



Public Procurement

Procurement by Utilities

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Utilities Procurement in Context

The term “utilities” is commonly used to describe the organisations which deliver services - such as the provision of water, electricity, gas or transport - to a community as a whole, typically through fixed networks. In many EU member states, activities in the utilities sector are entrusted to government organisations which are public entities. In some member states, however, bodies which operate in the utilities sector are wholly private undertakings (and not public bodies) that would fall within the definition of a contracting authority for the purposes of the Public Sector Directive (Directive 2004/18/EC). In other member states, there may be a mixed economy, meaning both private and public entities operate in the same utilities markets.

This mixed picture presented a problem when the European authorities were considering the regulation of procurement activity in the utilities market. In member states where contracting authorities operated in the utilities sector, there was no reason, in principle, why they should not also be covered by the public procurement system set up by the Public Sector Directive. However, this system did not ‘capture’ private companies and there was some reluctance to covering these companies in the first place. The European authorities could not simply impose the rules on the ‘public’ utilities because this would have created an uneven playing field, since the utilities would then only be covered in the member states where they were in public hands and not in those where they were in private hands. This would have distorted competition and member states were not ready to take such half-measures.

Another reason for regulating entities operating in these sectors was the closed nature of the market in some states, where the existence or grant of special or exclusive rights by the state creates a monopoly situation which limits competition. Competition is also limited by the fact that fixed networks are expensive to build but relatively cheap to maintain and operate. They may also require rights of way which typically are expensive or administratively complex to obtain. This creates a long term, monopolistic advantage for the operator who first puts such a network into place. In this situation the public interest (the interest of all users of the service, in particular in relation to value for money) has to be protected by imposing special rules on how the utilities operators (public or private) organise their purchases, in addition to other regulations which may govern their investments and operations.

By 1990 the European regulator had come up with a means of applying the procurement rules to the utilities sector. It did so in a separate Utilities Directive (Directive 2004/18/EC) in which it was made clear that it is not only the ‘public’ entities who are

bound to follow EU rules with regard to their procurement of goods, works and services, but also the private undertakings operating on the basis of special or exclusive rights. The paramount consideration in both public and private sectors is the extent to which the contracting entities are subject to state influence; whether this influence is exercised through direct control or indirect influence (e.g. the state's power to control the grant and operation of special or exclusive rights to private undertakings). It is worth noting in this context that the telecommunications sector used to be regulated but full liberalisation of the market in the late 1990s and 2000s led to a decision to remove them from regulation under the Utilities Directive.

The rules were adopted in a separate directive because the provisions are more flexible than in the Public Sector Directive. It was recognised that the entities in these sectors were operating in a more commercial market so that, although the main principles of the public procurement rules needed to be respected, it was also necessary to provide some flexibility in order to take account of the reality of the environment of their activities. The Utilities Directive therefore places generally less stringent requirements upon procuring entities than the Public Sector Directive; including higher financial thresholds, a wider range of options in terms of when and how to advertise contract opportunities, less control over the conduct of the selection and evaluation phases and the use of more flexible purchasing tools than are provided for in the Public Sector Directive. This reflects the more commercial nature of the business and operation of utilities in many member states. General principles derived from the Treaty, including equal treatment and transparency, will apply.

When does the Utilities Directive apply?

It is important to note that the Utilities Directive applies to contracts in relation to specified activities in four utility sectors only: water, energy, transport and postal services.

The Utilities Directive only applies when a procuring entity falls within the definition of a utility as set out in the Utilities Directive and then only to the extent that the utility carries out a relevant activity defined in the Utilities Directive and in relation to contracts of a defined type.

When these requirements are met, the Utilities Directive will apply to specified types of contract where the value of the contract exceeds the relevant EU financial threshold.

Which entities are subject to the application of the Utilities Directive?

Whether or not an entity falls within the definition of a utility to which the Utilities Directive applies is not linked to whether an entity is private or public in nature. It is linked to two factors: whether the entity operates in a specified field of activity (a “relevant activity”) and the basis upon which the entity carries out that activity.

There are three types of defined entity:

- **Contracting ‘authorities’:** The definition of a contracting authority is the same as in the Public Sector Directive. There are two main types of contracting authority, ‘public authorities’ and ‘bodies governed by public law’, and the case law on this issue has resulted in a flexible definition. (For further information see Procurement Brief - What is a Contracting Authority?)
- **Public undertakings:** A public undertaking is defined in the Utilities Directive as any undertaking over which public authorities may exercise, directly or indirectly, a dominant influence by virtue of their ownership of the undertaking, their financial participation therein, or the rules that govern it.
- **Entities operating on the basis of special or exclusive rights:** The Utilities Directive also applies to entities that fall within a three part definition. These are entities which:
 - are not public authorities or public undertakings; and
 - have as one of their activities any of the relevant activities outlined below; and
 - that operate on the basis of “special or exclusive rights” granted by a competent authority of a member state.

Examples of entities which fall within the definition of a utility

Some, but not all, entities which fall within the definition of a utility are listed in Annexes I to X of the Utilities Directive. The listed entities include, for example:

Pošta Slovenije, Gaz de France, Electricidade de Portugal, water supply authorities in Finland, Deutsche Bahn, Trenitalia, Eurotunnel, Societatea Comercială Minieră ‘Banat-Anina’ SA – Romania, Sofia Airport – Bulgaria.

What are the “relevant activities”?

Contracting entities falling within the above definitions are covered by the Utilities Directive, but only to the extent that they carry out a “relevant activity” and only in relation to contracts awarded for the purpose of carrying out that activity.

In summary, the relevant activities are:

- **Water:** activities concerned with the supply of drinking water. Contract connected with hydraulic engineering and land drainage and the disposal or treatment of sewage may also be covered where they are awarded by an entity engaged in the supply of drinking water.

Activities concerned with the “supply of drinking water” cover the provision or operation of a fixed network which provides a service to the public in connection with the production, transport and distribution of drinking water or the supply of drinking water to such networks. A “fixed network” can be distinguished from other supply methods such as the sale of bottled water which is not covered by the Utilities Directive.

- **Energy:** including the provision or operation of a fixed network intended to provide a service to the public in connection with the production, transport or distribution of electricity, gas or heat as well as the supply of electricity, gas and heat to such networks. Also covered is the exploitation of a geographical area for the purposes of exploring for and extracting oil, gas, coal and other solid fuels.
- **Transport services:** this covers some but not all transport services. Included is the exploitation of a geographical area for the provision of airports and maritime or inland ports or other terminal facilities to carriers by air, sea or inland waterway. Also covered is the operation of specified types of transport networks providing services to the public – railway, automated systems, tramway, trolley bus, bus and cable networks.
- **Postal services:** the clearance, sorting, routing and delivery of postal items as well as other defined services, such as mailroom management services and logistics services, provided by a postal services utility entity.

The Utilities Directive provides a mechanism for distinguishing between various situations where a contract covers several relevant activities, activities covered by both the Utilities Directive and the Public Sector Directive or relevant activities, as well as activities not covered by the Utilities Directive.

It is worth noting that when an entity which is a utility carries out activities which are not “relevant activities”, the contracts awarded by the utility in that context are not subject to the Utilities Directive. For example, when an entity operating an airport wishes to award a contract for the construction and operation of a hotel which is not located on the airport site, the contract will not be subject to the Utilities Directive. This is because the “relevant activity” is limited geographically. Similarly, the provision of a transport network not for the public – such as the operation of a freight railway line wholly within a large commercial factory site – will not be subject to the Utilities Directive because it is a purely commercial service not provided for the benefit of the public. Extreme care does need to be taken in establishing whether in particular circumstances a specific contract is or is not covered by the Utilities Directive.

What types of contract are covered?

The Utilities Directive covers three main types of contract, for:

- Works
- Supplies
- Services: some services are only partially covered by the Utilities Directive, complying only with requirements relating to technical specifications and transparency. There is no separate consultancy services category. These are dealt with in the same way as other services.

See *Procurement Brief 4 - Which Contracts Are Covered by the procurement Directives?* for more information on the definition of works, supplies and services contracts and on how contracts for a mix of works, supplies and/or services are classified.

What are the EU financial thresholds for contracts subject to the Utilities Directive?

The relevant EU financial thresholds are higher than the thresholds applying to contracts covered by the Public Sector Directive. The financial thresholds are fixed for a period of two years. For 2010/11 they are: EUR 4 845 000 for works contract notices and EUR 387 000 for supplies and services contract notices. These thresholds will change with effect from 1 January 2012. For up to date threshold values go to:

http://ec.europa.eu/internal_market/publicprocurement/rules/current/index_en.htm

There are detailed provisions covering the way in which the value of contracts is calculated for specific types of contract and specific situations. The main aims of the provisions relating to the calculation of the value of the contracts are to ensure that there is a genuine and transparent pre-estimate of the value of the contract to be awarded, and that the contracting entity does not attempt to avoid the application of the Utilities Directive, for example by splitting a requirement or a contract into smaller sub-threshold packages or contracts.

See also *Procurement Brief 5 - Understanding the EU Thresholds*.

Procurement procedures

The Utilities Directive provides for three main procurement procedures:

- open procedure
- restricted procedure
- negotiated procedure with a prior call for competition

Utilities have a free choice on which competitive procedure to use. Utilities also have flexibility in terms of how they advertise – the process referred to in the legislation as a ‘call for competition’. When conducting a restricted procedure or a negotiated procedure with a prior call for competition, utilities can choose to use:

- a contract specific notice; or
- an annual ‘periodic indicative notice’ or
- a notice on the existence of a qualification system

When conducting an open procedure, utilities have no choice and must use a contract notice.

Statutory time limits apply and a standard format contract notice must be used and published in the Official Journal of the European Union.

Conduct of the procurement process: the provisions in the Utilities Directive covering the conduct of the procurement process are generally less detailed and less prescriptive than the rules applying to the public sector. For example, there is no exhaustive list of criteria for qualitative selection and there are provisions allowing for the time limit for receipt of tenders to be set by mutual agreement. Utilities are, however, obliged to observe general principles to ensure equal treatment, transparency and not to distort competition.

Purchasing tools

Utilities have a number of purchasing tools they can use.

Qualification systems: A qualification system is unique to the Utilities Directive. It is a system, advertised in the OJEU, under which economic operators interested in contracting with the utility apply to be registered as potential providers for specific works, supplies or services. Using predefined and published qualification criteria, the utility registers some or all of these economic operators in the system. The registered economic operators form a pool for specified works, supplies or services from which the utility may draw those who are to be invited to bid or negotiate on contracts.

Framework agreements: A framework agreement is an arrangement advertised in the OJEU under which one or more economic operators are appointed as framework members following the submission and evaluation of selection stage information and tenders. The framework agreement establishes the terms governing the award of contracts, in particular relating to price and, where relevant, quantity. Once the framework agreement is established there is no further obligation to advertise in the OJEU when individual contracts are awarded under the terms of the framework agreement. The process is much more lightly regulated than for the public sector and there are no detailed provisions covering how framework agreements are set up or operate. For further information on framework agreements in the public sector see *Procurement Brief 19 – Framework Agreements*.

Dynamic purchasing systems: A dynamic purchasing system is a completely electronic process for making commonly used purchases. The system is advertised in the OJEU and is generally limited to a period of 4 years. The open procedure is used to appoint economic operators who are free to apply to join the system at any time by submitting indicative tenders. When a contracting entity wishes to award a contract using the dynamic purchasing system, it publishes a simplified notice in the OJEU and invites submission of indicative tenders. Dynamic purchasing systems are not commonly used.

Electronic auctions: An electronic auction is an electronic process which allows for the submission of new prices (revised downwards) and/or the submission of new elements of tenders after an initial full evaluation of tenders has been undertaken. Electronic auctions occur at the final stage of a tender process which has been conducted up to that point in accordance with one of the standard procurement procedures provided for in the Utilities Directive. See also *Procurement Brief 11 - Procurement Tools* and *Procurement Brief 17 – E-procurement*.

Design contests: There are special provisions governing the conduct of design contests, which in the case of utilities are for service contracts only. The rules of conduct are similar to those which apply to the public sector.

Exemptions specific to the utilities sector

The Utilities Directive provides for sector specific exemptions in a number of utility sectors based on practical considerations relating to supply or on the degree of competition in these markets. Such exemptions apply in respect of the purchase of fuel and energy for the production of energy; purchases of water for the provision of water services; certain bus transport services; and upstream oil and gas exploration and exploitation.

The Utilities Directive contains a number of exemptions applying across the utilities sector.

- **Activities outside the European Union:** The Utilities Directive does not apply to contracts which the contracting entities award for purposes other than the pursuit of their relevant activities or for the pursuit of such activities in a third country, in conditions not involving the physical use of a network or geographical area within the European Union.

- **Affiliated Undertakings Exemption:** Where ‘undertakings’ are made up of a number of mutually owned or mutually dependant companies, the Utilities Directive provides a specific exemption for purchases made between them under certain conditions. They are treated like ‘in-house’ contracts known as intra-group transactions.
- **Purchases for Re-sale or Hire:** The Utilities Directive excludes from its scope of application contracts awarded for purposes of re-sale or hire to third parties. This is intended to cover, for example, contracts for goods where the contracting entity intends to sell or hire the equipment purchased in a competitive market. These contracts will only be excluded if the contracting entity enjoys no special or exclusive right to sell or hire the subject of such contracts and other entities are free to sell or hire it under the same conditions as the contracting entity.

What is the Article 30 exemption?

Under Article 30 the European Commission may grant an exemption from the provisions of the Utilities Directive to the contracting entities carrying out a relevant activity that is, in the member state in which it is performed, directly exposed to competition and in a market to which access is not restricted.

The test of whether markets are competitive necessarily takes account of both the legal and factual situations in the member state in question and is to be addressed necessarily on a case-by-case basis. Common exemptions granted in relation to activities in individual member states include the production and supply of electricity, oil and gas exploration, and the provision of express and courier services.

The exemption is granted by means of a Decision by the European Commission, which is prompted by an application by an EU member state, a contracting entity, or the Commission itself on its own initiative. The Article 30 procedure is supplemented by Decision 2005/15, which covers, among other issues, publication requirements, extensions, and procedures for forwarding decisions.

A list of the exemptions granted can be found at:

http://ec.europa.eu/internal_market/publicprocurement/rules/exempt_markets/index_en.htm

Remedies

Remedies are legal actions available to economic operators who participate in contract award procedures, which allow them to request the enforcement of the public procurement rules and provide them with rights under those rules in cases where a contracting entity, intentionally or unintentionally, fails to comply with the law.

Directive 92/13/EEC, which has been amended by Directive 2007/66/EC (Remedies Directives), regulates remedies relating to utilities contract award procedures.

The aim of the Remedies Directives is to allow irregularities occurring in contract award procedures and the contract award decision to be challenged and corrected as soon as they occur. This should result in increased lawfulness and transparency of such procedures, build confidence among businesses, and facilitate the opening of local public contracts markets to foreign competition.

Although basic principles and requirements apply across all member states, different member states have different legal and judicial regimes, meaning that detailed implementation of the Remedies Directives varies to reflect particular circumstances. All national remedies must be:

- clear and straightforward, i.e. understandable and easy to use by economic operators;
- available to all economic operators wishing to participate in a specific contract award procedure without discrimination, especially not on grounds of nationality;
- effective in preventing or correcting instances of unlawfulness on the part of other economic operators and/ or contracting authorities.

The Remedies Directives require that member states provide, in specified circumstances, for a standstill period at contract award stage when economic operators participating in the procurement process are notified of a contract award decision. This is in order to ensure the right to challenge an award procedure before the time when implementation of the procurement contract makes it more difficult. Other provisions exist and include an obligation to notify direct awards and the availability in certain cases of the sanction of ineffectiveness of a concluded contract.

See also *Procurement Brief 12 – Remedies*.

Further reading:

- See the European Commission's website on procurement which covers both the public sector and utilities:

http://ec.europa.eu/internal_market/publicprocurement/index_en.htm