



Europe renews its policy on public procurement matters: procedures become more agile, accessible and electronic

Some of the provisions of Directive 2014/24/EU will have direct effect in Spain starting from 18 of April

Directive 2014/24/EU of the European Parliament and of the Council on public procurement of 26 February 2014 replaces the former Directive 2004/18/EC, which shall be repealed as of 18 April 2016.

On 18 of April is also the deadline set by the Directive for all Member States to adapt their respective domestic legal systems in order to comply with the provisions of the Directive.

The Directive seeks to modernize the applicable legislation on public acquisition of works, supplies or services, and to establish a more adequate framework for the compliance of the objectives of the European Union (“EU”) on public procurement matters, which are:

- to make the awarding procedures more flexible and appropriate to the needs of the contracting authorities, and
- to facilitate the participation of small and medium sized enterprises (SMEs) in public procurement.

In general and in order to cover both objectives, we highlight the following aspects of the Directive:

- it increases the awarding procedures and it makes the current ones more flexible;
- it establishes preliminary market consultations as an instrument of particular value for contracting authorities to prepare

their invitation to tender and to inform economic operators about their plans and their procurement requirements;

- it reduces the requirements which are imposed on the economic operators to attest their solvency in a tender, through the encouragement of the use of responsible statements and electronic certifications;
- it strengthens the use of electronic media for communication and for the exchange of information in the procurement procedures and it notably increases the provisions in electronic procurement matters; and
- it introduces the concept of “best price-quality ratio” to determine the most economically advantageous offer.

Awarding procedures

As pointed out, the Directive tries to implement more flexible awarding procedures, and for that reason:

- the relevance of open and restricted procedures is reduced;
- the Directive promotes the use of the negotiated procedure increasing the cases in which it can be applied;
- the periods for the reception of offers are reduced; and



- the use of electronic systems for communication and procurement is promoted; and
- a new procedure called innovation partnership is regulated. It is thought for the contracting authorities to have a procurement tool which allows them to satisfy their needs in connection with the development and subsequent acquisition of innovative products, services or works, the demand of which can not be satisfied by the market.

Preliminary consultations

The Directive introduces the novelty of preliminary market consultations as a mechanism for the contracting authorities to receive and obtain information of the economic operators with a view to prepare future procurements.

Using the preliminary consultations, the contracting authorities will also be able to inform the economic operators about their procurement plans and requirements.

The contracting authorities shall be able to request or accept the counseling of private operators as long as said counseling does not have the effect of distorting competition or leads to infringements of the principles of equal treatment and transparency.

Therefore, when a candidate or tenderer -or a company linked to a candidate or to a tenderer- has counseled the contracting authority in the framework of preliminary market consultations, the latter shall take the adequate steps to ensure that the participation of that candidate or tenderer does not distort competition, such as:

- informing the rest of the economic operators (candidates or tenderers) about the relevant information exchanged within the participation of the candidate or tenderer in the preparation of the procurement procedure or as a result of such preparation; or
- establishing appropriate periods for the reception of offers.

Electronic procurement

The Directive makes electronic systems the standard method for the communication and exchange of information, establishing the following general parameters for their use:

- the tools and devices, as well as their technical characteristics, shall be non-discriminatory, generally available and inter operable with the ICT products for general use and shall not restrict economic operators' access to the procurement procedure.
- the compulsory use of electronic means shall not apply in specific situations related to the submission of offers. Among others, when: i) due to the specialized nature of the procurement, the use of electronic means would require specific tools or file formats that are not generally available, or ii) communication would require specialized office equipment that is not generally available to the contracting authorities;
- the use of electronic communication media should take accessibility for persons with disabilities into due account.
- after the award takes place, no elements of the public procurement process of the contract should be subject to the obligation



of using electronic means, nor should internal communication within the contracting authority be subject to such obligation;

- contracting authorities are allowed not to use electronic means of communication where it is necessary in order to protect the particularly sensitive nature of an information;
- it is possible to make oral communications, provided that they are documented to a sufficient degree and that they do not affect matters related to the essential elements of the tender procedure;
- where necessary, it shall be possible to demand the economic operators to use tools and devices which are not generally available, provided that the contracting authorities offer alternative means of access.

European single document

The Directive considers that the obligation that tenderers have to produce a substantial number of certificates or other documents related to the solvency and selection criteria represents an obstacle for economic operators to participate in the public procurements, and especially for the SMEs.

To solve this problem the Directive introduces the European single procurement document which, in essence, consists in a formal declaration of the interested party in order to attest his capacity and solvency.

The European single procurement document will replace the certificates issued by the public authorities or by third parties, for the purposes of confirming that the tenderer complies with the following conditions:

- that he does not find himself in any of the instances of exclusion;
- that he complies with the selection criteria related to the suitability to exercise the activity in question and to the economic-financial and technical-professional solvency;
- in restricted procedures, that it complies with the rules and objective criteria that have been set forth in order to reduce the number of candidates, offers and solutions;
- if solvency can be confirmed by external means, the document shall also contemplate the relevant information about the entities regarding the capacity of which the economic operator depends on.

Furthermore, the European single procurement document shall have the following characteristics:

- it shall be only offered in electronic format;
- the economic operators shall be able to reuse it for other procurement procedures, as long as they confirm that the information contained in it is still correct;
- it shall be written following the form approved by the Regulation of the European Council 2016/7 of 5 January 2016.

Furthermore, according to the Directive the tenderers shall not be obliged to present supporting documents or other documentary evidence in the event that:

- the contracting authority has the possibility to obtain the relevant certificates or infor-



mation by directly accessing a national database from any Member State of the European Union which can be consulted free of charge.

- the contracting authority which has awarded the contract or entered into a framework agreement already has said documents, provided they are still valid.

Best price-quality ratio

In order to avoid the confusion caused by the concept of the “most economically advantageous tender”, the Directive introduces new terminology to refer to the criteria which shall be used for the awarding of contracts: the “best price-quality ratio”.

Regarding this new concept, the Directive sets forth that the most advantageous economical offer, from the point of view of the contracting authority, shall be determined based on the price or the cost, “using an approach that takes into account the cost-effectiveness relationship, as well as the life-cycle cost, and which will include the best price-quality ratio, which will be determined according to various aspects”.

Therefore, in order to better assess the best price-quality ratio, the contracting authorities must determine the economic and quality related criteria related with the object of the contract.

The Directive suggests a non-exhaustive list of possible awarding criteria which may be used to evaluate the best price-quality ratio:

- *quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions;*

- *organization, qualification and experience of the staff assigned to perform the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract;*
- *after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.*

Furthermore, to facilitate the choice of the contracting authorities, the Directive also provides that:

- the cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only;
- Member States may provide that contracting authorities may not have the power to use price only as the sole award criterion and they may even restrict the use of such criterion to certain categories of contracting authorities or to certain types of contracts.