

Bidmanagement in action: New European Public Procurement Directives expected in 2014

APMP meeting 29 November 2012
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Introduction

- ▶ Invitation: thanks!
- ▶ Scope of this lecture: European not national procurement
- ▶ Central theme today: implications of new D 2014 for Bidmanagers in a broader context
- ▶ Today not about insourcing, public-public assignments

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Agenda

- ▶ **History and context EU and single market**
- ▶ **History of procurement directives and development of 'public bidmanagement'**
- ▶ **D 2014 versus D 2004: implications for bidmanagers jurisprudence**
- ▶ **Time frame towards transposition**

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History and context: chronology

- ▶ **Inseperable connexion with European integration and single market policies**
 - 1951: Paris Treaty to establish European Community for Coal and Steel between West-Germany, France, Italy, BeNeLux
 - 1957: Rome Treaty to establish European Community for Atomic Energy and European Economic Community
 - 1968: Customs Union ending internal customs taxes and trade tariffs between member states
 - 1986: Single European Act to establish an internal market without frontiers
 - 1992: Maastricht Treaty: Single European Market realised

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History and context: policy movements

- ▶ **Chronology inseparable with policy development**
 - 40's–50's: pacification: EEC
 - 50's–60's–70's: negative integration:⁽¹⁾ Ending trade barriers
 - 80's–90's: positive integration:⁽¹⁾ Single Market
 - 90's–00's–10's: framing integration:⁽²⁾ Domestic change in thinking towards EU empowerment
 - 10's–20's: Consolidation?

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History of procurement directives

- ▶ **1962/1966/1970**
 - First attempt against protectionism in supplies and against forbidding foreign products (J.O. 36/32, 66/683, 70/32).
 - Official Journal and transparency⁽³⁾
- ▶ **1971/1977/1980**
 - First directive for works (71/305),
 - Principles of non-discriminative specification (1977)
 - Community wide publication and objectivity introduced (77/62)
 - 1980: GATT agreement: thresholds, outside Community access, defense

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History of procurement directives

- ▶ **1985/1986, Single Market White Paper and Single Market Act:**
 - Turning point: government procurement recognized as essential for tackling protectionism and favouring national champions, free non barrier trade essential and active enforcement
- ▶ **1988/1989**
 - Open procedures the norm, negotiating only by exception, publishing opportunities in advance, awarding decisions to be published, concessions in scope as well as utilities harmonized under influence of liberalization (88/295, 89/440, 90/351)
- ▶ **1992**
 - Maastricht treaty Single Market completed, first services directive and introduction design contest (92/50)

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History of procurement directives

- ▶ **1993**
 - Supplies, Works, Utilities rules consolidated in 3 directives (93/36/37/38)
- ▶ **2004**
 - Simpler, clearer: only 2 directives: 2004/17 for utilities and 2004/18 for rest of public sector: Works, Supplies and Services
 - Introduction of competitive dialogue and framework agreements

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New Directives 2014: why?

- ▶ **General: Lissabon strategy for modernisation and stimulating employment toards 2020⁽⁵⁾**
 - Simplification and less rigid rules
 - Stimulating SMO participation
 - Responding to policy related subjects on sustainability (green and social), life cycle costs
 - Battling corruption, optimal spending of government money and improving compliance with directives
 - Present D 2004 have obtained their objectives for transparency, lower pricing and increased competition

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D2004 <> D2014

- ▶ **3 new directives proposed**
 - Classic government (COM(2011) 896)
 - Utilities (COM(2011) 895)
 - Concessions (COM(2011) 897)
- ▶ **Present**
 - Classic government (2004/18)
 - Utilities (2004/17)

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D2004 <> D2014

- ▶ **Utilities: framework agreement of 4 years**
- ▶ **Classic/utilities: direct payment of sub-contractors**
- ▶ **New directive for concessions**
 - Works = /+ 5.000.000
 - Services = /+ 2.500.000
 - Notification afterwards, EU principles applicable (Parking Brixen ECJ-C-458/03)
- ▶ **Local and regional ('lower') governments: no tender obligation anymore, only 'local' previous announcement**
- ▶ **Promoting SME participation leads to obligation to use as many parcels as possible**
 - Comply or explain why not separating a parcel
- ▶ **Changes after the awarding > retendering yes/no? (e.g. Contract, significant amendment, C-454/06 Priesstext, change = max 5%, amount below threshold or: unexpected circumstances and assignment unchanged and delta in pricing below 50%**

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Independent supervisory authority

- ▶ **Checks**
 - Correct application of procurement rules
 - Advisory board on public procurement
 - Discovering fraud, corruption
 - Complaints of every body that wants to complain accepted
- ▶ **When applicable**
 - Contract documents of all awards:
 - Works = /+ 10 M Euro
 - Supplies/services = /+ 1 M Euro
- ▶ **Doubts: ask clarification**

!Less possibility for subjective awarding, more bids to win!

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Less red tape for bidmanagers

- ▶ **Own declaration/passport containing:**
 - Chamber of Commerce data
 - Professional membership, applicable licenses
 - Declaration for exception grounds not applicable
 - To be issued by national authorities
 - E-Certis database with supplier info: trusted, cross border and e-procurement⁽⁴⁾
 - Own declaration on financial data and professional qualities allowed, can be checked, evidence can be asked, but no documents can be asked that have already been supplied to procuring agency less than 4 years ago
- ▶ **Digital publication of tenderdocuments obligatory and 2 years after transposition e-tendering obligatory**
- ▶ **Minimum validity 6 months**

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No division between A and B services anymore: window of opportunity

- ▶ **Tenderobligation and rules apply above thresholds but:**
 - Exception for health, education, social insurances, social services and union services:
 - =/+500.000 Euro excl VAT, tender and PIN and AN obligatory, free procedure choice and transparency and non discrimination

!More tenders: more bids: more winning!

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New procedure and shorter *minimum* period to deadline

- ▶ **Innovative partnership introduced**
- ▶ **Public procedure: 40 days and urgent: 20 days**
- ▶ **Non-public: selection phase 30 days and tender phase 35 days**
 - Lower governments light regime: Only PIN with sufficient info on opportunity, awarding with non-public procedure or negotiation without prior notice out of subscribers known, within 12 months
 - In cooperation with subscribers deadline for submission to be established with minimum of 10 days
- ▶ **Negotiating procedure with prior announcement: selection phase 30 days and tender phase 30 days**
- ▶ **Competitive dialogue: selection phase 30 days and no minimum period for tender phase**
- ▶ **D 2004: 37, 40 and 52 days**
- ▶ **Other procedures unchanged + digital catalogue, digital auction**

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Negotiating and dialogue procedures

- ▶ **Grosso modo no changes in D 2014 versus D 2004**
- ▶ **Competitive dialogue and negotiating procedure with announcement**
 - Still a very complex assignment to justify usage but also:
 - Unacceptable or irregular subscription, special circumstances need negotiations (Was: very complex assignment)
 - Works: negotiations necessary due to nature of assignment, financial and legal conditions
 - Works: research and try out without profit purpose
 - Services and supplies: Technical specifications difficult to establish
 - 30 day minimum subscription period
 - No changes allowed in assignment itself only in content
 - Confidentiality.
- ▶ **Dialogue: ends with tender for selected subscribers (Question leading), negotiating ends with BAFO possibility (Offer leading)**

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Agreements, turn over demands, awarding criteria

- ▶ **Difference between framework contract (binding) and framework agreement (intention) unchanged**
- ▶ **Turn over: Max 3 times Y turn over per parcel/per assignment**
- ▶ **Tender value 500K+: division in parcels strongly recommend, if not explain**
- ▶ **Ability: Staff, technical, experience, reliability allowed for services and works *not* for supplies, can be taken into account if in relation with the assignment**
- ▶ **Demands must be in direct relation to the assignment to be valid**
- ▶ **Checking awarding criteria first and than selection criteria allowed**
- ▶ **Past performance as exclusion criterium allowed**

!Excellent offer helps supporting weak references or past performance!

3 Awarding criteria: more criteria helps bidmanagers

- ▶ **1. Lowest price**
- ▶ **2. Life Cycle Cost (LCC) new in D 2014 (sustainability)**
 - All costs during LC can be included:
 - E.g.:project, transition, energy, insurance, environmental costs can be included on condition that:
 - Data/can be checked in an objective non discriminating way
 - Establishing value in money must be possible
 - For repetitive application and based on scientific data
 - Access for all involved
- ▶ **3. EMAT**

!Opportunity to 'sell' a higher price based on LCC!

Summary: main changes between 2004 and 2014

- ▶ History>policies>SEM>Directives
- ▶ Less rigid (e.g.:lower government)
- ▶ Selection criteria can be used as awarding criteria (e.g. professionalism and experience)
- ▶ Negotiating and competitive dialogue: no changes in applicability
- ▶ Introduction of Past performance and Life Cycle Costing
- ▶ *General conclusion: no big changes, different words, codification of jurisprudence and measurability improved*

Time frame for transposition of new procurement directives 2014

- ▶ 30 June 2011: European wide conference on new PP directives
- ▶ 20 December 2011: publication of concept new directives
- ▶ Council of ministers
- ▶ European Parliament: intensive lobbying by member states resulted in 2600 amendments to change the concept D 2014
 - Lobbyists produce amendments on the amendments
 - Example amendment SME: allow subcontractors from own region to be contracted *after* the tenderperiod as well
 - Example amendment: all procedures to be transposed obligatory
- ▶ Next session EP 16 April 2013> first reading
- ▶ Accepted by EP 1 July 2013?
- ▶ Transposition period of 2 years
- ▶ Earliest possible date transposed: 1 July 2015
- ▶ 2 years to e-tendering obligatory: 1 July 2017 earliest (EC: 2016 ⁽⁴⁾)

Addendum: references

- ▶ (1): Tinbergen, J. (1965). *International Economic Integration*. Amsterdam: Elsevier
- ▶ (2): Knill, C. and Lehmkuhl, D.(1999). How Europe Matters. Different Mechanisms of Europeanization. *European Integration Online Papers* 3(7)
- ▶ (3): Bovis, C.H. (2007). *EU Public Procurement Law*. Cheltenham: Edward Elgar Publishing
- ▶ (4): European Commission (2012): *Strategy for e-procurement*, COM(2012) 179 final. Brussels: European Commission
- ▶ (5): European Commission Press release IP/11/1580