Key changes in public procurement directives & strategic procurement
(innovative, green & socially responsible procurement)
CSR to Slovakia

HEREBY RECOMMENDS that Slovakia take action in 2018 and 2019 to:

1. Ensure that the nominal growth rate of net primary government expenditure does not exceed 4.1% in 2019, corresponding to an annual structural adjustment of 0.5% of GDP. Implement measures to increase the cost effectiveness of the healthcare system and develop a more effective healthcare workforce strategy.

2. Reinforce activation and upskilling measures, including quality targeted training and individualised services for disadvantaged groups, in particular by delivering on the action plan for the long-term unemployed. Foster women's employment, especially by extending affordable, quality childcare. Improve the quality and inclusiveness of education, including by increasing the participation of Roma children in mainstream education from early childhood onwards.

3. Increase the use of quality-related and lifecycle cost criteria in public procurement operations. Tackle corruption, including by ensuring enforcement of existing legislation and by increasing accountability at the level of police and prosecution. Improve the effectiveness of the justice system, in particular by safeguarding independence in judicial appointment procedures. Reduce the fragmentation of the
CSR to Romania

HEREBY RECOMMENDS that Romania take action in 2018 and 2019 to:

1. Ensure compliance with the Council recommendation of XX June 2018 with a view to correcting the significant deviation from the adjustment path toward the medium-term budgetary objective. Ensure the full application of the fiscal framework. Strengthen tax compliance and collection.

2. Complete the minimum inclusion income reform. Improve the functioning of social dialogue. Ensure minimum wage setting based on objective criteria. Improve upskilling and the provision of quality mainstream education, in particular for Roma and children in rural areas. Improve access to healthcare, including through the shift to outpatient care.

3. Increase the predictability of decision-making by enforcing the systematic and effective use of regulatory impact assessment and stakeholder consultation and involvement in the design and implementation of reforms. Improve the preparation and prioritization of large infrastructure projects and accelerate their implementation, particularly in the transport, waste and waste water sectors. Improve the transparency and efficiency of public procurement. Strengthen the corporate governance of state-owned enterprises.

Done at Brussels,
HEREBY RECOMMENDS that the Czech Republic take action in 2017 and 2018 to:

1. Ensure the long-term sustainability of public finances, in view of the ageing population. Increase the effectiveness of public spending, notably by fighting corruption and inefficient practices in public procurement.
CSR to Hungary

HEREBY RECOMMENDS that Hungary take action in 2018 and 2019 to:

1. In 2018, ensure compliance with the Council recommendation of XX June 2018 with a view to correcting the significant deviation from the adjustment path toward the medium-term budgetary objective. In 2019, ensure that the nominal growth rate of net primary government expenditure does not exceed 3.9%, corresponding to an annual structural adjustment of 0.75% of GDP.

2. Continue simplifying the tax system, in particular by reducing sector specific taxes. Improve the quality and transparency of the decision-making process through effective social dialogue and engagement with other stakeholders and by regular, adequate impact assessments. Reinforce the anti-corruption framework, strengthen prosecutorial efforts and improve transparency and competition in public procurement inter alia through making data gained from the e-procurement system accessible to the public. Strengthen competition, regulatory stability and transparency in the services sector, notably in retail.

3. Unlock labour reserves through improving the quality of active labour market policies. Improve education outcomes and increase the participation of

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Agenda

- Day 1
  - European Public procurement
  - Recent case law in procurement
  - Strategic procurement in ESIF-programmes: Issues and discussion
  - Workshops
  - Q & A
Day 2

- Innovative and socially responsible procurement
- Green public procurement
- Case study: the Netherlands
- Workshop
- Q & A
European public procurement
ESIF and Public procurement

- **ESIF**: European Structural and Investment Funds
- **5 Funds:**
  - European Regional development fund: promotes balanced development in the different regions of the EU (ERDF)
  - European Social Fund: supports employment-related projects throughout Europe (ESF)
  - Cohesion fund: funds transport and environment projects (only countries < 90% gross national income (GNI)) (CF)
  - European agricultural fund for rural development: focuses on resolving the particular challenges facing EU’s rural areas (EAFRD)
  - European maritime and fisheries fund (EMFF): helps fishermen to adopt sustainable fishing practices and coastal communities to diversify their economies, improving quality of life along European coasts

EC Proposal 2021-2027: 7 Funds (also migrants, security, borders, but not rural anymore)
ESIF and Public procurement

- **ESIF**: European Structural and Investment Funds
- The ESIF mainly focus on 5 areas:
  - research and innovation
  - digital technologies
  - supporting the low-carbon economy
  - sustainable management of natural resources
  - small businesses

- Strategic procurement and Cohesion policy
  - Horizontal principles (Common Provision Regulation 1303/2013 Art 7 (social aspects) & 8 (sustainable development))
  - Thematic Objective TO1 and Smart specialisation strategy (focusing also on demand side of innovation – innovative procurement)
  - TO3 – SME related investments
  - Cohesion policy funding – EU-MS risk-sharing rationale
  - In practice, all ESIF investment areas (from TO1-TO11) are subjects to strategic procurement

- **EC proposal 2021-2027**: concentration on 5 thematic areas (smart, green/CO2, mobility, social, territorial)
European Public Procurement

- The new Procurement Directive 2014/24/EU
- Challenges of public procurement in ESI-funds

A package of three new EU public procurement directives


Adopted by the European Parliament in 2014

- Public sector
- Utilities
- Concessions

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European Public Procurement

- The new Procurement Directive 2014/24/EU


- Anticipated positives / savings:
  - To contribute to eliminating barriers to cross-border public procurement;
  - The wide use of e-invoicing in public tenders across the EU expected to generate savings of funds allocated for public procurement: up to EUR 2.3 billion a year.
European Public Procurement

- Does the EU Procurement Directive 2014/24/EU and MS implementations therefore apply?
European Public Procurement

- The new Procurement Directive 2014/24/EU

<table>
<thead>
<tr>
<th>Sole award criterion: most economically and advantageous tender</th>
<th>Greater flexibility and simplification of negotiations</th>
<th>No distinction between priority and non-priority services</th>
<th>Less red tape for bidders and easier access for SMEs</th>
<th>The new Innovation Partnership</th>
<th>Clarification of rules on contract modification</th>
<th>No push to privatize public services</th>
</tr>
</thead>
<tbody>
<tr>
<td>May be assessed on <strong>price, costs</strong> (cost-effectiveness approach), or <strong>best quality/price ratio</strong>.</td>
<td>Broader access to flexible procedures. Extended grounds: using the competitive procedure with negotiation.</td>
<td>The Part B rules are suppressed by the new legislation.</td>
<td>Encouraging contracting authorities to divide contract into lots.</td>
<td>Authorities may call for tenders to solve a problem without pre-empting the solution.</td>
<td>The new rules and exemptions have been derived from ECJ decisions.</td>
<td>The new norms do not require for privatization of public enterprises.</td>
</tr>
<tr>
<td>In future, it may include: design; environmental and social characteristics; innovation. Staff experience or qualification.</td>
<td>Availability of this procedure for all purchasing not “off the shelf”.</td>
<td>Specific rules for awarding public contracts for health and social services; education.</td>
<td>Reduction of bureaucratic burdens and introduction of a turnover cap.</td>
<td>More room is left for negotiations between the authority and the bidding companies.</td>
<td>Certain abilities to change existing contracts, eg. transfer of contract upon insolvency.</td>
<td>Water sector excluded from the scope of the new rules.</td>
</tr>
</tbody>
</table>

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European Public Procurement

- The new Procurement Directive 2014/24/EU

Exclusion due to non-compliance with the law
- Exclusion in hypotheses of non-compliance or violation of applicable EU and national law
- Exclusion applies to social, labor and environmental law

Exclusion due to deficiencies and exclusory acts
- Exclusion may be motivated by significant and persistent deficiencies shown in prior contracts
- Exclusion for exclusory acts done before or during the procedure

Incorporation of cooperation exemptions
- Certain contractual relations among public bodies are exempted from regulation
- Horizontal cooperation among contracting authorities

Tougher rules on subcontracting
- Prevention of social dumping and violation of workers' rights
- Tougher provisions on "abnormally low bids"
European Public Procurement

- The new Procurement Directive 2014/24/EU

Move towards e-procurement

- Contracting authorities have to make procurement documents freely electronically available from the date of publication of the notice:
  - Full e-procurement (communication and submission): latest until 2018.
- The new EU Directive on public procurement introduces mandatory e-procurement including:
  - Transmission of notices in electronic form and electronic availability of procurement documentation;
  - Switch to fully electronic documentation, particularly e-submission of tenders, in all procurement procedures.
European Public Procurement

- Latest initiative by the EC on public procurement
  - Making Public Procurement work in and for Europe
    Communication from the European Commission (EC) to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 3 October 2017
  - Six strategic priorities
    - Ensuring wider uptake of strategic public procurement
    - Professionalising public buyers
    - Improving access to procurement markets
    - Increasing transparency, integrity and better data
    - Boosting the digital transformation of procurement
    - Cooperating to procure together
European Public Procurement

- Latest initiative by the EC on public procurement
- Ensuring wider uptake of strategic public procurement
  - Strategic PP ≠ basic PP ≠ occasional PP
  - Need of mainstreaming innovative, green and social criteria
  - More extensive use of pre-market consultation
  - More use of qualitative assessments (MEAT), innovative solutions
  - Use of strategic criteria
    - Dissemination of standards and methodologies for benchmarks,
    - Regular updates of labels and evaluation criteria
    - Library of good practices
- Latest initiative by the EC on public procurement
- Ensuring wider uptake of strategic public procurement
  - Strategic PP ≠ basic PP ≠ occasional PP → What is Strategic procurement?

**Definition:** A systematic and fact-based approach for optimizing an organization's supply base and improving the overall value proposition

<table>
<thead>
<tr>
<th>What it is</th>
<th>What it is NOT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Focused on the Total Cost of Ownership (TCO) incorporating customer needs, organizational goals, and market conditions</td>
<td>Focused ONLY on cost</td>
</tr>
<tr>
<td>Getting the best product/service at the best value</td>
<td>Getting the cheapest product/service</td>
</tr>
<tr>
<td>Driven by a rigorous and collaborative approach</td>
<td>Ad-hoc activities involving only purchasing</td>
</tr>
<tr>
<td>Addresses all levers for savings</td>
<td>Focused on “beating up suppliers”</td>
</tr>
<tr>
<td>Decisions based on fact based analysis and market intelligence</td>
<td>Decisions based on opinion, unjustified preference, or complacency</td>
</tr>
<tr>
<td>A continuous process</td>
<td>A one-time project or decision</td>
</tr>
</tbody>
</table>
Latest initiative by the EC on public procurement

Ensuring wider uptake of strategic public procurement

Scope of Strategic procurement?

The scope of strategic sourcing extends beyond supplier price negotiation and takes into account the total cost of ownership.
- Latest initiative by the EC on public procurement
  - Ensuring wider uptake of strategic public procurement
    - Advantages of Strategic procurement?

  ![Diagram with Steps]

  1. Strategic Sourcing
  2. Create partnerships with suppliers
  3. Best practice sharing
  4. Cost savings
  5. Access to new suppliers
  6. Increase quality
  7. Improve operational efficiency
  8. Spec
  9. Standardize pricing
Latest initiative by the EC on public procurement

Ensuring wider uptake of strategic public procurement

Objectives of Strategic procurement?

Objectives of strategic sourcing surround the reduction of cost while maintaining or improving quality

- Improve the value-to-price relationship (i.e. achieve cost reductions while maintaining or improving quality/service)
- Examine supplier relationships across the entire organization
- Leverage entire organization’s spend
- Understand category buying & management process to identify improvement opportunities
- Develop & implement multi-year contracts with standardized terms and conditions across the organization
- Share best practices across the organization
Latest initiative by the EC on public procurement

- KSF for strategic PP
  - *High-Level Conference "Joining Forces in Public Procurement to Power Investment"* dd. 7th of December 2017

A clear **policy vision** provided at political level to the institutions and the professionals involved in strategic public procurement can make a difference. This policy vision, underpinned by political commitment at the appropriate level, may provide these professionals the necessary mandate to act.

The use of strategic public procurement requires some **changes in the culture shifting away from risk aversion** practices. Strategic procurement requires not only a wider use of flexible practices, knowledge of markets and innovative tools, but also **relevant knowledge and skills**.

**A high level of professionalization is a precondition** to take full advantage of the potential of strategic public procurement as a lever for growth. Public procurement is increasingly complex and interdisciplinary. Procurers have to understand not only the legal framework, but also the business and organisational needs, as well as integrate new technological developments.
- Latest initiative by the EC on public procurement
- Impact of strategic PP and the professionalization of public buyers

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European Public Procurement

- Latest initiative by the EC on public procurement
  - Improving access to procurement markets
    - Facilitate the access of companies, including SMEs
    - Facilitate cross-border access
    - Promoting global and convergent standards in procurement
• Latest initiative by the EC on public procurement
  • Increasing transparency, integrity and better data
    • Digital transformation → better and more accessible data in PP
    • Setting up publically accessible contract registers
      Effective reporting mechanisms and protecting whistleblowers against retaliation
    • Mandatory E-procurement from 2018 (above Eur thersholds)
    • Strengthening the provisions on conflicts of interest → avoid collusion
European Public Procurement

- Latest initiative by the EC on public procurement
  - Boosting the digital transformation of procurement
    - New technologies enhance new working methods?
      Streamlining and simplifying the procurement process
  - Promoting tools and standards:
    Single digital Gateway
    European services e-card – project → Art. 64 Eur Dir 2014/24/EU
European Public Procurement

- Latest initiative by the EC on public procurement
  - Cooperating to procure together – Strategic choice?
    - Central purchasing bodies (CPB)
    - Non-institutionalised Horizontal co-operation (exception art. 12)
    - In house structures (exception art. 12)
    - Transferring of competence → authority + associated economic activities

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European Public Procurement

- Novelties of the European Dir 2014/24/EU
  - Value of the contract → always without VAT
  - Exclusion, selection and contract award criteria
    European Single Procurement Document: exclusion and selection
    E-certis: exclusion and selection (means of proof - art. 60)
    Contract award criteria (art. 67): price or cost/ MEAT
  - Reserved contracts (art. 20) ≠ reserved contracts for certain services (art. 77)
    Reserved contracts: sheltered employment companies
    Reserved contract for certain services → only for some social and other specific services

- Governance
  Individual and national reporting on procedures for the award of contracts and other aspects (art. 83.3)
European Public Procurement

- Novelties of the European Dir 2014/24/EU
  - Greater use of contracts awarded by negotiated procedure with prior publication → competitive procedure with negotiation (art. 29)

  “A greater use of those procedures is also likely to increase cross-border trade, as the evaluation has shown that contracts awarded by negotiated procedure with prior publication have a particularly high success rate of cross-border tenders” (recital. 42)

  Obligation to negotiate, unless...
  Possible reasons (recital. 42 e.f.) → art. 26.4
  - Works: Design or innovative solutions
  - Services or supplies: required adaptation or design efforts
  - An open or restricted procedure resulted only in irregular or unacceptable tenders
European Public Procurement

- Latest initiative by the EC on public procurement
  - Cooperating to procure together
    - Central purchasing bodies (CPB)
    - Non-institutionalised Horizontal co-operation
      C-159/11, Azienda Sanitaria Locale di Lecce

- In house structures (recital. 32 e.f, art. 12 e.f.)
  Art. 12 2014/24/EU
  Vertical contract/agreement exception
    - Where the contracting authority exerts on the ‘supplying authority’ a control similar to that which it exercises over its own departments (R12(1)(a)), and
    - Where more than 80% of the activities of the supplying authority are performed for the buying authority or by other bodies controlled by it (R12(1)(b)), and
    - Where there is no direct private capital participation in the ‘supplying authority’ (R12 (1) (c)).
  Horizontal contract/agreement exception
    - The participating authorities co-operate to perform public services they provide, meeting common objectives (R 12(7)(a)) and
    - The co-operation is for public interest reasons only (R 12(7)(b)) and
    - The participating authorities perform less than 20% of the cooperative activities on the open market (R 12(7) (c)).
Types of direct public-to-public

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Framework agreement (art. 33)

FWA contains all contractual provisions

Publication + Complete RFP

Proposal to RFP

1 contractor

Degressive %

Chained execution

4 Years

1 contractor

X

order 1

ex 1

order 2

ex 2

order 3

ex 3

Degressive %

Shortlist (X,Y,Z)

order 1

ex X

order 2

ex X

order 3

ex Y

Chained execution

Shortlist (X,Y,Z)

order 1

Delivery X

order 2

Delivery X

Delivery Y

order 3

ex X

ex Y

ex Z
Framework agreement

1 contractor

X

RFP 1

Proposal X1

RFP 2

Proposal X2

RFP 3

Proposal X3

Mini-competition

Shortlist (X, Y, Z)

RFP 1

Proposal Y1

RFP 2

Proposal Y2

RFP 3

Proposal Y3

Proposal Z1

Proposal Z2

Proposal Z3

Publication

European Commission

FWA does not contain all contractual provisions

23/01/2019

Incomplete RFP

Proposal to RFP FWA

Publication +

W, G, S

Public procurement
European Public Procurement

- Challenges in ESIF-funds caused by the new public procurement rules
  - Right Choice of the contractual framework → complex contracting
  - No splitting of tenders based on available funding
  - Cross-border tendering
Amendments on contracts

Main rule
- A new public procurement procedure is necessary for modifications outside of those explicitly allowed by the Article 72(1) and (2). 72(5).

Any Change
- A contract/framework may change without re-advertisement in OJEU where:
  - The change is provided for in the initial procurement documents in a clear, precise and unequivocal review or option clause, which specifies the conditions of use and the scope and nature of the change; and the overall nature of the contract/framework is not altered.
  - The change is not “substantial” as defined in regulation 72(4).

Major Change *(regulations 72(1)(b), 72(1)(c) and 72(3))*
- A contract/framework may change without re-advertisement in OJEU where:
  - Additional works, services or supplies “have become necessary” and a change of supplier would not be practicable (for economic, technical or interoperability reasons) or would involve substantial inconvenience/duplication of costs (limited to 50% of original contract price); or
  - The need for the change could not have been foreseen by a “diligent” contracting authority, provided these changes do not affect the nature of the contract/framework or exceed 50% of the price of the original contract.
  - In these cases, the contracting authority must publish in OJEU a “Notice of modification of a contract during its term”.

Minor Change *(regulations 72(2))*
- A contract/framework may change without re-advertisement in OJEU where:
  - It is a minor change that does not affect the nature of the contract/framework; and
  - Does not exceed the relevant threshold; and
  - Does not exceed 10% (services or supplies) or 15% (works) of the initial value.

Corporate Changes *(regulations 72(1)(d))*
- A contract/framework may change without re-advertisement in OJEU where certain corporate changes have occurred in the supplier such as merger, takeover or insolvency, provided:
  - The new supplier meets the original qualitative selection criteria; and
  - Other substantial modifications are not made to the contract/framework.
Amendments on contracts

Need for modification/supplement

Modification or new contract

NPWP possible?

New Open tender

Negotiated procedure

New commitment

Revised Clause W/L/D Art. 38

Supplementary W/G/S Art. 71/1

Unforeseen circumstances W/G/S Art. 71/2

Replacement W/G/S Art. 71/3

Deminimis W/G/S Art. 71/4

Modification of quantities

Contractual modification

Supplementary commitment

Account/commitment

Budget

Ex ante Ex ante

Ex ante Ex post

Adm & Budg Ctrl
Recent case law in public procurement
Recent case law in Public procurement

- Qualification as a CA
- Dir 2014/24/EU

“a body which operates in normal market conditions, aims to make a profit, and bears the losses resulting from the exercise of its activity should not be considered as being a ‘body governed by public law’ since the needs in the general interest, that it has been set up to meet or been given the task of meeting, can be deemed to have an industrial or commercial character” (10)

“being financed for ‘the most part’ means for more than half, and that such financing may include payments from users which are imposed, calculated and collected in accordance with rules of public law”

ECJ, C-337/06 of 13th of december 2007, Bayerischer Rundfunk:
ECJ C-300/07 of 11th of june 2009, Hans & Christophorus Oymanns.
ECJ, C-337/06 of 13th of December 2007, Bayerischer Rundfunk:

1. There is financing, for the most part, by the State when the activities of public broadcasting bodies such as those in the main proceedings are financed for the most part by a fee payable by persons who possess a receiver, which is imposed, calculated and levied according to rules such as those in the main proceedings.

2. The first condition of the third indent of the second subparagraph of Article 1(b) of Directive 92/50 must be interpreted as meaning that, if the activities of public broadcasting bodies such as those in the main proceedings are financed according to the procedures set out when examining the first question, the condition of ‘financing ... by the State’ does not require that there be direct interference by the State or by other public authorities in the awarding, by such bodies, of a contract such as that at issue in the main proceedings.

ECJ C-300/07 of 11th of June 2009, Hans & Christophorus Oymanns.

1. There is financing, for the most part, by the State when the activities of statutory sickness insurance funds are chiefly financed by contributions payable by members, which are imposed, calculated and collected according to rules of public law such as those in the main proceedings. Such sickness insurance funds are to be regarded as bodies governed by public law and therefore as contracting authorities for the purposes of the application the rules in that directive.

2. If the provision of services is regarded as being more important than the supply of products in the contract in question, an agreement such as the one at issue in the main proceedings, concluded between a statutory sickness insurance fund and a trader, in which payment for the various types of service to be provided by the trader and the duration of the agreement are determined, with the trader undertaking an obligation to implement the agreement in regard to insured persons who ask him to do so and the abovementioned fund alone paying that trader for its services, must be regarded as a framework agreement within the meaning of Article 1(5) of Directive 2004/18.
Qualification as a CA

Dir 2014/24/EU

“In the case of mixed contracts, the applicable rules should be determined with respect to the main subject of the contract where the different parts which constitute the contract are objectively not separable” (11)

“In the case of mixed contracts which can be separated, contracting authorities are always free to award separate contracts for the separate parts of the mixed contract, in which case the provisions applicable to each separate part should be determined exclusively with respect to the characteristics of that specific contract.

On the other hand, where contracting authorities choose to include other elements in the procurement, whatever their value and whatever the legal regime the added elements would otherwise have been subject to, the main principle should be that, where a contract should be awarded pursuant to the provisions of this Directive, if awarded on its own, then this Directive should continue to apply to the entire mixed contract” (12)
Qualification as a CA

LitSpecMetUAB v. Vilnaus lokomotyvu remonto depas UAB

ECJ: “A company which was wholly owned by a contracting authority (whose activity consisted of meeting needs in the general interest) and which carried out both internal transactions for that contracting authority and transactions on the competitive market, is, subject to the certain conditions, to be classified as a ‘body governed by public law’, (...). The conditions were that the activities of that company were necessary for the contracting authority to exercise its own activity and, in order to meet needs in the general interest, that company was able to be guided by non-economic considerations, which it was for the referring court to ascertain”.
Qualification as a Public Procurement contract

- **Impresa Pizzarotti & C. SpA (C-213/13)**

  **ECJ:** “As the German Government has pointed out, it is also necessary, in order for it to be possible to conclude that there is a ‘public works contract’ for the purposes of Directive 93/37, that the execution of the planned work corresponds to the requirements specified by the contracting authority (judgment in Commission v Germany, EU:C:2009:664, paragraph 55).

- Such is the case where that authority has taken measures to define the characteristics of the work or, at the very least, has had a decisive influence on its design (see, to that effect, the judgment in Helmut Müller, C-451/08, EU:C:2010:168, paragraph 67).

- (...) it should be borne in mind in that regard that the decisive element for the purposes of the classification of the contract concerned is the main object of that contract, not the amount paid to the contractor or the arrangements for payment (judgment in Commission v Germany, EU:C:2009:664, paragraph 61)”.
In-house exemption

- Econord, C-182/11: “the in-house exemption applies where the contracting entity can demonstrate that it not only holds capital in that entity, but also plays a role in its managing bodies”

- Undis Servizi, C-553/15: “any activity ... which is devoted to persons other than those which control it, namely persons without any relationship of control in regard to that entity, including public authorities, must be regarded as being carried out for the benefit of a third party”
Transparency

- TNS Dimarso, C-6/15, 14 July 2016: disclosure of evaluation methods prior to opening of the tender?
  
  ECJ declared that there is no such obligation if there are circumstances that justify the impossibility of disclosure

  Awarding criteria cannot be altered after opening, nor the relative weighting

- Pizzo, C-27/15: “all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or specifications ...”.

Equal treatment/non-discrimination

- Pizzo, C-27/15: “the principle of equal treatment requires tenderers to be afforded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all tenderers must be subject to the same conditions”.
Exclusion/debarment and rejection of offers

- NC v Commission, T-151/16 (27 June 2017) – Self-cleaning
  “Although the contested decision shows that the remedial measures taken by the applicant were taken into account to determine the duration of the exclusion imposed, no reason is given in that decision as to why those measures were insufficient to satisfy the conditions for an operator that had taken certain remedial measures demonstrating its reliability not to be excluded from the contracts and grants of the Union” (para 58).

- Casertana Construzioni Srt v Ministerio delle Infrastrutture, (14 September 2017): a tenderer can be excluded when a member of its bidding consortium loses accreditation
Limits on obligation to provide reasons

- Prima vs Commission, T-722/14 (4 February 2016): “it is sufficient for the CA to forward to the unsuccessful tenderer, in addition to the name of the awardee, the respective scores of their offers under each of the award criteria and the comments underpinning those ratings, so as to allow said tenderer to understand what were the strengths and weaknesses of its offer and how the awardee’s offer defeated his” (para 37).

- Cofely Solelec v Parliament, T-419/15 (17 January 2017): contextual approach to the motivational duty (para 60): “there is no requirement that the decision should specify all the relevant elements of fact and of law. The sufficiency of the statement of reasons … may be assessed in the light not only of its wording but also of the context … It is sufficient that the decision expounds the main points of law and fact in a succinct but clear and relevant manner… Furthermore, where a decision has been adopted in a context which is well known to the person concerned, it may be motivated in a succinct manner”.

Patere legem quam ipse feciste

Connexxion Taxi Services, C-171/15:

Dutch authorities indicated that tenderers affected by exclusion grounds would be excluded without further assessment, and then relied on proportionality assessment not to exclude

ECJ insisted that the CA must comply strictly with the criteria which it has itself laid down in the tender documentation
GC and call-offs within framework contracts

- European Dynamics Luxembourg vs EMA, T-441/15:
  “”the present case differs from (T-498/11) in that ... in the present case, as regards the implementation of a multiple framework contract with cascade allocation, the specific contract has already been allocated according to the position of the economic operators in the cascade, without the need for any further competition between those (economic operators). Therefore, if the first economic operator is unable to provide the required service or not interested in doing so, the second best operator will be contracted. If the latter is unable to provide the required service or is not interested, then the third best operator will be contacted”” (para 24).
Awarding criteria and evaluation matrix

- TNS DIMARSO NV, C-6/15:

  Obligation for the contracting authority to specify in the call for tenders the **weighting of the award criteria**

  “In accordance with the principles governing the award of contracts provided for in Article 2 of Directive 2004/18 and in order to avoid any risk of favouritism, **the method of evaluation applied by the contracting authority in order to specifically evaluate and rank the tenders cannot, in principle, be determined after the opening of the tenders by the contracting authority**. However, in the event that the determination of that method is not possible for demonstrable reasons before the opening of the tenders, as noted by the Belgian Government, the contracting authority cannot be criticised for having established it only after that authority, or its evaluation committee, reviewed the content of the tenders.”

  “the authority is not required to bring to the attention of potential tenderers, in the contract notice or the tender specifications relating to the contract at issue, the method of evaluation used by the contracting authority in order to specifically evaluate and rank the tenders. However, that method may not have the effect of altering the award criteria and their relative weighting.”
Timing issues

- European Dynamics Luxembourg vs Joint Undertaking Fusion for Energy, T-553/13 (2 December 2015):

  “No obligation to complete evaluation within period of validity of offers; ‘the only consequence that may arise from that provision for the contracting authority is that it cannot oblige a tenderer whose tender has expired to sign and perform a contract based on the conditions set out in that tender” (para 27).
Cross-border problem regarding public procurement contract under the thresholds

Tecnoedi Construzioni Srl, C-318/15 (6 October 2016):

“As regards the objective criteria which may indicate certain cross-border interest, the Court has previously held that such criteria may be, in particular, the fact that the contract in question is for a significant amount, in conjunction with the place where the work is to be carried out or the technical characteristics of the contract and the specific characteristics of the products concerned. In that context, it is also possible to take account of the existence of complaints brought by operators situated in other Member States, provided that it is determined that those complaints are real and not fictitious (see, to that effect, judgments of 15 May 2008, SECAP and Santorso, C-147/06 and C-148/06, EU:C:2008:277, paragraph 31, and of 16 April 2015, Enterprise Focused Solutions, C-278/14, EU:C:2015:228, paragraph 20 and the case-law cited).”

(para 20)
Workshop Case studies
ESIF and Public procurement

- Procurement process in practice
- 4 questions:
  - Am I to apply this legislation (ratione personae)?
  - Is the subject of the contract to be considered as a public contract (ratione materiae)?
  - Is there an exception why I should not apply, partially or completely, the directive?
    - Other treaty/legislation
      - Exceptions mentioned in the directive (art. 8, 10 and 12)
  - What are the characteristics of the tender:
    - Qualification of the contract → W, G, S
      - Does it consider a social or other specific service (art. 74 e.f.)
    - Value of the contract
    - Technical specifications
    - Degree of urgency

Procedure and delays

This training has been organised by EIPA under the Framework Contract Nr 2018CE16BAT060. The opinions expressed are those of the contractor only and do not represent the EC’s official position.
ESIF and Public procurement

Workshop – Case 1

- You are an institution that organizes seminars, trade fairs, ...
- Your funding comes basically from Contracting authorities.
- You just gained an Interreg Northsea region (ERDF) grant for the organisation of an international seminar – 500,000 euro
- For this project you want to make a professional promotional clip that will be used on social media. After a market prospection, you estimate the price of the clip at 210,000 euro ex. VAT.

Q:

- Do you have to apply the directive 2014/24/EU?
- Which contract award procedure will you go for?
- Which publication rules will be applicable? Would these change if the estimated prices of the contract would be beneath the European threshold?
ESIF and Public procurement

- Workshop – Case 2
  - You are a hospital that just obtained a ERDF grant (50%) for the construction of a new hospital wing and accommodating facilities
  - The contract is planned to be executed in three phases: in 2017, 2018, and 2019.
  - ERDF had subdivided the project in three (financial) smaller project: 1.000.000, 1.500.000 and 500.000 euro

- Q:
  - Do you have to apply the directive 2014/24/EU?
  - Which selection and contract award criteria, and what procedure will be chosen?
  - Which publication rules will be applicable?