



# Procurement Directive 2014/24/EC

## What you need to know

On 28 March 2014 three new directives were published in the OJEU. One relates to the award of concession contracts, one replaces the 2004/17, the 'Utilities Directive' and one replaces 2004/18 the 'Classic Directive' that governs how public bodies in the EU can award public works, service and supply contracts. This last Directive, 2014/24 is the subject of this update.



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## 1. The Directive is not law currently.

The Directive is addressed to member states who have up to 2 years to implement the Directive through National Regulations. The UK has stated it intends to do so as soon as possible and has suggested autumn, however, this is a very ambitious target. Ireland hopes to implement it within 12-18 months, but intends to bring in some of the business friendly parts earlier by amending Circular 10/10.

## 2. Parts of the Directive are meaningless until the Regulations are implemented.

Parts of the Directive provide that Member States may or may not do certain things and parts leave it entirely up to the member states to decide how objectives of the Directive are implemented.

Therefore, until such times as we have a draft set of Regulations you should be careful not to read up and train too much for the new Directive. We, and I am sure many others, will be providing comprehensive notes and training at the right time.

## 3. Why is there a new Directive?

The Commission's stated aims include to promote the Europe 2020 strategy of smart, sustainable and inclusive growth while ensuring most efficient use of public funds. This includes significant changes to promote electronic procurement and to assist SMEs. The Directive is also designed to clarify basic notions and concepts to ensure legal certainty as well as incorporating certain aspects of related to well-established case-law of the Court of Justice of the EU.

## 4. Where can I find the Directive text?

You can get this from our website, [www.QuiggGolden.com](http://www.QuiggGolden.com) or look up the OJEU online dated 28 March 2014.

## 5. Directive 2007/66/EC, the Remedies Directive still applies.

This remains and it is still necessary to read this new Directive and the Remedies Directive together. Hopefully the UK and Ireland will produce a single set of Regulations combining both sets of obligations.

## 6. The distinction between Part A & Part B services has been abolished.

This distinction was always stated as being a temporary measure. However Article 10 now sets out a list of services that are totally exempt from the Directive, these include employment contracts, public transport contracts and legal services in relation to litigation.

## 7. New Light touch regime for certain services.

Although the heading of Article 74 refers to social & health care services, the actual list is set out at Annex XIV and includes legal services, postal services, tyre re-moulding and blacksmith services. So the full list must be checked carefully. Also the services are to be above a threshold of €750k. The Directive requires the publication of a call for completion and an award notice, but it is for Member States to put in place national rules for the award of them to ensure Contracting Authorities comply with the principles of transparency and equal treatment. Therefore this is an area where little more can be said until the Regulations are drafted.

## 8. Introduction of a new procedure called competitive procedure with negotiation.

This can only be used in certain circumstances, set out at Article 26, including if there is a design element. The procedure, at Article 29, is analogous to a restricted procedure with the ability to have repeated interim tenders followed by negotiation leading to a final tender, after which the award shall be made with no further negotiation. We see this as a real bonus to help Public Bodies get what they really want for the best value, but will require a new skill set

## 9. Award Criteria must be on MEAT and be based on a cost-effectiveness approach, such as life-cycle costing.

Article 67 is a significant provision and will have potentially far reaching consequences for the award of contracts in relation to works, where the initial capital value may be very small compared to the full life cycle cost, especially when the value of the design contract is compared to the life cycle cost of the works being designed.

## 10. Award criteria may include experience of staff.

This is a welcome move and will allow public bodies to expressly use experience as an award criterion, this provision is also at Article 67

## 11. All procurement is to be conducted electronically.

This is already happening in many procurements, but Article 22 now makes it mandatory, unless one of the narrow exemptions applies. An example of this would be if the process is so sensitive that electronic security devices are not robust enough.

## 12. A new ground for discretionary exclusion.

Where the bidder has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract which lead to early termination, damages or comparable sanction he can be excluded under Article 57(4)(g). However, a bidder can 'self-cleanse' to show that despite the grounds it has remedied the situation and changed his practices.

## 13. Early Market Engagement is allowed.

This is expressly allowed at Article 40 so long as it does not distort competition. Also a tenderer at Article 41 can give advice and help draft documents so long as steps are taken not to distort competition.

## 14. Division into Lots.

This is not mandatory, but an Authority who does not do so will have to set out its main reasons for not doing so either in the procurement documents or in the procurement report (see Article 46). If it is split, into lots, the Authority can limit the number of lots any individual tenderer can win.

## 15. Time limits are shortened.

These have been revised and now it is possible to allow as little as 15 days for a tender in an open procedure or 10 days to request to qualify and 10 days to tender in a restricted procedure, so long as a prior information notice has been published. See Articles 27, 28 and 47.

## 16. Limits on use of subcontractors.

This is done in two ways. Firstly, Article 71 provides that a Contracting Authority can require the removal of a subcontractor who is subject to one of the grounds of exclusion at Article 57. Secondly, an authority can require certain elements of a contract to be performed by the tenderer itself and not by a subcontractor, at Article 63(2).

## 17. The rules on how far a contract can be modified has been codified.

This is set out at Article 72, which sets out the rules as to what is and is not permitted by way of variation without the award of a new contract. For example a variation expressly set out in the procurement documents is allowed, such as a inflation clause, as is a change which is less than the threshold and less than 10% of the value for service and supply, or 15% for works contracts. If the modification is not permitted under Article 72 then it will require a new procurement procedure.

## 18. When an authority can clarify a tender has been codified.

Article 56(3) attempts to provide some clarification in relation to clarifying tenders. It provides that where information or documentation appears to be incomplete or erroneous or where specific documents are missing, Authorities may request the Economic Operator concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit. However, the Authority is to ensure that such requests are made in full compliance with the principles of equal treatment and transparency. Although this paragraph is to be welcomed it does not provide as much clarity as could be wished for. Authorities will therefore have to rely on existing case law to determine whether or not seeking the specific clarification from a tenderer would comply with the principles of equal treatment and transparency or not.

## 19. In-house and inter-authority cooperation rules codified.

This is another area where the text of the Directive now codifies the existing case law, and are known as the so called *Teckal* exemptions. The rules are fully set out at Article 12. Essentially where an Authority has control over the entity being awarded the contract, or where the contract represents true co-operation between Authorities the Directive does not need to be followed.

## UPCOMING SEMINARS

### BELFAST

ON 21 MAY 'The New Procurement Directive' at Quigg Golden, 18-22 Hill Street, Belfast from 3.00pm-5.00pm. Registration at 2.30pm.

### LONDON

ON 14 OCTOBER 'Managing Time and Money under NEC Sub-Contracts' at America Square Conference Centre.

ON 15 OCTOBER 'New Procurement Rules – everything you need to know' at America Square Conference Centre.

### CRAWLEY, WEST SUSSEX

ON 07 OCTOBER 'Managing Time and Money under NEC Sub-Contracts' at Reigate Hill Golf Club.

ON 08 OCTOBER 'New Procurement Rules – everything you need to know' at Reigate Hill Golf Club.

### GALWAY

ON 28 MAY 'The Impacts the New EU Directives will have on Tenders.' Venue to be confirmed.

ON 29 MAY 'Construction Contracts Act 2013: Payment Provisions and Adjudication – what's it all about?' Venue to be confirmed.

### CORK

ON 25 JUNE 'Construction Contracts Act 2013: Payment Provisions and Adjudication – what's it all about?' Venue to be confirmed.

ON 26 JUNE 'PWCs – an update' from 10.00am-1.00pm. Venue to be confirmed.

For a details of seminars visit:  
[www.QuiggGolden.com](http://www.QuiggGolden.com)