The Revision of the Public Procurement Directives

In light of the coming revision of the public procurement directives the Finnish, Swedish and Danish central purchasing bodies: Hansel, Adda and SKI have drafted this position paper. It outlines our most important joint considerations and potential solutions. All proposals refer to articles in directive 2014/24/EU unless specifically stated otherwise.

A. About legal techniques and remedies

We propose that the

- concessions directive (2014/23/EU) is used as a conceptual basis when developing a single directive for public and utilities procurements,
- European legislators consider regulating the necessary details in regulations or standards that are easier to amend than directives.
- European procurement regulation should only regulate how to buy, and
- European legislators consider reviewing the remedies directives with the purpose to secure efficient public procurements with a better suited, efficient and uniform European procedure for complaints.

Reasoning

The public procurement directives have been reviewed roughly every decade for the past thirty years. It has been a goal to simplify them but regretfully seldom the outcome. Instead, the directives reflect an underlying distrust of all procuring organizations that require their processes to be micromanaged. Micromanagement of the procuring organizations through legislation is from our point of view counterproductive and, in the end, inhibit us from pursuing several of the goals set out by the European Union.

We are of the opinion, that focus should be on directives with fewer rules, and as for the rules that remain, they should focus on the public procurement process and ensuring that the fundamental principles of equal treatment, transparency and proportionality are respected.

We propose that the necessary details, e.g. the content of future contract notices, should be easier to regulate (in regulations or standards). The technical development and use of purchase data, incl. AI, will cater for new and smarter solutions. The directives are too inflexible and will hamper the development of best practice and simplification, hence the competition in the internal market.

It is essential, that the revised procurement directives regulate HOW to buy. We are all working with strategic interests such as environmental and social sustainability, security of supply, trade policy (IPI), etc. It is our experience that detailed regulation concerning specific products and services are best kept in sector-specific legislation. Partly because further complication of the procurement rules is thereby avoided, partly because sector-specific “needs” risk evolving much faster than the public procurement legislation can be reviewed. We would however like to stress that it is important that the procurement directives clearly allow us to take such considerations into

account. It should also be noted that sector specific legislation, affecting public procurement procedures, must be in line with public procurement directives.

We would also like to draw attention to the need to reform the remedies directives in order to improve efficiency and speed of litigation procedures in the Member States.

B. Simplification

1. Deregulate the procurement procedures

We propose that

- contracting authorities shall have the freedom to organise the procedure leading to the award of contract or framework agreement. The design of the award procedure shall respect the fundamental principles of equal treatment, transparency and proportionality,
- contracting authorities may allow dialogue about the tenders during the procedure, and
- if the present regulation is kept, the restrictions on using competitive dialogue and competitive procedure with negotiation are removed.

Reasoning

The most used open and restricted procedures have the obvious disadvantage that the contracting authority's room for maneuver is very limited. This results in procedures not adapted to the particular market that the procurement concerns, unnecessary administrative burdens for both contracting authorities and economic operators and it hampers the digitalization of procurements, incl. the use of AI. The proposal is modelled on article 30 of the concession's directive

Errors or unclear aspects in tenders is the case in almost every procurement process. Incomplete or unclear tenders often leads to their rejection. To our experience it is often but not always SMEs that are affected. Clarifications alone are often insufficient, as economic operators might have misunderstood the procurement documents or have included errors in their tenders. The limited scope for dialogue during open and restricted procedures, prevents contracting authorities from allowing amendments to tenders. The competition suffers and contracting authorities may have to exclude the best tender.

If our main proposal is to be *innovative,* we would like to propose that all restrictions concerning *the use* of competitive dialogue and competitive procedure with negotiation should be removed. It will to some extent increase flexibility and put an end to the legal discussions on their use.

2. Modification of published tender material

We propose

- a wider access for changes to the published tender material, including removing arbitrary distinctions between "significant" and "fundamental" changes, and allowing broader modifications as long as they are transparently communicated, and time limits for submitting tenders are extended.

Reasoning

The scope of the contracting authority's right to change already published tender material is relatively unclear. The limits are not directly regulated in the directive, which in itself gives rise to uncertainty about the changes that may be made. The limits are derived from the principles of the TFEU, in particular the principles of equal treatment and transparency. These principles have subsequently been interpreted by the Court of Justice of the European Union[1].

Our experience is that this has led to discrepancy in interpretation across countries, and that the current legal interpretation in Finland and Denmark in this regard does not support the purpose of the directive to simplify and reduce transaction costs for both tenderers and contracting entities.

Technological developments over the past decade have changed the playing field. Today, all tender materials are available electronically, and it is simple to ensure that information about changes is published immediately and to everyone interested. This contributes to ensuring equal treatment and transparency. This should lead to a significant release of the possibilities for changing the tender materials after publication. It is technically possible already to support a very high degree of transparency that meets suppliers' need to determine whether or not they have an interest in a procurement procedure in full knowledge of the facts. Additional technical solutions could undoubtedly support this to an even greater extent.

It seems unnecessarily formalistic for (some) contracting entities to be repeatedly forced to cancel procurement procedures due to risk considerations, in a situation where all tenderers and interested parties can follow everything that takes place and at the same time adapt to the changes if appropriate time limit extensions are granted.

We see an obvious opportunity with the revision of the directives to ensure a wider unidirectional right for changes and greater clarity in this respect.

3. Modification of contracts

We propose

- that article 72 on contract modifications is either deleted or changed to provide more flexibility.

Reasoning

Initially, it is generally debatable whether modifications of concluded contracts should be regulated by the public procurement directives or whether such regulation of private law contracts is within the national competence. Be that as it may, the European legislator is of course competent to remove such legislation.

The strict regulation that the initial procurement documents should include "clear, precise and unequivocal review clauses" to allow modifications above the *deminimis* threshold (Art. 72.2)

[1] See the judgment of the Court of Justice in cases C-298/15 of 5 April 2017, "borta" UAB v Klaipedos valstybinio juru uosto direkcija VI and case C-396/14 of 24 May 2016, *MT Højgaard A/S and Züblin A/S v Banedanmark*

makes it rather difficult for contracting authorities (particularly CPBs and large contracting authorities) to e.g.

- accommodate resilience in times of urgent needs,
- to take reasonable account of unexpected inflation in order secure deliveries,
- take into account all kinds of unexpected situation which always occurs in large work projects,
- to take up new or improved solutions offered by the contracted economic operator even though they meet the need that was initially covered by the procurement.

From a societal perspective, it is grossly inefficient for public contracts to become static and unable to adapt to the rapid developments in society due to strict requirements on modifications. This leads to less efficient use of society's resources and may discourage economic operators from bidding for public contracts.

The financial thresholds for minor modifications are too restrictive, especially for large framework agreements procured by contracting authorities who has many separate legal entities using their agreements.

If modifications of public contract are regulated in the Directive, it should be significantly simpler and provide greater opportunities than the present Article 72.

4. Dynamic purchasing systems (DPS)

We propose that, if the present procedures are kept that

- the restrictions on using DPS are removed,
- there are no restrictions on modifying the conditions for a DPS,
- it is clarified that requirements on maximum value do not apply to DPS,
- it is clarified that framework agreements can be awarded on the basis of a DPS,
- it is clarified that new contracting authorities may join existing DPS, and
- when the qualifications, criminal records etc. are checked in the first phase of the DPS, strict deadlines for approving applications should be flexible.

Reasoning

In line with the general request for simplification, we suggest removing restrictions on DPS so they can be used for all types of procurements, not just “commonly used purchases that are generally available on the market”.

Given the flexible nature of DPS — where suppliers can join at any time and are not obliged to submit bids — strict procurement modification rules should not apply. We support a legal situation where there are no restrictions on changes during the term of the systems. There should be requirements on suitable publication of the modifications. It should be followed by an appropriate standstill period for purchases to allow economic operators to apply for (re)admission to the system.

Additionally, we question whether the maximum value requirement for framework agreements apply to DPS, as it seems unnecessary given its open-ended nature.

We advocate that it is allowed to award framework agreements based on CPBs' DPS. There seems to be different practices in different member states. That is also the case when it comes to admittance of new contracting authorities. We seek clarification that they may join an existing DPS.

And lastly, we would like to draw attention to the strict time limits assessing the requests to participate, in particular when this is done in the first phase of a DPS. Aplications are often incomplete, and the procurement unit has to request additional information or clarifications. Obtaining criminal record extracts can take several weeks. Strict deadlines should be removed or exceptions allowed if meeting the deadlines is impossible due to reasons attributable to the candidates.

5. European single procurement document

We propose

- that the regulation concerning the ESPD is removed.

Reasoning

The 2014 Directive introduced several measures intended to simplify the procurement processes or provide greater flexibility and more options for contracting authorities and economic operators, but which in fact have had the opposite effect.

The introduction of the European Single Procurement Document (ESPD), for example, has contributed to significantly increasing the administrative burden for both contracting authorities and tenderers despite the intention to the contrary. This is partly because the document itself is unnecessarily detailed and complicated, and partly because the documentation requirements introduced are regulated in such detail that they in fact prevent and obstruct the contracting authority's ability to organise the documentation process appropriately.

The regulation concerning ESPD has neither resulted in reduced administrative burdens nor significantly increased security for the information provided through the documentation process, and we are therefore of the opinion, that the regulation concerning ESPD should be removed

6. The freedom to choose award criterion should remain

Contracting entities should have discretion to choose award criteria. There should be no provisions on obligatory use of quality, environmental or other criteria as award criteria, as these values can be safeguarded also in technical specifications and/or contract clauses. It is a fallacy to conclude that a tendered solution is less green, responsible or safe simply because the award criterion is lowest price. The use of the lowest price as an award criterion should along the same lines not be restricted. It is however important that contracting authorities has the possibility to include reliable/serious tenderers in the competition and follow up concluded agreements.

C. Sustainable, resilient and unsound business practices

1. A right to set requirements and monitor supply chains

We seek greater clarification and propose that

- the directive explicitly mentions the right for contracting authorities to set and monitor supply chain requirements.

Reasoning

Given the political development there is – from time to time – more or less interest in emphasizing sustainability, resilience, cyber security, trade politics, data protection, preventing criminal behavior among suppliers, adhering to sanctions etc. It is crucial to implement these interests cautiously, allowing for risk-based approaches and flexibility for efficient public purchasing.

The procurement directives should by no means hinder strategic ambitions but rather support them. Ambitions such as environmental and social sustainability, resilience, cybersecurity, data protection, and adherence to sanctions, all share a need to understand and mitigate risks in supply chains. We therefore propose that contracting authorities should have explicit rights to set and monitor supply chain requirements. This must of course be done with due respect for the confidential information that might be shared, in particular when it comes to national security and actual business secrets.

2. Labels and standards

We propose

- relaxing the strict linkage requirement when using labels and simplifying documentation rules to enhance sustainable procurement, and
  placing the burden of proving “equivalence” on the economic operator.

Reasoning

We face great challenges applying the 2014 Directive's rules on labels and standards in public procurements. The current directive aims to facilitate sustainable procurement but imposes strict requirements, such as the requirement for label criteria to be *“linked to the subject-matter of the contract”* and *“appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract*. We cannot use labels like the Nordic Swan Ecolabel without extracting relevant criteria manually. It is a burdensome process even for large CPBs since it requires specific technical expertise in many products. We propose relaxing the strict linkage requirement and simplifying documentation rules to enhance strategic and sustainable procurement flexibility.

In addition to the above, the obligation to accept “equivalent” labels and standards and alternative means of proof to every aspect of them, forces contracting authorities to evaluate complex technical documentation, often beyond their expertise. The economic operators are much better suited to prove whether their products are “equivalent”. The burden of proving whether other means of proof are “equivalent” should according to us be placed on the economic operator and approved by a third, independent, party.

The practice required by the directives does in our opinion often discourage the use of ecolabels, standards and other sustainability criteria in tenders much in contrast to the intent of the legislation

3. Security and preparedness

We propose

- that contracting authorities are allowed to exclude high risk tenderers/tenders in accordance with European legislation or national law safeguarding national security,

- an exception from the directive or a more flexible ground for direct award (negotiated procedure without publication, article 32.1 c) with the purpose to protect continuity of supply and services to uphold critical infrastructure and public services in crises and wartime.

Reasoning

Due to the tightening of the global political situation, increasing attention has been paid in member states to how security and preparedness-related procurements can be carried out within the framework of the procurement directive. We consider it important that future procurement directives better take into account security and preparedness aspects in for example the definition of the procurement, technical specifications, the suitability requirements and exclusion criteria for candidates and tenderers, the use of negotiated procedure without notice, and contract modification grounds.

For example, in the 5G cybersecurity toolbox[2] the European commission encourages member states to impose restrictions on high-risk suppliers. However, it is not possible, according to the public procurement directive, to exclude high risk tenderers or tenders.

In addition to the possibility in the defence and security sectors, a specific exception should be introduced for security of supply, i.e. to ensure uniform rules across the EU to protect critical infrastructure and the continuity of public services in crises or wartime. The possibility of derogation should balance the importance of open competition with the need for security of supplies to critical infrastructure and continuity of public services. This could include e.g. suppliers trusted to deliver under challenging geographical circumstances, contracts concerning storage facilities and logistics, contracts concerning production conversion.

4. Criminal and unsound business practices

We propose to

- expand voluntary exclusion grounds to include beneficial owners and company representatives involved in fraudulent activities, and

- increase the limitation on voluntary exclusion due to professional misconduct from three years to five years from the final decision, judgement or relevant event, and

[2] Secure 5G networks: the EU toolbox

Reasoning

In order to combat crime and rogue economic operators in public procurement and to safeguard fair competition the exclusion grounds should be reviewed.

The voluntary exclusion grounds should be expanded to include beneficial owners and company representatives involved in fraudulent activities. Additionally, the three-year limitation on exclusion due to professional misconduct should be extended to five years to align with obligatory exclusion grounds.

By extending the mandatory exclusion grounds, linking voluntary exclusions grounds to tendering companies' representatives, a more effective system can be created to ensure that only serious and reliable economic operators are allowed to participate in public procurements. This would not only foster fair competition, reduce corruption and improve the quality of services and goods procured but also increase confidence in the public procurement system and reduce the risk of crimes against the public sector.

This paper has been processed by the legal departments of our central purchasing bodies. Do not hesitate to contact us if you have any questions.

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