

Daniela PIRVU
University of Pitesti
Claudia TOLEA
University of Pitesti

THE REFORM OF THE EUROPEAN PUBLIC PROCUREMENT SYSTEM

Theoretical
articles

Keywords

Public procurement
Reform
Rules

JEL Classification

H50, K40, M20

Abstract

The European public procurement system has a major role in ensuring the efficient spending of the public money and in promoting economic competitiveness. The legislative bases of the system are represented by harmonized European regulations, which aim to facilitate the application of the principles and freedoms enshrined in the EU Treaties. This paper presents the main aspects of the reform of the European public procurement system, aiming to make the procedures for awarding public contracts more transparent and open to all European companies and to streamline public spending for the procurement of goods, services and works.

1. Introduction

Public procurement has an important role in achieving the objectives of the Europe 2020 Strategy. According to the European Commission (2010), Public Procurement "is an important market, particularly in areas such as health, transport and energy. So, Europe has an enormous and overlooked opportunity to spur innovation using procurement. Moreover, public procurement of innovative products and services is vital for improving the quality and efficiency of public services at a time of budget constraints". Three of the 50 proposals made by the European Commission (2011a) to ensure a fair and sustainable business growth, to restore confidence in the single market and to ensure a good governance of the single market aim the EU public procurement legislation and market. In 2011, the European Commission stated that "EU public procurement legislation seeks to create an open and competitive pan-European procurement market for large procurement contracts, saving taxpayers several billion euros each year. At the same time, public procurement can be an important source of support for innovation, environmental protection and employment" (European Commission, 2011a). The economic, social, political and budgetary developments in recent years have led to the need to reform the public procurement regulations, primarily to make them simpler and more effective for the participants in the public procurement market and secondly to ensure greater efficiency in public spending, in compliance with the principles of transparency and competition.

The need for reform of the EU public procurement market is also determined by the numerous difficulties encountered, especially by small and medium enterprises, to access public contracts, reported in the literature (DG Enterprise and Industry of the European Commission, 2007; Karjalainen and Kemppainen, 2008; Vincze et al., 2010). Among these there are:

- lack of knowledge about the content of public tender procedures;
- high costs for the preparation of tenders;
- the large size of public contracts which basically excludes small and medium enterprises from the competition;
- the excessive bureaucracy related to the certification and qualification requirements;
- excessive demands regarding financial guarantees;
- favouring the local/national economic operators;
- making late payments for goods delivered or services and works performed by the contracting authorities, etc.

The study entitled "EU public procurement legislation: delivering results. Summary of evaluation report", conducted in 2011 by the

Directorate General for Internal Market and Services of the European Commission, reveals the complexity of European public procurement system which generates, under certain circumstances, disproportionately high costs of the procedures, compared to the expected benefits. The conclusions of the study highlight the need to reduce administrative costs of the public procurement process and to reform the EU law on public procurement in order to stimulate contracting authorities to integrate into their practices social or environmental policy objectives (Directorate General for Internal Market and Services of the European Commission, 2011).

A first step in achieving the objectives of the European Commission was the publication of the Green Paper on the Modernisation of EU public procurement policy which explained the milestones of the modernization of the European public procurement legislation (European Commission, 2011b).

In February 2014 the European Parliament and the EU Council adopted a new legislative package on the legal regime applicable to public procurement and concessions in the EU Member States, comprising:

- Directive 2014/2/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 / EC;
- Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts;
- Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

EU Member States have at their disposal a period of 2 years to transpose these rules into national law.

2. New aspects introduced by the new legislative package on public procurement

A. Simplifying the public procurement procedures on order to make them more flexible both for the contracting authorities and for the economic operators (especially SMEs), through:

The enhancement of the use of electronic public procurement systems

According to Article 59, when submitting the requests to participate or the tenders, the contracting authorities will accept from the economic operators an affidavit (the European single procurement document), which shows that the conditions required by the contracting authority for the award the public contract are met. Subsequently, the successful economic operator shall submit all the documents proving that it qualifies for the award of the public contract.

Article 53 stipulates the obligation of the contracting authorities to provide free direct, total and charge-less access through the electronic means, to the procurement documents.

The new directive requires the contracting authorities to use e-Certis system (e-Certis is an information system that indicates the documents and certificates required by the companies submitting tenders in order to obtain public procurement contracts in the European Union member countries.) and to require especially those types of certificates or forms of documents that are included in the respective system. The Member States have the obligation to make sure that the information related to the certificates and other supporting documents introduced into e-Certis are continually updated.

These legislative changes will generate more efficient public procurement procedures both for the economic operators, who will reduce their expenses related to obtaining the procurement documents and to the preparation of the qualification and selection documentation, and for the contracting authorities who will no longer have to use personnel for the multiplication and distribution of the procurement documents or documentation for the verification of the qualification and selection documentations.

More flexible public procurement procedures

The new European legal framework on public procurement provides contracting authorities with more freedom in choosing the type of procedure that best meets their needs. In this context, the procedures that involve negotiation have become more flexible and can be used by contracting authorities in many more situations.

For example, if, according to Directive 2004/18/EC, the competitive dialogue procedure could be applied only if the public procurement contract was considered "very complex" and the negotiation procedure only in exceptional or special cases ((irregular tenders or in the case of the submission of tenders which are unacceptable, the impossibility of previously or globally establishing prices for works that are performed solely for research, testing or development, etc.), Article 26 of Directive 2014/24/EU provides that these procedures can be applied if the needs of the contracting authorities can only be satisfied by adapting the solutions already available for works, goods or services for which, following an open or a restricted procedure, only irregular or unacceptable tenders were submitted or in the case of the following works, goods or service contracts:

- Those that include design solutions and innovative solutions;
- Those which cannot be awarded without prior negotiations due to specific circumstances related to the nature, complexity or legal and financial structure or because of risks related thereto;

- Those where technical specifications cannot be defined with sufficient precision.

It is noted that the competitive dialogue is accessible to the contracting authorities under the same conditions as the competitive procedure with negotiation.

Completion of legislative provisions concerning the reasons for the exclusion of the economic operators

The provisions of Article 57, entitled "reasons for exclusion" provides the contracting authorities the possibility to get better protection against the situations where economic operators fail to fulfil their contractual obligations. Thus, the new legislative framework provides that contracting authorities may exclude from participation in a public procurement procedure, those economic operators that have shown significant or persistent deficiencies in meeting any substantive requirement provided in a previously concluded public procurement contract, a contract previously entered into with a contracting entity or a previous concession contract that led to early termination of that previous contract, liquidated damages or other comparable penalties.

It is obvious that the new legislative provisions provide contracting authorities with more effective instruments for satisfying the needs and requirements for the procurement of goods, services and works.

B. Increasing the efficiency of public expenditure for the procurement of goods, works and services by:

Obtaining the best possible price/quality ratio in the public procurement process

The new EU legislative package concerning the public procurement focuses on achieving the best possible price/quality ratio in the public procurement process. The section regulating how public contracts are awarded only refers to a single awarding criterion: the most advantageous tender from the economic point of view (as opposed to the Directive on public procurement of 2004, which stipulated the possibility of awarding contracts public based on the lowest price criterion). Member States are even recommended to forbid to contracting authorities to use cost or price as the sole criterion for the award. Given that in recent years the lowest price represented award criterion the most frequently used by the contracting authorities, this provision will completely change the spending of public money for the procurement of goods, works and services.

According to Article 67, the most advantageous tender from the economic point of view is the tender offering the best price/cost ratio and the quality, innovation, environmental and/or social aspects, related to the object of the public procurement contract. The cost element was approached in a distinctive manner, stating that it

can be determined as life-cycle cost of the good, service or work, taking into account:

- The costs incurred by the contracting authority (the purchase cost, the cost of use, the maintenance cost and the costs at the end of the life cycle, such as the collection and recycling costs);
- The costs determined by the environmental effects (the effects of the greenhouse gas emissions or of other pollutants) and other costs of climate change mitigation.

Strengthening the measures to combat favouritism and corruption

Directive 2014/24/EU clearly defines the concept of "conflict of interest", providing the Member States with the legislative framework required to prevent, identify and address situations that could distort competition. According to Article 24 of the Directive, the concept of conflict of interest covers at least any situation where the members of the staff of the contracting authority or of a procurement service provider acting on behalf of the contracting authority who are involved in the completion of the public procurement procedure or who can influence its outcome have, directly or indirectly, a financial, economic or other personal interest that could be perceived as compromising their impartiality or independence in the context of the public procurement procedure.

The economic operators who have been convicted by a final judgment for the exercise of an undue influence on the public sector employees will be excluded from participation in a public procurement procedure.

Article 72 of the Directive sets out very clearly the circumstances which allow for the change of the contract during its validity term, so as to avoid the cases where economic operators bid low prices, relying on subsequent the supplementation of the value contract, thus affecting the free competition on the public procurement market.

C. Emphasizing the role of public procurement in achieving social and environmental policy goals, through:

The introduction of a special procurement regime in the case of contracts whose object is represented by social and other specific services

The award of the contracts whose object is represented by social and other specific services (According to Annex XIV to Directive 2014/24/EU, these services are related to: health services, social and ancillary services, social administrative services, education services, and cultural services, mandatory social security services, benefit services, community services, social and personal services, including services provided for trade unions, political organizations, youth organizations, and various services provided by associative organizations, religious services, hotel and restaurant services, legal services, other administrative and governmental services, services

provided for the community, penitentiary- related services, public safety and rescue services, investigation and security services, international services, postal services, various services) will be made based on a special purchase regime. Thus, Article 76 specifies that national regulations for awarding such contracts shall observe the principles of transparency and equal treatment of economic operators, but will take account of the need of the contracting authorities to ensure the quality, continuity, accessibility, availability and comprehensiveness of social services and other specific services. At the same time, the national regulations will take into account the specific needs of various categories of users, especially those of the disadvantaged and vulnerable categories, will ensure the involvement and accountability of the beneficiaries of social/specific services and will stimulate innovation.

Article 77 of Directive 2014/24/EU stipulates that the contracting authorities may reserve the right of certain organizations to participate in procedures for the award of public contracts intended solely for the following health, social and cultural services: education and training services; other administrative services and government services; domestic staff provision services; medical staff and healthcare provision services; insurance medical personnel provision services; pre-school services; higher education services; various school services; e-learning services; staff training services; training devices; pedagogical support services; health services and welfare services; community health services; services provided by libraries, archives, museums and other cultural services; sports services; services provided by social membership organizations; services provided by youth associations.

In this respect, the respective organizations must meet the following conditions:

- To aim at pursuing a public service mission, related to the provision of health, social and cultural services;
- Profits should be reinvested in order to achieve the objective of the organization. If profits are distributed or redistributed, this should be based on considerations related to the participation;
- The management or capital structure of the organization performing the contract should be based on the principle of the employees' participation to the capital or require the active participation of employees, users and stakeholders;
- The organization has not been awarded a contract for the services concerned by the contracting authority under Directive 2014/24/EU in the last three years.

Facilitating a better integration of the environmental considerations into the public procurement procedures

The new rules stipulate that the technical specifications of the products, services or works constituting the object of the procurement procedure will be formulated *inter alia*, in terms of performance or functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise to allow tenders to determine the object of the contract and to allow contracting authorities to award the contract. If they intend to purchase works, supplies or services with particular environmental characteristics, the contracting authorities may require ecolabels in the technical specifications, in the award criteria, or in the contract performance conditions, and have the opportunity to take into account the environmental factors during life of the products, services or works purchased.

Supporting the implementation of the social inclusion policies

According to Article 20 of Directive 2014/24/EU, Member States may reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged persons or may provide that such contracts be performed in the context of sheltered employment programmes where at least 30% (compared with the percentage of 50% laid down in the 2004 Directive) of staff of the workshops, economic operators or programmes are disabled or disadvantaged workers.

Stimulating innovation

Article 31 of Directive 2014/24/EU introduces a new procedure for the award of public procurement contracts, called the innovation partnership. Thus, the contracting authorities are able to establish innovation partnerships with one or more partners that carry out separate research and development activities. The innovation partnership aims at developing an innovative product, service, or innovative works and the subsequent acquisition of resulted goods, services or works, provided that they correspond to the maximum performance levels and costs agreed between the contracting authorities and the participants.

D. Facilitating the access of SMEs to the public procurement market

The new European legislation on public procurement encourages the award of public procurement contracts as separate lots. Due to the fact that between the amount/complexity of a public procurement contract and the technical and financial capacity of the economic operator performing the contract there is a directly proportional relationship, SMEs will have more chances in the competition existing in the public procurement market if the contracting authorities will opt for allotments contracts.

In response to signals from the representatives of small and medium enterprises, related to the too

stringent requirements related to the economic and financial capacity, which constitutes an obstacle to their participation in public procurement procedures, the new directive limits the minimum annual turnover of operators required by the contracting authorities. Thus, it should not exceed twice the estimated value of the contract, except in duly justified cases such as those involving special risks related to the nature of the works, services or products.

3. Conclusions

The new European legislation on public procurement brings many changes and clarifications that should help both operators and contracting authorities in the development of a more effective public procurement process. The same time, this legislation clearly states the role of public procurement as an instrument of economic, social and environmental policy. In this respect, we should mention the effort of the EU officials to identify solutions to increase the transparency and efficiency of public financial resources, to reduce bureaucracy in the procedures for the award of public procurement contracts and to facilitate the access of SMEs to the public procurement market. Several provisions of Directive 2014/24/EU of the European Union reflect the interest for research and innovation, including eco-innovation and social innovation, these being the main drivers of the future growth of unique, smart, green and inclusive market, being inscribed at the heart of the Europe 2020 Strategy.

However, in my opinion, the new package does not clarify all the uncertainties and does not fully resolve the issues related to the complexity of the European public procurement system. Probably, after the transposition of Directive 2014/24/EU into the Member State laws difficulties will be reported in interpreting actual situations. It should also be noted that in a negative sense that there are too many issues where the Member States may individually determine implementing rules. In this context, the legislative differences between Member States will stimulate public cross-border procurement.

Acknowledgements

This paper was co-financed from the European Social Fund, through the Sectorial Operational Programme Human Resources Development 2007-2013, project number POSDRU/159/1.5/S/138907 "Excellence in scientific interdisciplinary research, doctoral and postdoctoral, in the economic, social and medical fields -EXCELIS", coordinator The Bucharest University of Economic Studies.

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