limit laid down for submission of tenders or requests to participate, the documents, certificates and declarations referred to in section 11-2 of the Procurement Regulations if they do not exist in electronic format [i.e. in writing].

As mentioned above, the electronic signature shall fulfil the requirements in Regulations No 1296 of 21 November 2005 on voluntary self declaration arrangements section 3, 4 or 5, and shall be published on a list pursuant to section 11.

The Regulations 21 November 2005 No 1296 on voluntary self declaration arrangements section 3, 4 or 5 are decided pursuant to the Act on Electronic Signature³¹⁹ section 16a.

The regulations refers to the so called “Requirements specification for PKI in the public sector”³²⁰ adopted and published by the Government in 2005. Electronic signatures pursuant to this specification are based on public key technology (digital signatures), i.e. advanced electronic signatures supported by digital certificates.

The self declarations arrangement addresses three “classes” of certificates:

³¹⁸ Forskrift 21. november 2005 nr. 1296 om frivillige selvdeklarasjonsordninger for sertifikatutstedere, published at <http://www.lovddata.no/for/sf/nh/th-20051121-1296-0.html>.

³¹⁹ Lov 15. juni 2001 nr. 81 om elektronisk signatur, published at <http://www.lovddata.no/all/hl-20010615-081.html>.

³²⁰ Kravspesifikasjon for PKI i offentlig sektor, published at <http://www.regjeringen.no/upload/kilde/mod/rap/2004/0002/ddd/pdfv/250615-kravspekk-engelsk-versjon.pdf>.

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1. Person high (section 3)
2. Person standard (section 4)
3. Enterprise (section 5)

The differences between the types of certificates are along the following lines:

- a) Application and release procedures etc.
- b) The content of the certificate (who can be the “subject” of the certificate).
- c) Requirements as to protection of the private key.

The requirements for each class of certificates are set out in the tables below.

“Person high” certificates are qualified certificates. There is a requirement for personal appearance to apply for or receive the certificate and corresponding keys. The certificate shall permit linkage to a national identity number and the registration of the person in a Norwegian population register shall be verified.

Certificate class	Registration and release procedure	Requirements as to name structure and content	Requirements as to protection of private keys
"Person-High"	The certificate must be a qualified certificate and the certificate issuer must fulfil the registration and release procedures that follow from this, including the requirement as to personal attendance.	The name structure and certificate content must follow the requirements in Section 4 of the Act on Electronic Signatures (e-signaturloven) with the clarifications that follow from "Recommended certificate profiles for person certificates and enterprise certificates" [SEID profile based on ETSI technical specifications].	<ul style="list-style-type: none"> • Access to private keys must as a minimum require two- factor authentication, where one of the factors is something in the physical possession of the user (i.e. cannot be copied electronically). • The user must approve each operation involving private keys by authenticating him/herself • Private keys must never appear in plain text in registers that might be compromised or in other ways provide a basis for unauthorised use.

“Person standard” are based on a Norwegian profile of the ETSI TS 102 042 Normalised Certificate Policy/Lightweight Certificate Policy. The certificates may be issued without personal attendance given that the identity of the person can be verified in a trustworthy manner. The certificate may be issued either by sending it by post to the registered address or electronically on the basis of an existing authentication mechanism that as a minimum provides the same level of certainty of correct receipt as does a postal dispatch to a registered address. The certificate shall permit linkage to a national identity

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number and the registration of the person in the DSP (Norwegian Central Register of Persons) shall be verified.

<p>"Person-Standard"</p>	<p>The certificate issuer must fulfil the requirements in Sections 10 to 16 of the Act on Electronic Signatures (e-signaturloven) and Section 3 of the Regulations on requirements applicable to issuers of qualified certificates etc. (Forskrift om krav til utsteder av kvaliserte sertifikater).</p> <p>Verification must take place upon registration that the person is found in a Norwegian population register and that the name of the person accords with his or her national identity number.</p> <p>A reasonable degree of certainty must exist that keys and/or associated access codes/passwords and certificates are released to the correct person.</p> <p>Release must either be by postal dispatch to the registered address or electronically based on existing authentication mechanisms providing the same degree of security of correct receipt as a postal dispatch to the registered address.</p>	<p>The certificate must fulfil the requirements applicable to qualified certificates in Section 4 second paragraph letters b to j of the Act on Electronic Signatures (e-signaturloven).</p> <p>In other respects the name structure and certificate content must follow "Recommend certificate profiles for person certificates and enterprise certificates" [SEID profile based on ETSI technical specifications].</p>	<ul style="list-style-type: none"> • Access to private keys must require authentication • The user must have scope for choosing/deciding him/herself whether the individual operation involving private keys is to be approved. • Private keys must as a minimum be stored in encrypted form. • The solution should ensure that the certificate-holder is able to move the certificate and keys between various systems/work stations in a flexible, straightforward and secure way.
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“Enterprise” certificates are issued to legal persons like private corporations and Government entities. Enterprise certificates are subject to requirements that corresponds to the qualified certificates, added some requirements with regard to which persons that can apply for or receive a certificate on behalf of the legal person. The certificate shall identify the legal person by name and organisation number, and the keys may be stored in hardware.

Issuance is based on personal attendance by a person holding an authorisation. The certificate shall contain the organisation number of the enterprise.

<p>”Enterprise”</p>	<p>The certificate issuer must fulfil the requirements in Sections 3 and 7 of the Act on Electronic Signatures (e-signaturloven) and Section 3 of the Regulations on requirements applicable to issuers of qualified certificates etc. (Forskrift om krav til utsteder av kvaliserte sertifikater).</p> <p>It must be possible to identify the enterprise uniquely by equipping the certificate with the organisation number of the enterprise from the Central Coordinating Register for Legal Entities in accordance with the SEID certificate profile.</p> <p>Safeguard must be in place to ensure that keys with associated access codes/ passwords and certificates are released to a person with the right to receive them on behalf of the enterprise. (Authorisation from an authorised signatory of the company.) Documentation of the relationship to be possible.</p>	<p>The certificate must fulfil the requirements as to qualified certificates in Section 4 second paragraph letters b to j of the Act on Electronic Signatures (e-signaturloven).</p> <p>The name structure and certificate content must follow "Recommended certificate profiles for person certificates and enterprise certificates" [SEID profile based on ETSI technical specifications].</p> <p>The certificate must contain the organisation number of the enterprise.</p>	<ul style="list-style-type: none"> • Access control to private keys must be realisable. • The enterprise must have scope for choosing/deciding him/herself whether each operation involving private keys is to be approved. • Private keys must as a minimum be stored in encrypted form.
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In all three cases, the certification service provider will have to comply with the Requirements for PKI in the public sector and the SEID certificate profile (which in turn is based on ETSI TS 101456, ETSI TS 102 042, ETSI TS 101 862 and ETSI TS 102 280 with further references).

Certification service providers which comply with the Requirement specification for PKI in the Public Sector and that submits a self declaration shall be added to a list of providers pursuant to the regulations section 11.

The Norwegian Post and Telecommunication Authority supervise both the self declaration arrangement and the registration of certification service providers that issue qualified certificates.

As of 26 June 2007, the following certification service providers have submitted their self declarations:

1. Person High: Buypass AS, Commfides Norge AS and Zebsign AS
2. Person Standard: Commfides Norge AS and Zebsign AS
3. Enterprise: Buypass AS, Commfides Norge AS and Zebsign AS

The cost of the certificates differs between the providers and between sales channels. The Buypass Person High (Qualified) smartcard stored certificate can be bought from Norsk Tipping (the National Lottery) for NOK 60,- (approx € 7,5) including a USB card reader. If ordered directly from Buypass the certificate, stored on smartcard, costs NOK 249 (approx € 31). the certificates and smartcards (called "player card"), can be ordered on the internet. Personal attendance and identification is required to collect the smartcard at the post office.

Zebsign certificates are sold by Zebsign's partners (e.g. Siemens, Ergo Group and Telenor) as part of the partners' own solutions.

For Commfides certificates prices are available on request only.

26.3 Certificates, attestations and declarations

26.3.1 Requirements with regard to the personal situation of the candidate or tenderer – absence of conviction (art. 45 §1 and §2 (c-d) of Directive 2004/18/EC)

Attestation of absence of conviction is not required pursuant to the Procurement Regulations, neither commonly required by contracting authorities.

However, if it is known to the contracting authority that the tenderer has been sentenced to punishment for certain severe criminal activities, like corruption or money laundering, the tender shall be rejected. To the extent that the purchaser does require evidence that the tenderer is not subject to such crimes, an attestation (extract) from the penal register could theoretically suffice. However, according to Norwegian law, there are strict regulations with regard to the purposes for which persons are able to obtain this attestation. There is no legal provision that allows tenderers to obtain this attestation. Thus, the attestation is not suitable for procurements.

26.3.2 Requirements with regard to the personal situation of the candidate or tenderer – non-bankruptcy and financial status (art. 45 §2 (a-b) of Directive 2004/18/EC)

Attestation of non-bankruptcy is not required pursuant to the Procurement Regulations, neither commonly required by contracting authorities. However, a credit report may be required, or collected by the contracting authority itself.

26.3.3 Requirements with regard to the personal situation of the candidate or tenderer – compliance with fiscal and social obligations (art. 45 §2 (e-f) of Directive 2004/18/EC)

Attestation of compliance with obligations to pay taxes and duties is required, see the Procurement Regulations section 8-8 and 17-15.

Such attestation is issued by the tax collector's office. The attestation is in the form of a paper document.

26.3.4 Requirements with regard to the suitability to pursue the professional activity

Attestation of generic suitability to pursue a professional activity is not required. However, such attestation may be provided by the tenderers and shall then be considered by the contracting authority to be rebuttable evidence.

All Norwegian enterprises are registered in the Central Coordinating Register for Legal Entities. Key information such as organization number, legal form, business address and other contact information, name of the general manager, business codes (area of business) and whether the enterprise is registered in other public registers (such as VAT and employer registers) are available for free from the register.

26.3.5 Requirements with regard to economic and financial standing

Evidence with regard to economic or financial standing is commonly asked for. This include most notably:

- Bank statements, balance sheets and annual accounts of the tenderer;
- Credit reports (D&B or similar)
- Global revenue over the last three accounting years;

Typically, unsigned copies are provided.

The most commonly requested documents are balance sheets and annual accounts of the tenderer, and a statement of global or specific revenue over the last three accounting years.

When the tenderer cannot present the required documentation with regards to economical and financial suitability for valid reasons, this may be demonstrated through any other documents which the contracting authority deems suitable.

26.3.6 Requirements with regard to technical and/or professional ability

Evidence with regard to technical and/or professional ability is commonly asked for. This include most notably:

- Professional and educational qualifications;
- Statements containing references to works/supplies/services provided in the most recent three or five years;
- Statements detailing the average staffing of the tenderer in the last three years;

When the tenderer cannot present the required documentation with regards to economical and financial suitability for valid reasons, this may be demonstrated through any other documents which the contracting authority deems suitable. This information is usually incorporated into the main text of the offer. Specific certificates are rarely required.

26.3.7 Requirements with regard to quality assurance standards

The contracting authority may require the tenderer to demonstrate compliance with quality assurance standards.

If included in the call, tenderers are usually required to provide a certificate from an independent accreditation authority. The requirement shall refer to European standards. Attestations from other EEA-countries shall be accepted.

26.3.8 Requirements with regard to environmental management standards

The contracting party may require that the tenderer demonstrate compliance with environmental management standards, giving reference to the community arrangement (EMAS). If included in the call, tenderers are usually required to provide a certificate from an independent accreditation authority.

26.4 Interoperability

The Database of Public Procurements (DOFFIN) is fully accessible to all tenderers.

The eProcurement platforms contracted by the *eHandelssekretariatet* shall in principle also be accessible to all tenderers. However, due to the current requirement that the electronic signature shall comply with the Requirement specification for PKI in the Public Sector, practical difficulties may occur for foreign tenderers. However, it is expected that qualified certificates issued by foreign certification service providers will also be accepted.

The new eProcurement platforms shall interoperate with a validating service that shall be able to handle qualified certificates from certification service providers established in other EEA-countries.

26.5 Future trends/expectations

See E above.

27 Poland

27.1 Public procurement framework

27.1.1 General framework

Public procurement in Poland is governed by the Act of 29 January 2004 - the Public Procurement Law³²¹ (hereinafter: PPL).

In general, the Act applies to any public contract. Yet, it envisages a number of exceptions, either complete – art. 4 PPL (e.g. contracts and contests of value not exceeding the equivalent in PLN of 14.000 €) or partial – art. 5 PPL (e.g. contracts for social or legal services).

Awarding entities are obliged to prepare and conduct contract awarding procedures in a manner ensuring fair competition and equal treatment of economic operators (art. 7(1) PPL). One of the most prominent means of attaining this goal is the requirement to conduct the procedure transparently (art. 8(1) PPL).

In line with this obligation, awarding authorities are required to indicate a list of certificates or statements expected from tenderers in contract notices, specifications of the essential terms of contract (*specyfikacje istotnych warunków zamówienia*) or in invitations to tender (art. 25(1) PPL).

Contract notices are published in the Public Procurement Bulletin (*Biuletyn Zamówień Publicznych*), maintained in an electronic form and available at the website of the Public Procurement Office (*Urząd Zamówień Publicznych*) - <http://www.uzp.gov.pl/>, with a searching tool also available at the Internet Portal of the Public Procurement Office (www.portal.uzp.gov.pl). Pursuant to the European law obligations, procurements exceeding certain thresholds established by the relevant Ordinance of the Prime Minister³²² are additionally published in the Official Journal of the European Communities (Tenders Electronic Daily, <http://ted.publications.eu.int>). Since 11 June 2007, when the last amendment to PPL entered into force, awarding authorities, instead of the Public Procurement Office, have become responsible for publishing contract notices in the Public Procurement Bulletin (art. 12.1 PPL). Publication is undertaken electronically and publication forms are available at the Internet Portal of the Office (*Id.*). Notwithstanding this obligation, main procurement procedures (open tendering, restricted tendering, negotiated procedure with publication, competitive dialog, electronic bidding,

³²¹ *Prawo zamówień publicznych, Dz. U. 2004, Nr 19, Poz. 177, ze zm.*

³²² Ordinance of the President of the Council of Ministers of 19 May 2006 on the threshold values of contracts and contests upon which the obligation to transfer announcements to the Office for Official Publications of the European Communities is dependent (*Rozporządzenie Prezesa Rady Ministrów z dnia 19 maja 2006 r. w sprawie kwot wartości zamówień oraz konkursów, od których jest uzależniony obowiązek przekazywania ogłoszeń Urzędowi Oficjalnych Publikacji Wspólnot Europejskich, Dz. U. 2006, Nr 87, Poz. 604*).

design contests) commence by placing contract notices in a place accessible to the public in the seat of the awarding authority and on its website.³²³

In some awarding procedures contract notices must, according to the PPL, mandatorily contain a list of requested documents³²⁴, while in other procedures awarding authorities may choose to do so³²⁵. In practice, however, Section No. III of the contract notice form of the Public Procurement Bulletin, called "Information of legal, economic, financial and technical nature (*Informacje o Charakterze Prawnym, Ekonomicznym, Finansowym i Technicznym*)" comprises a section on requested documents.

Additionally, awarding authorities are obliged to make publicly available, in specifications of essential terms of the contract, all the requirements related to certificates and statements³²⁶.

As a principle, each specification of essential terms of the contract should be made available free of charge (art. 37(1) PPL). Economic operators can request receiving it in writing, even if the awarding authority selects electronic means as appropriate for providing statements, requests, notifications and information. This paper version privilege stems from a general rule referring to forms of communication between entities involved in public procurement. The rule pronounces that "written form shall be always permissible unless the Act provides otherwise" (art. 27(3), sent. 2 PPL).

In any procedure, awarding authorities are entitled to provide specifications of essential terms of the contract on its own website from the day of publishing a contract notice in the Public Procurement Bulletin or Official Journal of the European Union, until expiry of the time limit for submission of tenders (art. 37(2) PPL). In open tendering, i.e. the most basic procedure, authorization to put specifications on the website turns into an obligation³²⁷.

27.1.2 Certificates and statements

As a general rule, awarding authorities are obliged to request from economic operators documents proving that they satisfy contract awarding requirements (i.e. certificates) only where value of the contract is equal to or exceeds the amounts ensuing European publication of the contract notice³²⁸ (art. 26(1) PPL). On the other hand, where the value of the contract is lower, awarding authorities are

³²³ Arts: 40(1), 48(1), 56(1), 60c(1), 75(1), 115(1) PPL.

³²⁴ Restricted tendering (art. 48(2)(7) PPL, electronic bidding (art. 75(2)(10)) PPL.

³²⁵ Open tendering (art. 41) PPL, negotiated procedure with publication (art. 56(1)) PPL, competitive dialogue (art. 60.c(1)) PPL, contests (art. 115(2)) PPL.

³²⁶ The Act requires explicitly that every specification of essential terms of the contract cover "information concerning statements or documents to be provided by economic operators to confirm the fulfilment of the conditions for participation in the procedure" (art. 36(1)(6)).

³²⁷ Art. 42(1) provides in this respect: "the specification of essential terms of contract shall be made available on the website from the day of publication of the contract notice in the Public Procurement Bulletin or Official Journal of European Union, until the expiry of the time limit for submission of tenders".

³²⁸ See *supra* footnote 3.

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allowed, but not obliged, to request from economic operators the documents proving that they satisfy the conditions for participating in the procedure (art. 26(2) PPL). When no certificates are requested, statements of fulfilling conditions, signed by tenderers, suffice. Usually awarding authorities require a statement of fulfilling conditions for participating in the procedure (sometimes called a “statement of compliance with art. 22 PPL”³²⁹) and a statement of non-exclusion (sometimes called a “statement of compliance with art. 24 PPL”³³⁰). In practice, both statements, or at least the first one, are requested even if other documents proving compliance are required³³¹.

In any case, awarding authorities may request from economic operators only statements and certificates necessary to conduct the procedures (art. 25(1) PPL), i.e. the documents proving:

- 1) that the tenderer satisfies conditions for participation in the procedure;
- 2) that the supplies, services and works satisfy requirements specified by the awarding entity (*Id.*).

In detail this issue is subject to an executive measure, the Ordinance of the President of Council of Ministers of 16 May 2006 on kinds of documents which a contracting authority is entitled to request from a tenderer, and forms in which the documents can be submitted (hereinafter: Ordinance of 16 May 2006)³³². The legislative delegation for the Ordinance of 16 May 2006 provides explicitly that the executive measure is to take “into consideration that the forms of such documents should make it possible to award contracts using electronic means” (art. 25(2) PPL).

According to the Ordinance of 16 May 2006, to confirm that a tenderer is able to undertake required activities, and is not subject to contract awarding exclusion, awarding authorities may require:

- Relevant concessions, permissions or licences, if required by other provisions;
- Current information from appropriate trade register;
- Attestation of compliance with obligations under fiscal and social law;
- Extracts from the penal register, demonstrating that:

³²⁹ Art. 22(1) defines general eligibility criteria for participation in any awarding procedure. In extension it says:

“Eligible to compete for a contract shall be economic operators who:

- 1) are authorised to perform specific activities or actions, if such authorisations are required by the law;
- 2) have the necessary knowledge and experience, and have at their disposal the technical potential and personnel capable of performing the contract;
- 3) are in a financial and economic situation ensuring the performance of the contract;
- 4) are not liable to exclusion from the award procedure.”

³³⁰ Art. 24 PPL establishes reasons for excluding a tenderer from the procedure.

³³¹ This practice should cease in the future, because the amendment which entered into force on 11 June 2007 modifies art. 36(1)(6) PPL (see *supra* footnote 7) and art. 25(1) PPL (see *supra*, this point) so that awarding authorities should not request statements AND documents (certificates) at the same time.

³³² *Rozporządzenie Prezesa Rady Ministrów z dnia 19 maja 2006 r. w sprawie rodzajów dokumentów, jakich może żądać zamawiający od wykonawcy, oraz form, w jakich te dokumenty mogą być składane, Dz. U. 2006, Nr 87, Poz. 605.*

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- managers of the tenderer have not been validly sentenced for an offence committed in connection with a contract awarding procedure, an offence against the rights of people performing paid work, for bribery, for an offence against trade or for any other offence committed with the aim of gaining financial profits, as well as for a treasury offence or a crime of participation in organized crime group or in a union aimed at committing an offence or treasury offence;
- with respect to collective entities—no court has issued a decision prohibiting competing for contracts under the provisions on the liability of collective entities for tort under the liability to penalty.

(§ 1(1) of the Ordinance of 16 May 2006).

In order to confirm appropriate knowledge, experience, technical potential and ability of personnel to execute the contract, if these are requested by an awarding authority, the following documents may be required:

- List of corresponding works executed in up to the previous 5 years;
- List of corresponding supplies or services executed in up to the previous 3 years;
- List of tools and appliances at the tenderer's disposal necessary for executing the contract;
- List of persons and entities which may be involved in executing the contract;
- Statements that the personnel involved has appropriate qualifications, if these are required by law.

(§ 1(2) of the Ordinance of 16 May 2006).

To confirm the condition of financial and economic situation ensuring appropriate contract performance, the following documents may be requested:

- Financial reports or a part thereof, together with an evaluation report if the financial report is subject to evaluation by an auditor according to laws on accountancy; tenderers who are not subject to the obligation of compiling financial statements may be requested to submit other documents evidencing turnover and debts for up to the last three years;
- Banking information, issued in 3 months before the offering deadline set by the awarding authority, about financial resources accrued on the bank account of the tenderer, and its banking credibility;
- Insurance policy.

(§ 1(3) of the Ordinance of 16 May 2006).

For foreign tenderers the Ordinance of 16 May 2006 provides that equivalent documents delivered by a competent judiciary or governmental body from their country of origin will also be accepted, if the documents demonstrate that the tenderer:

- Is not in a state of bankruptcy or liquidation;
- Is in compliance with obligations under social or fiscal law;
- Is not judicially forbidden to compete for the tender

and that its managers have not been validly sentenced for an offence disqualifying the tenderer according to other provisions of the Ordinance.

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If the required documents are not issued in the tenderer's country of origin, a solemn statement before a judiciary or governmental body, a public notary or a competent professional organisation will be deemed acceptable.

(§ 2 of the Ordinance of 16 May 2006).

Finally, in order to confirm to the expected quality, awarding entities may require:

- Samples, descriptions or photographs;
- Certificates issued by a body competent for quality control or an independent body authorised to undertake compliance confirmation procedure, or equivalent documents;
- Certification by an independent body confirming compliance of the tenderer's activities with European environmental management standards, if the awarding authority establishes environmental management measures which the tenderer would be obliged to abide while executing works or service contracts, by applying to the Community Eco-Management and Audit Scheme (EMAS) or environmental management norms based on European or international standards certified by bodies conforming to Community law or the relevant European or international standards concerning certification, or equivalent documents.

(§ 3 of the Ordinance of 16 May 2006).

For the purpose of this study § 4 of the Ordinance of 16 May 2006 is also of paramount importance. It broadly allows for delivering copies instead of original documents. More specifically, the Ordinance proclaims that awarding authorities may require original documents or copies certified by a notary only when a copy submitted by the tenderer is unreadable or doubts arise as to its authenticity (§ 4(1)). This provision does not mean, however, to do away with any restrictions for copies. Paper copies must bear a brief warrant of authenticity (*potwierdzenie za zgodność z oryginałem*), which should be signed by hand (§ 4(1)). Consequently, similarly strict requirements are applied to digital copies. These must be signed with an advanced (called secure in Poland) electronic signature created with a qualified certificate (*Id.*). One may presume that the electronic signature should be of the person authorized to issue the warrant of authenticity as in the case of paper copies.

The abovementioned limitation on admissibility of copies may be rooted in the probability of fraud, deemed relatively high in the Polish trade. And, as the paper warrant of authenticity must be signed, the principle of functional equivalence justifies extrapolating this obligation onto digital documents.

It may be argued, however, that the requirement of issuing signed warrants of authenticity is not necessary, and even disproportionate. The same result could be achieved by presumed responsibility for authenticity of copies. In fact warrants of authenticity are aimed at determining the person responsible for possible fraud. A result that is in essence equivalent could be achieved by ascribing this responsibility implicitly to members of the tenderer's management body. This removes both the requirement of certifying the veracity of paper documents and equipping digital copies with an advanced signature associated with a qualified certificate, without alleviating the aim of the current obligation.

The conclusion presented herein derives from the current tendency to alleviate unnecessary technical obstacles in communication between contracting authorities and tenderers. In its original reading (i.e. the one of 2004) the PPL allowed communication between awarding authorities and tenderers by

electronic means only when a secure electronic signature with a qualified certificate had been used. This solution, aimed at maintaining a high level of certainty, did not pass muster in practice, though. In 2006 the obligation to use digital signatures for every e-mail in the procurement procedure was canceled³³³.

Currently, awarding authorities are free to establish higher technical requirements than plain e-mail (art. 27(4) PPL). But no general obligation in that respect stems from the PPL. The lowering of the communication security has not caused any practical problems so far, at the same time providing the public procurement legal framework with more flexibility. It may be argued that the legislator should choose a similar path for copies delivered from tenderers, or, more specifically, warrants of authenticity, in order to facilitate take-up of e-procurement.

27.2 E-Procurement initiatives and status

27.2.1 General e-Procurement framework and initiatives

Polish e-procurement market is covered by 4 players:

- e-Przetarg - www.e-przetarg.pl
- Market Planet - www.marketplanet.pl
- Polish Procurement Platform (PPP) - www.ppp.pwpw.pl
- X-trade - www.xtrade.pl

All four were asked to provide information for this study. Nevertheless, only the provider of PPP, i.e. *Polska Wytwórnia Papierow Wartosciowych* – PWPW (Polish Security Printing Works) www.pwpw.pl, responded to this inquiry. PWPW³³⁴ is, however, the most active player on the market and a representative one for purposes of this study.

PPP, based on the SAP SRM system, is addressed towards public authorities and the commercial sector. It aims at strengthening procurement processes, achieving cost reduction, and transparency of the awarding procedure.

Software is supported by advisory/helpdesk services divided into two areas:

1. Organization and Legal support team,
2. Technical support team.

The platform covers three main elements:

1. Electronic Auctions - purchasing enablement solution consisting of:

³³³ See the amendment to art. 27 of PPL, published in *Dz.U. 2006, Nr 79, Poz. 551*.

³³⁴ Responsible for PPP within *Polska Wytwórnia Papierow Wartosciowych* is Mr. Emil Osiewicz, Coordinator of the e-Commerce Services Department, tel. +48 (22) 53 02 657, +48 601 383 117, e-mail: emil.osiewicz@pwpw.pl, fax: +48 (22) 635 75 56, *Polska Wytwórnia Papierów Wartościowych S.A.*, 00-222 Warszawa, ul. Sanguszki 1.

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- Forward and reverse auctions
 - Auctions as a part of sophisticated procurement process
 - Digital signature as a tender safeguard
 - Measurement of results and analytics
- e-Auctions offering the customers:
- a. Publication
 - b. Submitting of tenders
 - c. Electronic awarding (evaluation of proposals and granting)
 - d. Electronic Auctions
2. Catalog procurement - comprehensive procurement solution enabling:
- Maintaining supplier catalogues
 - Workflow automation
 - Search & Comparison of items and prices
 - Handling open catalogue standards
- e-Catalogues are offering the Customers:
- a. Publication – content management
 - b. Submitting of requisitions
 - c. Approval/Workflow
 - d. Electronic awarding (evaluation of proposals and granting)
 - e. Electronic Auctions
 - f. Tendering through electronic catalogues
 - g. E-invoicing and e-payment (by integration with Customers ERP backend system).
3. Procurement-related services
- Suppliers self-service front-end
 - Analytical tools based on data warehouse
 - Order approval processes
 - Tender information system

PPP has organised more than 150 auctions for public authorities so far, with:

- Average number of bidders - 4,6
- Average price reduction - 19,76%
- Overall turnover - 75 842 920,43 PLN

None of those purchases has been legally disputed, which is a very good result compared to procurements by traditional means.

The SAP MM system used for PPP is deeply configurable, so any requirements of customers may be easily incorporated into the product.

The main challenge in current development projects, reported by the provider of PPP, is to assure compliance of the offered solutions, routines and procedures with changing legal requirements.

27.3 Certificates, attestations and statements

In theory, every awarding authority fulfilling public tasks should be able to receive, free of costs and from every public register, information it needs for fulfilling public tasks (e.g. procuring goods, services or works). A corresponding obligation to make the records held in public registers available for any

entity fulfilling public tasks was established by art. 15(1) of the Act on Informatisation³³⁵, which entered into force on 21 July 2005.

In practice, however, this provision remains defunct. Awarding authorities do not have, for procurement purposes, access to records held in public registers, unless these are freely available on-line. Even in the latter case (e.g. National Judiciary Register, *infra*, point D.4) awarding authorities do not search the information themselves. They require that tenderers present relevant documents instead.

On the other hand, tenderers should be able to request on-line the documents issued by public bodies. The obligation is primarily put upon public bodies by art. 16.1 of the Act on Informatisation. In detail the issue is regulated by the Ordinance of the President of the Council of Ministers on organisational and technical conditions for submitting electronic documents to public bodies³³⁶. The Ordinance, which entered into force on 14 January 2006, governs organisational and technical conditions for delivering electronic documents to public bodies and the form of an officially certified reception of electronic documents by their addressees (§ 1). It regulates only communication from a tenderer to a public body (e.g. applying for a certificate required in public procurements), but does not cover communication from the public body to the tenderer (e.g. delivery of a digital certificate).

Yet, also a procedure for the latter kind of communication exists. It is devised by the Ordinance of the Minister of Interior and Administration of 27 November 2006 on creation and delivery of letters in the form of electronic documents³³⁷. Unlike arrangements for communication towards public bodies (delivering applications and requests), the digital delivery of official documents is considered an opportunity, not an obligation, for public administration. In practice both options (electronic submission of applications and delivering official documents) is currently entirely unused for purposes of public procurement.

27.3.1 Requirements with regard to the personal situation of the candidate or tenderer – absence of conviction (art. 45 §1 and §2 (c-d) of Directive 2004/18/EC)

Prevalence/actual use in calls

Documents certifying no conviction for offences and crimes enumerated in PPL³³⁸ are required in a minority of public procurements.

³³⁵ *Ustawa z dnia 17 lutego 2005 r. o informatyzacji działalności podmiotów realizujących zadania publiczne, Dz. U. 2005, Nr 64, Poz. 565, ze zm.*

³³⁶ *Rozporządzenie Prezesa Rady Ministrów z dnia 29 września 2005 r. w sprawie warunków organizacyjno-technicznych doręczania dokumentów elektronicznych podmiotom publicznym, Dz. U. 2005, Nr 200, Poz. 1651.*

³³⁷ *Rozporządzenie Ministra Spraw Wewnętrznych i Administracji z dnia 27 listopada 2006 r. w sprawie sporządzania i doręczania pism w formie dokumentów elektronicznych, Dz.U. 2006, Nr 227, Poz. 1664.*

³³⁸ See *supra*, point B.2 for their list.

What document (if any) is used?

The Ordinance of 16 May 2006 allows for only one type of document proving no conviction: a current extract from the penal register, so-called no-conviction certificate (*zaświadczenie o niekaralności*).

No-conviction certificates are issued either by the central body responsible for maintaining the register (Information Bureau of the National Penal Register - *Biuro Informacyjne Krajowego Rejestru Karnego*, ul. Zwycięzców 34 skrytka pocztowa 28, 03-938 Warszawa) or by the Information Points of the National Penal Register (*Punkty Informacyjne Krajowego Rejestru Karnego*). The Information Points are maintained by courts of first or second instance throughout the country. There are currently 43 such points (in 41 Polish cities; Warsaw hosts 3 of them) connected instantly to the central database. The fee for information about an individual is 50 PLN (about 12 €) and for information about a collective entity (*podmiot zbiorowy*)—100 PLN (about 25 €).

Applications may be submitted either personally or by post. Certificates are also sent by post if so requested by the applicant. This option is chosen in a minority of cases, though, because in most of the Information Points no-conviction certificates, when applied personally, are issued on the spot (filling up the relevant form, paying the fee and receiving the certificate lasts 15-45 minutes). In a very limited number of cases producing the certificate takes more time (up to two days if the application is submitted in Wroclaw). If the applicant requests post delivery of the certificate, it is sent in up to 2 days (delivery takes another couple of days of the postal service).

Contents

Certificates identify the issuing authority, requesting party, date and place of issuance, and relevant decisions. The section devised for relevant decisions includes name of convicting authority, date of conviction, number of the case, legal basis for conviction, dates when serving the sentence started and ended, place of serving the sentence and recesses. The document is signed by a public official and stamped.

Electronic certificates

There has been no possibility for requesting or issuing penal register certificates in an electronic form.

27.3.2 Requirements with regard to the personal situation of the candidate or tenderer – non-bankruptcy and financial status (art. 45 §2 (a-b) of Directive 2004/18/EC)

Prevalence/actual use in calls

The PPL excludes from the public procurement procedure economic operators against whom the winding up procedure has been started or whose bankruptcy has been declared, except for economic

operators who, upon bankruptcy statement, entered into a composition approved by a valid court decision, unless such a composition provides for payment to the creditors by a liquidation of the assets of the bankrupt entity (art. 24(1)(2) PPL).

Awarding authorities do not, however, require any documents in this respect. There are two main reasons for this situation. First, virtually always tenderers need to submit current certificates or extracts from relevant trade registers (see *infra*, point D.4). Entities enrolled into the National Judiciary Register are obliged to change their names when they enter into the procedure of winding up or bankruptcy (“X in liquidation” or “X in bankruptcy” respectively) and other bankrupt entrepreneurs are deleted from the Register of Business Activity. Second, by submitting a statement of fulfilling conditions for participating in the procedure (see *supra*, point B.2), which happens in virtually any public procurement procedure, tenderers implicitly declare that the winding up or bankruptcy exclusion does not occur in their case.

What document (if any) is used?

See above.

Contents

See above.

Electronic certificates

See above.

27.3.3 Requirements with regard to the personal situation of the candidate or tenderer – compliance with fiscal and social obligations (art. 45 §2 (e-f) of Directive 2004/18/EC)

Prevalence/actual use in calls

Attestations demonstrating compliance with fiscal and social obligations are often required in Poland.

What document (if any) is used?

For both requirements (social and fiscal obligations) a formal procedure of obtaining an attestation exists.

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For certification of compliance with social law, Polish tenderers submit a request to the geographically relevant local unit of the Social Insurance Institution (*Zakład Ubezpieczeń Społecznych*) <http://www.zus.pl>. The certificate (*zaświadczenie o niezaleganiu w opłaceniu składek*) confirms that an applicant is not behind with contributions on the day of its issuance.

Certificates are only available on paper. Each form, on which the certificates are issued, bears its own, unique number.

Requests for certificates may be submitted on paper or electronically. When applying on paper, the applicant may, but does not have to, use a relevant form, i.e. *ZUS S-72b - Wniosek płatnika składek o wydanie zaświadczenia o niezaleganiu w opłaceniu składek*.

Electronic applications may be submitted via the Internet contact point of the Social Insurance Institution (*Elektroniczny Urząd Podawczy Zakładu Ubezpieczeń Społecznych* - <http://eup.zus.pl/>), after filling out an online version of the ZUS S-72b form and signing it with an advanced electronic signature associated with a qualified certificate.

Certificates of compliance with social law are collected personally, unless the applicant requests delivery by post. They are not delivered in a digital form and no plans in this respect have been announced. In both cases (receipt by person or by post) producing certificates takes up to 7 days and is free of costs.

With regard to fiscal obligations, a similar certificate (*ZAS-W zaświadczenie o niezaleganiu w podatkach lub stwierdzające stan zaległości*) is issued by geographically relevant state tax authorities of first instance (*Urzędy Skarbowe*). The document can only be provided on paper. The application may be submitted personally or be sent by post. Upon request of the applicant, the certificate may be collected personally or be sent by post. In both cases (receipt by person or by post) producing certificates takes up to 7 days. Fee for the certificate is 21 PLN (about 5 €).

Contents

Certificates identify issuing authority, requesting party (including enterprise by number), date and place of issuance, and requested information (i.e. compliance with fiscal or social obligations). The document is signed by public official(s)³³⁹ and stamped.

Electronic certificates

Currently there is no technical possibility to receive the information by an awarding authority directly from the system of tax or social security authorities. No plans in this respect exist.

³³⁹ Certificates issued by tax authorities are signed by three different persons.

It is also impossible to submit either of the requests electronically, even though an Internet portal of the Ministry of Finance (<https://e-poltax.mf.gov.pl/>) was established at fall 2006 in order to facilitate the delivery of documents to tax authorities. A limitation on receiving tax compliance certificates is due to the fact that the range of documents which may be submitted electronically³⁴⁰ has been established in an Ordinance of the Minister of Finance³⁴¹. The Ordinance enumerates 37 documents enabled for electronic delivery, but it does not cover tax compliance certificates.

27.3.4 Requirements with regard to the suitability to pursue the professional activity

Prevalence/actual use in calls

A proof of tenderer's enrolment in a trade register is always requested by awarding authorities.

There are two kinds of trade registers in Poland.

The first one is the centralised National Judiciary Register (*Krajowy Rejestr Sądowy*). It is maintained by a unit within the Ministry of Justice—the Central Information of the National Judiciary Register. The Central Information comprises the Central Office (ul. Ostrobramska 75 C, 04-175 Warsaw) and units (Departments, *Oddziały*) by 50 commercial courts of first instance, in 50 different cities.

Second, the Register of Business Activity (*Ewidencja Działalności Gospodarczej*) is maintained by each of the most basic local communes (*Gminy*). Currently, therefore, there exists one National Judiciary Register and about 2500 isolated nodes of the Register of Business Activity throughout the country.

Entities of their own legal personality (e.g. companies and partnerships) are enrolled into the National Judiciary Register, while the Register of Business Activity comprises entrepreneurs (personal tradesmen, civil partnerships) who undertake their business activities in other, less formal, ways. In general, smaller tenderers are enrolled in the Register of Business Activity, while the bigger ones—in the National Judiciary Register.

The National Judiciary Register has enabled an option of on-line searching of companies/partnerships by their name or register number (<http://pdi.cors.gov.pl/KRSED/>). Similar functionality has been implemented by a few of the authorities maintaining Registers of Business Activity (e.g. <http://bip.um.szczecin.pl/showpage?chapter=11224>). In practice, however, awarding authorities never look for the register information themselves.

If executing the contract requires concessions, permissions or licences, the documents, according to the general rule of § 4 of the Ordinance of 16 May 2006 (see *supra*, point. B.2) should be delivered in

³⁴⁰ After their being signed with an advanced electronic signature associated with a qualified certificate.

³⁴¹ Rozporządzenie Ministra Finansów z dnia 11 sierpnia 2006 r. w sprawie określenia rodzajów deklaracji, które mogą być składane za pomocą środków komunikacji elektronicznej, *Dz.U. 2006, Nr 146, Poz. 1060*.

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copies bearing warrants of authenticity. Alternatively, in procedures of value beneath the Community threshold, awarding authorities may require statements that entitlement exists and that it does not cease before execution of the contract.

What document (if any) is used?

Tenderers enrolled in the National Judiciary Register are required to submit a document called a "current extract from the National Judiciary Register" (*aktualny odpis z Krajowego Rejestru Sądowego*). Requests for the extracts may be submitted personally or sent by post (if the request is sent to the Central Office of the Central Information; departments handle only requests delivered personally). If requested personally, extracts are produced on the spot. If applied for by mail, they are delivered within about a month (which is due to the fact that only one point in the country handles requests delivered by post). The fee is 30 PLN (about 8 €) per extract.

Entrepreneurs enrolled into the Register of Business Activity should present a document called a certificate of enrolment into the Register of Business Activity (*zaświadczenie o wpisie do ewidencji działalności gospodarczej*). The certificates may be applied for either personally, in offices of the local communes relevant geographically, or by post. If applied for personally, they are produced on the spot. When sent by post, the requests are handled in up to one week. The fee payable together with the request is 17 PLN (about 4 €).

Contents

Current extracts from the National Judiciary Register reveal the entries currently in force under a given register number (number of the company in the register).

Certificates of enrolment into the Register of Business Activity state whether a given entrepreneur is on record. They also define the range of business activities that the entrepreneur has declared, and declared beginning of his/her business activity.

Electronic certificates

There exist no electronic certificates of enrolment into the Register of Business Activity.

On the other hand, an electronic access to the National Judiciary Register (log-in web-page available at <http://pdi.cors.gov.pl>) has been enabled since 1 January 2007. It covers electronic requests for register extracts and allows for receiving them in an electronic form. There are two requirements for electronic submission. First, the request must be submitted in an appropriate format (print enabling version of .pdf, .doc, .odt, .txt, .rtf). Second, it must be signed with an advanced electronic signature associated with a qualified certificate. According to data received from the Ministry of Justice, it was used by 72 registered users in the first half of the year 2007.

27.3.5 Requirements with regard to economic and financial standing

Prevalence/actual use in calls

Evidence of economic or financial standing is commonly requested.

What document (if any) is used?

Primarily, financial reports (*sprawozdania finansowe*) for up to three years are used to prove economic or financial standing, though also banking information and insurance policies are often requested in addition.

Financial reports are easily available, as tenderers are typically required to keep them at any rate.

Entities enrolled into the National Judiciary Register are obliged to deliver financial reports for every financial year to their geographically relevant commercial court. They may use electronic communication in this respect (see *supra*, point D.4). Copies of financial reports are not available on-line, but the courts are obliged to deliver authorised copies of financial reports pertaining to, among others, limited liability companies and corporations, by electronic means, to anyone requesting them electronically³⁴².

Financial reports must be signed both by a person vested with maintaining the accounting books and by the whole management, with an indication of the signature's date.³⁴³

Contents

Every financial report comprises³⁴⁴:

- Balance sheet;
- Profit and loss statement;
- Additional information (introduction to the statement and descriptions).

Awarding authorities rarely request the whole financial report. Often they ask for its most important parts, i.e. a balance sheet and a profit and loss statement for the last accounting year. Sometimes they are satisfied with a statement of aggregate turnover of the tenderer for up to the last three years.

³⁴² Art. 8a.2 of the Act on the National Judiciary Register (*ustawa z dnia 20 sierpnia 1997 r. o Krajowym Rejestrze Sądowym, Dz.U. 1997, Nr 121, Poz. 769, ze zm.*)

³⁴³ Art. 45(2) of the Act on Accountancy (*ustawa z dnia 29 września 1994 r. o rachunkowości, Dz.U. 1994 nr 121 poz. 591, ze zm.*).

³⁴⁴ Art. 52(2) of the Act on Accountancy.

When banking information is requested, awarding authorities are generally interested in certification of the current amount of financial resources accrued at the bank account of the tenderer and the banking credibility.

When requesting (civil liability) insurance policies, awarding authorities generally seek, regardless of the policy itself, an evidence that the tenderer has paid the insurance fee.

Electronic certificates

Financial reports are always delivered to awarding authorities on paper, in copies. According to the general rule, the copies are signed by the submitting person, to warrant its authenticity. As mentioned above (see point B.2, *in fine*) handwritten signatures could be, for these purposes, replaced by advanced electronic ones with a qualified certificate. But in practice they never are.

27.3.6 Requirements with regard to technical and/or professional ability

Prevalence/actual use in calls

The requirement of technical and/or professional ability is commonly used.

What document (if any) is used?

The information required varies, covering all the possibilities provided for in the Ordinance of 16 May 2006 (see *supra*, point B.2). Awarding authorities therefore request lists of corresponding works, supplies or services executed in the previous 3-5 years, lists of tools and appliances at the tenderer's disposal, which are necessary for executing the contract, lists of personnel intended to be involved in executing the contract, together with information about qualifications. Contrary to the Ordinance of 16 May 2006, awarding authorities sometimes also request other information, e.g. on the average number of staff and/or management personnel in a given period (generally up to the last three years).

In practice, documents originating from third parties are requested in two of the abovementioned areas.

The first one refers to evidencing qualifications of the personnel. Especially in works contracts awarding authorities happen to ask for documents certifying entitlement to occupy a given position (most often of a site manager), experience of qualified workers and their enrolment into the register of a vocational corporation. Routinely qualification certificates are required in procurements ensuing access to restricted information. Sometimes certificates are required in other procurements, e.g. of translation, promotion, auditing, or design services.

Second, from time to time awarding authorities request third party references (most commonly for the last three years) certifying that previous contracts have been executed properly by the tenderer.

Contents

Contents of statements or certificates correspond to the type of each requirement, which was discussed in response to the previous question.

Electronic certificates

As to certificates, see e.g. the discussion above. Statements, on the other hand, are always delivered as signed original documents. In theory, they could be signed with advanced electronic signatures associated with a qualified certificate. These are never used, however, for this purpose.

27.3.7 Requirements with regard to quality assurance standards

Prevalence/actual use in calls

Documents demonstrating compliance with quality assurance standards are rarely required in Polish procurements.

What document (if any) is used?

In most cases compliance with quality assurance standards may be achieved by other means than requesting separate documents, especially certificates. First, awarding authorities devise technical specifications for every call. These may implement quality assurance standards. By the same token, awarding authorities reserve in calls for tender (especially in works contracts) that tenderers are obliged to execute procurement in accordance with the contract, legal provisions and relevant business and technical standards.

Yet, awarding authorities are occasionally more specific. Relatively most often quality certifications are required when liquids (e.g. fuel) are purchased. Sometimes awarding authorities demand that the offered goods or services fulfil certain (most often ISO) standards or that they bear a CE certificate. In a very limited number of cases they require documents demonstrating compliance with a Polish technical norm³⁴⁵ implementing European standards. Occasionally, awarding authorities require also catalogue data of a given appliance to make sure that the item fulfils requirements of the technical specification. In 3 cases, out of 150 analysed for the purpose of this study, awarding authorities required, contrary to the basic assumptions of the public procurement law, an attestation issued by a named body accredited pursuant to legal provisions implementing the new approach directives into the Polish legal system.

³⁴⁵ Polish technical norms are endorsed by the Polish Standardisation Committee (*Polski Komitet Normalizacyjny*), ul. Świętokrzyska 14, 00-050 Warszawa, skr. poczt. 411, 00-950 Warszawa 1, <http://www.pkn.pl>.

The issue of quality assurance certificates is of a very limited significance for service contracts, as the quality of these is in general assured by appropriate qualifications of personnel (see in this respect *supra*).

Contents

Contents of statements or certificates correspond to the type of each requirement. There is no uniform certificate demonstrating that the quality assurance standards are fulfilled.

Electronic certificates

See, in general, discussion *supra*. More often, however, demonstration of quality assurance standards is embedded in offers submitted by tenderers, making the issue less relevant for this study.

27.3.8 Requirements with regard to environmental management standards

Prevalence/actual use in calls

Demonstration of compliance with environmental management standards is hardly ever used in Polish procurements. EMAS registration (or an equivalent proof of fulfilling environmental management standards) has not been required by any of 150 public procurement documentations studied for this study. Further inquiry has revealed that only in a handful of contract notices or specifications of the essential terms of contract available on-line, out of hundreds of thousands, any documents regarding environmental management standards have been requested.

What document (if any) is used?

In the very few procedures where a document confirming environmental management standards compliance has been requested, it has been predominantly ISO 14001 environment management certificate.

Contents

Certificates identify the certifying body, certifying procedure, the recipient, range of activities for which the certificate is issued, date/number of an audit, date of issuing the certificate, its duration, and a signature on behalf of the certifying body.

Electronic certificates

Certificates are done on paper only.

27.4 Interoperability

There are no obstacles for non-nationals to use the solutions offered by PPP both as a Purchaser and Vendor. PPP provides its services, both software and advisory, in Polish and English. Multicurrency is also supported.

Also, foreign advanced electronic signatures with qualified certificates would not cause major problems in this respect. The Polish Act on Electronic Signatures³⁴⁶ establishes six different grounds on which certificates issued by a certification service provider established outside Poland and providing no services on its territory may be fully vindicated by the Polish law. Recognition as a qualified certificate by an agreement on the European Economic Area is the broadest among the allowance situations (art. 4(5a)) and should generally suffice for enabling interoperability from the legal point of view. Also technically and organisationally authorisation with qualified certificates compliant with PKI and issued in another EU member state would be feasible. According to information received from the provider of PPP, to adjust this system to accepting foreign certificates a copy of a foreign certificate would be required in order to verify configurations, an address of the CRL list and a couple of days for testing.

27.5 Future trends/expectations

The Polish public procurement law has witnessed substantial facilitation of contract awarding procedures in the last 3 years. This trend may be expected to develop further in the future. As a consequence, the environment for e-procurement may become more friendly, unless an opposite trend (which seems to have lost some of its prominence) to enhance technological security at the expense of viability and cost-effectiveness prevails.

Also, legally anchored promotion of advanced electronic signatures, by requiring that they be used in areas of law other than public procurement, is often given as another stimulus for take-up of e-procurement in the future. Yet, this argument is not necessarily right. Indeed, from July 2007 advanced electronic signatures should replace the previous (simpler) mode of authorisation based on unqualified certificates for the purposes of electronic communication between enterprises and the social security scheme. But advanced electronic signatures have been widely rejected by the practice of e-commerce. Also an obligation to use them within the framework of public procurement has not passed muster and was finally erased. It is therefore hard to imagine that a move within a field like social security in the direction abandoned already by the public procurement law will stimulate e-procurement.

All in all, most probably development of e-procurement in Poland will be still very moderate, as a consequence of the current attitude, discussed in more detail below.

³⁴⁶ Ustawa z dnia 18 września 2001 r. o podpisie elektronicznym, Dz. U. 2001, Nr 130, Poz. 1450, ze zm.

27.6 Assessment

E-Procurement in Poland is in the incipient phase. To some extent this may be attributed to the situation where advanced electronic signatures are the preferable means of identifying parties in public procurement, while the market does not share this position³⁴⁷. This is why, as argued *supra*, the current requirement to sign warrants of authenticity, when a document is delivered in copy, could be alleviated.

From the European perspective another issue is important. Only in a minority of procurement procedures awarding authorities define their requirements in line with § 2 of the Ordinance of 16 May 2006 (see *supra*, point B.2). In other words, most often the authorities indicate implicitly that documents issued in Poland are acceptable. They also define which documents the Polish tenderers should submit. At the same time no alternative path to satisfy the requirements by foreign tenderers is established. This has a negative effect on the ability of the latter ones to participate in public procurements in Poland.

It is, however, of only indirect relation to e-procurement. This mode of awarding contracts remains of very limited use even in utterly national patterns. The most important reason for this seems to be an insufficiently favourable attitude towards e-procurement, i.e. weak promotion of it by the Public Procurement Office and the government itself, and the restraint of awarding authorities and tenderers.

E-procurement is hardly, if at all, promoted by the biggest single purchaser, i.e. the government, and the body responsible for monitoring the public procurement system, i.e. the Public Procurement Office. In addition, awarding authorities are not keen on inviting tenderers to submit documents in an electronic form and to conduct procurement procedures on-line, even though, as demonstrated by the example of auctions undertaken by PPP (see *supra*) e-procurement ensures substantial savings for awarding authorities. On the other hand, tenderers are not interested in blazing a trail of enforcing their right to deliver copies of documents in an electronic form instead of paper copies. Also, as demand for e-procurement platforms is limited, market for relevant technical solutions grows slowly, which does not help in lowering prices for e-procurement systems.

³⁴⁷ Economic operators do not find benefits from using advanced electronic signatures outweighing their costs.

28 Portugal

28.1 Public procurement framework

28.1.1 General framework

As many other countries, Portuguese public procurement law establishes two separate frameworks: one for utility services, and one for traditional sectors.

The law applicable to traditional sectors is Law 197/99, of 8 June ("**Decree-Law nº 197/99**"), on public procurement and certain contracts for supplies and services. This law implemented into Portuguese law the Council Directive 93/36/EEC of 14 June 1993, regarding coordinating procedures for the award of public supply contracts and the Council Directive 92/50/EEC of 18 June 1992, relating to the coordination of procedures for the award of public service contracts. The statute sets out general procedures and regulations for granting procurements in traditional sectors.

The law applicable to utility services is Decree-Law 223/2001, of 9 August (duly amended by Decree-Law 234/2004 of 15 December), which implemented the Council Directive 93/38/EEC of 14 June 1993. The Directive coordinated the procedures for procurement applicable to business operating in the water, energy, transport and telecommunication sectors. Accordingly, the Decree-Law regulates public procurement of works, supplies and services in the water, energy, transport and communications sectors. There is also the Decree-Law no. 1/2005 that enacts a legal framework to public supply contracts regarding software, hardware and electronic communications.

Furthermore, whenever a public company wishes to enter into a public work or concession agreement, the company must comply with the specific pre-contractual discipline stipulations of Decree-Law 55/99 dated 2 March. This statute is therefore of significant importance since it determines the general rules governing execution of public procurements and concessions for public works. The law also contains specific rules governing execution, as well as general conditions applicable to public procurement.

In addition, the new Public Procurement Code is currently under public discussion and is expected to enter into force by late-2008.

This statute will unify the legal framework described above, implementing into Portuguese law the Directive 2004/18/EC of the European Parliament and of the Council, dated 31 March 2004, on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. The new Public Procurement Code also implements Directive 2004/17/EC of the European Parliament and of the Council, dated 31 March 2004. This directive coordinates the procurement procedures governing entities that operate in the water, energy, transport and postal services sectors. The new Public Procurement Code will result in improved public procurement procedures and enhanced competition, transparency and market efficiency.

It should also be noted that the new Public Procurement Code will allow public entities to acquire assets regulated by Decree-Law n° 197/99 through electronic means (please see Section 28.1.2.).

However, we must stress that the Decree-Law 104/2002, of 12 April ("**Decree-Law n° 104/2002**")³⁴⁸, however, already provides for this alternative, allowing for payment of such acquisitions via electronic funds transfer.

Along these lines, Article 2 of the Decree-Law 104/2002 establishes that acquisitions performed by electronic means are subject to the same general principles and rules that govern non-electronic acquisitions.

The statute provides that:

(i) The transmission of documents and notices by e-mail have the same effect, for all purposes, as remittance through mail, phone or fax;

(ii) Electronic documents have the same effect, for all purposes, as physical documents³⁴⁹;

(iii) Online negotiation has the same effect as offline negotiation; and

(iv) The remittance of encrypted electronic documents with a digital signature has the same effect, for all purposes, as the use of a closed and opaque box.

Furthermore, the contracting authority must use a digital registry to guarantee the proof of transmission of electronic documents, ensuring that a record is kept of the documents' receipt and of the required notices sent within the scope of a Public Procurement.

Furthermore, under Article 6 of Decree-Law n° 104/2002, the Portuguese lawmakers permit the use not only of a digital signature (which is itself an advanced electronic signature), but also of other advanced digital signatures (within the meaning of the Directive 1999/93/EC of the European Parliament and of the Council, dated 13 December 1999, on a Community framework for electronic signatures).

Regarding publication of asset acquisitions, Article 4 of Decree-Law n° 104/2002 sets out that the contract documents, procurement rules or procedures, and all announcements published in the Official Newspaper ("***Diário da República***"), must also be published on the contracting authority's website or any other relevant websites.

³⁴⁸ This law will be revoked when the New Procurement Code takes effect.

³⁴⁹ Likewise, a digital signature on an electronic document has the same effect as an autograph signature, stamp or any other identifying signal on a physical document.

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Given that one of the basic goals of the legal framework described above is to foster a competitive environment, prior publication of procurement opportunities is usually required. As such, an announcement must be published in the Official Newspaper ("*Diário da República*"), in a national newspaper, and in a regional newspaper where the work is to be performed. In compliance with European obligations, procurements with a value exceeding certain thresholds (established by the statutes referenced above) shall also be published in the Official Journal of the European Communities.

In exceptional circumstances, prior publication in the Official Newspaper is not required, in which case the so called "negotiation procedure without prior publication" can be followed.

This alternative may only be pursued in a limited number of situations as indicated in the law, including:

(i) Procurements whose value does not exceed a threshold value set by Decree-Law n° 197/99;

(ii) Where special circumstances are met (e.g., (1) urgent procurements which could not have been foreseen and for which no offers have been made, provided that initial conditions of the procurement rules remain unchanged are complied with, or (2) where only excluded offers have been presented in a previous procurement procedure).

In these situations, although publication in the Official Newspaper is not legally required when the so called "previous consultation" or "direct award" procedures are followed, the general requirements governing publicity must always be met by other adequate means (e.g., publication of the agreement on the company's website).

28.1.2 A preliminary overview of the Public Procurement Code to be enacted

As previously mentioned, the new Public Procurement Code is expected to be enacted by late-2008.

This statute will unify the legal framework described in the section above and shall transpose the Directive 2004/18/EC of the European Parliament and of the Council, dated 31 March 2004, and the Directive 2004/17/EC of the European Parliament and of the Council, dated 31 March 2004.

A first draft of the Public Procurement Code has been publicly provided to be subject to discussion (Document: "**Anteprojecto do Novo Código dos Contratos Públicos, versão_10_05_2006**").

This version is a preliminary and uncompleted version, mainly to allow the discussion regarding the major principles of the act.

Although as we previously referred, there are already some provisions on e-Procurement, article 62 on the mode for presentation of proposals has the following mention: "*AN ALTERNATIVE SOLUTION IS BEING CONCEIVED THAT ENVISIONS ALLOWING A COMPLETELY ELECTRONICALLY BASED PROCEDURE, WITHIN THE LIMITS FORESEEN IN THE*

DIRECTIVES ON PUBLIC CONTRACTING AND THAT WILL NOT ALLOW THE USE OF ELECTRONIC MEANS FOR THE PURPOSE OF DISCRIMINATORY TREATMENT OF THE SUBMITTED CANDIDATES”.

However, we may already provide some guidelines on e-Procurement that it already provided in the preliminary document, as follows:

(a) The invitation made for proposal presentation that should be done in writing and accompanied of the contract provisions, may be sent by any electronic means of data transmission.

(b) In light of a process made by invitation, the proposal may be delivered through any electronic means of data transmission.

(c) Public Procurements are published on the Internet portal www.compras.gov.pt, through an announcement in accordance with the official model and in processes that imply an announcement in the Official Journal of the European Union, these should be electronically sent to the Official Publications Service of the European Communities.

(d) The minimum period for the presentation of the proposals may be reduced when the announcement referred in no. 1 is prepared and sent electronically.

(e) In negotiation processes, the jury can inform the candidates through any electronic means of data transmission and all of the formalities of the negotiation process may be based on electronic means of communication.

(f) During the process of competitive dialogue, the jury can notify qualified candidates through any electronic means of transmission of data. Furthermore, Electronic auctions are included in a specific section.

In accordance with the proposal, the electronic auctions obey by the following regime:

(a) All of the commissioning entities may make use of the electronic auctions, for commissioning preparation purposes (in the event that the proposal attributes only when depicted in a quantitative value and evaluation through an automatic mechanism).

(b) When the award criteria is that of the most economically advantageous proposal, the electronic auction can only be used when all of the impact levels can be quantified.

(c) In this case and besides general documentation, the Public Procurement programme should indicate: (i) the attributes of the proposals for electronic auction; (ii) the base value of each attribute on auction; (iii) the minimum intervals demanded between auctions; (iv) the operating rules of the electronic auction; (v) the information concerning the electronic device used and the conditions and technical specifications for their connection.

(d) All the candidates whose proposals were admitted will be invited simultaneously by the commissioning entity, through electronic means, to participate in the auction.

(e) The auction may be processed in consecutive stages, each one corresponding to the bid value of each of the attributes, if there are several, of the proposals on electronic auction. Furthermore, the commissioning entity cannot, at any given moment, reveal the identity of the candidates in the course of the auction.

Dynamic Acquisition Systems are also set forth, in that Public entities may, through a electronic system, namely an electronic management platform, conclude contracts for purchasing goods or services destined for current use with standardised technical specifications.

It is anticipated that the system will be subject to the following:

(a) Any interested party may access the system through the presentation of an initial version of a proposal.

(b) The system is only valid for 3 years, but may, nonetheless, be renewed.

(c) The dynamic acquisition system will be made operational in the following phases: (i) system implementation; (ii) simplified announcements; (iii) actual awarding.

(d) The commissioning entity should make the terms of the procedure available, in a complete, free and direct fashion, on the Internet portal www.compras.gov.pt or on an internet page of their responsibility.

(e) The documents to be presented by the interested parties in access system. These should be submitted through electronic means, except if in cases where this is not possible due to the nature of the documents or because of occasional failure of the computer equipment, hence not of the responsibility of the interested parties.

(f) Expenses related to the implementation and operation of the system may not be charged to the interested parties or candidates.

(g) When the proposal is presented, the tenderers ought to make an official binding statement that the dispositions listed in the qualification documents submitted with the initial version of the proposal will be maintained without any damage to the commissioning entity that may demand the presentation of evidence of the statement.

Please note that this version of the new Public Procurement Code shall surely be subject to many alterations.

28.1.3 Certificates and statements

The administrative requirements to be met are defined in Decree-Law n° 197/99 (regarding supplies or services) and Decree-Law n° 59/99 (regarding public works). While these requirements may vary, depending on the type of procurement, the tenderer is commonly required to provide the following documents with regard to his eligibility to participate in a call:

- An extract from a penal register of the legal representatives of the tenderer company.
- Statement that the tenderer:
 - is not in a state of bankruptcy, being wound up, or in a similar status;
 - has not filed for bankruptcy or to be wound up or for a similar procedure;
- Statement that the tenderer has not been convicted by a definitive ruling of a crime that impairs his professional integrity.
- Statement that the tenderer has not made material faults in the performance of its professional obligations, nor has made material false statements when providing information.
- Attestation of compliance with obligations under social law;
- Attestation of compliance with obligations under tax law.

In addition, it should be noted that the contracting authority may accept other documents other than those mentioned above, if the tenderer is justifiably unable to present these documents.

National tenderers shall also present the contractor's classification certificate, issued by the Portuguese construction regulator (i.e. *Instituto da Construção e do Imobiliário*). Likewise, other EU tenderers shall present the equivalent document issued by a competent regulatory authority. If they fail to do so, additional documents will be required to prove their eligibility to participate in a call (e.g., a statement signed by the company's legal representative, duly certified, attesting to the list of works executed in the last five years).

For foreign tenderers, Article 31 of DECRETO-LEI 197/99 establishes that equivalent documents delivered by the competent judiciary or governmental body from the country of origin will also be accepted. When the tenderer's country of origin does not deliver such documents, a statement under oath or a solemn statement before a judiciary or governmental body, a public notary or a competent professional organisation of the country of origin, will also be deemed acceptable.

With regard to the financial and technical suitability of the tenderer, a different set of supporting documents is typically required. These include, most notably³⁵⁰:

- Bank statements, balance sheets and annual accounts of the tenderer, if the publication of balance sheets is mandatory in the tenderer's country of origin;

³⁵⁰ The following documents are legally required only for procurements in traditional sectors, but not for procurements in the utilities sectors, where contracting authorities have greater liberty to determine suitable evidentiary documents.

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- Global revenue over the preceding three accounting years;
- Professional and educational qualifications;
- Statements containing references to works/supplies/services provided in the most recent three years, as evidenced by attestations of acceptance;
- Statements detailing the working equipment to be used by the tenderer;
- Statements detailing the average staffing of the tenderer in the preceding three years;
- Statement detailing the methods adopted by the tenderer;
- Statement detailing technicians or technical services at the tenderer's disposal;
- Quality certificate issued by independent entities attesting to the tenderer's compliance with the quality rules in force.

It should be noted that other documents may be required by the contracting authority, provided that they are related to the specific purposes of agreement to be executed.

When the tenderer is justifiably unable to present the required documentation with respect to economic and financial suitability, the tenderer may demonstrate suitability by providing any other documents which the contracting authority deems suitable. Although the authority is relatively free to assess the validity and value of the evidence provided, it must respect basic principles of good administrative governance. In practice, this means that any decision to reject certain evidentiary documents must be justifiable and transparent. When a contracting authority considers that the provided certificates are incomplete, ambiguous or unclear, it may request clarification from the tenderer before rejecting an offer outright.

Please bear in mind that the documents referred to above are usually original copies (i.e., signed and/or stamped) and must be written in Portuguese. Accordingly, a Portuguese translation must be provided if the relevant document is written in a foreign language.

28.2 E-Procurement initiatives and status

As mentioned, the e-Procurement directives have not been transposed to the Portuguese legal framework.

However, there is already a significant list of legal provisions within the scope of Public Procurement, the e-Public Procurement Programme and the Public Purchasing National System.

The most relevant provision are the following:

- **Decree-Law no. 37/2007, of 19 of February.** On the one hand defines the Public Purchasing National System (SNCP) and on the other, governs the creation and approval of the Public Purchasing National Agency's statutes. (ANCP)).

- **Joint order no. 280/2006, of 23 April.** Following the publication of the Resolution of the Council of Ministers no. 111/2003, of August 12, which approved the National eProcurement Programme, a work team was created in the Secretary General of the Ministry of Public Works, Transport and

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Communication to implement a pilot project that is aimed at fostering the development of the initiative within the scope of the National eProcurement Program.

- **Resolution of the Council of Ministers no. 124/2005, of 5 August.** The present resolution initiates a Public Administration restructuring process which aim is to rationalise their central structures and promote the decentralisation of functions, the coordinated deconcentration and the modernisation and automation of processes.

- **Decree-Law no. 255/2003, of 21 October.** Adopts a special expense regime, within the scope of the National eProcurement Program, of the citizen's portal project and of the projects associated to the rationalisation of communication costs in Public Administration.

- **Resolution of Council of Ministers no. 111/2003, of 12 August.** Approves the National eProcurement Programme.

- **Resolution of the Council of Ministers no. 107/2003, of 12 August.** Approves the Plan of Action for the Information Society, the key means for strategic and operational coordination of the XV Constitutional Government policies for the development of the information society in Portugal.

- **Resolution of the Council of Ministers no. 36/2003, of 12 March.** Determines the adoption of several concrete measures seeking the generalisation of the practice of purchasing goods and services through electronic means in the Public Administration and in the enterprise sector and assigns the Mission, Innovation and Knowledge Unit to proceed with respective implementation and accompaniment in articulation with other entities.

- **Resolution of the Council of Ministers no. 135/2002, of 20 November.** Defines the new institutional framework of the Government's activity as regards to information society, innovation and electronic government. It also defines the objectives and responsibilities of the UMIC

- **Decree-Law no. 104/2002, of 12 April.** Approves the electronic purchasing of goods by public organisms.

Furthermore, it has also been implement some preliminary actions in order to test e-Procurement solutions.

The Decree-Law no. 37/2007, of 19 of February, defines the Public Purchasing National System (**SNCP- Sistema Nacional de Compras Públicas**) and rules the creation and approval of the Public Purchasing National Agency's statutes (**ANCP**).

The Public Purchasing National System is governed by the Decree-Law no. 37/2007, of 19 February – legally designated as a public entity company – which also defined the National Public Purchases Agency, E.P.E. (**ANCP- Agência Nacional de Compras Públicas**) that will integrate all of the current purchasing entities by law, and will allow other voluntary purchasing organisms to accede to the system on a contractual basis.

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The SNCP is built on the following platform:

(i) Integration of all of the current purchasing entities by law, as well as other voluntary purchasing organisms on a contractual basis;

(ii) Segregation of contracting and purchasing functions and the adoption of centralised payment procedures, on both a global and sectorial level, on a frame agreement or other public contracts and in the subsequent purchase and payment by the purchasing entities;

(iii) Hybrid model for SNCP management.

The National eProcurement Programme (PNCE) outlines the following main objectives:

- To promote the efficiency of the process of public acquisition: i) generating structural profit and savings; ii) facilitating and expanding company access to the public purchasing market; iii) increasing the transparency and quality of the service provided.
- To grant economical agents with modernisation dynamics: i) promoting their competitiveness and productivity; ii) encouraging the adoption of new e-commerce practices on a national level.

There are also the following “projects” (as named by the ANCP):

- **Contract Provisions Download Tool**

The DCE system – Contract Provisions Download - consists of a tool which allows any public entity (central or local Public Administration) to make public tenders available online (tender program, contract provisions, attachments, justifications, etc.), as well as manage some of the interaction with the several interested suppliers in the different phases of an acquisitive procedure. In doing so, it will simply be necessary to certify with the Directorate General of Public Administration (**DGAP – Direcção Geral da Administração Pública**) and with the Information Systems Institute of the Ministry of the Finances the conformity of their data in the SGU – User Management System (**Sistema de Utilizadores**).

- **Support Tool for the Aggregation of Purchasing Needs in Public Administration**

Through process assessment and cost analysis undergone in the first stage of the pilot project included in the National eProcurement Program, it was concluded that the majority of the Public

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Administration Organisms and Institutes individually partook in the negotiation processes, which led to the misuse of its negotiating power and consequently to a larger consumption of human and financial means.

The Knowledge Society Agency (**UMIC**) created a company selection process for the development of a support Tool for the Aggregation of Purchasing Needs in Public Administration, so as to optimise the process of aggregation of purchasing needs facilitating the gathering of information and its analysis for the planning and preparation of subsequent negotiation processes, with the layaway trade chosen for that effect.

- **Catalogue Management Central System**

The Catalogue Management System is a central repository of products and services from State suppliers allowing the Public Sector buyers to conclude the acquisition processes, optimising their business relationship and model, containing general information on products and services for the Public Sector as well as useful specific information on the procedures of public acquisition. The supplier will have to submit the information related to their products and services and with the necessary regularity carry out the administration and maintenance of that data.

It is a system built on the platform of the Public eProcurement Technological Model, defined in a partnership forged with the HPG Group Company and having the Catalogue Management System as the one who primarily interacts and interoperates with the National Suppliers Registry and other internal and external systems, such as e-commerce service providing companies (B2B

- **Electronic Solutions for Public Tenders**

The electronic procedures for public contracting are suited within the projects developed by the UMIC to the extent of the Public eProcurement which have begun to involve the people that directly intervene in the public acquisitive procedures.

The main objectives are:

- Identify the most appropriate tools ;
- Adapt them to suit the needs of the organism;
- Acquire knowledge to prepare these tools to fit the acquisitive procedures;
- Test the concept.

This project is targeted at accommodating, in terms of the pilot project, some of the provisions of the community Directive.

- **Public e-Purchases Pilot Project**

The Public eProcurement pilot projects appear within the scope of the National eProcurement Programme (PNCE) and aims at improving the State's purchasing personality.

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Its implementation was divided into three spheres of action: i) assessing the Ministries and Organisms current situation; ii) solution implementation and operationalisation; iii) conception of the evaluation report and of the generalisation plan for public purchases.

○ **Application Characterisation**

The communication infrastructure, *hardware* and *software* needed for users of the pilot Ministries are the property of the *PSB2B*.

The projects are as follows:

1. *Dynamic price negotiation Tools (auctions)* - Dynamic price negotiations were executed during the pilots with suppliers belonging to the Public Procurement Telematic Catalogue (CTAP- Catálogo Telemático de Aprovisionamento Público) as well as some experiments forged within the negotiation procedures with suppliers not represented in the CTAP;
2. *Catalogue Purchasing* - the process of catalogue purchasing is executed electronically, from the request process until delivery confirmation, to the issuing of a receipt. The party placing an order, accesses the catalogues through the platform with the previously purchased products (in accordance with the acquisitive procedures) and makes the request. The parties responsible for the several areas (including accounting services that put the approval into effect) approve the request using the tool and a request is automatically issued to the suppliers of the goods that are connected to it. Depending on individual permission, the status of the requests may be monitored, for instance, consultation of the request's track record. After receiving the order a registry will be created in the tool of the received products thus allowing a control of the suppliers' performance. The tool also guarantees detailed monitoring of the whole purchasing process.

○ **National Registry of Suppliers (RNF)**

The National Registry of Suppliers (RNF- *Registo Nacional de Fornecedores*) has the objective of being a central repository of information on State suppliers. The RNF will allow the supplier to submit all necessary documents including financial demonstrations for application purposes to a public procurement tender, on one occasion only, while they are valid, and not every time a procedure is to take place.

It is foreseen that the suppliers' registry model to be implemented will guarantee (merely generic orientations):

- The presence of supplier authentication/accreditation mechanisms;
- The truthfulness of the information made available by the supplying entities; and will;
- Motivate suppliers to update registry data.

○ **Ministerial Purchasing Units and National Purchasing Unit**

The Resolution of the Council of Ministers no. 111/2003, of August 12, that approves the National eProcurement Programme, assigned the UMIC and the Ministry of Finances the responsibility of defining the institutional and organic framework of the National Purchasing Unit (*UNC-Unidade Nacional de Compras*).

The creation of a unit that assures the management and update of all of the PNCE is envisioned, with responsibilities that include policy defining and monitoring, sourcing (strategic purchasing management), regulation, normalisation and promotion, and centralised IT systems management therefore merging the responsibilities attributed to UMIC and DGP in this matter. However, it is a minimalist model, in that UNC will be handled by the Ministerial Purchasing Units (*UMC- Unidades Ministerias de Compras*), under a shared services policy, denominated the "inter administrative common service sharing."

The following central entities on which ministerial procurement procedures will be implemented are in the process of being formally recognised as Ministerial Purchasing Units:

- Ministry of Education: Integrated Procurement Centre (*CAPI- Centro de Aproveitamento Integrado*) - order no. 15620/2004;
- Ministry of public Works, Transport and Communications: Purchasing Project Structure (EPC) - Order no. 439/2005;
- Ministry of the Social Security, Family and Children: Purchasing Project Structure (EPC) - Order no. 11789/2004;
- Ministry of Finances and Public Administration: Order no. 1338/2005;
- Ministry of Justice: Purchasing Unit - Order no. 21322/2005;

The global purchasing process encompasses five main stages:

1. Strategic purchasing management;
2. Operational management and purchases;
3. Transactional purchasing management;
4. Payment;
5. Purchase management.

From these projects, it has been already tested the use of e-platforms on Public Procurement submitted to formal requirements of the said Decree-Laws using the opportunity granted by the Decree-Law nº 104/2002, but limited to nationals.

It is true that the PNCE - National Plan of Electronic Purchases has implemented a set of initiatives but the processes of aggregation and negotiation are limited to small purchases not subject to formal Public Procurement requirements.

Please note that we consider that the Decree-Law n° 104/2002 act provided an unique approach and a secure solution to allow the implementation of e-Procurement projects. Nevertheless, it has never been consistently used.

28.3 Certificates, attestations and declarations

Portugal is in the process of discussing the new Public Procurement Code as Directives 2004/18/EC and 2004/17/EC have not been transposed into the Portuguese legal framework. Accordingly, until this Code is enacted it is not possible to provide detailed information about the adoption of the e-statements and documents by tenderers (referred to above).

However, in our opinion, even today our legal framework allows the dematerialisation of documents and thus, the implementation of e-tenders.

In fact, according to a general provision of Decree-Law no. 290-D/99 of 2 August (**Decreto-Lei n.º 290-D/99, de 2 de Agosto**), amended by the Decree-Law no. 62/2003 (**Decreto-Lei n.º 62/2003**), electronic documents have the same effect as hard-copy documents.

Furthermore, the use of electronic signatures has been recognised under Portuguese law since 1999351 and according to art. 7 of Decree-Law no. 290-D/99, electronic signatures constitute valid proof of declaration with the same value as handwritten signatures.

We must also highlight that this act expressly states that public entities may issue electronic documents bearing a qualified electronic signature in accordance with the provisions of this statutory instrument for; "operations that concern the creation, issue, storage, reproduction, copying and transmission of electronic documents, which formalise administrative acts through computer systems, including the transmission thereof by telecommunications means. The data relating to the interested entity and the person who carried out each administrative act shall be indicated in clearly identifiable language and in a manner that will enable verification of the functions or the position of each document's signatory" (Art. 5). From this statement, it is clear that Portugal intended to provide a legal solution for the use of electronic signatures in the general act on electronic documents.

In addition many professionals (such as lawyers, solicitors and notaries) have the power to certify documents and the BAR Association and Notaries BAR have already implemented PKI platforms issuing digital signatures to their members.

From the above we can say that:

(a) the provision of statements by tenderers can be provided by electronic means and duly signed.

³⁵¹ Decree-Law no. 290-D/99, of 2 August (legal regime for electronic documents and electronic signatures).

(b) Declarations of the Public Administration may also be provided by electronic means and expressly be permitted by law (despite the fact that none of the public entities - except for judges - use or have been granted the power to use digital signatures).

(c) If necessary, e-documents can be certified by lawyers and solicitors.

As this interpretation has never been taken in Portugal, public tenders still come in hard-copy formats.

In summary, the legal framework in Portugal is currently being reformed into the new Public Procurement Code, which is expected to contain more explicit provisions with regard to electronic attestations and certificates.

However, the existing legal framework is already flexible enough to allow the legal use of such documents in electronic tendering procedures.

None the less, in practice such electronic documents are not yet used. While administrations are allowed to issue signed electronic documents which indicate the legal capacity of the signatory, this is not being done at present.

28.4 Interoperability

The lack of implementation of e-Public Procurement means that we cannot provide answers to the accessibility of non-nationals.

It is however important to note that the trend regarding e-Government platforms is to allow the access of non-nationals to e-public administration services in the future.

We also expect that non-nationals may in future be part of the process of Public Procurement.

28.5 Future trends/expectations

The lack of implementation of e-Procurement on a consistent basis derives from the fact that Directives 2004/18/EC and 2004/17/EC have not been transposed into the Portuguese legal framework.

Nevertheless, a new Public Procurement Code (which will enact the mentioned Directives) is in public discussion and is expected to come into force at the end of 2008.

Portugal now has a National Public Purchasing System (**SNCP- Sistema Nacional de Compras Públicas**) and an agency to coordinate the implementation of the structure of e-Procurement.

Accordingly, although in our opinion the Portuguese legal framework could allow some projects of e-Procurement (but not in all the types procedures set out in the Directives), due to importance that Portugal has given to dematerialisation and simplification of procedures (namely within the scope of the national program "**SIMPLEX**"), we consider that solutions of e-Procurement shall be implemented in the near future.

Some projects are currently being carried out to test the e-solutions on Procurement. However, a regulatory framework has to be created which may also lead to changes in the organic program that has been conceived.

29 Romania

29.1 Public procurement framework

29.1.1 General framework

In the context of complying with the engagements assumed in the process of the accession to the European Union, Romania has adopted legislation in compliance with the EU regulations with regard to the public procurement.

The national legal framework regarding public procurement in Romania is the following:

1. Government Emergency Ordinance no. 34 of 2006 regarding the Award of Public Procurement Contracts, Public Works Concession Contracts and Services Concession Contracts, approved by Law no. 337 of 2006 (the "GEO no. 34 of 2006");
2. Government Decision no. 925 of 2006 regarding Approving of the Application Norms of the Government's Emergency Ordinance no. 34 of 2006 regarding the Award of Public Procurement Contracts, Concession of Works Contracts and Concession of Services Contracts (the "GD no. 925 of 2006");
3. Government Decision no. 1660 of 2006 regarding the Approval of the Norms regarding the Application of the Provisions regarding the Awarding of the Public Procurement Contracts by Electronic Means of the GEO no. 34 of 2006 (the "GD no. 1660 of 2006");
4. Government Emergency Ordinance no. 74/2005 regarding the Setting Up of National Authority for Regulation and Monitoring Public Procurement ("NARMPP").

The legal framework is applicable to all public procurements. Local authorities have no regulatory autonomy; any contracting authority wishing to organise a public procurement must adhere to the national framework.

29.1.2 Certificates and statements

The legal requirements to be met are regulated in the GEO no. 34 of 2006, respectively GD no. 925 of 2006

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The GEO no. 34 of 2006 provides that the contracting authority must identify within the awarding documentation any request, criterion, regulation or other information necessary for assuring the tenderer with thorough, correct and explicit information regarding the awarding procedure.

The awarding documentation must comprise, without limitation to the below, the following:

- a. general information regarding the contracting authority;
- b. instructions regarding the deadlines that must be met and other formalities to be fulfilled for the participation to the public procurement;
- c. if the contracting authority requires, the minimum requests of expertise and the documents that must be filed by the tenderers;
- d. feasibility study;
- e. instructions regarding the drafting and presentation method of the technical and financial proposal;
- f. detailed and thorough information regarding the awarding criterion for the winning offer;
- g. instructions regarding the ways of appeal;
- h. information regarding the mandatory contractual provisions.

The common type of documentation that a tenderer must provide in order to prove its technical and/or professional capabilities refers to the balance sheet of the tenderer or letters of good-standing submitted by banks, reports on global turnover, insurances for various professional risks etc.

When the tenderer cannot present the required documentation regarding to economical and financial compliance for valid reasons, the contracting authority may request any other documents deemed suitable.

For foreign tenderers equivalent documents delivered by the competent judiciary or governmental body from the country of origin will also be accepted.

When the tenderer's country of origin does not deliver such documents, an affidavit authenticated in front of a public notary will also be deemed acceptable.

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With regard to the verification and language issues, there are no formal rules for verifying the validity of an offer. The contracting authority is thus free to assess the validity and value of the provided evidence.

The competent regulatory authority is NARMPP, which is a public institution, subordinated to the Government and in the direct co-ordination of the Prime – Minister.

The NARMPP has as fundamental role the drafting, promotion and implementation of the public procurement policy and fulfils the following functions:

1. Drafting the strategy in the field of public procurement, according to the requirements of the acquis;
2. Regulation of the procedures on awarding the public procurement contracts;
3. Monitoring, analysis, evaluation and supervision of awarding process of public procurement contracts;
4. Representation of Romania within the consultative committees, working parties and communication networks, organized by the European institutions;
5. Methodological counseling of the contracting authorities in the awarding process of public procurement contracts, with supportive role in the correct application of the legislation in this field;
6. Initiation of projects or training actions of the personnel involved in the specific activities of public procurement, with supportive role in developing the administrative capacity for the implementation of the legislation at the level of the contracting authorities.

Starting with January 1, 2007, the notice of intention, the notice of participation and the awarding notice are published in the Electronic System of Public Procurement - <http://www.e-licitatie.ro/> ("ESPP") and subsequently in the Official Monitor, Part VI.

Moreover, the participation notice and the awarding notice are published in the Official Journal of the European Union if the total value of the public procurement contract exceeds the following amounts:

- a. EUR 125,000 for supply or services contracts granted by authorities and public institutions;
- b. EUR 420,000 for supply or services contracts granted by public companies or other public institutions carrying out relevant activities in one of the sectors of public utility: water, energy, transports and postal services;

- c. EUR 5,000,000 for services contracts.

29.2 E-Procurement initiatives and status

29.2.1 General e-Procurement framework and initiatives

As stated above, the act currently in force is the GEO no. 34 of 2006 with its application norms approved by GD no. 925 of 2006.

Art. 21 (1) of the GEO no. 34 of 2006 specifically provides that any contracting authority is entitled to apply the procedures of electronically awarding public procurement, i.e. ESPP.

The ESPP is regulated by the GD no. 1660 of 2006.

The ESPP was set-up in 2002 under the name www.e-market.ro. The initial e-Procurement application was conceived only for a few public authorities which had to use the e-Procurement system in public acquisitions. Starting on July 1, 2006 the new website improved as regards the security of transactions, and www.e-licitatie.ro replaced the former application.

Moreover, starting on January 1, 2007 - date of Romania's EU accession –e-Procurement became mandatory for the public procurement system, therefore any contracting authority and tenderer must register themselves to the ESPP.

A full list of contracting authorities and tenderers can be consulted on-line: <https://www.e-licitatie.ro/Public/Actors/EntitiesList/EntitiesList.aspx>

The implementation process is divided into several modules, to be implemented in stages. The following modules are already implemented in the ESPP:

- e-notification: the registration procedure allows tenderers to register electronically their contact details (name, address, phone, e-mail etc), indicate their specific fields of interest also using the CAEN codification. Tenderers can either be Romanian or foreign legal entities or individuals.
- e-auctions: only the final stage of offline procedures or of the online bid regarding “the lowest price” criterion.
- e-tendering.
- e-catalogues.

The other modules have not become yet operational, and include:

- e-auctions: with the exception of the final stage of offline procedures or of the online bid regarding “the lowest price” criterion.
- e-awarding.
- e-invoicing and e-payment.

The General Inspectorate for Communications and Information Technology is responsible for the implementation of the ESPP, in close collaboration with the NARMPP.

There is no information available regarding the implementation term of the remaining modules in the ESPP.

With regard to the usage of electronic signatures, please note that only the ESPP operator has an electronic signature. Currently, the ESPP operator assigns a personal identification number (“PIN”) to each tenderer following their registration in the system and will be used in downloading the digital certificate.

29.3 Certificates, declarations and attestations

29.3.1 Requirements with regard to the personal situation of the candidate or tenderer – absence of conviction (art. 45 §1 and §2 (c-d) of Directive 2004/18/EC)

Prevalence

This is not a mandatory requirement in Romanian public procurements, although it is requested in practice.

What document (if any) is used?

Romanian natural person tenderers are usually required to submit a certificate of criminal record. The certificate of criminal record is provided by the relevant local Police Inspectorate.

Romanian legal entities are usually required to submit an affidavit authenticated by a public notary regarding compliance with the relevant Romanian legal provisions.

The foreign natural person tenderers are usually required to provide an affidavit authenticated by a public notary regarding compliance with the relevant Romanian legal provisions.

Foreign legal entities are also required to provide an authenticated affidavit along with an extract of the relevant trade registry authority.

Contents

Such certificates identify the issuing authority, the requesting party, date and place of issuance, and legal status of the requesting party.

Electronic certificates

The attestation has no electronic equivalent and no plans for such an equivalent have currently been announced.

29.3.2 Requirements with regard to the personal situation of the candidate or tenderer – non-bankruptcy and financial status (art. 45 §2 (a-b) of Directive 2004/18/EC)

Prevalence

This is a common, although not mandatory, requirement in Romanian procurements.

What document (if any) is used?

Romanian and foreign tenderers are usually required to submit a certificate of good standing issued by the relevant Trade Registry and a bank reference letter issued by the bank where the share capital is domiciled.

If the contracting authority requests it, foreign tenderers must also submit an authenticated affidavit regarding compliance with Romanian relevant legal requirements.

Contents

The attestation identifies the issuing authority, the requesting party, date and place of issuance and the declaration of the issuing authority that the requesting party has not been declared bankrupt.

Electronic certificates

Currently, the attestation has no electronic equivalent. The Trade Registry Law no. 26 of 1990 has been recently amended with regard to the issuance of electronic certificates as of January 1, 2007. However, the procedure is under implementation and no official deadline has been announced.

29.3.3 Requirements with regard to the personal situation of the candidate or tenderer – compliance with fiscal and social obligations (art. 45 §2 (e-f) of Directive 2004/18/EC)

Prevalence

This is a common, although not mandatory, requirement in Romanian procurements.

What document (if any) is used?

Romanian tenderers are required to submit a certificate of fiscal record, which is provided by the local Financial Administration of the tenderer's jurisdiction. Delivery can take between 24 hours and 10 working days, depending on the urgency fee paid by the tenderer.

Social security certificates are not usually requested in Romanian public procurement.

Contents

The certificate identifies the issuing authority, the requesting party, date and place of issuance and the requested information. The document is signed by a public official and stamped.

Electronic certificates

The attestation has no electronic equivalent and no plans for such an equivalent have currently been announced.

29.3.4 Requirements with regard to the suitability to pursue the professional activity

Prevalence

This is not a common requirement in Romanian procurements.

What document (if any) is used?

Romanian tenderers are required to submit an affidavit authenticated by a public notary regarding the suitability to pursue the professional activity or an attestation issued by the professional register where the tenderer is registered.

Contents

The attestation identifies the issuing authority, the requesting party, date and place of issuance and the requested information. The document is signed by an authorized representative and stamped.

Electronic certificates

The attestation has no electronic equivalent and no plans for such an equivalent have currently been announced.

29.3.5 Requirements with regard to economic and financial standing

Prevalence

This is a common, although not mandatory, requirement in Romanian procurements.

What document (if any) is used?

Romanian tenderers are required to submit a bank reference letter, which is provided by the bank where the share capital of the tenderer is domiciled or the last balance sheet and annual accounts approved by a certified accountant or auditor.

Contents

The certificate identifies the issuing authority, the requesting party, date and place of issuance and the requested information. The document is signed by an authorized representative and stamped.

The annual accounts typically state:

- Full name and legal form;
- Unique enterprise number;
- Seat of establishment and date of establishment;
- Date of approval of the annual account by the management and period covered by the account;
- Management details, including general managers and daily management, and period of appointment;

- Identification of any external auditor or accountant;
- Full balance sheets and financial/fiscal results.

Electronic certificates

The attestation has no electronic equivalent and no plans for such an equivalent have currently been announced.

29.3.6 Requirements with regard to technical and/or professional ability

Prevalence

This is not a common requirement in Romanian procurements.

What document (if any) is used?

Romanian tenderers are required to demonstrate technical and/ or professional ability by indicating the profiles of its personnel, their qualifications and past realizations. However, this information is usually integrated into the main body of the offer in the form of resumes and/ or project references.

Contents

The attestation identifies the issuing authority, the requesting party, date and place of issuance and the requested information. The document is signed by an authorized representative and stamped.

Electronic certificates

The attestation has no electronic equivalent and no plans for such an equivalent have currently been announced.

29.3.7 Requirements with regard to quality assurance standards

Prevalence

The requirement to demonstrate compliance with quality assurance standards is an uncommon requirement in Romanian procurements, being mostly limited to procurement with a higher value and/or specific technical nature.

What document (if any) is used?

Romanian tenderers are usually required to provide a certificate from an independent accreditation authority. The most common requirement is that the tenderer demonstrates the compliance of its products or services with ISO standards.

Contents

The attestation identifies the issuing authority, the requesting party, date and place of issuance, date of testing and issuance, duration of the accreditation. The document is signed by an authorized representative and stamped.

Electronic certificates

The attestation has no electronic equivalent under Romanian law and no plans for such an equivalent have currently been announced.

29.3.8 Requirements with regard to environmental management standards

Prevalence

The requirement to demonstrate compliance with environmental management standards is an uncommon requirement in Romanian procurements, being mostly limited to procurement with a higher value and/or specific technical nature.

What document (if any) is used?

Romanian tenderers are usually required to provide a certificate from an independent accreditation authority. The most common requirement is that the tenderer demonstrates the compliance of its products or services by an accredited organisation.

Contents

The certificate identifies the issuing authority, the requesting party, date and place of issuance, date of testing and issuance, duration of the accreditation. The document is signed by an authorized representative and stamped.

Electronic certificates

The certificate has no electronic equivalent under Romanian law and no plans for such an equivalent have currently been announced.

29.4 Interoperability

As described above, the only e-Procurement system in Romania is the ESPP platform. Since there are no electronic signatures involved in the public procurement, the same procedure is open for both national and foreign tenderers. However, in practice the ESPP operator may request additional documentation for foreign tenderers in order to be registered in the ESPP platform.

As already mentioned, the ESPP operator assigns a personal identification number ("PIN") to each tenderer following their registration in the system and will be used in downloading a digital certificate.

The ESPP platform will become fully available after the implementation of all ESPP modules.

29.5 Future trends/expectations

The main expectation is the full implementation of the currently inactive modules of the ESPP platform.

Moreover, the General Inspectorate for Communications and Information Technology is envisaging the amendment of the registration procedure.

The GD no. 1660 of 2006 specifically provides at Art. 68 (2) that as of June 1, 2007 the ESPP operator is bound to submit to the NARMPP and the Ministry of Communications and Information Technology the technical project afferent to the accomplishment of the dynamic acquisitions systems with regard to adopting the relevant applicable norms. However, neither the representatives of the ESPP operator nor the NARMPP officials could advise on the non-compliance with the above-mentioned deadline.

29.6 Assessment

Romanian's e-procurement initiatives are still in an early stage, since the ESPP platform does not yet allow for much of the functionality prescribed in the Procurement Directives. It remains to be seen whether the future implementation will meet the end users' needs.

Specifically with regard to certificates and statements, Romanian procurements are characterised by a fair degree of flexibility, in the sense that the contracting authority has a substantial freedom in determining which certificates and statements are required, and in determining if provided originals or copies (including foreign documents) meet these requirements. The general principles of good

administrative governance generally ensure that decisions to reject documents are not made arbitrarily, and that tenderers typically have the opportunity to clarify and/or rectify any issues.

30 Slovakia

30.1 Public procurement framework

30.1.1 General framework and competent authority

The rules for public procurement are laid down in the Act of 14 December 2005 on public procurement and on modification and amendment of certain acts³⁵² (*Zákon o verejnom obstarávaní*, hereinafter referred to as "Public Procurement Act").

This regulation presents the transposition of both e-procurement directives Directive 2004/18/EC of 31 March 2004 and Directive 2004/17/EC of 31 March 2004. As in several EU countries, the implementation process is divided into several modules:

- 1) preparation and planning phase,
- 2) awarding of contract phase including:
 - *notification*:
 - *tendering* (questions and answers session, submission and opening of proposals).
 - *awarding* (evaluation of proposals and granting)
- 3) archiving phase including:
 - *ordering*
 - *invoicing* and e-payment.

The Public Procurement Act was detailed and executed through a two decrees enacted according to the authorising provisions laid down in Art. 154 of the Public Procurement Act :

- Decree of 9 January 2006 on announcement used in public procurement³⁵³;
- Decree of 1 March 2006 on details concerning the types of design contests in architecture, town and country planning and civil engineering, concerning the content of contract documents and concerning the jury activities³⁵⁴;

³⁵² English version available on http://www.uvo.gov.sk/download/2006/zakon25_2006/act_25_2006.pdf

³⁵³ Vyhláška Úradu pre verejné obstarávanie č. 35/2006 Z.z. o oznámeniach používaných vo verejnom obstarávaní; only Slovak version available: <http://www.uvo.gov.sk>

³⁵⁴ Vyhláška Úradu pre verejné obstarávanie č. 158/2006 Z.z., ktorou sa ustanovujú podrobnosti o druhoch súťaží, návrhov v oblasti architektúry, územného plánovania a stavebného inžinierstva, o obsahu súťažných podmienok a o činnosti poroty; only Slovak version available on: <http://www.uvo.gov.sk>

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This legal framework regulates the public awarding of supply contracts, building works contracts, service contracts, building works concessions, design contests and administration in public procurement. The Public Procurement Act is not applicable e.g. to a contract, the subject of which is constituted by Top Secret or Secret classified information, acquisition or rental of immovable property and the rights connected thereto except financial services etc³⁵⁵.

The contracting authority and contracting entity are during the award of contracts obliged to follow the Public Procurement Act. Contracting authority are the Slovak Republic represented by its authorities (government, ministries, central public administrative bodies, Art. 6 (1) letter a), municipalities (Art. 6 (1) letter b), higher territorial units (communes, Art. 6 (1) letter c), legal entities (Art. 6 (1) letter d)³⁵⁶ or an associations established by these.

Local administrations thus have no regulatory autonomy; any contracting authority wishing to organise a public procurement must adhere to the legal framework mentioned above.

The competent authority for the public procurement procedures is the Public Procurement Authority (*Úrad pre verejné obstarávanie*), which is a central public administration authority with its seat in Bratislava. The Public Procurement Authority (hereinafter referred to as "Authority") may establish permanent or temporary workplaces outside its seat. Such workplaces shall not have any legal personality.

The Authority is headed by its chairman who is appointed and removed by the government. He is deputised by the Authority deputy chairman, who is appointed and removed by the government following a proposal of the Authority chairman. Tenure of the chairman and deputy chairman is five years. The same person may hold the office of the chairman or deputy chairman for not more than two successive terms.

The Authority is a central institution with competences for the whole territory of the Slovak Republic. The Authority supervises public procurement, leads the state administration in public procurement, cooperates with the European Commission and ensures the fulfilment of notification obligations with regard to the European Commission, imposes the fines for administrative infractions etc³⁵⁷.

³⁵⁵ List of exemption when the legal framework is not applicable is laid down in Art. 1(2) the Public Procurement Act.

³⁵⁶ For the purposes of the Public Procurement Act the legal entity means a person founded or established for a special purpose of meeting needs in general interest, not having industrial character or commercial character and

- a) fully or partially funded by a contracting authority pursuant to paragraph 1 (a) to (d),
- b) controlled by a contracting authority pursuant to paragraph 1 (a) to (d), or
- c) a contracting authority pursuant to paragraph 1 (a) to (d) appoints or elects more than one half of the members in its management body or supervisory body.

³⁵⁷ Responsibility and tasks of Authority is laid down in Art. 112 Public Procurement Act.

One of the basic principles of the legal framework is the organisation of a competitive environment, including through a prior publication of procurement opportunities. This means that an announcement used in public procurement must be published in the Official Journal of the European Communities (on-line version: see Tenders Electronic Daily, <http://ted.publications.eu.int>, hereinafter referred to as "Publication Office") and subsequently in the Journal of Public Procurements³⁵⁸ of the Authority, which is published on a weekly basis (on-line version: see <http://www.uvo.gov.sk/vestnik>, only Slovak version available).

The announcement sent to the Authority may not include other information than that referred to in the announcement sent to the Publications Office. The announcement has to be sent to the Authority on the day following the date on which the announcement was sent to the Publications Office. The announcement may be sent to the Publication Office and to the Authority by the contracting authority and contracting entity either by electronic or by other means (an announcement sent by a contracting authority may not exceed 650 words). If the announcement was sent by electronic means, then it will be published by the Authority not later than 6 days from the date of the announcement dispatch to the Publications Office and if it was published by other means, then it will be published by the Authority not later than 13 days from the date of the notice dispatch to the Publications Office.

Notwithstanding this obligation, contracting authorities are of course allowed to publish the procurement through other channels to increase response rates, including by directly contacting potential tenderers, although such announcements may not take place before the legally required publication or contain more/other information, to ensure fair competition.

In exceptional circumstances prior publication is not required, and the so called 'negotiation procedure without prior publication' can be followed. This can only be done in a limited number of situations indicated in the law, including in procurements beneath a threshold value set by Public Procurement Act, urgent procurements which could not have been foreseen, or when only invalid offers have been presented in a prior procurement procedure.

30.1.2 Certificates and statements

The administrative requirements to be met are defined from Art. 26 to 30 of Public Procurement Act. While these vary depending on the type of procurement (works, supplies or services), the tenderer is commonly required to provide the following documents with regard to the exclusion criteria (which establish a tenderer's eligibility to participate in a call):

The first group of documents are related to his personal status³⁵⁹:

- An extract from a penal register (not older than 3 months), demonstrating that the tenderer:
 - has not been lawfully convicted for the offence of corruption, for the offence of damaging the financial interests of the European Communities, for the offence of laundering of the proceeds of crime or for the offence of establishing, plotting and supporting a criminal group;

³⁵⁸ Vestník verejného obstarávania.

³⁵⁹ Art. 26 Public Procurement Act.

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- has not been lawfully convicted for an offence concerning the professional conduct of business;
- Statement of the competent court that the tenderer is not subject of proceedings for the declaration of bankruptcy, is not bankrupt or being wound up, nor a bankruptcy petition has been rejected against him due to lack of estate,
- Statement of the Social Insurance Agency and health insurance agency (not older than three months) that the tenderer does not have a history of arrears in the payment of contributions to health insurance, social insurance and contributions to seniors pension savings scheme to be collected by a judicial execution of a decision,
- Confirmation of the locally competent tax authority (not older than three months) that the tenderer does not have a history of tax arrears to be collected by a judicial execution of a decision,
- Document proving his business authorisation or a document of enrolment in a professional register kept by a professional organisation demonstrating that tenderer is authorised to deliver supplies, execute building works or provide a service,
- Statement of the competent labour inspectorate that tenderer has not violated the prohibition of illegal employment pursuant to a special regulation (over the preceding five years),

The Public Procurement Act has a special provision for foreign tenderers and provides when equivalent documents delivered by competent judiciary or governmental body from the country of origin will also be accepted. In this case, if the tenderer is not established in the Slovak Republic and the country of his establishment does not issue any of the documents mentioned above or does not issue any equivalent documents either, they may be replaced by a declaration on honour pursuant to the regulations in effect in the country of his establishment. If country of his establishment (country of origin) does not regulate the concept of declaration on honour, it may be substituted by a statement made before a court, administration authority, notary, any other professional institution or trade institution pursuant to the regulations in effect in the country of origin or in the country of establishment. (Art. 26 (3 and 4) Public Procurement Act).

With regard to selection criteria (which establish the financial and technical suitability of the tenderer and his quality assurance), a different set of supporting documents is typically required. These include most notably:

Financial and economic position of tenderer can be demonstrating by (Art. 27):

- Statement of a bank or foreign bank branch, which may be a commitment of a bank or foreign bank branch to extend a loan;
- Blue card of professional liability insurance or blue card of business liability insurance in the event such insurance is required,
- Balance sheet or statement of assets and liabilities or data therefrom,
- Overview of the total turnover or an overview of the turnover made in the field related to the object of contract, for not more than three economic years, for which they are available depending on the establishment or commencement of the activity operation.

When the tenderer cannot present the required documentation with regards to economical and financial suitability for valid reasons, this may be demonstrated through any other documents which the contracting authority deems suitable (Art. 27 (3)).

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To demonstrate financial and economic standing, a tenderer may use financial resources of another person regardless of their legal relationship, which he would have available for the contract performance. In such event, he shall submit the contracting authority or contracting entity a document proving that fact, which may be a commitment of that person

Technical ability or professional suitability may be demonstrated by a document or by documents depending on the type, quantity, importance or use of the supply, building works or services such as:

- List of supplies delivered or services provided over the preceding three years stating the prices, delivery dates and customers,
- List of building works executed over the preceding five years, accompanied by certificates of satisfactory execution of the building works stating the prices, places and dates of the works completion and assessment of the works performed according to the business conditions,
- data regarding engineers or technical authorities responsible for the quality control,
- data concerning education and professional experience or professional qualification of the managing staff, in particular of the persons responsible for the management of building works or for the provision of service, etc.

It is worth noting that the documents pertaining to selection criteria mentioned above are usually³⁶⁰ not originals in the sense that they carry no signature or seal demonstrating their authenticity. Copies of such documents (which carry no signature or seal themselves) are often submitted in procurement proceedings, and such copies are typically accepted by the contracting authority. This situation is different from most of the exclusion criteria documents (most notably the attestations from penal registers, social security and fiscal documents), which are typically required to be originals, i.e. signed and/or stamped.

This is relevant because there is no reason in principle why an electronic copy would not be equally acceptable as a paper copy. From a legal perspective, problems with electronic documents can only arise if the document is required to be an original.

All document mentioned above that are able to determine the suitability of tenderer may be substituted by confirmation of enrolment in the list of entrepreneurs. According to Art. 128 of Public Procurement Act the Authority shall keep a list of entrepreneurs who have proven their capability to conclude contracts or framework agreements in public procurement and who have applied for enrolment³⁶¹. Enrolment in the list of entrepreneurs shall entitle the entrepreneur to demonstrate in public procurement his meeting of conditions of participation concerning his personal status pursuant to Article 26 (2) through a confirmation by the Authority. The list of entrepreneurs shall be a list available to the public which anyone may consult and make excerpts from. The list of entrepreneurs shall be published by the Authority on its internet site. Enrolment in the list shall be performed with a one year validity. The Authority will enrol the entrepreneur in the list within 15 days of the request delivery and where the request failed to meet the required elements, from the date of its completion and the Authority will issue an entrepreneur a confirmation within seven days from the date of his enrolment in the list of entrepreneurs.

³⁶⁰ Notwithstanding the contracting authority's right to request original documents, e.g. balance sheets or revenue statements which have been certified by an independent auditor.

³⁶¹ Form of application for enrolment in a list is published on the web site of Authority <https://www.uvo.gov.sk/zoznamy/podnikatelia/zapis07.html>.

30.2 E-Procurement initiatives and status

As stated above, the rules for public procurement are laid down in the Act of 14 December 2005 on public procurement and on modification and amendment of certain acts³⁶² (hereinafter referred to as "Public Procurement Act") and in two implementing regulations, the Decree of 9 January 2006 on announcement used in public procurement³⁶³ and the Decree of 1 March 2006 on details concerning the types of design contests in architecture, town and country planning and civil engineering, concerning the content of contract documents and concerning jury activities³⁶⁴.

This regulation presents the fully transposition of both e-procurement directives Directive 2004/18/EC of 31 March 2004 and Directive 2004/17/EC of 31 March 2004. As in several EU countries, the implementation process is divided into several modules:

- 1) preparation and planning stage,
- 2) awarding of contract stage including:
 - *e-notification*:
 - *e-tendering* (questions and answers session, submission and opening of proposals). This module is operational from the end of 2006.
 - *e-awarding* (evaluation of proposals and granting)
- 3) archiving stage including:
 - *e-ordering*
 - *e-invoicing* and e-payment.

According to the guiding document for Slovak e-government strategy "*Competitiveness Strategy of Slovakia until the year 2010*" and according to the "*Action Plan*" (task No. 7) an obligation was established to develop and put into operation a system of electronic public procurement. On the basis of this initiative and according to Art. 112 letter m) of the Public Procurement Act the Ministry of Transport, Post and Telecommunication in cooperation with the private company IBM Slovakia has developed the central portal for public procurement (*evo – Elektronické verejné obstarávanie*³⁶⁵). At the end of the previous year the portal was taken over by the Public Procurement Authority of the Slovak Republic that is responsible for the implementation of the system.

The objective of the establishment of an information system - central portal for public procurement was to make the process of public procurement in public administration more effective and transparent, and

³⁶² English version available on http://www.uvo.gov.sk/download/2006/zakon25_2006/act_25_2006.pdf

³⁶³ Vyhláška Úradu pre verejné obstarávanie č. 35/2006 Z.z. o oznámeniach používaných vo verejnom obstarávaní; only Slovak version available: <http://www.uvo.gov.sk>

³⁶⁴ Vyhláška Úradu pre verejné obstarávanie č. 158/2006 Z.z., ktorou sa ustanovujú podrobnosti o druhoch súťaží, návrhov v oblasti architektúry, územného plánovania a stavebného inžinierstva, o obsahu súťažných podmienok a o činnosti poroty; only Slovak version available on: <http://www.uvo.gov.sk>

³⁶⁵ Electronic public procurement portal: <https://evo.gov.sk>

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it is also a consequence of the legal obligation laid down in Art. 25 (3) Public Procurement Act to employ for the method of open and restricted procedures exclusively electronic communications. The obligation came into force from 1 January 2007. After this provision entered into force, the legislators found out that the provision was not enforceable in practice (a few steps were possible to provide electronically), which was the main reason to pass an amendment to the Public Procurement Act. It introduced a *possibility* (rather than an *obligation*) to employ electronic communications (from 13 March 2007).

Currently there are two platforms in practice. The first, ZOVO (*Zber oznámení vo verejnom obstarávaní*³⁶⁶), covers the stage of e-notification aimed for e-announcement collection and for sending the announcement into the Journal of Public Procurement; and the second, EVO (*Elektonické verejné obstarávanie*), covers the stage of e-tendering and is a platform for tender submitting and for acceptance of a tenderer's proposal.

ZOVO is intended for contracting authorities and contracting entities, who send the notifications into the Journal of Public Procurement or send the information about conclusion of the contracts below the threshold (Annex of ordinance No. 35/2006 Coll.). However, it should be noted that the paper publication remains the only official and legally binding version, and that the electronic publications are provided as a matter of convenience.

The collection of announcements is realised through the ZOVO application. Received eNotifications are automatically processed in the information system *Procurio* that is the leading application for the eNotification process. Contracting authorities and contracting entities are informed about the process status via electronic notice.

ZOVO is an internet application (recommended at least version 6.0), created on the basis of simple HTML using javascript. The application allows to create and to fill in all requested eNotification forms – the total number of available forms is 23.

ZOVO is accessible either for registered or non-registered users. To be a registered user it is necessary to submit a written application to the Authority. Afterwards the applicant receives a low security user name and password attended for the access to the application. Non-registered users may use only demo version of ZOVO. As this registration does not require information which is specific to Slovak entities, registration is open to foreigners.

The second platform EVO (*Elektonické verejné obstarávanie*) includes the e-tendering stage. Through the EVO system it is not possible to perform the complete process of e-procurement. The system supports just the following stages of e-procurement that are presently operational:

- preparation and planning phase (the system allows to publish the prior notices, time schedule of awarding contract or analysis and market research);
- awarding of contract phase (the system allows to award the contracts above and below the limit, to perform open procedures, restricted procedures, negotiated procedures with publication and e-Auction)
- archiving phase (archiving of contract, administration and archiving of agreements)

³⁶⁶ Only Slovak version available on <http://www.uvo.gov.sk/vestnik/ZOVO.html>

The current EVO system does not allow to perform the phases eOrdering and eInvoicing, but the provider of the EVO system is currently considering to develop the system and to add certain new functionality such as dynamic purchasing systems (Art. 47 Public Procurement Act), an eOrdering module, award of contracts below the threshold (Art. 99 Public Procurement Act), award of small-value contracts (Art. 102 Public Procurement Act) and adding review procedures.

The Public Procurement Act does not stipulate a type of electronic signature required in the application. The only exception is a submitting of offer that has to be signed by electronic signature according to the eSignature Act³⁶⁷ (Art. 18 (2)). According to the general regulation for the area of electronic signatures (eSignature Act), the use of an advanced electronic signature is permitted in the process of public procurement (Art.3 eSignature Act), as well as qualified electronic signatures (Art.4 eSignature Act).

The EVO system currently allows only to use public key certificates and private keys issued by an internal certification authority integrated in the system. Certification services are provided through Lotus Domino ver. 6.5 s pomocou CryptoAPI BouncyCastle ver. 1.24 pre JDK1.3, and certificates are generated automatically by a JAVA module after the registration process into the system. These certificates are only temporarily determined for each individual contract. The certificate is sent to the user at the e-mail address given during the registration process.

The announcement, submission of documents and communication between a contracting authority or contracting entity and a tenderer or candidate may be carried out in writing by post, fax, by electronic means or by telephone or by a combination of those means. The contracting authority and contracting entity shall determine the means of communication so that they are generally available and that the opportunities of tenderers or candidates to participate in public procurement are not restricted.

Public Procurement Act defines (Art. 16) the concepts 'document in writing' and 'electronic means'. An electronic means shall mean using electronic equipment for processing including digital compression and storage of the data which is transmitted, conveyed and received by wire, by radio waves, by optical means or by other electromagnetic means. In writing is defined as any expression consisting of words or figures which can be read, reproduced and subsequently forwarded. It may include information which is transmitted and stored by electronic means .

Art. 18 (4) Public Procurement Act: The devices for electronic communication, in particular electronic transmission and receipt of tenders and requests to participate, must through hardware and suitable procedures ensure

a) meeting of the requirements concerning electronic signatures, which apply to tenders and to requests to participate,

³⁶⁷ This provision does not prescribe a type of electronic signature to be used in the application and does content only the reference on eSignature Act. Slovak legislation defines only the electronic signature based on asymmetric cryptography (digital signature) and does not define the technologically neutral electronic signature according to Art. 2 (1) of the Directive. Therefore the minimum type of e-signature used in EVO application is electronic signature according to eSignature Act (that is a transposition of advanced electronic signature defined in Art. 2(2) of Directive 1999/93/EC.

- b) the opportunity to determine the exact time and date of receipt of tenders and requests to participate,*
- c) the opportunity to reasonably ensure that no one has access to the information transmitted in accordance with these requirements before the determined time limit,*
- d) in the event of breach of the access prohibition pursuant to (c), the opportunity to reasonably ensure an exact identification of such breach,*
- a) that only authorised persons may determine or change the time limit for making the submitted information available,*
- f) that during the contract award procedure, access to all or to a part of the information submitted is possible only on a basis of a previous decision of authorised persons,*
- g) that the decision of authorised persons pursuant to (f) would allow access to the information submitted only after the time limit determined beforehand,*
- f) that the information submitted and made available in accordance with these requirements may remain available only to persons who are authorised to be informed.*

Further, the tools used for electronic communication, as well as their technical characteristics, must not be discriminatory, they must be generally available and interoperable with the information and communication technology products in general use. In the event of electronic communication relating to a contract award procedure, the parties involved must have all the necessary information of a technical nature available, including encryption. A tender has to be signed by an electronic signature pursuant to the eSignatures Act.

The main issue in the process of e-procurement was shown to be the fact that in Slovakia it is currently not possible to submit other documents in public procurements (such as trade licences, declarations of social and health insurance etc.) in electronic form. For this reason the legislator introduced an exception in Art. 18 (3): where documents demonstrating compliance with the conditions of participation in public procurement are not available in an electronic form, the tenderer or candidate shall submit those in writing within the time limit for the submission of tenders or requests to participate.

30.3 Certificates, attestations and declarations

In this section, we will take a closer look at how the common requirements defined by the e-Procurement Directives are typically met in Slovakia.

30.3.1 Requirements with regard to the personal situation of the candidate or tenderer – absence of conviction (art. 45 §1 and §2 (c-d) of Directive 2004/18/EC)

Prevalence/actual use in calls

As indicated above, this is a common (though not mandatory) requirement in Slovak procurements.

What document (if any) is used?

Slovakian tenderers are required to submit a so called extract from the penal register (*Výpis z registra trestov*). An extract from a penal register (according to Art. 26 (2) letter a) not older than 3 months), demonstrates that:

- The tenderer has not been lawfully convicted for the offence of corruption, for the offence of damaging the financial interests of the European Communities, for the offence of laundering of the proceeds of crime or for the offence of establishing, plotting and supporting a criminal group;
- neither tenderer nor his statutory body or a member of his statutory body has not been lawfully convicted for an offence concerning the professional conduct of business.

Apart from procurements, the certificate is often requested during job application procedures, specifically when applying for a public function or for a position involving contact with minors.

For natural persons, the extract from penal register is provided by the General Prosecutor's Office (<http://www.genpro.gov.sk/index/go.php?id=159>). The applicant has to fill out an application, paste a duty stamp and prove his identity through his ID card. The administrative fee is 100,- SKK (about 2.85 EUR) charged by duty stamps. In Slovakia there is no criminal liability for legal entities; therefore it is not possible to issue such a document to legal persons and an extract can be delivered only for the statutory body or member of the statutory body of the tenderer's company.

Traditionally, the delivery of such an extract required the requesting party to present himself physically before the issuing authority. However, even when the certificate is requested electronically, a paper certificate is delivered.

Contents

The certificate identifies the issuing authority, the requesting party, date and place of issuance, and relevant decisions. The latter includes criminal convictions (which have not been revoked through grace, pardon or rehabilitation), internments, and dispossession of parental authority (by date, jurisdiction, description of facts and final decision). The document is signed by the public official and stamped.

There is no formal validation procedure of the certificate after receipt by the contracting authority. In case of ambiguity, the contracting authority is free to request additional information from the tenderer. The contracting authority may not directly contact the central service of the Penal Register to obtain this certificate without the tenderer's intervention.

Electronic certificates

During the previous year the Ministry of Transport, Post and Telecommunication has implemented a pilot project aimed on extension and utilisation of qualified electronic signature in public and state

administrative bodies. As part of this project 400 qualified certificates on smart cards were issued and a secure creation and verification application (SCVA) QSign from the private company ARDACO was installed on 1000 working stations. Together with this project a Central E-Registry on the Central Portal for Public Administration was procured. The result of those projects is the fact that those working stations are able to create qualified electronic signatures, and from these working stations an extract from the Penal Register in electronic form signed by qualified electronic signatures may be delivered. But the real situation seems not to be so optimistic, and extracts are practically issued only in paper based form.

30.3.2 Requirements with regard to the personal situation of the candidate or tenderer – non-bankruptcy and financial status (art. 45 §2 (a-b) of Directive 2004/18/EC)

Prevalence/actual use in calls

As indicated above, this is a common (though not mandatory) requirement in Slovakian procurements. Evidence that a tenderer is not subject of proceedings for the declaration of bankruptcy, is not bankrupt or being wound up, nor a bankruptcy petition has been rejected against him due to lack of estate is demonstrated by a confirmation (attestation) of the competent court.

What document (if any) is used?

Slovakian tenderers are usually required to submit an attestation of non-bankruptcy, issued by the county courts for a territory of district courts (8 county courts in Slovakia are competent to issue such kind of attestation – County court Bratislava I., County Court Nitra, County Court Trnava, County Court Trenčín, County Court Žilina, County Court Banská Bystrica, County Court Prešov and County Court Košice).

Attestations can be requested at the clerk's office of the county courts of the jurisdiction where the requesting party is established. Delivery is instantaneous, and the court has no fees for its issuance.

The attestation must be requested in person, and the resulting document bears the stamp of the county court and the handwritten signature of the clerk of the court.

Contents

The attestation identifies the issuing authority, the requesting party (including official address and unique enterprise number), date and place of issuance, and contains a declaration that the requesting party has not been declared bankrupt and has not filed for a wind-up.

Electronic certificates

The attestation has no electronic equivalent, but in context with the pilot project of Ministry of Transport, Post and Telecommunication (mentioned already above) it is already technically possible to deliver such attestations in electronic form signed by a qualified electronic signature. One of the main problems may be the fact that the originals are stamped by the clerk of the court to confirm the official nature of the document. This role is occasionally played by server certificates issued to an administrative authority, although such solutions are not yet commonplace. However, it should be noted that the law does not appear to mandate the presence of the stamp. None the less, it seems doubtful that the signature of the clerk of the court would suffice if his legal capacity cannot be deduced by the recipient of the document.

30.3.3 Requirements with regard to the personal situation of the candidate or tenderer – compliance with fiscal and social obligations (art. 45 §2 (e-f) of Directive 2004/18/EC)

Prevalence/actual use in calls

Attestations demonstrating compliance with fiscal and social obligations are mandatory requirements in Slovakian procurements. Evidence that a tenderer does not have a history of arrears in the payment of contributions to health insurance, social insurance and contributions to seniors pension savings schemes to be collected by a judicial execution of a decision is demonstrated by a confirmation of the Social Insurance Agency and health insurance agency not older than three months; and evidence that a tenderer does not have a history of tax arrears to be collected by a judicial execution of a decision is demonstrated by a confirmation of the locally competent tax authority not older than three months.

What document (if any) is used?

For both requirements (social and fiscal obligations) an attestation exists.

Attestation that a tenderer has not a history of arrears in a payment of contribution to health insurance is issued by one of the seven existing state or commercial health insurances. The form of an application is published on the web site of the Authority (<https://www.uvo.gov.sk/zoznamy/podnikatelia/zapis07.html>). The attestation is submitted in original or a notary declared copy not older than 3 months.

Attestation that a tenderer has no history of arrears in payment of social insurance and contributions to seniors pension savings schemes is issued by the Social Insurance Agency (<http://www.socpoist.sk>). The form of an application is published on the web site of the Authority (<https://www.uvo.gov.sk/zoznamy/podnikatelia/zapis07.html>). The attestation is submitted in original or a notary declared copy not older than 3 months.

Confirmation that a tenderer has no history of tax arrears to be collected by a judicial execution of a decision is demonstrated by an attestation issued by locally competent tax authority. The form of an application is published on the web site of the Authority

(<https://www.uvo.gov.sk/zoznamy/podnikatelia/zapis07.html>). The confirmation is submitted in original or a notary declared copy not older than 3 months.

Apart from procurements, the certificate and attestations are often required in various situation.

Delivery does not take a long time; attestations or certificate are mostly issued immediately.

Contents

The certificate identifies the issuing authority (including the specific public official), the requesting party (including by enterprise number), date and place of issuance, and the requested information (i.e. compliance with fiscal or social obligations). The document is signed by the public official and stamped.

Electronic certificates

None of the attestations have an electronic equivalent that is provided to the tenderer, and no plans for such an equivalent have currently been announced.

30.3.4 Requirements with regard to the suitability to pursue the professional activity

Prevalence/actual use in calls

Generic suitability and authorisation to deliver supplies, execute building works or provide a service can be demonstrated by the tenderer by a document proving his business authorisation or a document of enrolment in a professional register kept by a professional organisation (Art. 26 (2) letter e). A professional activity as indicated through enrolment in a trade/professional register is very often asked for Slovakian procurements. Information about enrolment in a business register are freely available also in electronic form (online on web site <http://www.orsr.sk>), but the information in this database is usable only for information purposes and has no legal binding force.

What document (if any) is used?

Documents demonstrating business authorisation of tenderers may be either an extract from the Trade Register³⁶⁸ named trade licence (<http://www.zrsr.sk>) or an extract from Business Register³⁶⁹ named sometimes also Commercial Register (<http://www.orsr.sk>).

³⁶⁸ Živnostenský register Slovenskej republiky.

³⁶⁹ Obchodný register Slovenskej republiky.

A trade licence can be obtained from the district authority's department of trade.

Apart from procurements, a trade licence is mandatorily requested during the application for enrolment in a business register or very often in various situations if a demonstration of a business authorisation is needed. Enrolment of a new entrepreneur in a trade register takes 7 day and costs 1.000 SKK (about 28,60 EUR). Everybody is entitled to take a look inside a trade register or to apply for an extract from it. After a natural or legal person is already enrolled in a trade register an extract (trade licence) will be issued immediately after the applicant submits an application and pays the administrative fee (100 SKK, about 2,85 EUR).

An extract from a business register (<http://www.orsr.sk>) can be obtained from 8 register courts (district courts established in every one of 8 municipalities). Apart from procurements, an extract from a business register is very often required in various situations if the demonstration of a business authorisation is needed. Enrolment of a new entrepreneur in a business register takes 5 days and costs 10.000 SKK (about 286 EUR). Everybody is entitled to take a look inside a trade register or to apply for an extract from it. After an entrepreneur is already enrolled in a business register an extract from business register will be issued immediately after the applicant submits a application and pays the administrative fee (200 SKK, about 5,71 EUR).

Contents

The trade licence of a natural person contains the following data (Art. 47 (2) of Trade Licence Act³⁷⁰):

- personal data of entrepreneur,
- trade name,
- identification number ³⁷¹(unique enterprise number),
- object of enterprise,
- place of enterprise,
- date of inception (in case the date is later than the date of issue)
- date of issue.

The trade licence of a legal person contains the following data (Art. 47 (3) of Trade Licence Act):

- business name, seat of establishment and identification number,
- personal data of responsible representative,
- object of enterprise,
- date of inception (in case the date is later than the date of issue)
- date of issue.

The extract from the business register contains following datas:

- business name,
- seat of establishment and date of establishment,

³⁷⁰ Zákon č. 455/1991 Zb. o živnostenskom podnikaní v znení neskorších predpisov (Živnostenský zákon).

³⁷¹ So called IČO (Identifikačné číslo osoby)

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- identification number,
- legal form,
- name, surname, address and date of birth of all associate partners,
- management details, including statutory bodies,
- ground substance
- Basic financial information, including capital and date of deposit of balance sheets;
- Date of issue.

Electronic certificates

During the previous year the Ministry of Transport, Post and Telecommunication has implemented a project aimed on extension and utilisation of qualified electronic signature in public and state administrative bodies. As a part of this project 400 qualified certificates on a smart cards were issued and a secure creation and verification application (SCVA) QSign from the private company ARDACO was installed on 1000 working stations. Together with this project a Central E-Registry on a Central Portal for Public Administration was procured. The result of those projects is the fact that those working stations are able to create qualified electronic signatures and from these working station a trade licence in electronic form signed by a qualified electronic signature may be delivered. But the real situation seems not be so optimistic, and trade licences are practically issued only in paper based form.

Since 1 August 2007 an extract from the Business Register will also be available in electronic form, when the system of eServices of the Business Register³⁷² will be fully operational. An electronic extract from the Business Register signed by a qualified electronic signature will cost only 10 SKK (0,28 EUR) instead of the 200 charged for paper based extract.

30.3.5 Requirements with regard to economic and financial standing

Prevalence/actual use in calls

Evidence with regard to economic or financial standing may be proven by:

- a) a statement of a bank or foreign bank branch, which may be a commitment of a bank or foreign bank branch to extend a loan,
- b) blue card of professional liability insurance or blue card of business liability insurance in the event such insurance is required,
- c) balance sheet or statement of assets and liabilities or data therefrom, or
- d) an overview of the total turnover or an overview of the turnover made in the field related to the object of contract, for not more than three economic years, for which they are available depending on the establishment or commencement of the activity operation.

³⁷² System of eServices of Business Register will be provided by Ministry of Justice and communication between register courts and citizens through a Central Portal of Public Administration.

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To demonstrate financial and economic standing, a tenderer or candidate may use financial resources of another person regardless of their legal relationship, which he would have available for the contract performance. In such event, he shall submit the contracting authority or contracting entity a document proving that fact, which may be a commitment of that person.

Typically, unsigned copies are provided, although it is possible to request audited or initialled documents.

What document (if any) is used?

The most commonly requested documents are balance sheets and annual accounts of the tenderer, and a commitment of a bank. These are documents that the tenderer is typically required to keep at any rate, and are therefore easily available.

Annual accounts for Slovakian tenderers tend to be unsigned and unstamped copies of the accounts, that are not charged and are issued for free. Their legal value thus mostly originates from the fact that their addition to an offer is an implicit guarantee from the tenderer with regard to their accuracy. Electronic copies are mostly not available.

Other documents (bank statements, balance sheets) are also occasionally requested, and also tend to have the status of unauthenticated documentation.

Contents

The balance sheet typically states:

- Permanently assets,
- Floating assets (store, claim, financial asset)
- Short-term and long-term obligations,
- Equity and funds.

As stated above the paper contain no stamp or signature.

Electronic certificates

See above: no official certificate exists. As a result, contracting authorities are in principle not required to request this information from Slovakian tenderers.

30.3.6 Requirements with regard to technical and/or professional ability

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Prevalence/actual use in calls

Technical ability or professional suitability may be demonstrated by documents depending on the type, quantity, importance or use of the supply, building works or services, as a rule by

a) a list of supplies delivered or services provided over the preceding three years stating the prices, delivery dates and customers; where the customer was

1. a contracting authority pursuant to the Public Procurement Act (proof of performance is to be confirmed by other contracting authority),

2. a person other than a contracting authority (proof of performance is to be confirmed by the customer; where that is impossible, by a statement of delivery by the tenderer or candidate),

b) a list of building works executed over the preceding five years, accompanied by certificates of satisfactory execution of the building works stating the prices, places and dates of the works completion and assessment of the works performed according to the business conditions where the customer was

1. a contracting authority pursuant to the Public Procurement Act (proof of performance is to be confirmed by other contracting authority),

2. a person other than a contracting authority (proof of performance is to be confirmed by the customer; in the event that this is impossible, by a statement of their execution by the tenderer or candidate),

c) data regarding engineers or technical authorities responsible for the quality control regardless of their contractual relationship with the tenderer or candidate; in the event of a building works contract, those who may be referred to by the tenderer or candidate with a request to execute such works,

d) in the event of supply or service, by a description of the hardware and measures applied by the tenderer or candidate to assure quality and his study and research facilities,

e) in the event of complex products to be supplied or products intended for special purposes, by control of production capacity of the tenderer or candidate carried out by the contracting authority or contracting entity or on its behalf by the competent authority in the country of establishment of the tenderer or candidate, subject to that authority's agreement; if is necessary, by control of the means of study and research which are available and of the quality of the control measures applied,

f) in the event of complex services or services intended for special purposes, by control of technical ability of the tenderer or candidate providing services carried out by the contracting authority or contracting entity or on its behalf by the competent authority in the country of establishment of the tenderer or candidate, subject to that authority's agreement; if is necessary, by control of the means of study and research which are available and of the quality of the control measures applied,

g) data concerning education and professional experience or professional qualification of the managing staff, in particular of the persons responsible for the management of building works or for the provision of service,

f) indicating the environmental management measures which the tenderer or candidate will apply when performing the contract having as its object building works or service, if applicable,

i) in the event of building works or services, data concerning the average annual staff numbers and the number of managing staff over the preceding three years,

j) data concerning the machinery and hardware which the tenderer or candidate has available to execute building works or to provide service,

k) indicating the share of contract performance, which the tenderer or candidate providing service intends to subcontract,

l) in the event of supply which are products to be delivered,

1. by samples, descriptions or photographs,

2. by conformity statements and additional documents thereto, by certificates issued by persons authorised or persons notified by the European Communities which are authorised to assess conformity of products or establish the conformity of building products with technical specifications.

To demonstrate one's technical ability or professional suitability, a tenderer or candidate may use technical and professional capacities of another person regardless of their legal relationship, which he would have available for the contract performance. In such event, he shall submit the contracting authority or contracting entity a document proving the fact, which may be a commitment of that person.

In the event of a supply contract which also includes activities linked with siting and installation of the supplies, technical ability or professional suitability of a tenderer or candidate to carry out such activities shall be evaluated in particular with regard to his abilities, experience, efficiency and reliability.

What document (if any) is used?

Typically, tenderers are required to demonstrate technical and/or professional ability by indicating the profiles of its personnel, their qualifications and past realisations. However, this information is usually integrated into the main body of the offer in the form of resumes and/or project references. Authentic documents (such as certified diploma's, certified descriptions of products/service or certified references) are significantly less common. In such cases a paper copy is usually provided, and the contracting authority may require the tenderer to sign/initialise it to warrant its authenticity.

The acquisition time and costs of any required document of course varies from requirement to requirement.

Contents

Contents vary depending on the requirements. As noted above, typical examples include qualifications, diplomas, product/service descriptions and past realisations.

Electronic certificates

Since there is no systematic practice of requesting certain certificates, it is difficult to assess if electronic certificates are legally acceptable.

However, it should be noted that in most cases paper copies of the original certificates or statements are sufficient, and these are usually not signed. There seems to be no reason why electronic copies of such documents would not be equally acceptable. If the contracting authority requires the certificates or attestations to be signed, the general principles of the Slovakian legal framework for e-procurement

and e-signatures should be followed. Thus, a qualified signature seems most suitable to ensure this functionality.

As stated above, in practice this information is usually integrated into the main body of the offer in the form of resumes and/or project references rather than separate authentic documents, and no separate signature is thus required.

30.3.7 Requirements with regard to quality assurance standards

Prevalence/actual use in calls

In the event that a contracting authority or contracting entity requires submission of a quality certificate issued by an independent institution attesting the compliance of the tenderer or candidate with the quality assurance standards, he may take the advantage of the quality assurance systems resulting from European standards. A contracting authority and contracting entity shall recognise as equivalent certificates issued by competent authorities in Member States. A contracting authority and contracting entity must accept also other proofs submitted by a tenderer or candidate which are equivalent to the quality assurance measures pursuant to the requirements for issuing the relevant certificate.

What document (if any) is used?

If included in the call, tenderers are usually required to provide a certificate from an independent accreditation or certification authority or an auditor/expert's assessment. The most common requirement is that the tenderer demonstrates the compliance of his/her products or services with certain standards, typically originating from the Slovak Standard Institute (SÚTN- *Slovenský ústav technickej normalizácie* – see www.sutn.org). Compliance with other standards (specifically ISO standards) might also be required.

Contents

The content of an auditor/expert's report, certificates or accreditation decision is not fixed.

Electronic certificates

The provided certificates are usually delivered in paper form, or in unsigned and unstamped PDF-form. Because the content and form of this document is not prescribed by law these may be delivered also in electronic form without electronic signature. In practice, as stated above, copies of the certificate are typically deemed sufficient, so that the absence of a signature on the provided document need not be a barrier.

30.3.8 Requirements with regard to environmental management standards

Prevalence/actual use in calls

The requirement to demonstrate compliance with environmental management standards is an uncommon requirement in Slovakian procurements, being mostly limited to procurement with a higher value and/or specific technical nature. In the event that a contracting authority or contracting entity requires to submit a quality certificate issued by an independent institution by which the compliance with certain environmental management standards by the tenderer or candidate is confirmed, advantage may be taken of the Environmental Management and Audit Scheme of the European Community or environmental management standards resulting from the relevant European Standards or international standards of certified authorities. A contracting authority and contracting entity shall recognise as equivalent certificates issued by authorities in Member States. A contracting authority or contracting entity must accept also other proofs submitted by the tenderer or candidate which are equivalent to environmental management measures pursuant to the requirements for issuing the relevant certificate.

What document (if any) is used?

If included in the call, tenderers are usually required to provide a certificate from an independent accreditation authority. Certification duration and cost can vary from organisation to organisation.

Contents

The resulting certificate is typically a paper document identifying the origin (the accreditation agency), the recipient, the nature of the certificate (including the assessed standard), date of testing and issuance, duration of the accreditation, and finally the a signature on behalf of the accreditation bureau.

Electronic certificates

The provided certificates are usually delivered in paper form, or in unsigned and unstamped PDF-form. Because the content and form of this document is not prescribed by law these may be delivered also in electronic form without electronic signature. In practice, as stated above, copies of the certificate are typically deemed sufficient, so that the absence of a signature on the provided document need not be a barrier.

30.4 Interoperability

The main eProcurement systems in Slovakia (EVO and ZOVO) are provided by the Authority. EVO is accessible only for registered users. An application for registration is published on the EVO portal in three text formats (.doc, .pdf, .odt). The requirements for registration are firstly the assignment of a registration number in the ZOVO system, and secondly the submission of a completely filled out

application for registration sent to the Authority. The application has to be submitted only in paper form. After the registration process the registered user receives the public key certificate³⁷³ and private key for signing (sent through the e-mail notification) issued by an internal certification authority that is a part of the EVO system.

With regard to interoperability, the system is accessible to anyone who is registered in the EVO system, but the currently available EVO system is available only in a Slovak version, which can present real problems for non-nationals.

Currently the system is not able to receive a certificate issued by regular certification authorities according to eSignature Act. The integration of systems opened for commercial certification authorities can cause real problems in the field of interoperability (because of the whole European Union issue related to the mutual recognition of certificates). In the field of interoperability no pilot project is in place yet.

30.5 Future trends/expectations

As indicated above the main expectation is the full implementation of the current EVO system.

Currently it is not possible through the EVO system to perform the complete process of e-procurement. The system supports just the stages of e-procurement such as the preparation and planning phase (the system allows to publish the prior notices, time schedule of awarding contract or analysis and market research), the awarding of contract phase (the system allows to award the contracts above and below the limit, to perform open procedures, restricted procedures, negotiated procedures with publication and e-Auction), the archiving phase (archiving of contract, administration and archiving of agreements). All of these stages are currently operational and already two open procedures were successfully provided (the Ministry of Transport, Post and Telecommunication has procured a European corridor and the Ministry of Defense has procured ballistic helmets).

The current EVO system also does not allow to perform the phases eOrdering and eInvoicing, but the provider of the EVO system is currently considering to develop the system and to add certain new functionality, such as a dynamic purchasing system (Art. 47 Public Procurement Act), eOrdering module, award of contracts below the threshold (Art. 99 Public Procurement Act), the awarding of small-value contracts (Art. 102 Public Procurement Act) and the addition of review procedures.

The next expectation is to open the EVO system for certificates from commercial certification authorities and thus allow the use of certificates or qualified certificates for the signing of an offer.

Also useful would be the translation of the EVO system and all required forms at least to English.

³⁷³ Internal certification authority uses certification format x.509v3, for storage and distribution of certificates is used PKCS#12 and for signing of documents PDF version 1.4.

30.6 Assessment

The Slovakian eProcurement infrastructure was built very well and meets the user's needs. The current real problem is that the documents demonstrating the personal situation of a tenderer cannot be submitted electronically. Until this will be done the whole process of eProcurement will not have a significant impact.

The objective of the establishment of an information system - central portal for public procurement (EVO) was to make the process of public procurement in public administration more effective and transparent, and it can be said that this objective was achieved.

In summary, the Slovakian e-Procurement framework is already complete, the eProcurement platforms are already in place (ZOVO and EVO), and only the real usage is missing.

31 Slovenia

31.1 Public procurement framework

31.1.1 General framework

In Slovenia policy and regulatory issues of public procurement fall under the competence of the Ministry of Finance. However all contracting authorities under the law on public procurement have some autonomy in case of procurement procedures of minor value, which are regulated by internal acts, respecting the mandatory provisions of the general framework.

A core function in public procurement is designated to the National Review Commission for Reviewing Public Procurement Award Procedures (shortened: National Review Commission), which is a specific, independent, professional and expert state institution providing legal protection to tenderers at all procedural levels of the award of public contracts.

<http://www.gov.si/dkom/?lng=eng&vie=cnt&gr1=pre>

The competences and procedures of the National Review Commission are laid down in the Auditing of Public Procurement Procedures Act http://zakonodaja.gov.si/rpsi/r09/predpis_ZAKO2099.html.

The National Review Commission decides authoritatively on a claim. There are two types of decisions it can make - a claim can be rejected as unsubstantiated or a claim can be sustained and the procedure in question partially or entirely invalidated. In connection to this it should also be noted that the National Review Commission has the competences of an appellate body which decides on a claim authoritatively. Again, there are two types of decisions it can adopt - a claim can be rejected as unsubstantiated or a claim can be sustained and the procedure in question partially or entirely invalidated. There are no special means of redress to appeal its decision; however an unsuccessful tenderer can, independent from the procedure before the National Review Commission, claim his rights before a court of law in a civil procedure. Typically such a claim against a contracting authority will be based on not serious negotiations.

The National Review Commission can also advise a contracting authority on how to implement the procedure regarding the invalidated element. Such advice can be binding on the authority and in case of a breach the Commission can report to the supervisory body of the contracting authority or to the Government.

It should be noted that a contracting authority may not award a contract until the NRC's decision is pending. Consequently, in practice the means of redress to the NRC were often used also to delay the conclusion of a contract. It was argued that such behaviour was the consequence of mostly two circumstances: a rather low threshold for filing a claim and somewhat formalistic case approach of the NRC. Recently some substantive changes of Auditing of Public Procurement Act in this respect had been adopted. Accordingly the NRC may, in case of urgency for reasons of public health decide that a

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contract can be awarded, even though the decision of the NRC is pending. In this case a prior approval of the Government is needed, to be obtained by the contracting authority.

As stated above all regulatory issues surrounding public procurement fall within the competence of the Ministry of finance, Directorate for public property, Department for Public Procurement System (the names and translations of both can differ as they are subjected to internal organisational changes).

Two basic principles of the legal framework regulating procurement emphasize the principle of transparency and the organisation of a competitive environment. Both are operationalised mainly through in principle mandatory prior publication of procurement opportunities. Notwithstanding this obligation, contracting authorities are of course allowed to publish the procurement through other channels to increase response rates, including by directly contacting potential tenderers, although such announcements may not take place before the legally required publication or contain more/other information, to ensure fair competition.

Typically all procurement opportunities must be published on the internet portal for tenders (Article 58, Act on public procurement). However, as the latter is not yet established publication in the Slovene Official Journal (hereinafter referred to as RS OJ) is needed (Article 108, Act on public procurement).

As the Act on public procurement does not regulate publication of tenders of minor value (less than 40.000,00€ for goods and services), an internal regime, defined by the contracting authority itself will apply. Mostly publication on the internet (web page of the contracting authority) will be sufficient. To this end it should be observed also, that up to a certain value (10.000,00 €) no publication is needed and a contract can be awarded directly.

Publication on the internet portal (i.e. in the RS OJ until the portal becomes operational) for tenders is mandatory in the following cases of tenders:

- for products and services over 40.000,00 € and
- for construction works over 80.000,00 €

Following the EC Directives publication of procurement opportunities through the Office for Official Publications of the European Communities (Publications Office) is mandatory in the following cases of tenders:

- for products over 137.000,00€/211.000,00€ (depending on whether the tendered product is on a List of products defined by a governmental Decree);
- for services over 137.000,00€/211.000,00€ (depending on whether the tendered service is on a List of products defined by a governmental Decree and not subject to exclusion) and
- for construction works over 5.278.000, 00€.

In this respect it should be noted that the obligation of mandatory publication can also depend on the type of procedure applied on the tender itself. The above mentioned thresholds apply in case of an open procedure which is also the most commonly applied procedure; whilst 8 other types of procedure are also possible.

The general framework on public procurement is binding to all federal government bodies, local self-government bodies, public agencies, public foundations, public institutes and other bodies governed by

public law (a legal person established for the purpose of providing non-commercial activities in general interest, financed over 50% by central or local government or another public body) as separate legal entities. As all of those are separately responsible for ensuring the legality of public procurement procedures it could be stated that the framework as a whole is somewhat fragmented, as every contracting authority has absolute autonomy. In this respect it should be noted that the Act on public procurement especially provides for the possibility of mandating a tender by different contracting authorities (mandators) to a joint mandate holder. In this case the mandate holder can be only a legal person which is a contracting authority itself, which is logical, as private mandate holders would fall outside the regulatory framework on procurement (Article 16, Act on public procurement).

The only provision referring to a somewhat centralised approach is defined by Article 36 of the Act on public procurement, which regulates centralised tenders by the Government. Accordingly a yearly adopted governmental decision is needed, defining the scope and subject of common tenders in the fiscal year, in order to obtain a stronger negotiating position. However, as such a Decision is not mandatory, centralised tenders are still more an ad hoc decision adopted by consensus of the ministries involved. Today examples of centralisation can be observed especially in the fields of informatics, telephony services, motor vehicles, postal services, air transport services etc.

Like the European Procurement Directives, the Slovene public procurement entails since November 2006 two separate frameworks: one for utility services, and one for traditional sectors, with the former being somewhat more flexible. However the legal development of public procurement in Slovenia was very dynamic. Since the adoption of the first system Act on public procurement in March 1997 (http://zakonodaja.gov.si/rpsi/r04/predpis_ZAKO484.html) there were two major revisions (http://zakonodaja.gov.si/rpsi/r07/predpis_ZAKO1667.html, and <http://www.uradni-list.si/1/objava.jsp?urlid=20042&stevilka=75>) before the final adoption of both new framework Acts:

http://zakonodaja.gov.si/rpsi/r08/predpis_ZAKO4298.html and

http://zakonodaja.gov.si/rpsi/r09/predpis_ZAKO4299.html

As already stated above the redress and auditing procedures are governed by the Auditing of Public Procurement Procedures Act:

http://zakonodaja.gov.si/rpsi/r09/predpis_ZAKO2099.html.

To this end it should be observed that before the adoption of a separate framework for utility services, the same procurement rules applied for all public bodies engaged in procurement, referred to above. An indicative list of all contracting authorities is defined by the Decree on lists of contracting authorities, works, services, lists of products, information to be included in notices, definition of technical specifications and requirements relating to devices for the electronic receipt of tenders:

http://zakonodaja.gov.si/rpsi/r00/predpis_URED4160.html

To complete the overview of the whole legal framework regulating public procurement in Slovenia also other mostly governmental regulation should be observed:

http://zakonodaja.gov.si/rpsi/r08/predpis_ZAKO4298.html

31.1.2 Certificates and statements

General provisions with regard to certificates, attestations and declarations are put down by Articles 41 to 48 of the Act on public procurement. In principle the contracting authority may require numerous documents. However, it is obliged to obtain these on its own, if the document required is in public evidence. Such regulation is very practical for the tenderer as in consequence he must only make reference to the public body, holding the documents required. On its own the tenderer is only obliged to provide documents, (certificates, attestations and declarations) not held by public bodies.

With regard to the exclusion criteria it should be noted that only the fact that a tenderer has been convicted by a definitive ruling of a crime against the economy will automatically exclude him from the tender (by law), whilst other exclusion criteria can be defined by the contracting authority. Typically those include cases of a tenderer being in the state of bankruptcy, being wound up or similar status or having applied for it.

With regard to selection criteria, which establish the financial and technical suitability of the tenderer, a different set of supporting documents is typically required. These include:

- Bank statements, balance sheets and annual accounts of the tenderer, if the publication of balance sheets is mandatory in the tenderers country of origin;
- Global revenue over the last three accounting years or less;
- Meeting of standards, provided by standardisation bodies on national or European level.
- Professional and educational qualifications;
- Statements on the tenderers environmental management.
- Statements containing references to works/supplies/services provided in the most recent five years, as evidenced by attestations of acceptance.

It is worth noting that the documents pertaining to selection criteria mentioned above are usually not originals in the sense that they carry no signature or seal demonstrating their authenticity, nor is it required that their formal authenticity is to be guaranteed (e.g. by a notary seal). Copies of such documents are in practice submitted in procurement proceedings, and such copies are typically accepted by the contracting authority.

There are almost no specific arrangements or provisions in the law or in practice, relating to foreign documents. The principle of non-discrimination would apply. The only case regulated by the Act on public procurement in respect of documents relating to exclusion criteria. In case foreign law does not provide for documents required in the tender (and defined as exclusion criteria), their provision can be replaced by a declaration of honour by the tenderer, before a public body (notary, court or administrative body) in that foreign state.

31.2 E-Procurement initiatives and status

31.2.1 General e-Procurement framework and initiatives

As already stated above the Slovene public procurement framework entails since November 2006 two separate frameworks: one for utility services (Public procurement in water management, energy transport and postal services area act), and one for traditional sectors (Act on public procurement), with the former being somewhat more flexible. Both were also the primary implementation instruments of the e-Procurement directives.

http://zakonodaja.gov.si/rpsi/r08/predpis_ZAKO4298.html

http://zakonodaja.gov.si/rpsi/r09/predpis_ZAKO4299.html

The redress and auditing procedures are governed by the Auditing of Public Procurement Procedures Act:

http://zakonodaja.gov.si/rpsi/r09/predpis_ZAKO2099.html .

The revised first Act on public procurement (from February 2004) already contained provisions regulating the enactment of a central information system for eProcurement. Accordingly the information system should have been implemented and started functioning by February 2005. Very similar provisions regulating eProcurement were later adopted also in the new regulatory framework. However, until now still no such information system is functioning, neither on a central, regional or local level.

There were some suggestions in the media and general public that a central information system is already functioning, with all functionalities stated below:

- e-tendering (questions and answers session, submission and opening of proposals);
- e-awarding (evaluation of proposals and granting);
- e-auctions: reverse electronic auctions and
- e-catalogues.

In fact on the link below we can find a declaratory statement that e-procurement is legally possible, however relevant government sources do not provide a comprehensive link to a web service/application enabling that in practice (on the central e-government portal there are only links to legislation and timed-out connections):

- <http://e-uprava.gov.si/e-uprava/poslovneSituacijeStran.euprava?dogodek.id=149>
- <http://www.gov.si/razpisi/elposel.htm>

On the other hand, there are program solutions enabling e-procurement, provided by the software industry, however without reference to the contracting authority using it (e.g. <http://normacom.si/index.php?id=60>). As already stated above, this is perfectly possible as the whole procurement regime is somewhat fragmented, allowing every contracting authority almost complete independence. This obviously hampers also the exchange of best practices between different contracting authorities.

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There are forms of informatisation of procurement procedures. A very comprehensive one can be observed on the link below (Ministry of public administration; very much the same functionalities can be observed for all ministries and institutions of central government).

http://www.mju.gov.si/si/javna_narocila/aktualna_javna_narocila/

Furthermore it can also be observed that a reverse auction has obviously been enacted. Unfortunately, no further information in this respect is provided.

<http://e-uprava.gov.si/e-uprava/novice.euprava?novice.veljavnost=novice.veljavnost.arhivske&novice.tip=3&novice.id=395>

In the time of writing this report a central governmental internet portal for e-procurement was introduced on: <http://www.enarocanje.si/?podrocje=portal>. Though provisions of the Act on public procurement provide the legal basis for electronic tender submission (Articles 66 and 67) and also contract awarding, such a solution is for now not implemented. There is also no information available whether this will be case in the near future.

The functionality supported at this point covers only on-line publication and submitting questions to the contracting authority:

- **Publication**
 - o http://www.mju.gov.si/si/javna_narocila/aktualna_javna_narocila/
 - o <http://www.enarocanje.si/pregledobjav.asp>

- **Submitting questions to the tendering authority**
 - o <http://www2.gov.si/javnar/jnvodg.nsf>
 - o <http://www.enarocanje.si/pregledobjav.asp>

In this functionality no limitations to non-nationals can be observed. Publication is provided on the internet and freely accessible. It should be however noted that submitting questions is subject to prior registration and that to this end knowledge of the Slovene language is needed.

As observed above already the amended Act on public procurement, adopted in 2004, contained provisions aiming at the establishment of a central information system on e-procurement, with all functionalities stated above. It should have started functioning in 2005, however that never happened. Very similar provisions regulating eProcurement were later adopted also in the new regulatory framework, with a 6 month transitional period, which ended in the second half of June and were somewhat respected with the introduction of the <http://www.enarocanje.si/> internet portal.

According to the regulatory framework on e-procurement, the portal will require in the future an advanced electronic signature using a qualified certificate, as regulated by the Electronic commerce and electronic signature Act http://zakonodaja.gov.si/rpsi/r03/predpis_ZAKO1973.html.

31.3 Certificates, attestations and declarations

Before examining the different categories below, it should be reminded that in principle the contracting authority is obliged to obtain documents from public registers on its own. The practical application of that principle however differs from public body to public body. It is thus still often the case that provision of public accessible information is required from the candidates themselves.

31.3.1 Requirements with regard to the personal situation of the candidate or tenderer – absence of conviction (art. 45 §1 and §2 (c-d) of Directive 2004/18/EC)

Prevalence/actual use in calls

A tenderer demonstrates this requirement with an extract of judicial record (certificate of non conviction). In practice absence of conviction is mandatory for participation in tendering procedures. A convicted participant will automatically excluded from participation and possible awards nullified.

As also legal entities are criminally liable there are different certificates of non-conviction for both, natural and legal persons.

The certificate is provided by the Ministry of justice at the cost of 1, 06€. The procedure is quite expedite and should not take more than a week.

Ascertainment of the fact of non-conviction for a criminal offence is mandatory in every procurement procedure as its consequence is exclusion of the convicted tenderer. It should be however reminded, that due to the principle that the contracting authority is obliged to obtain documents from public registers on its own, such a certificate is in practice often replaced by a statement of honour (under criminal liability) the tenderer. Another common purpose of the certificate is its use in employment applications.

Contents

The certificate ascertains that a natural or legal person was or was not found guilty for a crime by a definite ruling. It is validated by the designated tendering commission.

Electronic certificates

No electronic document – certificate – itself exists, however there are different electronic versions of applications which can be used to request the paper certificate, and which are accessible from:

http://www.mp.gov.si/si/potrdila_in_obrazci/

Basically there are two types of electronic documents for filing an application existing. Both can be obtained at no cost. The first can be downloaded, signed and filed manually, whilst the second is an application, which can be accessed using a qualified electronic certificate (PKI system). The certificate itself however is always a physical document and no such electronic document exists. The physical document is manually signed by the Minister and sent by post to the applicant.

31.3.2 Requirements with regard to the personal situation of the candidate or tenderer – non-bankruptcy and financial status (art. 45 §2 (a-b) of Directive 2004/18/EC)

Prevalence/actual use in calls

A certificate demonstrating that a person is not in a bankruptcy proceeding is issued by the registry court after an application by the applicant that no such entry exists. In practice however a formal declaration by the tenderer will be sufficient; perhaps also due to the fact that the court register is public evidence and thus contracting authorities are obliged to obtain all relevant information by themselves.

For now the Slovene legal system does not provide for the possibility of bankruptcy of natural persons. Thus for now this requirement would apply only to legal persons. There are however proposals on regulating also the bankruptcy of natural persons, which ought to be enacted by the end of this year.

Such a declaration can be obtained from the central court register <http://www.sodisce.si/default.asp?idall=1309&showin=all> at the cost of 2,38€ (http://www.sodisce.si/filelib/srq_takse_euro.pdf). Typically it should not take longer than a week to obtain it.

In practice a court register entry certificate not older than 3 months is mandatory in every procurement procedure as it demonstrates the legal capacity of the tenderer. However on the fact of bankruptcy or insolvency proceedings a formal statement of the tenderer will be sufficient in most cases. It is however likely that the latter is obtained together with the entry certificate.

Contents

The certificate ascertains that no insolvency proceedings have started against a certain legal person. It is validated by the designated tendering commission.

Electronic certificates

No electronic versions of the above mentioned documents are available. There is only the possibility of applying for them in an electronic form by using a qualified certificate.

Requirements of the newly adopted Public procurement Act suggest that also such a solution could be needed in the process of the establishment of a central electronic procurement system on condition that their provision will be mandatory (that would however be somewhat contrary to the principle of public administration referred to in the beginning). It is namely also likely that a formal statement by the tenderer will be sufficient and thus no such electronic document is needed for that purpose. Unfortunately no further information in this respect can be provided.

31.3.3 Requirements with regard to the personal situation of the candidate or tenderer – compliance with fiscal and social obligations (art. 45 §2 (e-f) of Directive 2004/18/EC)

Prevalence/actual use in calls

A tenderer demonstrates compliance with an Attestation on paid taxes and contributions from the Tax authority. In practice a formal declaration is also used. The Attestation is issued on the basis of tax number, which is designated to every natural and legal person.

The Attestation is issued by the Tax Authority. Unfortunately there is no information on its costs available. Though also no information is available on the time scope for its issue it is doubtful that it would take longer than a week to obtain it.

The attestation is not so commonly asked for and is more often replaced by a relevant formal statement of the tenderer, perhaps also due to the fact that it is information from a public registry, to be obtained by the contracting authority itself. The attestation is in fact more commonly used by natural persons in the process of applying for consumer credits.

Contents

The attestation ascertains that a certain natural or legal person has paid all due taxes and contributions. It is validated by the designated tendering commission.

Electronic certificates

Though the Slovene Tax Authority provides some very complex electronic services (e.g. electronic filing of taxes as a transactional service), there is no possibility of obtaining or applying for the attestation in an electronic form.

<http://edavki.durs.si/OpenPortal/Pages/Introduction/AllForms.aspx>

Requirements of the newly adopted Public procurement Act suggest that also such a solution could be needed in the process of the establishment of a central electronic procurement system on condition that their provision will be mandatory. It is namely also likely that a formal statement by the tenderer will be sufficient and thus no such electronic document is needed for that purpose. Unfortunately no further information in this respect can be provided.

31.3.4 Requirements with regard to the suitability to pursue the professional activity

Prevalence/actual use in calls

Under Slovene law legal capacity of a certain entity to perform services is defined by the scope of its registration to that very service, which is published and freely accessible (also online) in the Court register. The Act on public procurement (Article 43) explicitly states that a contracting authority must obtain relevant information with regard to this requirement on its own if the tenderer is a Slovene registered natural or legal person. Consequently that could only apply to foreign tenderers, which would have to provide a relevant declaration, certificate, etc.

31.3.5 Requirements with regard to economic and financial standing

Prevalence/actual use in calls

Requirements with regard to economic and financial standing of the tenderer are rather infrequently used as selection criteria in procurement proceedings. Typically they involve bank statements, accounting reports, balance and turnover sheets, professional risk insurance policies, business credit information extracts etc. Most likely their presentation is required as a form of guarantee the subject of the tender won't be endangered by reasons outside the tender itself. The requirement can be met by all natural and legal persons pursuing a certain professional activity.

Typically such a document is obtained from the organisation issuing it (banks, insurances, organization providing business credit information etc) or even by the tenderer itself as far as internal information is concerned). The costs can differ as some information can be provided at no cost, whereas other are subject to the very contract with the organization concerned (however typically separate bank statements are provided to the account holder at 5-10€ within a week time).

As the Documents referred to are only optional and due to the nature of tender, where financial flows are as a rule one sided (from the contracting authority to the tenderer for performing a service or delivering certain goods), they are rather infrequently asked for by contracting authorities. They do however have many other common purposes in everyday business: taxation, evaluation, financing, etc.

Contents

The attestation gives business information on different legal or economic aspects of a certain natural or legal person pursuing a given professional activity. It is validated by the designated tendering commission.

Electronic certificates

Unfortunately no electronic versions of the above mentioned documents are available.

Requirements of the newly adopted Public procurement Act suggest that also such a solution would be needed in the process of the establishment of a central electronic procurement system on condition the requirement is asked for in a certain tender. Unfortunately no further information in this respect can be provided.

31.3.6 Requirements with regard to technical and/or professional ability

Prevalence/actual use in calls

Requirements with regard to technical or professional ability of the tenderer are very frequently used as selection criteria in different, almost all, procurement proceedings. Typically they involve references from previous projects (in the past three years), self presentation of the tenderer, quotation of the project team etc (Article 45 of the Public procurement Act). It could be stated that those requirements are beside the price in practice used as the most common selection criteria in the process of awarding a contract. The requirement can be met by all natural and legal persons pursuing a certain professional activity.

Due to the nature of the requirement the tenderer will have all relevant information already by himself and will thus be able to provide it by himself at no special cost and time. In practice this is for now done by completing the tender documentation with relevant information required

Though the documents referred to are not mandatory, they very commonly asked for in procurement proceedings. As already stated above these requirements are beside the price offered in practice used as the most common selection criteria in the process of awarding a contract. They do not have any other special purpose, can however serve very much the same in other procurement proceedings or also as a reference.

Contents

The information provided shall ascertain that the tenderer performed certain projects, same or similar, to those in the tender, that he has the necessary experiences to fulfill the tender, or that he has special professional ability or expertise on that subject matter and other relevant aspect, enabling the tendering commission to sort the candidates. It is validated by the designated tendering commission.

Electronic certificates

Unfortunately no electronic versions of the above mentioned documents are available. It should be noted that the nature of the requirement as it is applied for now (there are practically no added information or imported documents required), shall not pose any special problem in adopting an electronic application accordingly.

Requirements of the newly adopted Public procurement Act suggest that also such a solution is needed in the process of the establishment of a central electronic procurement system. As already stated above the requirement as it is applied for now, shall not pose any special problem in adopting an electronic application accordingly.

31.3.7 Requirements with regard to quality assurance standards

Prevalence/actual use in calls

Requirements with regard to compliance with standards are frequently used as selection criteria in different procurement proceedings. Typically they involve a requirement that the tenderer must provide services or goods according to a certain European standard defined by the competent European standardization body or organization (Article 46 of the Public procurement Act). The requirement can be met by all natural and legal persons pursuing a certain professional activity; thus having a business interest in obtaining the certificate referred to.

What document (if any) is used?

In Slovenia standards are defined by the Slovene standardization institute <http://www.sist.si/slo/g1/g1.htm>. Most of the standards (e.g. ISO standards) are issued from <http://www.siq.si/>, upon prior verification by SIQ. The costs depend on various criteria and can differ significantly from the standard pursued, scope of business, nature of the professional activity etc. Very much the same holds true to the timeframe for obtaining a certain standard. It should be however noted that following the explicit provision of Article 46 all European standards are respected directly.

As a rule fulfilment or presentation of standards is not mandatory. However standards are commonly asked for in procurement proceedings as selection criteria. It is also possible that a certain tender requires from tenderers presentation of standards; thus the criteria can also exclude a tenderer from candidacy. Standards have also many other purposes; mostly they function as a reference or added value to the quality of the service/good.

Contents

The certificate ascertains that the tenderer performs services according to a certain required standard or that goods fulfill a certain required standard. It is validated by the designated tendering commission.

Electronic certificates

Unfortunately no electronic versions of the above mentioned documents are available.

Requirements of the newly adopted Public procurement Act suggest that also such a solution would be needed in the process of the establishment of a central electronic procurement system. Unfortunately no further information in this respect can be provided.

31.3.8 Requirements with regard to environmental management standards

Prevalence/actual use in calls

In case of environmental management standards we refer to the general observations made on standards provided above. It should be however noted that following Article 47 of the Act on public procurement, the contracting authority may require only EMAS approved environmental management standards or international standards, approved from the EC by other legal instruments. The main effect of this exception is that Slovene contracting authorities are in environmental issues limited in scope of usage of standards.

31.4 Interoperability

As described above, the e-Procurement system which shall be enacted following the Act on public procurement will require qualified electronic certificates. In this regard the status of foreign tenderers is defined by Article 46 of the Electronic commerce and electronic signature Act http://zakonodaja.gov.si/rpsi/r03/predpis_ZAKO1973.html, providing for mutual recognition of qualified electronic certificates, issued by certification authorities in the EU.

However legal mutual recognition does not necessarily imply that such recognition will be also technically possible (as the application most likely cannot provide for its universal interoperability); a notion which is being commonly accepted as the main factual barrier to the use of qualified electronic certificates. Consequently and depending on implementation details, this may render the platform inaccessible to certain qualified electronic certificates, especially if the platform were to exclusively rely on certain acceptable signatures. This is however a notion of technology applied that can be observed

in case of domestic certification authorities very much the same in case of foreign certification authorities.

31.5 Future trends/expectations

As described above, the e-Procurement system which shall be enacted following the Act on public procurement and which will depend on qualified electronic certificates shall have all relevant functionalities: e-notification, e-tendering, e-awarding, e-auctions and e-catalogues. As such an obligation exist already from the previous legal framework from (2004), with due implementation and enactment in 2005, evolution of the system and projections are very hard to estimate.

31.6 Assessment

From subjective observations it can be suggested that the whole e-procurement infrastructure is evolving legally and also technically generally meeting the needs of tenderers as well as contracting authorities. As already stated the required legal framework was implemented very early, however its practical implementation is still lagging behind significantly. The reasons for such a situation can be different, ranging from a very difficult technical decision on the main specifications of the application which is very complex, to more political reasons on who will be responsible for the enactment but also legal issues as the whole contract awarding procedure can be long lasting.

We can however be optimistic that a viable solution will be implemented at the latest in the mid-term as the pressure on the establishment of a central e-procurement system is rising. Most notably the Slovene Court of Audit issued a special auditing report on opportunity loss, affected through non-application of a central e-procurement system in time (reference: <http://www.rs-rs.si/rsrs/rsrs.nsf/uvod?openForm>).

Perhaps a very interesting general observation on public procurement is the volume of public expenditure on tenders, which ratio to GDP in Slovenia is very high (amounting 6,7% of the GDP in 2005 http://www.cek.ef.uni-lj.si/u_diplome/vodlan2670.pdf the public sector amounts for 40-45% of the GDP, with estimated 15-20% of which spent on tenders), making it a significant macroeconomic factor. Furthermore it can however be observed that due to various mandatory requirements the price offered by tenderers is still higher than on the open market.

32 Spain

32.1 Public procurement framework

32.1.1 General framework

The CODICE project states the master guidelines for the legal policy of eProcurement in Spain. This project forms part of the general objective to provide the General State Administration with a technological environment, tools and services that enable the contracting authorities to electronically process their procurement procedures, and to provide the best integration and interoperability of the electronic procurement procedures with the contracting authorities' current or future information systems, and of tenderers or potential tenderers, facilitating maximum use by all the economic operators interested in accessing public procurement contracts.

It is the reference framework for the project, which has been conceived to provide the infrastructure, functionalities and common services to be used by all the contracting authorities, on which other subsystems are based that will progressively be developed and deployed in order to provide the necessary specific functionalities for the operation of different electronic procurement procedures by the contracting authorities participating in the platform; those procedures are envisaged in Directive 2004/18.

In particular, this project must enable the following objectives to be met:

- Create a central public procurement portal.
- Provide all the contracting authorities of the General State Administration (as well as other organisations and bodies participating in the Platform) with a central procurement portal, which publishes their "contracting profiles" electronically and with all the information about their procurement processes (whether or not they are carried out electronically): prior announcements, calls for tenders, tender information, additional documents, questions and answers, proposals and notifications of awards and in general, any information that has to be made available to the economic operators that are interested or which participate in the public procurement processes. In the case of announcements and documents subject to publication in the Official Journal of the European Union (OJEU), as well as those published in the contracting authority's portal or in other public information media, the consistency of the information divulged in the various media is guaranteed.

That portal is the central access point for the information about public procurement and it enables all the economic operators that are interested in participating in the public procurement processes to locate all the relevant information in a single place, providing the functionalities and services required for searching, identifying and selecting business opportunities, obtaining all the information and documentation required for tendering, and providing interaction between the contracting authorities and economic operators, without prejudice to the other access, information and publicity points of the procurement that may coexist, in terms of both the conventional and electronic means.

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The Directorate General for State Assets, Subdirectorato-General of Purchasing, which reports to the Ministry of the Treasury, is responsible for the regulation of public procurements.

The Directorate General for State Assets (Subdirectorato-General of Purchasing) places at the disposal of Internet users the information about calls for tenders, providing the text of the specifications of the administrative clauses, the technical requirements, as well as the software and information required for presenting tenders, together with a summary of the tender announcement in the B.O.E. (Official State Gazette). That information is provided to supplement the one that can be obtained, free of charge, from the Subdirectorato-General of Purchasing (C/ Infanta Mercedes, 31.- 28020 Madrid) between Monday and Friday from 9:00h to 14:00h and until the deadline for presenting the tenders for each file; if there is a discrepancy, the documentation provided by the Subdirectorato-General of Purchasing will prevail.

The Centralised Acquisition System is addressed to all organisations that purchase through the Centralised Acquisition's Catalogue of Goods and Services.

- **ORGANISATIONS WHICH BELONG TO ONE OF THOSE ADMINISTRATIONS:**

1. The General State Administration and its Autonomous Organisations.
2. Management Companies and common services of the social security.
3. State Public Sector Bodies.

MINISTRY FOR PUBLIC ADMINISTRATION

Official web site: www.map.es

Ministerial Department/Organisation that uses eProcurement: [Ministry for Public Administration](#)

Application:

http://www.map.es/servicios/contrataciones/licitaciones_abiertas_map.html

MINISTRY OF JUSTICE

Official web site: www.mjusticia.es

Application:

http://www.mjusticia.es/cs/Satellite?c=Page&cid=1151913189411&lang=es_es&menu_activo=ic&pagename=Portal_del_ciudadano%2FPage%2FLici

MINISTRY OF INTERIOR

Official web site: www.mir.es

Ministerial Department/Organisation that uses eProcurement: Subdirectorate-General of Economic and Asset Management, National Police Force, Civil Guard Force, Management of State Security Infrastructure and Equipment, Directorate General of Prisons, Prison Work and Job Training.

Applications:

- http://www.mir.es/MIR/Licitaciones/gestion_economica/Contratos_publico/
 - http://www.policia.es/suministros/suministros_cuer.htm
 - <http://www.guardiacivil.org/quesomos/organizacion/apoyo/materialmovil/>
 - <http://www.mir.es/SES/GIESE/Licitaciones/>
 - <http://www.mir.es/INSTPEN/INSTPENI/Licitaciones/>
 - <http://www.mir.es/INSTPEN/TRABPENI/Licitaciones/index.html>
-

MINISTRY OF DEVELOPMENT

Official web site: www.fomento.es

Ministerial Department/Organisation that uses eProcurement: Territorial Planning and Coordination of Roads, Railway, Civil Aviation, Merchant Navy, Road Transport, Postal Regulation, National Geographic Institute, Economic Programming, Technical General Secretariat, Association Members.

Applications:

http://www.fomento.es/MFOM/LANG_CASTELLANO/INFORMACION_MFOM/CONTRATACIONES/

MINISTRY OF WORK AND SOCIAL AFFAIRS

Official web site: www.mtas.es

Application:

<http://www.mtas.es/search/index.jsp;jsessionid=D83D050129B83DEDB9816A6A58EDC089?sarch=1&c=MTAS&si=1&ns=10&st=relevance&qt=licitaciones&ir=Buscar>

MINISTRY OF EDUCATION AND SCIENCE

Official web site: www.mec.es

Application: <http://apliweb.mec.es/licitacionesconsultas/listado.jsp>

MINISTRY OF INDUSTRY, TOURISM AND TRADE

Official web site: www.mityc.es

Application:

- <http://www.mityc.es/es-ES/Servicios/LicitacionPublica/Informacion/Informacion.htm>
 - <http://www.mityc.es/es-ES/Servicios/LicitacionPublica/ListadoConcursos/>
-

MINISTRY OF AGRICULTURE, FISHERIES AND FOOD

Official web site: www.mapa.es

Ministerial Department/Organisation that uses eProcurement: Subsecretariat, General Secretariat of Agriculture and Fisheries, General Secretariat of Marine Fishing

Application: <http://www.mapa.es/es/ministerio/pags/contratacion/contratacion.htm>

MINISTRY OF THE PRESIDENCY

Official web site: www.mpr.es

Application: <http://www.mpr.es/ServiciosCiudadano/LicitacionesYContratosPublicos/2007.htm>

MINISTRY OF CULTURE

Official web site: www.mcu.es

Application:

<http://www.mcu.es/licitacion/cargarFiltroBusquedaLicitacionAction.do?action=busquedaInicial¶ms.licitacionadjudicacion=L&layout=licitaciones&cache=init&language=es>

MINISTRY OF HEALTH AND CONSUMER AFFAIRS

Official web site: www.msc.es

Application: <http://www.msc.es/ciudadanos/empresas/licitaciones/index.jsp>

MINISTRY OF THE ENVIRONMENT

Official web site: www.mma.es

Ministerial Department/Organisation that uses eProcurement: [General Directorate of Quality and Environmental Assessment](#), [General Directorate of Coasts](#), [General Directorate of Water](#), [General Directorate of Biodiversity](#), [Autonomous Organisation of National Parks](#), [SGRIP](#), [Subsecretariat](#), [Technical General Secretariat](#).

Application: <http://www.mma.es/portal/secciones/licitaciones/>

- **Member Organisations that belong to:**
 - Regional governments.
 - Local councils.

The centralised acquisition system of goods and services, established within the framework of the General State Administration, its autonomous Organisations, Management bodies and Common Services of the Social Security and other state public sector organisations, can be used by the Regional Governments, Local Councils, their autonomous Organisations and public bodies. Adding them to the centralised system can be done for all of them or for categories of goods and services, through agreements to join the General Directorate of State Assets, by virtue of [Additional Provision Ten](#) of the Consolidated Text of the Law on Public Administration Contracts approved by Legislative Royal Decree 2/2000, of 16 June.

http://catalogopatrimonio.minhac.es/pctw/como_adh.aspx

Type of member	Procedures	Forms
Regional governments	See	See
Provincial governments	See	See
Local councils	See	See

Autonomous organisations that report to the regional governments and local administration organisations	See	See
Public bodies that report to the regional governments and local administration organisations	See	See

The following texts collectively make up the legal framework:

- Public Sector Contracts Bill (Official Gazette of the Spanish Parliament [Boletín Oficial de las Cortes Generales] of 8 September 2006, number 95-1).
- Consolidated text of the Law on Public Administration Contracts.
- Article 183: Centralised goods procurement
- Article 182g: Negotiated procedure without publicity
- Article 210 f: Negotiated procedure without publicity
- Additional Provision Three: Competency for acquiring equipment and systems for treating information.
- Additional Provision Ten: Joining the centralised procurement systems of acquisition of goods and services.
- General regulation of the Law on Public Administration Contracts.
- Article 193: Procedure for the centralised acquisition of goods declared for common use.
- Order of 17 April 1984 (Ministry of the Treasury), which regulates the payment system for the supply of goods with centralised acquisition (BOE of 3 May 1984).
- Ministerial Order of 4 March 1987 on the acquisition and cataloguing of furniture for civil servant offices.
- Royal Decree 541/2001, of 18 May, which establishes certain specialities for the procurement of telecommunication services (BOE of 9 June 2001).
- Article 12: Centralised procurement of telecommunications services.
- Order HAC/729/2002 of 25 March on the declaration of goods and services with centralised procurement (BOE of 6 April 2002).
- Order EHA/3432/2004, of 13 October, which creates a Single Procurement Body and the Procurement Board of the Central Services at the Ministry of the Treasury and the Voluntary Register at the Department.
- Additional Provision One: Voluntary Register of Tenderers at the Centralised Acquisition System.
- Resolution of 16 May 2005 of the General Directorate of State Assets, which approves the Conecta-Patrimonio application for the telematic presentation of proposals for the tenders to adopt the type of goods and services with centralised acquisition, as well as the requests for supplies and services arising from those tenders.
- Order EHA/2593/2006 of 28 July on the declaration of goods and services with centralised procurement.
- Order EHA/2/2007 of 9 July on the declaration of goods and services with centralised procurement.

http://catalogopatrimonio.minhac.es/pctw/norm_legis.aspx

32.1.2 Certificates and statements

1. The legal framework that establishes the methodology for issuing certificates is contained in the Public Sector Contracts Bill, which transposes the European Directives that regulate eProcurement and which also regulates all the procurement undertaken with the Public Administration.
2. There is also a Centralised Acquisition System that is a model for the specific procurement of goods and services which, because of its special characteristics, can be used in general by all the departments of the Public Administration organisations.

Non-Spanish Companies from European Union Member States or from signatory States to the Agreement on the European Economic Area have to present, in addition to the documentation required of all companies, which is detailed below, a document that accredits their registration or a certificate of annex I of the General Regulation on the Contract Law.

Non-Spanish companies that are not covered by the preceding paragraph must additionally present:

- A report from the Permanent Diplomatic Mission or Consulate Office of Spain in the company's place of domicile, accrediting the company's registration in the local professional, commercial or similar register or, in its absence, the company's habitual actions in local operations in its scope of activity.
- A report from the Permanent Diplomatic Mission of Spain in the company's place of domicile or a report from the General Secretariat of Foreign Trade of the Ministry of the Treasury regarding the status of the signatory State to the Government Procurement Agreement of the World Trade Organization.
- A reciprocity report issued by the Permanent Diplomatic Mission of Spain in the company's place of domicile.

32.2 E-Procurement initiatives and status

32.2.1 General e-Procurement framework and initiatives

The Public Sector Contracts Bill deals with the regulation of contracts with a broad definition in its scope of application, considering that the Law will have to operate in a context influenced by supranational regulations and with varied types of addressees. Compared with the prior regulation represented by Law 13/1995 of 18 May, which included a general part comprising the regulations

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applicable to all the contracts and a special part which contained the peculiar features of the “typical” Administrative Contracts, the Public Sector Contracts Bill meets, on the one hand, the requirement of directly regulating procurement from a broader range of addressees and, on the other, the requirement of differentiating the treatment of the regulations which are transposed from Community provisions.

In view of those principles, the new features of the Bill regarding the Consolidated Text of the Law on Public Administration Contracts affect the delimitation of its scope of application, the distinguishing feature of the regulations that come directly from Community law, the addition of new procurement regulations introduced by Directive 2004/18/EC, the simplification and improvement of contractual management, and the classification of a new figure, the Collaboration Contract between the public sector and the private sector.

With the dual objective of adapting the scope of the Bill to the Community Directives and of not leaving public sector bodies exempt from regulation, the delimitation of the subject Bodies is made in very broad terms. Therefore, article 3.1, from a) to g), lists the bodies which, because of their internal autonomous legislation policy, are deemed fit to be subject to public contract legislation. And this is done in very broad terms, as can be seen in article 3.1.h), which works as a residual clause and reproduces the definition of Public Body of Directive 2004/18/EC. Within Public Sector Bodies, the Bill distinguishes three categories of subjects:

1. Public Administrations.

2. Public Sector Bodies which are not Public Administrations but are subject to Directive 2004/18.

3. Public Sector Bodies which are not Public Administrations and are not subject to that Directive.

The Bill uses those names for the businesses which, because of the Contracting Authority, their type or their amount, are subject to European regulation guidelines.

The applicability of the Community provisions to the various public sector contracts can be modulated by either restricting it just to the cases that require them or using it in a negative way for all the contracts in which the national legislator has the freedom to configure their legal regime.

The Law makes a general review of the Contractual Management regulation in order to make progress in its simplification and rationalisation and reduce the costs and charges borne by the contracting authority and in individual contracts.

That review has particularly affected the Contractor Classification system, the means of accrediting the Competence requirements for making contracts with the public sector, and the Award Procedures, by increasing the amounts established by the upper limits of the simplifications – Negotiated Procedure and that corresponding to Minor Contracts – and by drawing up a new negotiated procedure with publicity for contracts not subject to harmonised regulation that do not exceed a specific amount.

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The provisions part has 309 articles grouped into a Preliminary Title that comprises, on the one hand, the Purpose and Scope of the Law and, on the other, the delimitation of the types of Public Sector contracts, distinguishing the contracts classified as:

- Construction work
- Public Services Concessions
- Supplies
- Services
- Collaboration between the Public Sector and the Private Sector

And the contracts subject to Harmonised Regulation and those classified as administrative contracts and private contracts.

Part of those amendments originate from the Report and Conclusions of the Expert Commission on the Study and Diagnosis of the Public Procurement Situation. That Commission, which was created on 10 June 2003 and was formed by experts from the Administration, the academic world and the private sector, presented its conclusions in April 2004. The report and conclusions of the Commission were published by the Department's Publications Centre.

As we stated earlier in the section on the legal framework of procurement certificates, in general the centralised acquisition system is a specific procurement model for goods and services which, because of their special characteristics, can be used in general by all the Public Administration departments. They are the common use goods and services which, among other features, have the following characteristics:

- Multiplicity of similar models.
- Plurality of suppliers.
- No compatibility problems.
- Recurring acquisitions by the various administrative units.
- Associated with the service operations.

Through the web site of the Centralised Acquisition System, of the Subdirectorate General of Purchasing, the various processes related to the Centralised Acquisition System can be carried out safely through telematic means.

It offers the following services to the Public Bodies:

- Consultation of the Catalogue's articles.
- Advanced searches based on different criteria.
- Comparison of the Catalogue's articles.
- Creation of a "Shopping basket" of articles.
- Printing or e-mailing of the requests for articles.
- Monitoring of the status of the various requests.
- Reception of Notifications about the requests.

The Central Acquisition System is not the only central purchasing centre for the Administration in Spain.

http://catalogopatrimonio.minhac.es/pctw/info_inst_1.aspx

At a regional level, there are purchasing centres independent of the Central Acquisition System of the Directorate General of Assets, which pursue the same objective: save costs, time and resources.

- **Catalunya government**

The Catalunya government has a large purchasing centre that began working on 1 January 2004 to manage its technology acquisitions and which can be accessed via the Internet (<http://www.ecataleg.net>). All the Catalunya government's departments and attached bodies can access any product in the catalogue, which includes all the companies that supply products, services and provides advice regarding that government's projects.

Through that purchasing centre, a broad catalogue of standardised IT goods and services can be accessed, including: servers, computers, routers, printers, scanners, photocopiers, training services for IT or data digitisation and recording, and software: operating systems, office applications, etc.

The objectives that have already been met with this purchasing portal have been as follows: increased transparency, less paper, on-line information for decision-making, integration with other operating systems and, above all, electronic tendering.

- **Galicia government**

The Galicia government has created SIPLEX (the Government's Electronic Publication and Tender System) for the complete management of administration procurements via telematic means, from the publication of tenders to the signature of the contract, based on the use of digital certificates to provide tenderers with the same guarantees of trust as the traditional model of administration procurements.

Any company that wants to use this new system must register with the Galicia government's Contractor Register. Moreover, the proxy who signs and presents the tender must have a Class 2 digital certificate from the Spanish Mint.

Regarding the components of the procurement body of the Galicia government, the only requirement is that each one should also have their own personal digital certificate, which is necessary for opening the tenders. That project was developed by Galicia's Directorate General of Organisation and IT Systems of the Ministry of the Presidency, Institutional Relations and Public Administration to be used by all the Departments, Autonomous Bodies and Public Companies of that Regional Administration and which can progressively include the possibility of electronic tenders in its procurement procedures.

- **Canary Islands government**

The Canary Islands government is also a pioneer regarding the objective of facilitating relations between companies and the Administration by implementing the PLYCA (the Administration's Tender and Procurement Project) solution in the administration's electronic tender and procurement processes.

PLYCA enables the public tender and procurement processes to be carried out electronically, including the regulations, procedures, processes and documents that govern this type of procurement. It also supports the use of the electronic signature to give the processes and documents involved in the procurement process legal validity. The origin of that project dates back to 1998, when a study was conducted regarding the viability of electronic tenders and procurements in line with all the specifications of SILICE (Information System for Electronic Procurements and Tenders) established by MAP.

As from the Order of 23 June 2003 of the Department of Economy, Treasury and Trade of the Canary Islands Government, that tool was validated and its expansion commenced; at present, the PLYCA system is being used by nearly 1,000 users in 6 governmental departments. The companies that want to tender and procure with the Canary Islands Administration electronically have all the necessary mechanisms for facilitating and speeding up the procurement of the products approved by the Administration.

One of the requirements applicable to the telematic presentation of proposals for centralised acquisition is to have an Advanced Electronic Signature in order to sign the tenders electronically.

To add the electronic signature, encrypt the file that contains the proposal and send that proposal, the interested parties must use the IT application for that purpose included in the web site of the Subdirectorate-General of Purchasing.

The functioning and dynamics of the public procurement process are as follows:

1. The Administration puts a tender on the web site, the amount of which depends on the kind of good or service required (a maximum of one million euros for electronic management services).
2. The companies reply to the Administration's request by sending their proposals, accompanied with all the necessary documentation, and identifying themselves to the Administration via an electronic certificate and electronic signature.
3. The sealed bids are opened. This process is carried out by the Subdirector-General of Purchasing or by a delegate of that department, together with an auditor and another person responsible from the Administration. Those three people each have one-third of the password that opens the sealed bids, so this step can only be opened if all three are there.
4. The Administration time-stamps the economic tender and, through the Subdirector-General of Purchasing and the auditor, signs it electronically.
5. The tenders of the companies enter the phase of valuation, award and notification to the successful tenderer.

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6. The successful tenderer becomes part of the catalogue of companies to which the Administration grants its trust during three years so that the public sector managers can ask about their tenders if they wish.

The electronic procurement process works in the following way:

1. Creation of a buy order.
2. Digital signature process: applicant, auditor, expense manager, etc.
3. Sending to the Subdirectorate-General of Purchasing (via XML).
4. Validation
5. Approval
6. Sending (via XML) to the supplier and the body
7. Information about the order's reception, payment, incidents, etc.

The Tenderers' Register, attached to the Subdirectorate-General of Purchasing of the Directorate General of State Assets, is the instrument through which individuals and legal persons register in order to be accredited, for the purposes of presenting proposals for the tenders and at the time of the award. As with the electronic tender processes, that Register will gradually be implemented. The advantage of registering in the Tenderers' Register is that, once the corresponding regulation comes into force, it exempts them from supplying in those tenders the documents that would have been presented for the Tenderers' Register, provided that this is established in the Specifications of the Administrative Clauses and Technical Requirements. It also enables tenders via electronic means for the tenders that have this possibility.

The registration, which is completely free of charge, in the Voluntary Tenderers' Register is mandatory only for those who wish to make electronic tenders and not for tenders using the traditional methods.

In addition to registering in the Register, the following are also needed for telematic tenders: downloading from the web site of the Directorate General of State Assets, of the Certificate of the corresponding Tender; provision of information required in each tender for the telematic presentation process; provision of an encrypted electronic file with the verification data of the tender; inclusion of the electronic signature; encryption of the file with the proposal; and sending of the proposal using the IT application included in the web site of the Subdirectorate-General of Purchasing of the Directorate General of State Assets.

In order to use electronic tendering:

1. All companies must submit:

The Registration Form for the Voluntary Tenderers' Register

2. In addition to that form, non-Spanish Companies from European Union Member States or from signatory States to the Agreement on the European Economic Area must submit a

document that accredits their registration or a certificate of annex I of the General Regulation on the Contract Law.

3. Non-Spanish companies that are not included in the preceding section must supply:

- A report from the Permanent Diplomatic Mission or Consulate Office of Spain in the company's place of domicile, accrediting the company's registration in the local professional, commercial or similar register or, in its absence, the company's habitual actions in local operations in its scope of activity.
- A report from the Permanent Diplomatic Mission of Spain in the company's place of domicile or a report from the General Secretariat of Foreign Trade of the Ministry of the Treasury regarding the status of the signatory State to the Government Procurement Agreement of the World Trade Organization.
- A reciprocity report issued by the Permanent Diplomatic Mission of Spain in the company's place of domicile.

The applications are completely functional and operational and there are no barriers for non-nationals.

32.3 Certificates, attestations and declarations

In this section, we will take a closer look at how the common requirements defined by the e-Procurement Directives are typically met in Spain.

For each of these requirements, the following comments with regard to issuing and validity hold true:

1.- Article 72 of the Public Sector Procurement Bill states that, through the Official Register of Tenderers and Classified Companies of the State, certificates can be issued for accrediting, before all the contracting authorities of the public sector, based on what is stated in it and unless there is evidence otherwise, the conditions for the entrepreneur's competency regarding its personality and capacity to perform, representation, professional or business qualification, economic and financial solvency, and classification, as well as any procurement prohibitions that must be stated in it.

2.- At regional level, the registration in the Official Register of Tenderers and Classified Companies of a Regional Government will accredit identical circumstances for the purposes of the procurement with it, with the local bodies included in its territorial scope, and with the other public sector bodies, organisations and agencies that report to them. Proof of the content of the Official Registers of Tenderers and Classified Companies is done via a certificate from the body in charge of it, which can be issued by electronic, IT or telematic means.

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Evidence of the content of the Official Registers of Tenderers and Classified Companies is done via a certificate from the body in charge of it, and can be effectively issued by electronic means, as stated in article 72.2 of the Public Sector Procurement Bill.

1.- Additional provision nineteen of the Public Sector Procurement Bill regulates the use of electronic, IT and telematic means in the public procurement procedures in the following way:

- a) They must not discriminate; they must be available to the public and be compatible with information and communication technologies of general use.
- b) The information and technical specifications required for the electronic submission of the offers and requests for participation must be available to all the interested parties; they must not discriminate and must be in line with open standards of general use and broad implementation.
- c) The programs and applications required for the electronic submission of the offers and requests for participation must be of wide use, easy access and non-discriminatory, or they must be made available to the interested parties by the contracting authority.
- d) The systems for communications and for information exchange and storage must guarantee in a reasonable way, depending on the status of the technology, the integrity of the data transmitted and that only the competent bodies, on the date stated for this, can access them or that, in the case of breaking that access prohibition, the breach can be clearly detected.
- e) The applications used for making the communications and notifications and sending the documents between the tenderer or contractor and the contracting authority must be able to accredit the date and time of their issue or reception, the integrity of their content, and their sender and addressee. In particular, those applications must ensure that there is record of the exact time and date of the reception of the proposals or of the requests for participation and of any documentation that must be submitted to the contracting authorities.
- f) All the actions and manifestations of willingness by the administrative bodies or tenderers or contractors that have legal effects and are issued in both the preparation phase and in the phase of calling the tender, awarding and executing the contract and must be authenticated via a recognised electronic signature in accordance with Electronic Signature Law 59/2003, of 19 December. The electronic, IT and telematic means used must ensure that the signature conforms to the provisions of that law.

2.- a) The tenderers or candidates must submit the documents, certificates and declarations that are not available in electronic format before the expiration of the scheduled deadline for submitting the tenders or requests for participation.

b) That references in that law to the submission of written documents is not an obstacle for submitting them via electronic means. Electronic copies of the documents must be added to the file, authenticated with the recognised electronic signature of the administrative body qualified for its reception, and will have the same effects and the same value as the certified copies of those documents.

c) The formats of the electronic documents that form part of the procurement files must conform to the publicly available specifications and their use must not be subject to restrictions, and free and full accessibility to them must be guaranteed by the contracting authority, the taxation and control authorities, the jurisdictional authorities and the interested parties, during the period in which the file must be maintained.

d) A requirement for processing the contract award procedures via electronic means is that the contracting authorities must demand from tenderers prior registration in the Official Register of

Tenderers and Classified Companies corresponding to the data to which articles 303.1.a) to d) refer.

3. By conforming to the requirements established in the preceding section and to those stated in the standards that regulate in general their use in legal operations, the provisions for implementing that law will establish the conditions in which electronic invoices can be used in public sector procurement.

32.3.1 Requirements with regard to the personal situation of the candidate or tenderer – absence of conviction (art. 45 §1 and §2 (c-d) of Directive 2004/18/EC)

Current legislation, i.e. the Consolidated Text of the Law on Public Administration Contracts, plus the Public Sector Procurement Bill both establish a number of prohibitions for procurements. Article 49.1.a) of that Bill refers precisely to people who have been convicted by final judgement of participation in a criminal organisation, corruption in international economic transactions, influence peddling, bribery, fraud, illegal levying, crimes against the Treasury and Social Security, crimes against workers' rights, embezzlement and similar receptions and conducts, crimes relating to environmental protection, and special disqualifications for exercising their profession, office, industry or trade.

Consequently, article 61 and subsequent establish the way in which the competence for procuring must be accredited, in relation to those circumstances. In particular, they require evidence that the entrepreneurs are not involved in any of those prohibitions, either through legal attestation or an administrative certificate, depending on the case, and when that document cannot be issued by the competent authority, it can be replaced by a responsible declaration granted before an administrative authority, notary public or qualified professional body.

32.3.2 Requirements with regard to the personal situation of the candidate or tenderer – non-bankruptcy and financial status (art. 45 §2 (a-b) of Directive 2004/18/EC)

In the same line as the preceding section, article 63 of the Bill requires, as a means of accrediting the economic and financial solvency, the provision of documents determined by the Contracting authority, from among those envisaged in article 64 to 68 of the law. That is, the appropriate declarations from financial institutions, a receipt of the existence of insurance for indemnity of professional risks, the submission of annual accounts to the Mercantile Register or to the corresponding official Register, and the entrepreneurs that are not obligated to submit their accounts to the official Registers can provide their duly legalised accounting records.

Likewise, they can submit a declaration about their overall business volume, referring to the last three years at most and if, with a justified cause, the entrepreneurs are unable to submit those documents, they will be authorised to accredit their economic and financial solvency via any other document deemed fit by the contracting authority.

32.3.3 Requirements with regard to the personal situation of the candidate or tenderer – compliance with fiscal and social obligations (art. 45 §2 (e-f) of Directive 2004/18/EC)

There is an obligation to accredit that the tenderer is up to date with its tax and social security obligations. This has already been explained above.

32.3.4 Requirements with regard to the suitability to pursue the professional activity

Article 66 of the aforementioned Public Sector Contracts bill requires that entrepreneurs accredit their technical solvency in the supply contracts by providing a list of the main supplies carried out in the last three years, indicating their amount, dates and public or private destinations, via certificates issued or endorsed by the competent authority, when the addressee is a public sector body or, when it is a private buyer, via a certificate issued by it or, in the absence of a certificate, via a declaration from the entrepreneur.

32.3.5 Requirements with regard to economic and financial standing

The financial solvency and the financial stability must also be accredited. This was explained in section 29.3.1.

32.3.6 Requirements with regard to technical and/or professional ability

The tenderer must accredit what technical personnel or technical units, whether or not they form part of the company, are available for executing the contract, especially those in charge of quality control. Likewise, the tenderer must also describe the technical installations of the measures that are used to guarantee the quality and of the company's study and research means. It must also accredit the control performed by the contracting public sector body or, in its name, by a competent State body in which the entrepreneur is established, always via an agreement with that body.

32.3.7 Requirements with regard to quality assurance standards

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1.- In addition to what was already stated in the preceding section, article 69 of the Public Sector Procurement Bill states that, with regard to the contracts subject to harmonised regulations, it is necessary to accredit the quality assurance standards when the contracting authorities require the submission of certificates issued by independent bodies accrediting that the entrepreneur adheres to certain quality assurance standards, referring to the quality assurance systems based on the series of European standards on this issue, certified by bodies that conform to European standards regarding certification. The contracting authorities will recognise the equivalent certificates issued by bodies established in any EU member state and will also accept other evidence with equivalent quality assurance measures submitted by the entrepreneurs.

2.- In relation to the contracts that belong to the Centralised Acquisition System, the Subdirectorate General of Purchasing places at the disposal of the organisations and companies the member contracts that contain the conditions required for the reception of goods supplied and services provided, whose characteristics and prices must coincide with those that, identified with their key word, are stated in the corresponding supply order, as well as the payment of the price, which will be paid in accordance with article 99 of the Consolidated Text of the Law on Public Administration Contracts stated in the preceding clause.

The procedure for this corresponds with the following steps:

- Supply Order: After checking that the request matches the key words and concepts stated in the catalogue, the Subdirectorate General of Purchasing notifies both the successful tenderer and the Body of the supply order.
- Reception: Once the requested material is received, the successful tenderer sends the corresponding invoice to the applicant Body and it, or the receiving Centre, if they are different, will check, in the shortest possible time, that the goods are in a good state so as not to delay the reception and payment, notifying the Subdirectorate General of Purchasing that the reception is in good condition.
- Prices: 1) The prices will not increase during the contract validity period unless, for reasons stated in the specifications, this is authorised by the General Directorate. 2) The price includes transport and installation expenses in the place designated by the Administration and the start-up (except in those cases that require special installation), as well as taxes and all types of encumbrances, especially the 16% Value Added Tax (the current rate). 3) For supplies whose destinations are not subject to VAT for territorial reasons, the requests must include the prices as stated in the Catalogue, or those which are in force at that time, if they have been changed, in order to mechanise them and detect possible errors; although the stamp will state "VAT EXEMPT", and the expense will be approved for the amount minus the corresponding VAT amount. The Body will bear the municipal taxes as a result of the Canary Islands Indirect General Tax or the Tax on Production, Services and Imports, in the territories governed by those tax rates. Those taxes will be settled in any case by the company. 4) The successful tenderers cannot issue, outside the channels instrumented by the Subdirectorate General of Purchasing, more favourable prices, conditions or requirements than those of the award; failure to comply with these will lead to the termination of the contract.
- Changes: The successful tenderers can request, from the Subdirectorate General of Purchasing, price decreases of the awarded products, as well as changes in models due to

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technological or commercial innovations, duly justified under the protection of the Specifications.

- **Guarantee and maintenance:** The guarantee period will be one year, unless a longer period was offered, and it will be expressly stated in the Catalogue.
- **Delivery times:** The requested goods must be delivered within the deadlines set in the catalogue and never without exceeding them by three months, which is the maximum period stated in the specifications (except for special deliveries).
- **If the period set after the date of notification of the supply order to the company has been exceeded** (which tends to be the same date on which the Body receives the notification), the claim must be made in writing to the Directorate General of State Assets - Subdirector General of Purchasing – which may give rise to the corresponding penalty. An identical procedure is followed if there are anomalies or defects in the received goods.
- **Supply of accessories:** Likewise, the applicant Bodies may interest the General Directorate of State Assets in the supply of accessories for the main object of the request (when they are not expressly stated in the Catalogue), provided that their amount does not exceed 10% of the object and, in any case, does not exceed the amount established for minor supplies in article 176 of the Consolidated Text of the Law on Public Administration Contracts, approved by Legislative Royal Decree 2/2000 of 16 June. When the requests include those accessories, they must always be accompanied with an offer from the successful tenderer.
- **Special procurement conditions:** The Directorate General of State Assets, on its own initiative and with the consent of the successful tenderer, or at the latter's initiative, and in line with articles 102 and 190 of the Law on Public Administration Contracts, can, for reasons of public interest or real service needs of the Body receiving the supply and, especially, for reasons of new technology or marketing, change or extend the goods, prices and conditions of the award of that tender, provided that the amount of the good to be changed or extended does not exceed 20% of the price of the similar good awarded in each case. If there are no similar goods awarded, the contracting authority can, for the same reasons stated above, extend the supplementary or auxiliary elements of the principal good, provided that the amount does not exceed 20% of the price of the good that it supplements or aids.

32.3.8 Requirements with regard to environmental management standards

1.- Nevertheless, article 70 of that Law requires accreditation of adherence to the environmental management standards; in the contracts subject to harmonised regulation, the contracting authorities can demand the submission of certificates issued by independent bodies accrediting that the entrepreneur adheres to certain environmental management standards, referring to the Eco-Management and Audit Scheme (EMAS) or to the environmental management standards based on European or international standards on that issue and certified by the bodies in accordance with Community legislation or with European or international standards regarding certification. The contracting authorities will recognise the equivalent certificates issued by bodies established in any European Union member state and will also accept other equivalent proof of environmental management measures submitted by the entrepreneurs.

2.- The Centralised Acquisition System has implemented a number of actions in the field of public procurement regarding the normalisation and standardisation of products, specifications, conditions, support for other quality and environmental policies, unified supplier policies, as well as a unified information system for public procurement.

32.4 Interoperability

To ensure interoperability between the electronic procurement subsystems themselves (public procurement platform, electronic registers of companies, electronic catalogues, electronic auction systems, etc.) and with the information systems of the economic players that participate in the procurement processes and with those of the public Administration bodies, it is necessary to ensure both technical operability as well as semantic and organisational operability. In particular, it is necessary that the exchange information systems should share the same unequivocal and consistent interpretation of the exchanged data, documents and messages, so that the electronic information provided by any of the players in a transaction can be correctly understood and processed by the other participants.

The existing international regulations and standards, such as ISO 11179 and 15000, plus the ebXML of OASIS and UN/CEFACT standards, and the W3C Recommendations for XML language and structure, together with the initiatives fostered by the IDA programme of the European Union in relation to electronic procurement, provide the foundations for the definition and construction of the necessary interoperable information architecture. Based on those foundations, several procurement platforms have resolved that need by developing or adopting frameworks or architectures for the appropriate information components for electronic procurement. With that same aim, initiatives have been fostered to develop libraries with standard components, in XML format, for general use electronic procurement, such as UBL, OAGIS and eBIS-XML, as well as other initiatives for developing libraries with a sectoral nature, aimed at specific "vertical" markets. Those initiatives are being used as the foundations for developing electronic public procurement platforms, as well as for initiatives for interoperability in electronic procurement processes such as those fostered by the European Union in the framework of the IDA project (IDA eProcurement XML Schemes Initiative).

To ensure that electronic public procurement in Spain conforms to that regulatory framework, the Directorate General of State Assets proposes, within the Avanza Plan, to execute certain essential projects for ensuring harmonious development and deployment of the information systems required for meeting the proposed objectives.

To accommodate in a harmonious and coordinated way the varied needs and conditioning factors of the different potential users of the electronic procurement systems to be deployed, and to facilitate interoperability of the public procurement platform and its different subsystems with the technical, organisational and information infrastructures of all the participants in the public procurement processes, it is necessary to define firstly a framework architecture that provides both the common essential components of the system (standardised definitions and denominations, reusable elementary components and modules, common use electronic documents, etc.) and the structure and rules that enable them to be extended or adapted to the special needs of the different specific procurement contexts. That architecture provides the other systems to be developed subsequently the "blocks" or basic components of information, as well as the necessary composition rules for constructing electronic documents and messages that the tenderers and contracting authorities have to exchange

during the procurement processes, ensuring at the same time interoperability of all the elements whose interaction will provide the necessary functionalities for making electronic procurement effective.

With the triple aim of aligning the development of Spanish electronic procurement with the best known practices, of taking advantage of the knowledge and experience accumulated in that field by the international community, reusing as far as possible its results, and of ensuring maximum interoperability of subsequent developments to be undertaken for implementing electronic public procurement, the project aims to provide the General State Administration with the necessary IT services for constructing a public architecture of standardised components, documents and messages, in accordance with the best applicable international regulations and standards, that can be used by all the necessary IT systems, applications and components for constructing interoperable solutions for electronic procurement, as well as for the IT systems, applications and components of the economic players that wish to participate in the electronic procurement processes put to tender by any public procurement body.

32.5 Future trends/expectations

The electronic public procurement program has shown that the use of the techniques and procedures of the electronic administration reinforces the capacity of society to generate more productive and fairer environments.

The cultural change that has enabled the electronic administration has continued, with its internal capacity for using and treating electronic documents and electronic signatures, and it is also the administration itself that generates the companies and citizens related to it to follow its model.

The scope of the electronic administration where one can see with greater clarity the return of investments is in public procurement, whose undeniable benefits can be applied to the rest of the electronic administration that focuses on citizens and public servers.

The costs are identified and centralised mainly in the training of civil servants and the implementation of the systems, together with the organisational changes that must be made.

An architecture that houses this and other applications is necessary so as not to introduce ambiguities that generate chaos and unnecessary costs.

But all of that is only part of the solution, whose scope covers all of society and whose changes must be gradually undertaken, slowly but surely, in a continuous evolutionary process.

32.6 Assessment

The eProcurement process established in the Spanish Public Administration seems to be perfectly organised and optimised because it includes:

- centralised supply management, which will lead to significant savings as a result of larger supply volumes to be acquired;
- a decentralised system, with restricted access, so that users can make requests for material (not only the Central and Regional Administration, but also the local and associated bodies);
- an extensive and varied catalogue of products in which users can select the most suitable ones.

On the other hand, the extension of eProcurement activities to the procurement of other specific goods, construction work or services does not seem very viable because of their specific nature since they impose specific and extensive environmental conditions that force the tenderers to make very elaborate proposals and projects, whose assessment requires an in-depth analysis; this means that it is difficult to treat them through general automatic means and, therefore, it would be the development of appropriate software applications for each specific case, which would negatively affect the economy and duration of the acquisition process.

33 Sweden

33.1 Public procurement framework

33.1.1 General framework

The rules for purchasing of goods and services by national, regional and local authorities are laid down in the Swedish Public Procurement Act (SFS 1992:1528) (*Sw: Lag (1992:1528) om offentlig upphandling*).³⁷⁴

The EU Directives 2004/17/EC and 2004/18/EC of 31 March 2004 have at this point not been transposed into Swedish law yet. Amendments to the existing Swedish laws are, however, under discussion. Following a governmental report (SOU 2006:28)³⁷⁵, a corresponding legislative proposal has recently been put forward (Prop. 2006/07:128)³⁷⁶. The amendments are expected to take effect on 1 January 2008.

The legislative proposal suggests a new Public Procurement Act (*Sw: Lag om offentlig upphandling*) ("traditional sector) and a new Act on Procurement within the sectors water, energy, transport and postal services (*Sw: Lag om upphandling inom områdena vatten, energi, transporter och posttjänster*) ("utility services"). These two new statutes will replace the existing Act on Public Procurement (SFS 1992:1528) and reflect the structure and content of the two EU directives to a large extent.

The current Swedish Public Procurement Act contains general provisions concerning public procurement (Chapter 1), special regulations governing the award of public supply contracts (Chapter 2), public works contracts (Chapter 3), public contracts in the water, energy, transport and telecommunications sectors (Chapter 4), public service contracts (Chapter 5) together with provisions regarding procurement in cases where the amounts involved are below the threshold values contained

³⁷⁴ A non-official and a possibly slightly outdated version, however in English, can be found at the website of NOU (Nämnden för offentlig upphandling), a central government agency responsible to supervise the observation of the Public Procurement Act (LOU), <http://www.nou.se/loueng.html>. A brief introduction into the work of NOU can be found (in English) at <http://www.nou.se/english.html>. Following a decision by the government from December 2006 (in Swedish at http://www.nou.se/pdf/Uppdrag_nou_kkv.pdf), NOU will, however, become a part of the Swedish Competition Authority September this year (http://www.konkurrensverket.se/t/NewsPage_2363.aspx).

³⁷⁵ Nya upphandlingsregler 2, SOU 2006:28, in Swedish available at <http://www.regeringen.se/sb/d/108/a/60333>.

³⁷⁶ Ny lagstiftning om offentlig upphandling och upphandling inom områdena vatten, energi, transporter och posttjänster, Prop. 2006/07:128, in Swedish available at <http://www.regeringen.se/sb/d/108/a/84376>.

in Chapters 2-5 and in certain other cases (Chapter 6). The act also contains provisions regarding review, damages etc. (Chapter 7).³⁷⁷

According to Chapter 1 Section 7 of the Public Procurement Act the contracting entity shall advertise procurements unless otherwise provided in Chapters 2 – 5 and the “contract notice shall be sent in the fastest appropriate manner to the Office for Official Publications of the European Communities.” (Chapter 1 Section 8). In other words, contract notices have to be published in the Official Journal of the European Communities (on-line version: see Tenders Electronic Daily, <http://ted.publications.eu.int>). Contracting authorities may, of course, publish the procurement through other channels. As there is no central Swedish platform for these publications, national, regional and local authorities choose their own methods. One exception is possibly the co-ordination function www.avropa.nu, which will be explained more in detail below.

The publication in TED is not necessary in procurements below the threshold values. As different provisions in Chapters 2 to 5 of the Act show EU publication is not necessary in cases where Chapter 6 of the Act is applicable.

The advertisements have to contain certain information according to the Regulation on standard forms for advertisements of public procurements (SFS 2002:590) (*Sw: Förordning (2002:590) om standardformulär för annonsering vid offentlig upphandling*). The Regulation transposed the EU Directive 2001/78/EC³⁷⁸.

The publication typically indicates the administrative requirements to be met, including necessary certificates and statements to be provided by prospective tenderers, and contains the specific administration and/or contact person to whom the finalised offer should be provided.

33.1.2 Certificates and statements

The Swedish Public Procurement Act states only indirectly a few administrative requirements that are to be met. Chapter 1 states in Sections 17 and 18 requirements that may be made of suppliers

17 § A supplier may be excluded from participation in an award procedure if he

1. is bankrupt or is being wound up, his affairs are being administered by the court, he has entered into an arrangement with his creditors, he has suspended payments, or he is subject to an injunction against carrying on business,

³⁷⁷ See Chapter 1 Section 1 of the Act on Public Procurement.

³⁷⁸ Commission Directive 2001/78/EC of 13 September 2001 amending Annex IV to Council Directive 93/36/EEC, Annexes IV, V and VI to Council Directive 93/37/EEC, Annexes III and IV to Council Directive 92/50/EEC, as amended by Directive 97/52/EC, and Annexes XII to XV, XVII and XVIII to Council Directive 93/38/EEC, as amended by Directive 98/4/EC (Directive on the use of standard forms in the publication of public contract notices) (Text with EEA relevance)

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2. is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding up or administration by the court or for an arrangement with creditors or similar proceedings,

3. has been convicted of an offence concerning his professional conduct by a judgement which has the force of *res judicata*,

4. has been guilty of grave professional misconduct and the contracting entity can furnish proof of this circumstance,

5. has not fulfilled obligations relating to the payment of social insurance fees or taxes in the country in which he is established or the country in which procurement takes place, or

6. has in some material respect failed to furnish required information or furnished incorrect information requested by virtue of this Article or Article 18.

A contracting entity may request a supplier to show that there are no grounds for excluding him by virtue of subsections 1-3 or 5 of the preceding paragraph.

An entity may also require a supplier to show that he is registered in the country in which he is trading according to the country's regulations about company registration, registers of traders or similar registers. Act (1997:1068).

18 § A supplier can prove that he fulfils the requirements laid down on the basis of Article 17 with appropriate documents. If special grounds exist, documentary proof may be replaced by a sworn statement or some similar assurance.

In its contract notice or in invitations to tender, the contracting entity must indicate what proof is required of the supplier's financial and economic circumstances and his technical abilities and capacity.

A supplier that is registered in the official list of approved suppliers in an EEA country is to be considered as fulfilling the demands that may be made by virtue of subsections 1-3 in the first paragraph of Article 17. Act (1997:1068).

The Regulation on proof for public procurement (SFS 1998:1364) (Sw: *Förordning (1998:1364) om bevis vid offentlig upphandling*) states several other administrative requirements.

The requirements differ depending on if the procurement concerns goods or services. Within the procurement for goods the regulation states that tenderers may be required to submit (according to Section 2 of the Regulation)

- bank statements,
- balance sheets (Sw: *balansräkningen*) of the tenderer, if the publication of balance sheets is mandatory in the tenderer's country of origin;
- global revenue over the last three accounting years.

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The contracting authority can accept less formal documents as evidence, if the tenderer has reasons for not being able to provide these certificates.

The actual documents required are often the following:

- Certificate of registration (*Sw: registreringsbevis*) of the Swedish Trade and Industry Register (*Sw: Näringslivsregister*)³⁷⁹, administered by the Swedish Companies Registration Office (*Sw: Bolagsverket*)³⁸⁰
- The Swedish Tax Agency's response (Form SKV4820 "Request response Public information")³⁸¹
- Statement (*Sw: Sanningsförsäkran*) of the tenderer that he/she
 - is not in a state of bankruptcy, being wound up or similar status;
 - has not filed for a state of bankruptcy, being wound up or similar status;
 - has not been convicted by a definitive ruling of a crime impairing his professional integrity.
 - has not made serious errors in the performance of its professional obligations
 - has not been convicted by a definitive ruling of non-compliance with obligations under social law (such as anti-discrimination legislation)
 - or has made serious false statements when providing information.
- Annual Accounts (*Sw: Årsredovisning*) of the tenderer

33.2 E-Procurement initiatives and status

33.2.1 General e-Procurement framework and initiatives

There is no central national application at the moment that allows authorities to procure by electronic means. This is due to the decentralised structure of the Swedish administrative system. In 1998, however, the Swedish government established a co-ordination function for government procurement with the aim of increasing efficiency in public spending. This was based on Regulation (SFS 1998:796) on coordination of government procurement (*Sw: Förordning (1998:796) om statlig inköpsamordning*).

The system consists of all central authorities directly under the Swedish government, which includes about 550 authorities. Other types of governmental organisations can also be included in the system, under certain conditions. The aim of the system is to develop, co-ordinate and follow up procurement within the central government, including the establishment, development and deployment of a framework purchasing system. The Swedish National Financial Management Authority (*Sw: Ekonomistyrningsverket*) is the authority responsible for the co-ordination function of government procurement. It is assisted by twelve government authorities, which take care of the operational

³⁷⁹ https://snr3.bolagsverket.se/hjalp/a_guide.html

³⁸⁰ http://www.bolagsverket.se/in_english/index.html

³⁸¹ Available in English as a pdf document at <http://www.skatteverket.se/download/18.906b37c10bd295ff4880002521/482015b.pdf>

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procurement by procuring different framework agreements for supplies and services needed within the government.

The system includes about 95 product areas, e.g. for stationery, cars, IT supplies and services, furniture, and flight services. The annual turnover is around 750 million euro. This corresponds to about 8-10% of the estimated total expenditure for the central government from external suppliers. Information regarding the different framework agreements can be found in a special database together with other information about the system for co-ordination of government procurement at the website www.avropa.nu.

The different framework agreements are available to national, regional and local authorities. An authority can thus use the website to locate the necessary information about a framework agreement, whereas the procurement process as such is further handled by the authority itself (by electronic or traditional means).

The e-procurement systems in use today can be divided in two parts. On one hand commercial solutions have been developed that support the administration of contracts as well as sub-ordering and purchasing within these contracts, on the other hand procurement systems have been developed that support the complete procurement process. In addition other systems are being developed for certain steps in the procurement process, e.g. systems for electronic auctions.

The parts in the procurement process that are mostly done by electronic means today are the advertising and the dispatching of the specification. Filling out the forms and the administration of the mailing lists are normally done manually.

Although, as indicated, electronic means are not frequently used in public procurement today and although there is no application at the national level, there are several commercial solutions. One of them, ChamberSign, provides a possibility for suppliers to submit electronic offers.³⁸² In order to use the ChamberSign service, the supplier and the agency or municipality both register and activate an account with ChamberSign. Offers can then be communicated electronically after both parties have been authenticated by the ChamberSign service. The offer is electronically signed and encrypted. For more information on the ChamberSign service we refer to ChamberSign's web site at <http://www.chambersign.se>.

Verva (the Swedish Administrative Development Agency)³⁸³ has also been investigating new ways to increase the use of electronic means within public procurement since beginning of 2006.³⁸⁴ In February 2007 its working group published a report on its findings.³⁸⁵

³⁸² Some of the customers of ChamberSign can be found at <http://www.chambersign.se/pages/customers/>

³⁸³ http://www.verva.se/web/t/Page_492.aspx

³⁸⁴ More information in Swedish at http://www.verva.se/web/t/Page_1405.aspx

³⁸⁵ The report *Uppdrag att arbeta för en ökad användning av elektronisk offentlig upphandling*, 2007:5 is available in Swedish at <http://www.verva.se/upload/publikationer/2007/Uppdrag-att-arbeta-for-en-okad-anvandning-av-elektronisk-offentlig-upphandling.pdf>

In order to reach the goals stipulated in the European initiative i2010 Verva sees a need for further activity in Sweden. This includes setting up more specific goals and making suitable Swedish authorities responsible for further investigation while guaranteeing that they receive the necessary financial means to do so.

Another suggestion of the Working Group concerns creating the possibility for the Swedish Tax Authority and the Swedish Companies Registration Office to issue certificates electronically.

From a legal point of view the present Public Procurement Act supports electronic means. For example, Chapter 1 Section 5 defines a public contract as “a written agreement entered into by a contracting entity regarding procurement in the meaning of this act and that is signed by the parties or signed by them with an electronic signature.”

The earlier governmental report SOU 2006:28 specifically dealt with dynamic purchasing systems and electronic auctions. These questions are, however, not included in the legislative proposal (Prop. 2006/07:128), but will be subject to another report that will be published at a later stage.

Another question dealt with in the proposal are economic operators (Article 11 Directive 2004/17). The government sees a need for further investigation, but plans to implement this possibility into Swedish law.

33.3 Certificates, attestations and declarations

In this section, we will take a closer look at how the common requirements defined by the e-Procurement Directives are typically met in Sweden. One should, however, have in mind that the directives have not yet been transposed yet. Therefore reference will also be made to the legislative proposal dealing with the implementation of the directives.

In addition, due to the decentralised character of Swedish administration, a general assessment of the use of certain certificates and statements based on statistical data is rather difficult.

33.3.1 Requirements with regard to the personal situation of the candidate or tenderer – absence of conviction (art. 45 §1 and §2 (c-d) of Directive 2004/18/EC)

Prevalence/actual use in calls

The provisions of Article 45 § 1 of the Directive are new in Swedish legislation and have not been a requirement so far. They are, however, included in the legislative proposal introducing two new statutes within the field of public procurement.

The requirements of Article 45 § 2 are, on the other side, already reflected in Chapter 1 Section 17 of the Swedish Procurement Act and have therefore been used in Swedish procurements. It is, however, difficult to assess if they have been a common requirement in Swedish procurements.

What document (if any) is used?

In some cases Swedish tenderers are required to sign a statement (*Sw: Sarningsförsäkran*) of the tenderer that he/she has not been convicted by a definitive ruling of a crime.

Swedish legislation regulates the use of the criminal records registry and grants a data subject the right to access personal data that concerns him or her. An extract from the registry can be obtained by an individual for several purposes, including working at a school, application for a visa or for no particular reason.³⁸⁶

According to the legislative proposal an extract from the penal register would contain more information than necessary for procurement purposes. In addition, not all crimes mentioned in Article 45 § 1 of the Directive are reflected in the Swedish Penal Code. As an effect of this the contracting entity would have to access the relevant court decision as well.

Contents

A pre-printed statement is included in the tender request information. The information that has to be filled out by the tenderer would be the name and registration number of the tenderer as well as the signature of the legal representative.

Electronic certificates

As is the case for most certificates there is no electronic equivalent for statements of this kind at the moment. Neither is there an electronic equivalent for the extract from the penal register.

³⁸⁶ An application for an extract can be found in English at <http://www.polisen.se/mediaarchive/4347/1541/2013/2016/Registerutdrag%20Engelsk%20RPS447.3b.pdf>

33.3.2 Requirements with regard to the personal situation of the candidate or tenderer – non-bankruptcy and financial status (art. 45 §2 (a-b) of Directive 2004/18/EC)

Prevalence/actual use in calls

Depending on the contracting entity, this can be a more or less common requirement in Swedish procurements.

What document (if any) is used?

In some cases bank statements can be used, in others a statement (*Sw: Sanningsförsäkran*) of the tenderer that he/she is not in a state of bankruptcy, being wound up or similar status; and has not filed for a state of bankruptcy, being wound up or similar status. Usually this would be the same statement as the one used for the absence of conviction.

Contents

A pre-printed statement is included in the tender request information. The information that has to be filled out by the tenderer would be the name and registration number of the tenderer as well as the signature of the legal representative.

Electronic certificates

The attestation has no electronic equivalent, and no plans for such an equivalent have currently been announced.

33.3.3 Requirements with regard to the personal situation of the candidate or tenderer – compliance with fiscal and social obligations (art. 45 §2 (e-f) of Directive 2004/18/EC)

Prevalence/actual use in calls

Attestations demonstrating compliance with fiscal and social obligations are common requirements in Swedish procurements.

What document (if any) is used?

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As mentioned above, the Swedish Tax Agency's response (Form SKV4820 "Request response Public information")³⁸⁷ is usually used for this purpose. Apart from procurements, the certificate is often requested as a part of auditing procedures.

The attestation can be requested by sending the form to the Swedish Tax Authority (*Skatteverket*), 871 87 Härnösand or via fax 0046 (0)611 796 25 or 0046 (0)611 796 26. For questions one can contact the Tax Authority at 0046 (0)611 795 15 or one of the contact persons³⁸⁸.

Attestations can be requested in Swedish or English, are only available on paper and carry a hand written signature.

Contents

The certificate identifies the issuing authority (including the specific public official), the requesting party (including its registration number) as well as date and place of issuance. The document is also signed by the public official.

Furthermore, the certificate states if a company is recorded in the register of organisations, if it is registered as an employer, registered for value added tax and the type of tax (company, employee or both) it is registered for. In addition it states the employer's contributions for the last three months.

The certificate also contains the Swedish Enforcement Administration's (*Kronofogdemyndigheten*)³⁸⁹ response stating the company's possible amount of liability for taxes.

Electronic certificates

At this point, the certificate does not have an electronic equivalent that is provided to the tenderer, and except suggestions in this regard in different reports³⁹⁰ no concrete plans for such an equivalent have currently been announced.

33.3.4 Requirements with regard to the suitability to pursue the professional activity

³⁸⁷ Available in English as a pdf document at <http://www.skatteverket.se/download/18.906b37c10bd295ff4880002521/482015b.pdf>

³⁸⁸ For a list of the contact persons (in Swedish) see <http://www.skatteverket.se/fordigsomar/foretagare/foretagareforebyggandeinformation/kontaktpersonerforebyggandeinformation.4.61589f801118cb2b7b280006979.html>

³⁸⁹ <http://www.kronofogden.se/4.3dfca4f410f4fc63c8680007823.html>

³⁹⁰ E.g. the Verva report mentioned earlier.

Prevalence/actual use in calls

Generic suitability to pursue a professional activity as indicated through enrolment in the trade register is a common requirement in Swedish procurements.

What document (if any) is used?

The certificate of registration (Sw: *registreringsbevis*) of the Swedish Trade and Industry Register (Sw: *Näringslivsregister*) has to be attached to most tenders.

In order to obtain the certificate one can register as a customer with the e-service Swedish Trade and Industry Register against a start fee of around 60 Euro. Searches for registration numbers are available for free, other information such as who is representing the company or a member of the board, or the annual accounts of a company are available for a small fee.³⁹¹

Certificates can also be ordered via the web form of the Swedish Companies Registration Office (Sw: *Bolagsverket*).³⁹² In both cases (web form or e-service) the certificate of registration is available in Swedish, English or German and costs around 20 Euros.

Contents

The certificate includes information³⁹³ on the unique registration number of the company, the company's name and legal form, it's address, as well as the names of legal representatives and of members of the board.

Electronic certificates

Since June 2005 the Swedish Companies Registration Office (Sw: *Bolagsverket*) issues certificates electronically. The statements can be purchased and downloaded as an electronically signed PDF document via the e-service Swedish Trade and Industry Register (Sw: *Näringslivsregister*).

33.3.5 Requirements with regard to economic and financial standing

Prevalence/actual use in calls

³⁹¹ Prices are available (in Swedish) at <https://snr3.bolagsverket.se/priser.asp>

³⁹² http://www.bolagsverket.se/produkter_tjanster/bestallningsformular/bestall.asp

³⁹³ See (in Swedish) http://www.bolagsverket.se/produkter_tjanster/om_bevisen/

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Commonly a copy of the annual accounts, a summary of the turnover (possibly limited to relevant assignments only) or a copy of the balance sheets is asked for, both usually for a period of e.g. the most recent three years. Other possibilities such as bank statements or insurance extracts are also possible.

What document (if any) is used?

The most commonly requested documents are annual accounts of the tenderer. Balance sheets or a statement of global or specific revenue over the last three accounting years might also be required. As the tenderer usually has these documents in his/her possession, they are easily available.

As mentioned earlier, this information can also be obtained from the e-service Swedish Trade and Industry Register.

Contents

Depending on the type of company, the annual accounts usually contain

- Full name and legal form;
- Unique registration number;
- Seat of establishment and date of establishment;
- Date of approval of the annual account by the management and period covered by the account;
- Management details, including general managers and daily management, and period of appointment;
- Auditor's report;
- Full balance sheets and financial/fiscal results;

Neither the paper nor the electronic version typically contains any signature.

Electronic certificates

As indicated above, not only registration certificates, but also annual accounts can be downloaded via the service Swedish Trade and Industry Register (*Sw: Näringslivsregister*).

33.3.6 Requirements with regard to technical and/or professional ability

Prevalence/actual use in calls

The requirement to demonstrate technical and/or professional ability is a common requirement in Swedish procurements. However, specific certificates are rarely required.

What document (if any) is used?

Typically, tenderers are required to demonstrate technical and/or professional ability by indicating the qualifications of its technical personnel. This information is, however, usually integrated into the main body of the offer in the form of project references. Authentic documents (such as certified diploma's, certified descriptions of products/service or certified references) are less common.

Contents

Contents vary depending on the requirements. As noted above, typical examples include qualifications, diplomas, product/service descriptions and past realisations.

Electronic certificates

Since there is no systematic practice of requesting certain certificates, it is difficult to assess if electronic certificates are legally acceptable.

However, as paper copies of the original certificates or statements are mostly sufficient, electronic copies of such documents would possibly be equally acceptable.

33.3.7 Requirements with regard to quality assurance standards

Prevalence/actual use in calls

The requirement to demonstrate compliance with quality assurance standards is an uncommon requirement in Swedish procurements.

What document (if any) is used?

If included in the call, tenderers can be required to provide a certificate from an independent accreditation authority. The most common requirement is that the tenderer demonstrates the compliance of his/her products or services with certain standards (e.g. ISO standards). The certificates can be issued from national as well as international authorities.

In some cases no specific certificates are necessary, but the tenderer has to complete the forms necessary for the submission of the tender.

Contents

Certificates commonly contain the name of the issuing organisation, the name of the recipient, the nature of the certificate (including the assessed standard), date of testing and issuance and duration of the accreditation.

Electronic certificates

Even though it depends on the authority issuing the certificate, the document will usually be in paper form.

33.3.8 Requirements with regard to environmental management standards

Prevalence/actual use in calls

The requirement to demonstrate compliance with environmental management standards has so far been a very uncommon requirement in Swedish procurements. The Swedish Environmental Management Council (SEMC) (Sw: *Miljöstyrningsrådet*)³⁹⁴ is, however, currently carrying out an investigation into the possibilities how to increase the use of environmental criteria.

What document (if any) is used?

As these requirements are not very common, it is difficult to assess which certificates might be used. When it comes to products and services, one could, however, imagine the application of one of the accreditation schemes the Swedish Environmental Management Council (SEMC) is administering, such as the environmental product declaration (EPD) or the European Eco-Management and Audit Scheme (EMAS).

Another possibility is the confirmation of the tenderer's affiliation to the REPA register (or equivalent) or the Swedish Environmental Protection Agency EE register.

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³⁹⁴ Swedish Environmental Management Council (SEMC) is a company owned jointly by the Swedish Government, the Confederation of Swedish Enterprises and the Swedish Association of Local Authorities and Regions. The Swedish Environmental Management Council administrates three tools – EMAS and EPD for improving and communication about the environmental performance of organisations and products/services and ECU for product-related guidance about ecologically conscious procurement. <http://www.miljostyrning.se/eng/>

One can assume that the possible certificates are usually paper documents identifying the origin (the accreditation agency), the recipient, the nature of the certificate (including the assessed standard), date of testing and issuance, and the duration of the accreditation.

Electronic certificates

The provided certificates are usually delivered in paper form.

33.4 Interoperability

As already mentioned there is no central e-Procurement application in Sweden, but rather several private initiatives involving different national, regional and local authorities.

Depending on the system used the accessibility to foreigners is unclear. As far as paper documents have to be sent there does not seem to be an obstacle for non-Swedish companies to participate in procurements, especially considering that contract notices are published in the TED. The language barrier might be more of an obstacle than administrative reasons.

33.5 Future trends/expectations

As indicated above, several investigations are being carried out at the moment covering different aspects of the procurement process. Sweden is dedicated to the goals of the European initiative i2010 including to reach a percentage of at least 50 % of all procurements above the threshold being done electronically. It is, however, not clear at this point how the usage of e-procurement will be stimulated. Several authorities initiate projects on their own, but there does not seem any co-ordination on a national level yet.

The platform www.avropa.nu could certainly be utilised to a larger extent. There does not seem to be any plans for this at the moment, however.

33.6 Assessment

Sweden's e-procurement initiatives are still in an early stage and do not seem particularly co-ordinated on a national level. This is, as already indicated, mainly due to the decentralised structure of the Swedish administration system.

It is unclear, whether the low percentage of use is due to a lack of interest from the contracting entities' side or if this is also a result of the tenderers lack of readiness to be able to submit tenders by electronic means.

The government has lately focused more on electronic invoicing and by 1 July 2008 the Swedish central government agencies shall have implemented electronic invoicing. This was decided by the Swedish government in December, 2006.³⁹⁵

As visible in the diversity of requirements set up by different authorities in their procurement processes, Swedish procurement is characterised by flexibility when it comes to which certificates are supposed to be submitted. The legislation includes several non-mandatory requirements concerning certificates.

In general, Swedish e-Procurement is not being completely utilised in all levels of public administration yet. The government seems to be aware of this issue, however, and has initiated several projects and investigations in order to stimulate electronic procurement. As soon as the legislative amendments based on the two EU Directives have entered into force, changes in practice will probably also be noticeable and hopefully reflect Sweden's reputation again for innovation within the IT sector.

³⁹⁵ More information in English at <http://www.e-fakturera.nu/english.4.6f60681109102909b80002032.html>

34 Turkey

34.1 Public procurement framework

34.1.1 General framework

There are two basic acts codifying administrative procurement principles and procedure in Turkish Law. The first one is State Procurement Law (the SPL hereafter) of September 8th, 1983 No: 2886; and the second is the Public Procurement Law (the PPL hereafter) of January 4th, 2002 No: 4734. Furthermore, Law on Public Procurement Contracts of January 22nd, 2002 No: 4735 defines the principles and procedure of the contracts concluded after procurements arranged according to the PPL.

In both acts, the administrative bodies in the scope of the acts are identified clearly. Government budget agencies, annexed budget administrations, special provincial administrations and municipalities are in the scope of the SPL. The scope of the PPL consists of departments included in the general budget, annexed budget, special provincial administrations and municipalities and their related revolving funds organisations, associations, and legal entities; state economic enterprises, consisting of public corporations and state economic establishments; social security establishments, funds, and entities with legal personality that are established in accordance with special laws and that are assigned public duties (except for professional organisations and foundation institutions of higher education) and establishments with independent budgets; and any institutions, organisations, associations, enterprises and corporations of which more than half of the capital is directly or indirectly, together or separately owned by the aforementioned bodies.

On the other hand, the Law on Public Financial Management and Control No: 5018 (hereafter the PFMC), published in the Official Gazette of December 24th, 2003 No: 25326, which came into effect after the PPL, has a different classification. Budget types are counted as central government budget, general budget, special budget, regulatory and supervisory institution budget, social security institution budget and local administration budget in the Article 12 of the PFMC. The "annexed budget" term of the PPL is not included in the PFMC. Therefore, when determining the scope of the PPL, the PFMC should be taken into consideration.

Buying, selling, service, construction, rent, change of goods, establishment of real rights other than ownership and transportation fall within the scope of the SPL. In the PPL, any procurement of goods, services and works, the cost of which is covered by any kind of resources that are at the disposal of the contracting entities mentioned in the PPL (other than the exception counted in Article 3, which is amended with Law No: 4964), and the construction tenders of banks within Law No: 4603 (with the exception of Saving Deposit Insurance Fund and banks whose shares are partially or fully owned by this Fund and banks covered by Law No: 4603) are in the context of the PPL.

The principles and procedure of the PPL will be applied to administrations which are subject to the PPL. Article 68 of the PPL, entitled "Provisions not applicable", rules that a) the provisions of the SPL

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shall not be applicable in procurements covered by the PPL and b) the provisions of other laws, which are not in conformity with the PPL and which are exempted from the SPL shall not be implemented. Therefore, the PPL does not cancel the SPL but limit its area of application.

In conclusion, the institutions which were subject to the SPL before will continue their selling and renting tenders according to the SPL. But there will be three different possibilities for institutions which were not subject to the SPL before.

a) the institutions which are exempted from the SPL in their special act, will continue their selling and renting tenders according to the principles which they were subject to before. The exception of Article 68 (b) is applied to procurements of these institutions in the context of the PPL.

b) the PPL will be applied to tenders of goods and services and construction which were not subject to the SPL by means of special acts. For instance, Article 21 of Law on Social Security Institution is as follows: "Institution is subject to provisions of Public Procurement Law, but the tenders out of the scope of Public Procurement Law is not subject to State Procurement Law." Therefore, tenders of goods and services and construction of the Social Security Institution are subject to the PPL, but income yielding business of the Institution (i.e. selling and renting), the special act will be applicable.

c) The institutions which are not subject to the SPL by their statutes, and which are taken into the scope of the PPL, will continue their procurements with the principles and procedures which they were subject before.

Through the PPL, a Public Procurement Authority with public legal entity, which is administratively and financially autonomous, has been established. Its duties are to evaluate and conclude any complaints claiming that the proceedings carried out by the contracting entity within the period from the commencement of the tender proceedings until the signing of the contract are in violation of the PPL; to prepare, develop and guide the implementation of all the legislation concerning this law and the PPC and the standard tender documents and contracts; to provide training on procurement legislation; to compile and publish statistics relating to quantity, price and other issues; to keep the records of those who are prohibited from participating in tenders and to carry out other duties determined in the PPL. The Authority consists of three units, which are the Public Procurement Board, the Presidency and the service units.

Whether the Public Procurement Authority has jurisdiction to evaluate and decide upon the cancellation of tenders was controversial. Upon the request to overcome the hesitation on this matter, the First Circuit of Council of State ruled that cancellation of tenders by the administration was an administrative decision on the tender during the tendering process, and therefore the Public Procurement Authority has jurisdiction to evaluate and conclude any complaints claiming that the proceedings carried out by the administration within the period from the commencement of the tender proceedings until the signing of the contract.

The SPL requires a tenderer to have a legal domicile, in addition to certain other documents. In Article 10 of the PPL, the rules on qualification to participate in the procurement are regulated in detail. For the participation of the tenderers qualified for the procurement the required information and documents are defined; the information or documents that will be required for qualification evaluation proceedings, in accordance with the characteristics of the subject of the procurement, shall be specified in the

tender documents or in the advertisements or invitations relating to pre-qualification. In the present practice construction tenderers are no longer expected to turn in a builder's card which shows their professional qualification. The requirement to have a legal domicile which was a handicap for foreign tenderers has also been abolished. In Article 10 of the PPL, the general rules on qualification to participate in a procurement are as follows:

Rules on Qualification

Article 10- The tenderers participating in the procurement proceedings may be required to submit the following information and documents, for evaluation of their economic, financial, professional and technical qualifications:

a) For evaluation of the economic and financial standing;

1) Bank statements relating to the financial standing of the tenderer,

2) (Amendment:4964/Article 7) The balance sheet of the tenderer which is obligatorily to be published in accordance with the related legislation, or required sections of the balance-sheet; or if those are not available, equivalent documents.

3) A statement of the tenderer's overall turnover, or documents indicating the volume of the work being carried out and completed by the tenderer relating to the subject matter of the procurement proceedings.

b) For the evaluation of professional and technical qualifications;

1) Documents proving that the tenderer is registered to the related chamber in accordance with the relevant legislation, and is legally eligible to submit tenders,

2) (Amendment:4964/Article 7) Documents demonstrating the experience of the tenderer in relation to the subject of the procurement in the public or private sector, within the last five years in case of procurement of goods and services, and within the last fifteen years in case of procurement of works in the amount equalling to at least 70% of the contract value realised, or 50 % of the contract value monitored or managed and accepted as free from fault by the contracting entity in proving its experience in similar jobs,

3) Documents relating to the production and/or manufacturing capacity, research-development activities and quality assurance practices of the tenderer,

4) Information and/or documents relating to the organisational structure of the tenderer, proving that he employs or will employ an adequate number of staff in order to fulfil the subject matter of the procurement,

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5) *In cases of procurement of services or works, the documents demonstrating the educational and professional qualities of the executives and the technical staff of the tenderer,*

6) *Documents relating to facilities, machinery, devices and other equipment required for fulfilment of the work that is the subject of the procurement proceedings,*

7) *Documents relating to the technical staff or technical institutions responsible for quality control, whether they are directly attached to the tenderer or not,*

8) *Certificates granted by internationally recognised quality control institutions accredited in accordance with the rules, certifying the conformity of the work in question with the relevant specifications and standards,*

9) *If requested by the contracting entity, samples, catalogues and/or photographs of the goods to be supplied for the confirmation of their accuracy,*

The information or documents that will be required for qualification evaluation proceedings, in accordance with the characteristics of the subject of the procurement, shall be specified in the tender documents or in the advertisements or invitations relating to pre-qualification.

(Annexed: 4761/ Article 13) (Amendment: 4964/ Article 7) Among the documents which are defined under the sub item no:2 of item no: (b) in the first paragraph, the ones for construction or construction related service duties, the real person should be either an architect or an engineer among the staff who are employed to carry out auditing or management duties. The documents, which will be obtained through completion of work, management and auditing, cannot be used by persons apart from the individuals and institutions who are the owners of the documents and cannot be transferred, rented and sold. In order to participate in a tender, legal entities, which are established or participated in by the owners of this document, should have more than half of the shares of the legal entity, It is obligatory to request this share requirement in every tender and to maintain the share during the guarantee period. The documents which will be obtained through management activities, are taken into consideration maximum 1/5 rate.

Any tenderer shall be excluded from the procurement proceedings who;

a) is bankrupt or is being wound-up, whose affairs are being administered by the court, who has entered into an arrangement with creditors, who has suspended business activities or who is in any analogous situation arising from a similar procedure under his own national laws and regulations;

b) is the subject of proceedings for a declaration of bankruptcy, for an order of compulsory winding up, or administration of court due to his debts to creditors or of any other similar proceedings under his own national laws and regulations,

c) has not fulfilled obligations relating to the payment of finalised social security contributions in accordance with the legal provisions of the country in which he is established or those of Turkey,

d) has not fulfilled obligations relating to the payment of finalised taxes in accordance with the legal provisions of the country in which he is established or those of Turkey,

e) has been convicted of an offence concerning his professional conduct by a judgement of a competent court within the five years preceding the date of the procurement proceedings.

f) are established, to be involved in misconducts by appropriate means of proof by the contracting entity that are against the work ethics or professional ethics during a work he carried out for the contracting entity, within the five years preceding the date of the tender

g) has been prohibited from professional activity by the chamber where he is registered in accordance with the relevant legislation, as of the date of the tender,

h) fails to submit the information and documents specified in this article or it is established that he/she has submitted misleading information and/or false documents,

i) has participated in procurement proceedings in spite of prohibition according to Article 11,

j) are established to be involved in prohibited conducts and actions laid down in Article 17

34.2 E-Procurement initiatives and status

34.2.1 General e-Procurement framework and initiatives

In Turkey, while some electronic procurement projects have been started, most of them are still in development.

The strategy of e-Procurement Projects is based on the decisions of the Supreme Planning Council and the State Planning Organization.

With the decision of the Supreme Planning Council dated March 24th, 2005 No: 2005/5, in the scope of the e-Transformation Turkey 2005 Action Plan, the first stage of electronic procurement system is the "Public e-Buying Platform", which was founded and has come into use.

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In the "Information Society Action Plan" published in the Official Gazette of July 28th, 2006 and carried out by the Undersecretariat of the State Planning Organisation in the context of the e-Transformation Turkey Project, the Authority is responsible for "the completion and widespread utilization of the e-procurement system and the electronic catalogue purchase system, in order to perform public purchases through electronic media". The Authority has been given a time period of 21 months to accomplish the project.

There is no special law on e-procurement in Turkey, however, some amendments and authorisations regarding some specific parts of e-procurement projects were implemented in the legal framework and the secondary legislation mentioned in Section 34.1 of this report.

With the Law No: 4964 amending the PPL, starting on 01.01.2004 the advertisements and invitations are ruled to be published in the Public Procurement Bulletin prepared by the Authority. The principles and procedure of the stages relating to the preparation of the advertisements and their sending to the Authority for publication first came into force through the Public Procurement Authority decision dated 12.04.2003 No: 2003/DK.D-458. Later, these were regulated by the Public Procurement General Communique, published in the Official Gazette dated 07.05.2005 No: 25886.

According to this, administrations shall send procurement advertisements to the Authority over the internet to be published in the Bulletin. The Public Purchase Platform in the Authority's web site has a web based computer application (an advertisement preparation and sending program) prepared by the Authority. This application helps the administration with the advertisement preparation. At this stage, advertisements are examined by the Authority's expert personnel in order to ascertain them to be consistent with the provisions of the law and application regulations; if any inconsistencies are detected, feedback is provided to the administration over the internet.

Since 2006, those who want access to electronic procurement advertisements were expected to subscribe to the Electronic Public Procurement Bulletin, if they met the requirements stated in the announcement on "Electronic Public Procurement Bulletin Subscription Procedure and Requirements" published in the Official Gazette dated 12.18.2005 No: 26027. In 2006, a total of 5.478 individuals, firms and public bodies subscribed to the Bulletin.

Procurement advertisements on public purchases have been published in the Public Procurement Bulletin by the Public Procurement Authority since the beginning of 2004. The administration prepares the procurement advertisements, the first and the most important stage of procurement process, on the electronic media by the help of "Advertisement Preparation and Sending Program". The advertisement prepared in that fashion are published following an advance examination of the Authority.

The Public Purchase Platform consists of four main modules:

- Administration (Public Purchase Units)
- Tenderers (firms/real persons or legal entities)
- Citizens
- Procurement Analysis

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The first three of these modules are accessible by the administration, tenderer and the citizens, while the last one, the procurement analysis module, is accessible only by the Public procurement Authority for the purpose of supervision of the procurement.

The administrations making purchases in the scope of the PPL and its exemption provisions (Purchase Units) can use the Administration Module, whose objective is to carry out procurement related operations. The basic functions of the Administration Module are as follows:

- Procurement Registration and Search
- Advertisement Preparation, Sending and Tracking
- Confirmation and Tracking
- Result Information Sending and Tracking
- Direct Obtaining Information Sending and Tracking
- Sharing Information (Examination of Technical and Administrative Specification)
- Other Operations (Protocol, Information Consistency Control, Information Updating)

Tenderers must subscribe to the Platform if they want to use the Tenderer Module. To subscribe to the Platform, tenderers must fill the Electronic Public Procurement Bulletin registration form. To access the system, they can use the user ID and password given during the registration process. In the Electronic Public Procurement Bulletin, tenderers can search for procurement advertisement, correction advertisements, results and cancellation announcements, they can also access the Daily Bulletin. Furthermore tenderers can reach the daily bulletin easily by means of an advertisement band. The Tenderer Module can perform the following operations:

- Access to Daily Bulletin
- Advertisement Search Engine
- Procurement Watch Band
- Prohibition Search
- Access to Technical and Administrative Specifications
- Preparing a Procurement Agenda

The following information can be accessed with the Citizen Module:

- Detailed information on the procurements held by public authorities.
- The results of the procurements whose contact cost is more than the amount stated in Article 47 of the PPL (the contractors of those procurement and contract costs)
- Published dispute decisions
- Information related to the applications of complaints to the Public Procurement Authority
- The updated list of the prohibited tenders

The citizen entrance option, in which detailed search options are available, can be used without a user ID or password.

With the Communiqué, published in the Official Gazette dated 02.22.2006, No: 26088, a new regulation related to the tenderers' letters of guarantee came into force. Administrations will be able to confirm these tender guaranties electronically.

A separate Communiqué, published in the Official Gazette dated 12.19.2006, No: 26381, contained new regulation regarding the Public Procurement Bulletin. It was decided that the Bulletin will no longer be printed, but that it could only be accessed through electronic media after 2007. In conformity with this decision, the Second Division of the Third Chapter of the Public Procurement General Communiqué, "General Principles Governing Public Procurement Bulletin" was amended with a "Communiqué Amending Public Procurement General Communiqué", published in the Official Gazette dated 12.19.2006, No: 26381. With this amendment coming into force, beginning from 01.01.2007, printed and electronic procurement advertisements have been announced only in the electronic media by the Authority, thus ending printed Bulletin. Furthermore, beginning from 01.01.2007, paid membership is cancelled, Public Procurement Bulletin became accessible without any charges.

A draft law amending the SPL, the PPL and Law on Public Procurement Contracts has been prepared by the commissions formed under the chairmanship of Public Procurement Authority Legal Consultancy Office. In the draft, the following issues are foreseen:

- The definitions of advance advertisement, tenderer candidate, electronic purchase platform, dynamic purchasing system and competitive bidding is to be added to the text of the law.
- The obligation that the Authority shall be informed of all the results of the procurements made in the scope of the law. The results shall be announced in the electronic public procurement bulletin as well.
- The use of electronic applications in the procurement process.

Although the e-procurement projects in Turkey are taking international studies into consideration as mentioned before, there is no national legislation to adopt the provisions on electronic procurement of European Communities Directives 2004/18/EC and 2004/17/EC yet.

The principles of electronic signatures which will be used upon the completion of the electronic procurement project are determined by the Electronic Signature Act No: 5070. According to Electronic Signature Act, only secure electronic signatures can be legally binding. Secure electronic signatures can only be created by a smart card with at least an EAL 4+ security level and a qualified certificate of an Electronic Certificate Service Provider which has the public key infrastructure and necessary authorisation from the Telecommunication Authority.

With regard to the possibility of sending electronic invoices in the electronic procurement project, there is no legislation yet. However, in the "Information Society Action Plan" published in the Official Gazette dated 07.28.2006, the necessity of having legal arrangements on electronic invoices is stated clearly.

34.3 Certificates, attestations and declarations

During a normal procurement process in Turkey, specific documents, including the ones indicated here below, may be asked to be submitted separately.

1. Documents to be obtained from trade registry offices/chamber of commerce and industry/chamber of craftsmen,
2. Judicial record and documents obtained from the statistical general directorate,
3. Documents obtained from social security authorities (Social Security Administration, Occupational Pension Fund),
4. Documents obtained from tax offices,
5. Documents obtained from the Public Procurement Authority,
6. Documents obtained from Public Registration Office,
7. Documents obtained from Provincial Directorate of Commerce and Industry,
8. Documents issued by a certified and sworn-in certified public accountant,
9. Documents obtained from the banks,
10. Documents/information issued by the administration in charge of public procurement,
11. Documents issued by a public notary,
12. Documents issued by the administration giving the commitment,
13. Documents issued by the chamber required to be registered under the relevant legislation,
14. Documents issued by free zone directorships,
15. Documents issued by the Turkish Standards Institution,
16. Documents issued by the Ministry of Agriculture,
17. Documents issued by the Turkish Accreditation Agency,
18. Representations/warranties/documents directly submitted by the tenderer.

Under these circumstances participation in the procurement becomes difficult and therefore, depending on the cost of the required documents, prices increase.

The E-procurement project envisages obtaining the information regarding participation and suitability in an electronic form, and transforming from a system based on paper documents to a system based on information exchange. Therefore, collaboration is required between the administration and other institutions which issue the relevant documents. To this end, a cooperation agreement has been entered into with the Social Security Administration, the Occupational Pension Fund and the Turkish Union of Chamber and Commodity Exchanges. Negotiations (discussions) with the Ministry of Justice, the Ministry of Finance, the Ministry of Industry and Trade and the Banks Associations of Turkey are still pending, and collaboration with the Ministry of Internal Affairs and the Turkish Union of Chambers of Certified and Sworn-In Certified Public Accountants is on the agenda.

34.3.1 Requirements with regard to the personal situation of the candidate or tenderer – absence of conviction (art. 45 §1 and §2 (c-d) of Directive 2004/18/EC)

During the classical procurement process in Turkey a person who,

- has been convicted of an offence concerning his professional conduct by a judgment of a competent court within the five years preceding the date of the procurement proceedings,
- has been found to have committed a fraudulent bankruptcy by relevant authorities,
- has been prohibited temporarily or permanently to participate in procurements pursuant to the provisions of Public Procurement Law and other laws, and who is convicted by a crime under Anti-Terror Law No: 3713 and organised crime.

cannot participate in public procurements.

In order to obtain the information listed here above, the Administration and/or the Authority may require the relevant documents from the persons concerned. Currently the classical process in public procurement platform is in force and the information is submitted to the Administration or Authority in paper form.

Upon the completion of E- Procurement Project, information regarding:

- conviction of an offence concerning the tenderers professional conduct by a judgment of a competent court within the five years preceding the date of the procurement proceedings
- prohibition temporarily or permanently to participate to the procurement pursuant to the provisions of Public Procurement Law and other laws, and conviction of a crime under Anti-Terror Law No: 3713 and organized crime
- decision to commit a fraudulent bankruptcy rendered by relevant authorities

will be acquired online from the Ministry of Justice and the General Directorate of the Judicial Register and Statistics.

34.3.2 Requirements with regard to the personal situation of the candidate or tenderer – non-bankruptcy and financial status (art. 45 §2 (a-b) of Directive 2004/18/EC)

During the classical procurement process in Turkey, in order to evaluate the economic and financial qualification of the tenderer the documents mentioned here below may be required

- 1) Bank statements relating to the financial standing of the tenderer,
- 2) The balance sheet of the tenderer or required sections of the balance-sheet,
- 3) A statement of the tenderer's overall turnover or documents indicating the volume of the work being carried out and completed by the tenderer relating to the subject matter of the procurement proceedings.

In addition, the persons subject to the circumstances as indicated here below cannot participate to the procurement:

a) is bankrupt or is being wound-up, whose affairs are being administered by the court, who has entered into an arrangement with creditors, who has suspended business activities or who is in any analogous situation arising from a similar procedure under his own national laws and regulations;

b) is the subject of proceedings for a declaration of bankruptcy, for an order of compulsory winding up, or administration of court due to his debts to creditors or of any other similar proceedings under his own national laws and regulations,

Upon the completion of the e-procurement project the documents/information to be obtained from the system to be established by Turkish Union of Chambers and Commodity Exchanges are as follows:

- The documents/information acknowledging that the tenderer is bankrupt or is being wound-up, whose affairs are being administered by the court, who has entered into an arrangement with creditors, who has suspended business activities or who is in any analogous situation arising from a similar procedure under his own national laws and regulations;

- The document/information acknowledging that the tenderer is the subject of proceedings for a declaration of bankruptcy, for an order of compulsory winding up, or administration of court due to his debts to creditors or of any other similar proceedings under his own national laws and regulations,
- The documents/information acknowledging that the tenderer is registered to the related chamber in accordance with the relevant legislation, and is legally eligible to submit tenders,
- In the event the tenderer is a real person, the documents/information obtained from chamber of commerce and/or industry or professional chambers within the first year of the announcement concerning procurement acknowledging that the tenderer is registered to the related chamber,
- In the event the tenderer is a legal entity, the documents/information obtained from chamber of commerce and/or industry within the year of the first announcement concerning procurement acknowledging that the tenderer is registered to the related chamber in accordance with the relevant legislation
- Turkish Trade Registry Gazette indicating the latest shareholders, members or founders of the legal entity and their position in the management structure, document/information indicated under the paragraph (f), (c), (d) and (e) of the Article 11 of Law No. 4734 (except for joint stock companies acknowledging that the relevant persons are not a member of the board of directors or do not hold more than 10 % of the capital), the documents/information indicating the contractors providing consultancy services for the subject matter of the procurement and for the consultancy services the documents/information indicating the contractors (the companies with which they have a partnership and management relation and for joint stock companies where they hold more than half of the capital and for the companies where more than half of the capital is held by the relevant companies),
- The documents/information regarding the foundations, associations, unions, funds and other entities included within the body of the contracting entity carrying out the procurement, or related with the contracting entity and the companies to which such entities are partners,
- In the event the procurement is either limited to domestic tenderers or there is a price advantage for the domestic tenderers, document regarding domestic tenderer and domestic goods certificate in the event of procurement of goods if there is a price advantage for the tenderers. In order to follow the proceedings concerning the prohibition from participation to procurement and to enhance efficiency, the information regarding the company of which's more than half of shares are held by the person prohibited to participate to procurement and information regarding shareholders who held the shares of the company prohibited to participate to the procurement and information regarding the legal entities which's more than half of shares are held by these persons.

- In the event the tenderer is a manufacturer, documents acknowledging that the tenderer is a manufacturer and capacity report,
- In the event the term of the procurement is more than one year, conformation deed obtained from Trade Registry Office evidencing that the shareholder structure is preserved.

34.3.3 Requirements with regard to the personal situation of the candidate or tenderer – compliance with fiscal and social obligations (art. 45 §2 (e-f) of Directive 2004/18/EC)

In classical procurement project a tenderer who,

- has not fulfilled obligations relating to the payment of finalised social security contributions in accordance with the legal provisions of the country in which he is established or those of Turkey
- has not fulfilled obligations relating to the payment of finalised taxes in accordance with the legal provisions of the country in which he is established or those of Turkey,

cannot participate to the procurement. At present, information acknowledging that there has been no outstanding finalized tax payment of the tenderer under the relevant Turkish legislation shall be obtained from tax offices affiliated to the Ministry of Finance/ Revenue Administration Department. After the completion of the e-procurement project the relevant information will be obtainable from the infrastructure named VEDOP (tax offices automation project) to be established by Ministry of Finance.

Upon the completion of the e-procurement project, in accordance with the agreement entered into with Social Security Administration and Occupational Pension Fund, the information to be obtained in electronic form are as follows:

- No outstanding finalized social security contribution is payable;
- Employment of adequate number and adequate quality of staff as required as envisaged by the Administration;
- Premium payments certified by Social Security Administration or employment commencement form;

- In connection with the procurement of cleaning services, insurance premium payroll for the last four months acknowledging that staff in cleaning service for at least 120 days without deduction has been employed within the five years prior to the procurement;
- Information concerning the staff employed in research and development department (payroll information);
- In the event quality control service is fulfilled by the tenderer, information concerning employment of sufficient staff (payroll information concerning the relevant staff);
- In the event the business is not occupied in purchase and sale of end products, for the back payment of the performance bond information acknowledging that the company has no connection with Social Security Administration.

34.3.4 Requirements with regard to the suitability to pursue the professional activity

During the classical procurement process, in the event that the tenderer is a legal entity, trade registry and chamber registry documents (in the event the legal entity is registered to the chamber) shall be submitted to the Administration and/or Authority; and in the event the tenderer is a real person, identification details must be provided.

As mentioned in section 33.3, upon the completion of the e-procurement project, in addition to the information to be obtained from Turkish Union of Chambers and Commodity, the information to be obtained online from the Ministry of Industry and Trade regarding the participation of the craftsmen to the procurement under the project of e-craftsmen is as follows:

- As of the date of procurement, information acknowledging that the craftsmen has not been barred from professional activity by the chamber registered in accordance with the relevant legislation;
- The information obtained within the first year of the announcement concerning procurement acknowledging that the tenderer is registered with the chamber;
- In the event that the tenderer is a manufacturer, information acknowledging that the tenderer is a manufacturer.

In addition, in case the tenderers are real persons, their identification details can be verified electronically through the the infrastructure of MERNIS established by the Public Registration and Citizenship General Directorate.

34.3.5 Requirements with regard to economic and financial standing

Please see section 33.3.2 above.

34.3.6 Requirements with regard to technical and/or professional ability

In order to evaluate the professional and technical qualifications of the tenderer the documents as listed below may be required to be submitted in accordance with the article 10 of the Public Procurement Law:

- Documents proving that the tenderer is registered to the related chamber in accordance with the relevant legislation, and is legally eligible to submit tenders,
- Documents demonstrating the experience of the tenderer in relation to the subject of the procurement in the public or private sector, within the last five years in case of procurement of goods and services, and within the last fifteen years in case of procurement of works in the amount equalling at least 70% of the contract value realized, or 50 % of the contract value monitored or managed and accepted as free from fault by the contracting entity in proving its experience in similar jobs,
- Documents relating to the production and/or manufacturing capacity, research-development activities and quality assurance practices of the tenderer,
- Information and/or documents relating to the organisational structure of the tenderer, proving that he employs or will employ adequate number of staff in order to fulfil the subject matter of the procurement,
- In cases of procurement of services or works, the documents demonstrating the educational and professional qualities of the executives and the technical staff of the tenderer,
- Documents relating to facilities, machinery, devices and other equipment required for fulfilment of the work that is the subject of the procurement proceedings,

- Documents relating to the technical staff or technical institutions responsible for quality control, whether they are directly attached to the tenderer or not,
- Certificates granted by internationally recognized quality control institutions accredited in accordance with the rules, certifying the conformity of the work in question with the relevant specifications and standards,
- In case requested by the contracting entity, samples, catalogues and/or photographs of the goods to be supplied for the confirmation of their accuracy.

Upon the completion of the e-procurement project, the information scheduled to be obtained from the information exchange platform to be established jointly with Turkish Union of Chambers of Certified and Sworn-In Certified Public Accountant and Authority is as follows:

- Information concerning balance sheet proportion,
- Information regarding the tenderer's overall turnover,
- Registration details relating to facilities, machinery, devices and other equipment,
- Information acknowledging that relevant installation has been established for the quality control.

34.3.7 Requirements with regard to quality assurance standards

Upon completion of the Electronic Tender Project, data exchange will be implemented with the Turkish Standards Institute in electronic medium.

34.3.8 Requirements with regard to environmental management standards

There is no requirement with regard to environmental management standards in line with the general rules in tender practice; however, it may be sought as a specific requirement. A study is also planned with respect to online document share for compliance with the environmental management standards in line within the scope of the Electronic Tender Project.

34.4 Interoperability

Upon completion of the Electronic Tender Project, all the administrative organisations will be able to post their procurement requests over the Public Procurement Platform and the tenderers will be able to submit their offers according to such procurement requests. Under the current system, the administrations notify the Authority with respect to their requests through the web site prepared by the Authority, and after the evaluation by the experts of the Authority, such procurements requests are added to the bulletin.

34.5 Future trends/expectations

The major aim of the Public Tender Authority is to realise tenders through electronic platforms.

As a first step to electronic tendering, the “Public E-Procurement Platform” was created by the Authority and made available for the users at the end of 2005 within the scope of the E-Transformation Turkey Project 2005 Action Plan of High Planning Board decision no. 2005/5 dated 24.03.2005.

In the “Action Plan for Information Society Strategy” published in the Official Gazette, dated 28.07.2006, implemented by the Undersecretariat of the State Planning Agency within the scope of E-Transformation Turkey Project, the Authority is designated as the responsible party for “the E-tender system that will be created for realization of the public procurements on-line and completion of electronic catalogue procurement and generalization of its usage” and the studies and works are planned to be completed within a period of 21 months.

Upon completion of the electronic tender project, the following modules and functionality will be achieved.

1. Determination of Needs (Stock control / Needs Reporting)

With the support of the software such as stock control and meeting the needs, the administration will be able to determine the required time frame for the needs in advance and prevent the setbacks regarding the process with respect to meeting the needs.

2. Electronic Tender Platform (Administration / tenderer Database)

The administration will carry out the transactions of the process, starting from when the need arises and ending when the need is met, on the Public Procurement Platform managed by the Authority; however, prior to that the procuring administrations and the tenderer will have to register with the Public Procurement Platform. Currently, 40.000 administrations and 100.000 tenderers are registered with the Platform. Under the current situation, the tenderers document the competency and participation criteria conventionally. With the realisation of e-tendering, as a result of the electronic integration of the relevant Public Authorities/Organisations and Non-Governmental Organisations, the updated on-line obtainable information will be available on the Public Procurement Platform. Procuring administrations will realise the transaction by confirming whether or not the tenderers are competent and provides the required documents.

3. Electronic tender Documents (E-Technical Tender Specifications / E-Administrative Tender Specifications)

At this stage of the project, it will be possible to prepare the technical tender specifications, administrative tender specifications, standard forms and draft agreement through a module, determine the approximate cost in line with the market conditions with the support of the electronic applications, formation of the tender announcement from the tender documents.

4. Electronic Offer (E-Offer / E-Offer Letter / E-Competency and Participation)

Preparation of the error free and complete offers, and securely forwarding the encrypted offers. If the offers are forwarded by this way, disputes relating to validity of offers, completeness of the document and information, identification of certain products and firms will be prevented from arising.

5. Electronic Offer Evaluation (Compliance with the Tender Documents / Selection of the Best Offer / Decision Making, Result / E-Agreement)

Determination of the best and second best offers will be carried out by way of evaluating the offers by a module and implementation of the lowest price principle of the administration and the factors other than the price implementation. The necessary notifications will also be on-line and made to the tender participants and the bidder who submits the best offer and the agreement will be signed on the electronic platform.

6. Agreement Management (E-Payment / Delivery – Guarantee / Price Difference / Performance of the Agreement / Contractor Assessment / Termination of the Agreement)

The tendering process is terminated with the signing of the agreement and administrative action is replaced with the private law relationship. However, the public procurement process and meeting the needs end with the signing of the agreement. The other practices such as delivery, examination and acceptance, guarantee implementation, payment and price difference must be evaluated within the public procurement process.

As a result of the realisation of the project;

- It will be possible to participate to the tender and enquire about competency requirements for participation and submission of the bids and offers.
- Time and labour force will be saved.
- As all the stages will be standardized, there will be a decrease in the number of disputes with respect to the tender documents and tenderer competency requirements.
- Subjective practices and corruption allegations will be prevented by way of carrying out the transactions with respect to the tender on-line.
- Public resources will be saved.

34.6 Assessment

The realisation of the Public Procurement Platform will contribute to the accomplishment of transparent structure in the public tender system and the administrations will gain a standards purchasing process.

Additionally, it has been decided with the "Information Society Action Plan" published in the Official Gazette dated 28.07.2006 which is carried out within the scope of the E-Transformation Turkey Project by the State Planning Agency Undersecretariat that an action will be taken with respect to e-invoicing and electronic commercial books; and the Ministry of Finance, Revenue Management Directorate has initiated efforts with respect to the matter by taking EU practices as a reference. Considering the legislation with respect to the e-signature, which is effectively in line with EU standards, and considering the fact that even the mobile-signature³⁹⁶, which is implemented in a few countries in the world, is implemented in Turkey and with the completion of the e-invoice and electronic commercial books projects, the systems, which will support the e-tender process and substantially contribute to its operation, will increase the efficiency and penetration of the e-tendering process.

³⁹⁶ See At. <http://www.itu.int/wsis/stocktaking/scripts/documents.asp?project=1175587257&lang=en> also <http://www.e-guven.com> (Turkish Language Available)

35 United Kingdom

35.1 Public procurement framework

35.1.1 General framework

Following the model of the European procurement Directives, the United Kingdom has adopted two separate procurement frameworks, one for utility contracts and one for all other forms of public sector contracts.³⁹⁷ The public sector has been defined as incorporating the following components:

- central government departments and agencies;
- the NHS and its local trusts;
- the Ministry of Defence;
- the Northern Ireland Assembly, the National Assembly for Wales and the Scottish Executive;
- local authorities;
- universities; and colleges

The legal basis for the United Kingdom procurement regulations is found in the European Communities Act 1972 which confers extensive powers on Government Ministers to introduce secondary legislation in order to give effect to the requirements of European Directives. Exercising these powers 2 regulations were made, approved by Parliament and entered into force on 31 January 2006.

The Public Contracts Regulations 2006³⁹⁸ were adopted in order to implement the Public Sector Procurement Directive (2004/18/EC). The Regulations seek also to take account of the decision of the

³⁹⁷ Although this report will focus on the regulations applying in England, Wales and Northern Ireland it may be noted that separate regulations, The Public Contracts (Scotland) Regulations 2006, apply in Scotland.; Although equivalent in most respects the Scottish framework applies slightly lower threshold figures for determining when public sector contracts require to be advertised. Relevant legal instruments are the Public Contracts (Scotland) Regulations 2006 (SSI 2006 No 1) available from <http://www.opsi.gov.uk/legislation/scotland/ssi2006/20060001.htm> and the Utilities Contracts (Scotland) Regulations 2006 (SSI 2006 No 2), available from www.opsi.gov.uk/legislation/scotland/ssi2006/20060002.htm

³⁹⁸ SI 2006, No 5. The text of this regulation is available from http://www.opsi.gov.uk/si/si20060005_en.pdf

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European Court of Justice in the case of Alcatel Austria v. Bundesministerium fur Wissenschaft und Verkehr³⁹⁹ and the subsequent case of Commission v. Austria.⁴⁰⁰ By providing for a standstill period between a decision to award a contract to a particular supplier and its final conclusion so as to allow dissatisfied competitors the opportunity to challenge the award. The Regulations apply whenever “a contracting authority seeks offers in relation to a proposed public supply contract, public works contract, Part A services contract, framework agreement or dynamic purchasing system”⁴⁰¹. Regulation 3 defines the scope of the term “contracting authority widely to encompass any element of central or local government

The Utilities Contracts Regulations 2006.⁴⁰² were adopted in order to implement the revised Utilities Directive (2004/17/EC) The Regulations seek also to take account of the decision of the European Court of Justice in the case of Alcatel Austria v. Bundesministerium fur Wissenschaft und Verkehr⁴⁰³ and the subsequent case of Commission v. Austria.⁴⁰⁴ Schedule One to the Regulations define seven categories of activity whose procurement practices are required to comply with the regulations.

- Water
- Electricity
- Gas
- Heat
- Oil and Gas exploration and extraction
- Coal and other solid fuel
- Transport.

The Schedule defines in greater detail the particular operators who come within the scope of the Regulations.

The legal basis for procurement in the United Kingdom derives from a number of sources. The publication Government Accounting⁴⁰⁵, issued by the Treasury and which provides the definitive source on matters to do with public expenditure identifies three key elements:

³⁹⁹ C81/98.

⁴⁰⁰ C212/02.

⁴⁰¹ Regulation 5.

⁴⁰² ⁴⁰² SI 2006, No 6. The text of this regulation is available from http://www.opsi.gov.uk/si/si20060006_en.pdf

⁴⁰³ C81/98.

⁴⁰⁴ C212/02.

⁴⁰⁵ <http://www.government-accounting.gov.uk/>

Parliamentary requirements

Parliamentary requirements have been set out in legislation, reflect customary parliamentary procedure, or have been agreed between the Treasury and Parliament. Examples are:

1. legislative requirements: much of the guidance concerning the use of the Contingencies Fund, trading funds, the role of the National Audit Office, and the Comptroller and Auditor General (C&AG);

2. parliamentary procedure: those practices that Parliament has adopted over the years for handling financial business (much of the guidance on Supply reflecting such procedure); and

3. specific agreement reached between the Treasury and Parliament: for example, the advice on the 1932 Concordat between the Public Accounts Committee (PAC) and the Treasury, which deals with the need for continuing functions of government to be based on specific statutory authority in addition to the annual Appropriation Act.

Treasury administrative controls

These are rules and practice that have been laid down by the Treasury rather than Parliament. They are mainly designed to secure good financial control, promote high standards of propriety, improve value for money, and secure effective accountability. For example, much of the advice concerns the need for Treasury approval for certain spending decisions and relates to requirements that the Treasury rather than Parliament has laid down. Examples include the need for departments to seek Treasury approval for expenditure proposals that:

- 1. might increase pressure on Estimates provision;*
- 2. could set a potentially expensive precedent;*
- 3. could cause repercussions for others;*
- 4. exceed the general threshold for major capital projects; or*
- 5. are novel or contentious.*

This does not mean, however, that Parliament has no interest in these requirements. Parliament votes money in the knowledge, and on the understanding, that controls of this nature are in place. The Public Accounts Committee, for example, would be concerned if such controls did not exist.

Best practice

Best practice relates to operating procedures of common application that departments are encouraged – though not necessarily obliged – to follow in the interest of good administration. Much of the advice on issues such as investment appraisal or purchasing is of this nature. On a number of such issues the guidance in Government Accounting is only a summary of key issues, which are discussed at greater length in other documents.⁴⁰⁶

Chapter 22 of Government Accounting is concerned specifically with issues of procurement. It states that:

22.2.1 In procuring goods, works or services, departments are responsible and accountable for achieving value for money....

22.2.2 Goods, works or services should be acquired by competition unless there are compelling reasons to the contrary. Subject to the department's legal obligations, the form of competition should be appropriate to the value and complexity of the product or service to be acquired.

22.2.3 Government departments are subject to EC procurement rules and other international agreements setting out a legal framework to which they must adapt their contract award procedures. In addition to EC Treaty obligations, specific rules apply to most contracts where the estimated value exceeds a specified threshold.

22.2.4 Subject to those legal requirements, and the government's policy on value for money, Accounting Officers are responsible for determining the circumstances in which contracts may be awarded without competition.

Other than requirements to publish contracts above threshold levels in the Official Journal, there are no specific legal requirements relating to publication. As will be described in more detail below, the website supply2gov⁴⁰⁷ provides a portal enabling all public sector agencies to advertise contracts whose value falls below the threshold requiring publication in the Official Journal.

35.1.2 Certificates and statements

⁴⁰⁶ <http://www.government-accounting.gov.uk/current/frames.htm>

⁴⁰⁷ <http://supply2.gov.uk>

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Requirements concerning the nature and form of the information which may be required to be supplied by a potential contractor (referred to as economic operators) are laid down in the Public Contracts Regulations and the Utilities Contracts Regulations. In general, it is open to a contracting authority to determine what level of information is required to be supplied with the purpose of the regulations being both to set ceilings upon the amount of information which may be required and also to specify the forms of evidence which are to be accepted as providing conclusive evidence of conformity with requirements.

Regulation 23 of the Public Contracts Regulations provides for a range of situations which are to disqualify an economic operator. These apply in the situation where the contracting authority has actual knowledge that the operator or any of its directors or persons having power to represent, make decisions for or control the operator has been convicted of a range of economic offences including bribery, corruption, tax evasion and money laundering. The disqualifying factors may only be disregarded if the contracting authority "is satisfied that there are overriding requirements in the general interest which justify doing so".⁴⁰⁸

Regulation 23 continues to define a further range of situations in which an economic operator may be considered ineligible to participate in a procurement process. These relate to the fact that

- an individual has been declared bankrupt or a company or partnership has been declared insolvent.
- An individual has been convicted of a criminal offence relating to the conduct of his business or has committed an "act of grave misconduct in the course of his business or profession"
- Has failed to meet requirements relating to the payment of social security payments
- Has failed to meet obligations relating to the payment of taxes
- Has been guilty of serious misrepresentation in relation to the supply of information to the contracting authority
- In relation to the provision of services, is not a member of a professional association in a situation where services may be lawfully provided only by members of the association.⁴⁰⁹

It is provided that the contracting authority may require economic operators to provide such evidence as it considers necessary evidence of their eligibility to participate in the procurement process. It is further provided, however, that certain forms of evidence are to be considered as conclusive. In respect of involvement in criminal conduct or financial insolvency it is provided that 'an extract from the judicial record' or in the case where a state does not maintain such records, a document issued by the relevant judicial or administrative authority. In respect of payment of social security or tax contributions a certificate issued by the relevant authority will be conclusive. In any case, if the information cannot be

⁴⁰⁸ Reg 23(2)

⁴⁰⁹ Regulation 23(4).

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provided in a particular Member State it is provided that a declaration on oath made before a competent authority may serve as a substitute.⁴¹⁰

Beyond the factors which may render an economic operator ineligible to obtain a public sector contract, the Regulations continue to specify the categories of information which a contracting authority may reasonably require to be provided in order to assure them that an economic operator possesses the necessary financial stability and technical expertise to perform any contract which may be awarded. The relevant economic and financial indicators are listed in regulation 24 and indicators of technical or professional ability in regulation 25.

In respect of the former category it is stated that account may be taken of:

(i) appropriate statements from the economic operator's bankers or where appropriate, evidence of relevant professional risk indemnity insurance;

(ii) statements of accounts or extracts from those accounts relating to the business of the economic operator where publication of the statement is required under the law of the relevant State in which the economic operator is established; or

(iii) where appropriate, a statement, covering the 3 previous financial years of the economic operator, of—

(aa) the overall turnover of the business of the economic operator; and

(bb) where appropriate, the turnover in respect of the work, works, goods or services which are of a similar type to the subject matter of the public contract.

Regulation 25 specifies further categories of information which may be required to be supplied regarding the economic operator's technical or professional ability to meet the requirements of the procurement in a satisfactory manner. The nature of the information supplied varies depending upon whether the contract in question is one for the supply of goods, works or services. Information may be required as to previous activities of the economic operator in the form of listings of works carried out within the previous 5 years or goods or services supplied over the previous 3 years. Information may also be required about the size of the economic operator's workforce and details of the educational and professional qualifications and experience of any staff who will be employed in the performance of the contract. Information may also be required as to the environmental management measures which the contractor is able to apply when performing the contract.

The Regulations make limited provision as to the form in which information is to be supplied. In cases such as confirmation of compliance with tax or social security requirements, the form of any certificate will be determined by the relevant authority. In other cases, information, for example relating to turnover of the economic operator will be generated by the operator itself. In the event that the

⁴¹⁰ Regulation 23(5)

contracting authority considers that the level of information supplied is inadequate it may require the economic operator to provide supplementary information. General principles of administrative law and in particular requirements of fair dealing would mean that it would be only in the event that an economic operator failed to respond in a satisfactory manner to a request for supplementary information that the operator could be declared ineligible to participate in the procurement process on the ground that insufficient information had been provided.

As will be discussed more extensively below, a number of schemes operate whereby economic operators may submit information of the kind referred to above to a single source. Examples are the supply2.gov.uk portal which applies in relation to contracts with a value of less than £100,000 and Constructionline⁴¹¹ Originally designed for the construction industry, this latter service is now available to operators in other sectors and provides the opportunity to register details once and for these to be reused in any subsequent procurement processes. Regulation 27 of the Public Contracts Regulations provides that contracting authorities are to accept a certificate of registration from the administering authority as evidence of most of the items of information which would otherwise require to be submitted as part of the procurement process.⁴¹²

35.2 E-Procurement initiatives and status

35.2.1 General e-Procurement framework and initiatives

As stated above, the United Kingdom has adopted the Public Contracts and the Utilities Contracts Regulations in order to implement the Public Procurement Directives. Whilst these make specific provision for e-procurement, activity in this respect considerably predates the Directives and the 2006 Regulations.

The Office of Government Commerce was established in April 2000 as an independent office of the Treasury. Its remit is stated as being to: improve the efficiency and effectiveness of government procurement⁴¹³

The increased use of electronic communications has been a feature of government policy since the 1990's with ambitious targets set of making central and local government services available on an on-line basis. Use of such techniques for government procurement has been a feature of this strategy. In 2003 the Office of Government Commerce published a document eProcurement: Cutting through the hype, to serve as a guide and encouragement for the public sector to move towards e-procurement. In a further document published in 2005 entitled 'eProcurement in action', the Office of ~Government Commerce estimated that in 2003-4 30% of central government purchase orders were being made

⁴¹¹ <http://www.constructionline.co.uk/>

⁴¹² Reg 27(4)-(5).

⁴¹³ http://www.ogc.gov.uk/who_we_are.asp

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using electronic procurement systems.⁴¹⁴ It was estimated that this had produced efficiency savings of £57.8 million.⁴¹⁵

A range of techniques have been applied within the United Kingdom. A number of agencies have made use of electronic auctions as a means of encouraging competition between potential suppliers. Regulation 21 of the Public Contracts Regulations provides for the use of electronic auctions in respect of virtually any form of procurement except where the contract "has as its subject matter intellectual performance, such as the design of works."⁴¹⁶ The regulations continue to specify the information which must be made available to potential participants in the auction. An initial evaluation is to be made of potential bidders in order to determine their eligibility to participate and the contracting authority is to determine and publicise the number of phases and timings associated with the auction.

The Office of Government Commerce announced in June 2007 that:

The price public sector organisations pay for their office stationery, printer cartridges, paper and magnetic media will be cut by up to 62% in a groundbreaking collaborative deal led by the Ministry of Defence (MoD) announced today.

Significantly reduced prices were achieved by holding what was the largest UK public sector reverse eAuction ever, with the greatest savings for UK taxpayers ever achieved using an auction process.

The reverse eAuction, which took place over four consecutive days, was the final part of a 9 month long procurement process led by the MoD, with assistance from the Office of Government Commerce. A critical factor in the success of the procurement and the substantial savings it has achieved was the strategic and collaborative approach taken by the MoD, which combined all of its own office supplies requirements with those of seven other leading public sector organisations to maximise leverage in the market.

The total pre-auction value of the combined requirements was £232 million, and the post auction aggregate price was £132 million, yielding a saving of £100 million. Further savings are also likely, as all other public sector organisations will be able to join the deal and access these prices⁴¹⁷

Commencing with 4 auctions being held in 2003, the figure rose to 67 by 2005 with a combined value in the latter year of nearly £300 million. Savings over pre-auction prices of £71 million were claimed amounting to a 24% cost reduction.⁴¹⁸

⁴¹⁴ Para 1.1.1

⁴¹⁵ Para 2.2.1.

⁴¹⁶ Reg 21(3).

⁴¹⁷ <http://www.gnn.gov.uk/content/detail.asp?NewsAreaID=2&ReleaseID=295410>

⁴¹⁸ http://www.ogcbuyingsolutions.gov.uk/RAF/raf_using.asp

A framework for managing reverse eAuctions is provided by OGCbuyingsolutions which is an executive agency of the Office of Government Commerce.⁴¹⁹ Four service providers Achilles, BravoSolution, BT and TradingPartners have been contracted to provide management and associated support for eAuctions. And any public sector agency may make use of these services.⁴²⁰

Further initiatives have been launched by the Office of Government Commerce in the area of sourcing. This is defined as encompassing “the use of secure web-based collaborative tools by procurement professionals and suppliers to conduct the strategic activities of the procurement lifecycle online. These strategic activities including requirements definition, tendering, negotiation, award and contract management are designed to deliver value for money procurement solutions to the public sector.”⁴²¹

As with eAuctions, the conduct of sourcing utilises the facilities of a service provider. In this instance. Management and technical services are provided by BravoSolution under the terms of a contract with the Office of Government Commerce.⁴²² The service comprises four modules which may be used either individually or in combination

- eTendering;

eTendering provides web-based technology that allows buyers and suppliers to securely manage their interactions during the tender process online. The tool is fully compliant with EU Procurement Directives and supports the full tender process including advertisement, expression of interest, pre-qualification questionnaire (PQQ), invitation to tender (ITT), reverse auctions and award notices. It can be used for procurements of any category, size, complexity and value both above and below OJEU.⁴²³

- eEvaluation;

eEvaluation service provides web-based technology that enables teams to work collaboratively developing evaluation plans, structuring assessment criteria, evaluating tender documentation and carrying out bid comparisons in a secure, common working environment. eEvaluation is most suitable for complex or strategic procurements and can be used in conjunction with eTendering.⁴²⁴

- eCollaboration;

⁴¹⁹ <http://online.ogcbuyingsolutions.gov.uk/information/about>

⁴²⁰ http://www.ogcbuyingsolutions.gov.uk/RAF/raf_faq.asp

⁴²¹ <http://www.ogcbuyingsolutions.gov.uk/esourcing/esourcing.asp>

⁴²² http://www.ogcbuyingsolutions.gov.uk/esourcing/managed/esourcing_managed_contract.asp

⁴²³

http://www.ogcbuyingsolutions.gov.uk/esourcing/managed/options/managed_options_etendering.asp

⁴²⁴

http://www.ogcbuyingsolutions.gov.uk/esourcing/managed/options/managed_options_evaluation.asp

eCollaboration service provides web-based technology that enables teams to collaborate in the management of documentation and supports project and contract management both before and after contract award within a secure, shared working environment.⁴²⁵

- eContract Management

eContract Management service provides web-based technology that facilitates the contract management life cycle from the establishment of a contract through to its expiry including contract authoring, vendor management and performance monitoring and automated alerts for key contract milestones.⁴²⁶

The eAuction and sourcing procedures are likely to apply to relative high value contracts. A number of further initiatives have been put in place at both central and local government level to encourage the use of electronic communications for the supply of smaller value goods and services.

At the simplest level, the Office of Government Commerce introduced the Government Procurement Card programme. These are essentially credit cards issued by the Visa banking consortium which may be allocated by public authorities to members of staff and used for the acquisition of low value items. More than 85,000 cards have been issued and used for the purchase of goods and services worth some £2 billion. Use of the cards, it is estimated, has produced savings in transaction costs in the region of £28 per transaction.⁴²⁷

A number of portals exist to facilitate electronic transactions, including the Project Zanzibar⁴²⁸. Operating as a web based service, Zanzibar is a purchase to pay system and electronic marketplace which is available to all public sector organisations. Zanzibar comprises 5 core elements:

- A public sector marketplace - with hosted catalogues and the ability to 'punch out' to external suppliers.
- An optional P2P system which allows access to an e-marketplace, via a web browser, the sending of orders and the receipting of invoices.
- A data warehouse - with secure access to information about all Zanzibar transactional activity.
- A supplier portal - enabling single point access for suppliers
- Integration facilities - allowing buyers and suppliers to integrate existing eProcurement, finance and sales order systems with Zanzibar.⁴²⁹

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http://www.ogcbuyingsolutions.gov.uk/esourcing/managed/options/managed_options_ecollaboration.asp

426 http://www.ogcbuyingsolutions.gov.uk/esourcing/managed/options/managed_options_econtract.asp

427 1999 KPMG survey endorsed by the National Audit Office.

428 <http://www.ogcbuyingsolutions.gov.uk/zanzibar/zanzibar.asp>

429 <http://www.ogcbuyingsolutions.gov.uk/zanzibar/about.asp>

The Zanzibar system is available in situations where an existing contract exists with suppliers. The Supply2.gov web site⁴³⁰ focus on public sector contracts with a value of less than £100,000. Supply2.gov allows suppliers to register and search the database of public sector contract opportunities. It provides also a facility for potential suppliers to register their details and be informed automatically of any relevant contract opportunities which may be published.

At the local government level a partnership between the EGS group and the Improvement and Development Agency for local government (IDeA) has established a number of electronic market places

- IDeA: marketplace, focused on Local Government;
- Bluelight Marketplace, specialising in Police and Emergency Services;
- Unity Marketplace providing services to the Further Education community.
- Parabilis marketplace focused on the Higher Education sector.

A number of regional exchanges have also been established.⁴³¹ A similar service eProcurement Scotl@nd (ePS) has been established to provide an electronic market place for the Scottish public sector.⁴³²

35.2.2 Administrative simplification for United Kingdom tenderers

A noteworthy initiative in the field of e-Procurement is Supply2.gov, which has entered into an agreement with another service, Constructionline.co.uk. This again is a government run service which is stated to provide a “national database of assessed pre-qualified suppliers.”⁴³³ Originally this web site covered only organizations connected with the construction industry but the linkage with supply2gov has made it available to other suppliers. The service enables potential suppliers to submit the information which may require to be provided under the Public Contracts regulations on a single occasion and have this reused in any subsequent procurement process.

35.3 Certificates, attestations and declarations

In this section, we will take a closer look at how the common requirements defined by the e-Procurement Directives are typically met in the United Kingdom. Acting upon the recommendations of

⁴³⁰ <http://supply2.gov.uk>

⁴³¹ <http://www.egsgroup.com/exchanges/IDeA.php>

⁴³² <http://www.eprocurementscotland.com/>

⁴³³ http://www.constructionline.co.uk/static/html/static_page/SrgSupplierAbout.htm

the Better Regulation Task Force which reported in 2003 the Office of Government Commerce has produced a model pre-qualification questionnaire which is intended to be used in all tendering processes whose value falls below the EU threshold⁴³⁴. The Public Contracts Regulations specify the categories of information which may be required in all contracts.

35.3.1 Requirements with regard to the personal situation of the candidate or tenderer – absence of conviction (art. 45 §1 and §2 (c-d) of Directive 2004/18/EC)

Prevalence/actual use in calls

It is standard practice to require a tenderer to indicate whether anyone associated with the management of a company has been convicted of a criminal offence related to business or professional conduct or has committed an act of gross misconduct in the course of business. If the answer to the question is in the affirmative, the tenderer will be required to supply further details and to give an indication what steps have been taken to put matters right.

What document (if any) is used?

In most cases a declaration that no criminal offences have been committed will be accepted at face value although any falsehood would serve as ground to revoke any contract which might subsequently be awarded. In most cases although an individual may be entitled to access details of criminal convictions recorded against his or her name, third parties have no such right and indeed the attempt to require an individual to make application for a copy of a criminal record and disclose this to a third party is unlawful under the provisions of the Data Protection Act 1998⁴³⁵. In the case, however, where the contract would involve the tenderer working with children or vulnerable persons, the Police Act 1997⁴³⁶ establishes the Criminal Record Bureau⁴³⁷ as an executive agency of the Home Office to provide a mechanism to allow employers to identify persons who might be unsuitable to act in such a capacity.

Two forms of disclosure are available depending upon the nature of the position and the level of involvement with children. A standard disclosure provides details of convictions including those which would normally be regarded as spent under the provisions of the Rehabilitation of Offenders Act 1974. This statute sets time limits upon convictions for specific categories of relatively minor offences so that after the expiration of a set period of time, a person may, in response to a question about convictions for criminal offences, deny these offences without running the risk of being considered to have given a false reply. Enhanced disclosures contain the above information but also include any relevant intelligence related data held by the police authorities. The procedure in each case would be for the individual(s) in question to make application to the Criminal records Bureau requesting that disclosure be made to a specific authority.

⁴³⁴ http://www.ogc.gov.uk/tools_services_pqq_4651.asp

⁴³⁵ Section 56.

⁴³⁶ Part V.

⁴³⁷ <http://www.crb.gov.uk/>

Any disclosures take the form of the applicant and the potential employer being sent a paper copy of the information. There are no provisions for the information to be supplied in electronic form although an online tracking service⁴³⁸ allows applicants and employers to monitor the progress of the application.

35.3.2 Requirements with regard to the personal situation of the candidate or tenderer – non-bankruptcy and financial status (art. 45 §2 (a-b) of Directive 2004/18/EC)

Prevalence/actual use in calls

Again this is a common feature in United Kingdom procurements with applicants being required to give information as to any personal bankruptcies or corporate insolvencies.

What document (if any) is used?

As with information relating to criminal convictions it would not be normal to require an applicant to provide evidence supporting a claim that there have been no instances of bankruptcy or insolvency although any false statements would provide grounds for the revocation of any contract which might subsequently be avoided.

Information regarding those individuals who are the subject of bankruptcy orders or who have been the subject of an order disqualifying them from serving as director of a limited liability company can be obtained from the Insolvency Service.⁴³⁹ The Service was established under a number of statutes, principally Insolvency Acts 1986 and 2000, the Company Directors Disqualifications Act 1986 and the Employment Rights Act 1996 and holds details related to England and Wales. Separate but similar services are provided for Scotland and Northern Ireland.

Information whether a particular person is the subject of bankruptcy proceedings can be obtained on line and free of charge.⁴⁴⁰ Requests may also be made by telephone (0845 602 9848) or by visiting one of a network of 38 Official Receiver's Offices located throughout England and Wales.

The primary source of information relating to company insolvency is Companies House.⁴⁴¹ This also maintains details of directors' disqualifications⁴⁴² and also of any companies which have been declared insolvent either at their own request or following proceedings by creditors. Basic information

⁴³⁸ <http://www.crb.gov.uk/Default.aspx?page=4336>

⁴³⁹ <http://www.insolvency.gov.uk/>

⁴⁴⁰ <http://www.insolvency.gov.uk/bankruptcy/bankruptcysearch.htm>

⁴⁴¹ <http://www.companieshouse.gov.uk>

⁴⁴² <http://www.companieshouse.gov.uk/didir/>

concerning companies can be obtained on line and free of charge.⁴⁴³ More extensive information, including copies of statutory accounts filed by companies can be obtained upon payment of a fee.⁴⁴⁴

35.3.3 Requirements with regard to the personal situation of the candidate or tenderer – compliance with fiscal and social obligations (art. 45 §2 (e-f) of Directive 2004/18/EC)

Prevalence/actual use in calls

Affirmation of compliance (or an indication of any reason for non-compliance) with tax and social security obligations is a standard feature of procurement within the United Kingdom

What document (if any) is used?

No specific documents are used in the United Kingdom but it is normal practice to require tenderers to supply details of VAT registration number, PAYE reference and, as appropriate, Corporation Tax or Self Assessment reference

35.3.4 Requirements with regard to the suitability to pursue the professional activity

Prevalence/actual use in calls

The United Kingdom makes limited use of this element. It is common practice in tenders to require information as to the business status of a tenderer but in general the United Kingdom imposes few requirements regarding the form of business undertakings.

What document (if any) is used?

Regulation 23(4)(j) of the Public Contracts regulations provides that an economic operator may be declared ineligible to participate in a procurement process if it is not registered in a professional or trade register. Schedule 6 to the regulations lists relevant registers in the other Member States. For the United Kingdom, reference is made register of incorporated companies maintained by Companies House⁴⁴⁵ This register is a publicly available document and, as indicated above, can be accessed free of charge on an on-line basis. Many undertakings, especially SME's will not be incorporated. As an

⁴⁴³ <http://www.companieshouse.gov.uk/WebCheck/findinfopage/>

⁴⁴⁴ Details of services and fees can be obtained from <http://www.companieshouse.gov.uk/toolsToHelp/ourPrices.shtml>

⁴⁴⁵ <http://www.companieshouse.gov.uk>

alternative the Regulations provide that the a Commissioner of Oaths⁴⁴⁶ certifies that the economic operator is carrying on business at a specified location under a specified trading name.⁴⁴⁷ The Electronic Communications Act 2000 provides the basis for these materials to be signed using a digital signature.

35.3.5 Requirements with regard to economic and financial standing

Prevalence/actual use in calls

United Kingdom practice is to seek information regarding the financial status of an economic operator. Regulation 24 of the Public Contracts Regulations refers to an extensive range of items of information which may be sought. Reference is made to the provision of statements of account (generally covering a 2 year period) and:

a statement, covering the 3 previous financial years of the economic operator, of—

(aa) the overall turnover of the business of the economic operator; and

(bb) where appropriate, the turnover in respect of the work, works, goods or services which are of a similar type to the subject matter of the public contract. ⁴⁴⁸

In some instance, for example in the case of a newly incorporated company, it may not be feasible to satisfy such a requirement. In such a case the contracting authority may require “other information to demonstrate the economic operator’s economic and financial standing”.⁴⁴⁹ The Office of Government Commerce pre-qualifying questionnaire offers the alternative to provide statements of turnover, profit and loss account and cash flow during the previous year or a statement of cash flow forecast supported by a banker’s letter outlining the current cash and credit position.

The Public Contracts Regulations make reference also to the provision of references from the economic operator’s bankers or evidence of the operator holding relevant professional indemnity insurance.⁴⁵⁰

What document (if any) is used?

⁴⁴⁶ Defined as a person appointed by the Lord Chancellor with power to administer oaths or take affidavits. All practising solicitors have these powers.

⁴⁴⁷ Regulation 23(7)(b).

⁴⁴⁸ Regulation 24(1)

⁴⁴⁹ Regulation 24(2).

⁴⁵⁰ Regulation 24(1)(1)

No specific format is laid down for the above information. Accounts filed at Companies House require to follow by specified formats but there is much more flexibility afforded to unincorporated bodies although the professional accounting bodies will apply their own standards when compiling accounts.

35.3.6 Requirements with regard to technical and/or professional ability

Prevalence/actual use in calls

Regulation 28 of the Public Contracts Regulations specifies the categories of information which a contracting authority may require to be submitted in this respect. It is universal practice for contracting authorities to require information in respect of these factors.

What document (if any) is used?

Information is generally sought regarding the economic operator's previous performance in respect of contracts of the kind in question. References may be sought from 3 previous customers including at least one public sector agency.

Typically, tenderers are required to demonstrate technical and/or professional ability by indicating the profiles of personnel who will be employed in the provision of any services or information regarding the nature of goods which have previously been supplied.

Contents

Contents vary depending on the requirements. As noted above, typical examples include qualifications, diplomas, product/service descriptions and past realisations.

Electronic certificates

In general there is no barrier to the use of electronic communications in procurement and it is a key element of purchase to pay systems that all elements of the process might be conducted electronically..

35.3.7 Requirements with regard to quality assurance standards

Prevalence/actual use in calls

The requirement to demonstrate compliance with quality assurance standards is a common element of United Kingdom procurement.

What document (if any) is used?

The most frequent requirement is that an economic operator holds a certificate evidencing compliance with a recognised quality management standard, generally in the BS/EN 9000 series. A considerable number of agencies have been accredited by the United Kingdom Accreditation Service⁴⁵¹. This body, is "is the sole national accreditation body recognised by government to assess, against internationally agreed standards, organisations that provide certification, testing, inspection and calibration services."

A list of accredited certifiers is available from http://www.ukas.com/about_accreditation/accredited_bodies/default.asp

Contents

A certificate of compliance will indicate the nature of the organisation, and the nature of the goods or processes which are the subject of the certificate together with a note of its period of validity.

Electronic certificates

In general there is no requirement for a handwritten signature to verify the authenticity of an certificate of conformity with a quality management standard. Although the certificate will be supplied in paper form, United Kingdom procurement policy does not require provision of original documents and a scanned copy of a certificate would be acceptable - assuming a contracting authority wished sight of a certificate.

35.3.8 Requirements with regard to environmental management standards

Prevalence/actual use in calls

The standard pre-qualification questionnaire developed by the Office of Government Commerce asks economic operators to indicate whether they have environmental management systems. Government policy is that environmental issues should be carefully considered in procurement⁴⁵². Although the importance of this depend upon the type of procurement being undertaken. The Institute of Environmental Management and Assessment (IEMA) has developed the Acorn Inspection Scheme which enables companies to gain accredited inspection and recognition for their achievements at each step as they work towards ISO 14001 or EMAS.

What document (if any) is used?

⁴⁵¹ <http://www.ukas.com/>

⁴⁵² <http://www.defra.gov.uk/environment/business/scp/pdf/ems.pdf>

A number of agencies have been accredited by UKAS to certify compliance with environmental management systems. Certification duration and cost can vary from organisation to organisation and details are available from http://www.ukas.com/about_accreditation/accredited_bodies/certification_body_schedules.asp.

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35.4 Interoperability

As described above, a number of e-procurement systems have been developed in the United Kingdom. The Office of Government Commerce has issued extensive guidance regarding the format and structure of e-procurement systems which follows established web development protocols. All major systems are provided over the Internet and can be accessed by potential suppliers using basic PCs and Internet connections. The relative absence of legal formalities has the effect of making the systems accessible to non-United Kingdom resident operators.

35.5 Future trends/expectations

The 2007 Treasury report, 'Transforming Government Procurement'⁴⁵³ claims significant improvement in the efficiency of public sector procurement. By 2008, it is estimated savings of £5.5 billion per annum will be achieved. The use of e-procurement is seen as a significant contributor. The United kingdom's legal systems have always afforded considerable flexibility to those wishing to conclude contracts. Requirements for writing and signature have always been limited and the adoption of secondary legislation under the Electronic Communications Act 2000 provides a basis for removal of the few remaining barriers.

⁴⁵³ www.hm-treasury.gov.uk/media/4EA/89/government_procurement_pu147.pdf

35.6 Assessment

The United Kingdom's e-procurement system is relative well established and in keeping with government policies to encourage electronic communications between government and others is becoming more widespread. Paradoxically, perhaps, one of the major concerns expressed has been the desire to ensure that increased use of electronic communications does not debar from the procurement process those who for whatever reason do not wish to conduct business in this way.