

P3 is More than just Private Funding

An EU Procurement Law Perspective

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Memo

P3 is more than just private funding - An EU Procurement Law perspective

By

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Submitted at
The NYC PPP Symposium, September 2015

*19 % of EU GDP spent per year
on procurement under the European
Public Procurement Directives*

1. Introduction

This memo concerns the new public procurement directive adopted by the EU in 2014. The new directive, in many ways, acknowledges P3 as a significant instrument in both the public and the private sector, especially in comparison to the 2004 public procurement directive on works. In the last 10 years, P3 has been governed by restrictive rules on anti-corruption, transparency, equality and competition, based on a principle on non-negotiation.

The main principles of public procurement according to article 18 in the 2014/24/EU directive are:

Article 18(1)

Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.

Compared to private contracts, the 2004 directives restricted both traditional contracting out relationships and P3 for the benefit of negotiation and collaboration, and The Commission has in this regard listened to the industry and science by meeting their demand for a more efficient way to contract and collaborate, while still acknowledging the duty to ensure transparency, competition and restriction of corruption.

Thus, the 2014 Public Procurement directive on works etc. has improved significantly and furthermore the directive now shows that the Commission considers P3 to be more than just a

²⁷ Christina D. Tvarnø, Professor, PhD, Copenhagen Business School, Law Department.

way to finance public projects. This memo describes the improvements in the new directive regarding its approach to and objectives of P3's.

2. The new 2014/24/EU directive

In December 2011, the Commission proposed the revision of Directives 2004/17/EC (procurement in the water, energy, transport and postal service sectors) and 2004/18/EC (public works, supply and service contracts), as well as an adoption of a directive on concession contracts. The directives were voted by the European Parliament on January 15 2014 and adopted by the Council on February 11 2014. The Member States have until April 2016 to transpose the new rules into their national law (except with regard to e-procurement, for which the deadline is September 2018).

It is the aim of the EU Commission that the new public procurement directive has three main objectives: simplification, flexibility and legal certainty.²⁸ These are three factors that are relevant in optimising P3 and public procurement, both being key drivers in the EU economy. Simplification of procedures, a higher degree of flexibility and legal certainty should all aim at improving the 'value for money' through having a more efficient, strategic, transparent and competitive legal environment concerning P3 and public procurement in general.

The overall change concerned 3 directives, including the revision and replacement of two existing directives. Directive 2014/24/EU²⁹ revised and replaced 2004/18/EC, and directive 2014/25/EU³⁰ revised and replaced 2004/17/EC. Furthermore, a new directive on concession contracts was introduced, 2014/23/EU.³¹

This memo only considers the 2014/24/EU directive on public procurement.

The two most important objectives of the directive 2014/24/EU regarding P3 include

²⁸ European Commission, MEMO, Brussels, 15 January 2014.

²⁹ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, p. 65–242.

³⁰ Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ L 94, 28.3.2014, p. 243–374.

³¹ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L 94, 28.3.2014, p. 1–64.

1) for public purchasers to be better able to negotiate the terms of contracts with companies to obtain the service that best suits their needs and

2) for public authorities to be able to base their decision on the best life cycle cost of the goods offered.³²

3. The scope of the 2014/24/EU directive

According to article 18, the directive on public procurement is not intended to cover all forms of disbursement of public funds. Thus, the 2014/24/EU-directive only covers the acquisition of works, supplies or services for consideration by means of a public contract. These types of works and services are subject to this directive whether they are implemented through purchase, leasing or other contractual forms.

Article 1(1)

This Directive establishes rules on the procedures for procurement by contracting authorities with respect to public contracts as well as design contests, whose value is estimated to be not less than the thresholds laid down in Article 4.

The notion of acquisition should be understood broadly in the sense of obtaining the benefits of the works, supplies or services in question, not necessarily requiring a transfer of ownership to the contracting authorities.

The increasingly diverse forms of public action have made it necessary to more clearly define the notion of procurement itself. However, that clarification should not broaden the scope of this Directive compared to that of Directive 2004/18/EC.

Hence, the EU rules on public procurement are intended to cover the acquisition of works, supplies or services for consideration by means of a public contract. This, on the other hand, means that acquisitions of works, supplies or services should be subject to the 2014/24/EU Directive whether or not they are implemented through purchase, leasing or other contractual forms.

Article 1(2)

Procurement within the meaning of this Directive is the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose.

³²http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/reform/fact-sheets/fact-sheet-01-overview_en.pdf

The realisation of a work corresponding to the requirements specified by a contracting authority requires that the authority in question must have taken measures to define the type of the work or, at the very least, have had a decisive influence on its design.³³

The mere financing, in particular through grants, of an activity, which is frequently linked to the obligation to reimburse the amounts received when they are not used for the purposes intended, does not usually fall within the scope of the public procurement rules.

In situations where all operators fulfilling certain conditions are entitled to perform a given task without any selectivity, such as customer choice and service voucher systems, should not be understood as being procurement.

4. Life-cycle-cost

The 2014/24/EU directive introduces the economic tool of life-cycle-cost to the legal framework. In public procurement projects evaluated through the most economically advantageous tender, the lower life-cycle-cost perspective can be addressed and used as an award criterion. The legal definition of the life-cycle-cost is the following: all costs over the life cycle of works, supplies or services including research, development, production, transport, use, maintenance and end-of-life disposal cost and pollution.

The public authority must in advance clarify how to assess the costs in an objective and non-discriminatory manner.³⁴

Article 67(1).

Life-cycle costing shall to the extent relevant cover parts or all of the following costs over the life cycle of a product, service or works:

(a) costs, borne by the contracting authority or other users, such as:

- (i) costs relating to acquisition,
- (ii) costs of use, such as consumption of energy and other resources,
- (iii) maintenance costs,
- (iv) end of life costs, such as collection and recycling costs.

(b) costs imputed to environmental externalities linked to the product, service or works during its life cycle, provided their monetary value can be determined and verified; such costs may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.

The introduction of procurement in a best life-cycle-cost perspective is a significant and relevant tool used to optimise P3 projects. Without the life cost perspective, a key driver in an optimal P3, the relevance of the P3 disappears.

³³ Preamble 9 in 2014/24/EU directive.

³⁴ Preamble 96 in the 2014/24/EU Directive.

5. Before the procurement takes place

In general, it has been a problem in both the public sector and the private industry that prior consultations have been forbidden due to the fact that consultations might lead to situations that favour the companies involved, thus distorting competition. Due to article 41 in the new 2014/24/EU directive, such prior consultations are regulated more optimally, also in regard to P3.

The public party now must take the necessary steps to ensure that the participation of a previously consulted company does not affect competition within the tender procedure concerned. Furthermore, any information to which the company may be party as a result of its prior involvement must be sent to the other participating companies. A prior consulted company may be excluded only as a last resort and if it is impossible to guarantee equal treatment for participating companies by any other means.

6. The definition of the economic operator

The directive uses the phrase ‘economic operators’. This should be interpreted in a broad manner, and thus include any persons/entities that offer the execution of works, the supply of products or the provision of services on the market, irrespective of the legal form under which they have chosen to operate.

The legal form can be firms, branches, subsidiaries, partnerships, cooperative societies, limited companies, universities, public or private groups of economic operators, including situations in which the private parties have come together in the form of a temporary association..

This broad definition of the economic operator supports the idea of a consortium formed with regard to the P3 and the bidding, building, operating and funding processes.

7. The termination of the strict ban on negotiation

The commission has recognised the significant need for contracting authorities to have additional flexibility to choose a procurement procedure that provides for negotiations. Negotiations are extremely relevant with respect to P3, and were one of the key obstacles in the 2004/18/EC directive concerning the benefits of P3.

The EU Commission predicts that contracts awarded by negotiated procedure (with prior publication) will have a particularly high success rate of cross-border tenders. This might be a

relevant argument for allowing negotiation. Also, because negotiation is a key factor regarding P3, the ban on the ban on negotiation must be acknowledged in this regard as well.³⁵

Hence, the 2014/24/EU directive provides a new procedure in article 29: the competitive procedure with negotiation.³⁶ This procedure can be applied in various P3 situations where open or restricted procedures without negotiations are not likely to lead to satisfactory procurement outcomes because a P3 includes a significant input from the private sector.

The EU Commission requires several adequate safeguards when using negotiation to ensure equal treatment and transparency. Thus, contracting authorities must observe the following conditions in order to use the negotiation procedure:

- Prior to the tender procedure, the contracting authorities must indicate the minimum requirements that characterise the nature of the procurement, and that would not be changed in the negotiations or afterward.
- The Award criteria and their weighting must remain stable throughout the entire procedure and may not be subject to negotiations. This must be observed to guarantee equal treatment of all economic operators in all negotiations.
- The public party must regard the negotiation instrument as an attempt to improve all the tenders in general.

If the above requirements are observed, the negotiations may concern all characteristics of the P3: works, supplies and services including, for instance, quality, quantities, and commercial clauses, as well as social, environmental and innovative solutions.

8. Modification in the contract after signing

It has been and is still a main principle within the public procurement law in the EU that modification of contracts after they are signed without calling a new tender procedure may breach the rules on EU public procurement. The 2014/24/EU directive does however give some exemptions with regard to contract changes after signing the contract:

³⁵ Christina D. Tvarnø, Why the EU Public Procurement Law Should Contain Rules that Allow Negotiation for Public Private Partnerships - Innovation Calls for Negotiating Opportunities, In EU Public Procurement, Modernisation, Growth and Innovation: Discussions on the 2011 Proposals for Procurement Directives, Ølykke; Hansen & Tvarnø (eds.), Djøf, 2012, p. 201-219.

³⁶ See appendix below.

Firstly, due to article 72(1)(a), a new call for tenders is not required for any modifications that are not substantive, i.e. do not change the nature or the economic balance of the contract and that have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses.

Secondly, due to article 72(1)(b), a new call for tenders is not required if the change is arising from unforeseen events or relates to additional work, products or services needed but that, for technical reasons of interchange ability or interoperability or cost, can be provided only by the company holding the current contract. In both cases, the corresponding increase in price may not exceed 50 % of the initial contract.

Thirdly, due to article 72(1)(c), modifications after the signing of the contracts can only be allowed if the following conditions are fulfilled:

- (i) the need for modification has been brought about by circumstances which a diligent contracting authority could not foresee;
- (ii) the modification does not alter the overall nature of the contract;
- (iii) any increase in price is not higher than 50 % of the value of the original contract or framework agreement.

Regarding the aim and content of a P3, these exemptions are relevant in ensuring that collaboration can be present after the signing of the P3 contract. The exemptions allow the parties to find a balance in the contract environment, securing that the contract can meet the challenges that might arise due to it being a complex project including multiple parties.

9. Summing up

The EU Commission has introduced a new set of rules aiming at improving the market for public procurement. The EU Commission has changed the rules to ensure that the parties in the collaboration can find better solutions to the public needs. Some significant changes include the right to negotiate, on a minor scale, to find the optimal solution, as well as the introduction of the total cost perspective.

A simplification of the public procurement procedures and a higher degree of flexibility are positive changes regarding P3. The elimination of the ban on negotiation is a benefit to all public purchasers, but especially a benefit in regard to P3. Thus, under the 2014/24/EU directive, it is possible to negotiate the terms of the contracts with companies to obtain the service that in the best way suits the public needs.

All in all, this shows that the EU Commission recognise that P3 is a relevant tool to both public and private parties, but must be supported in order to be efficient. The 2004 directive considered the ban on corruption and the need of transparency to be more relevant compared to efficiency.

By introducing the negotiation and total cost perspective to public procurement, the EU Commission shows that P3 is more than just private funding, that it is also about reducing life cost through a collaborative contractual relationship.

Appendix

2014/24/EU

Article 29

Competitive procedure with negotiation

1. In competitive procedures with negotiation, any economic operator may submit a request to participate in response to a call for competition containing the information set out in Annex V parts B and C by providing the information for qualitative selection that is requested by the contracting authority.

In the procurement documents, contracting authorities shall identify the subject-matter of the procurement by providing a description of their needs and the characteristics required of the supplies, works or services to be procured and specify the contract award criteria. They shall also indicate which elements of the description define the minimum requirements to be met by all tenders.

The information provided shall be sufficiently precise to enable economic operators to identify the nature and scope of the procurement and decide whether to request to participate in the procedure.

The minimum time limit for receipt of requests to participate shall be 30 days from the date on which the contract notice or, where a prior information notice is used as a means of calling for competition, the invitation to confirm interest was sent. The minimum time limit for the receipt of initial tenders shall be 30 days from the date on which the invitation was sent. Article 28(3) to (6) shall apply.

2. Only those economic operators invited by the contracting authority following its assessment of the information provided may submit an initial tender which shall be the basis for the subsequent negotiations. Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 65.

3. Unless otherwise provided for in paragraph 4, contracting authorities shall negotiate with tenderers the initial and all subsequent tenders submitted by them, except for the final tenders within the meaning of paragraph 7, to improve the content thereof.

The minimum requirements and the award criteria shall not be subject to negotiations.

4. Contracting authorities may award contracts on the basis of the initial tenders without negotiation where they have indicated, in the contract notice or in the invitation to confirm interest, that they reserve the possibility of doing so.

5. During the negotiations, contracting authorities shall ensure the equal treatment of all tenderers. To that end, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others. They shall inform all tenderers, whose tenders have not been eliminated pursuant to paragraph 6, in writing of any changes to the technical specifications or other procurement documents, other than those setting out the minimum requirements. Following these changes, contracting authorities shall provide sufficient time for tenderers to modify and re-submit amended tenders, as appropriate.

In accordance with Article 21, contracting authorities shall not reveal to the other participants confidential information communicated by a candidate or a tenderer participating in the negotiations without its agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

6. Competitive procedures with negotiation may take place in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria specified in the contract notice, in the invitation to confirm interest or in another procurement document. In the contract notice, the invitation to confirm interest or in another procurement document, the contracting authority shall indicate whether it will use that option.

7. Where the contracting authority intends to conclude the negotiations, it shall inform the remaining tenderers and set a common deadline to submit any new or revised tenders. It shall verify that the final tenders are in conformity with the minimum requirements and comply with Article 56(1), assess the final tenders on the basis of the award criteria and award the contract in accordance with Articles 66 to 69.