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Public Procurement

Which Contracts are Covered by the Procurement Directives?

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The Directives cover three main types of contract: works, supplies and services including design contests.

Some contracts will often contain elements of one or more of the above types of contract. Thus, a contract to construct a building might include design services and certain necessary supplies. Similarly, a supply contract may include siting and installation services. The Directive contains specific rules that are used to classify these 'mixed contracts'.

A number of contracts are entirely excluded from the scope of the Directives (but not necessarily of the Treaty), either because of their nature so it would be inappropriate to apply the provisions of the Directives or because they are the subject of different systems of regulation or administration. Some contracts, the new 'reserved contracts', receive special treatment as a result of the identity of those supplying the goods, works or services under them.

Even if not excluded, contracts will only be subject to the provisions of the Directives where their value exceeds the relevant monetary value set out in the Directives – the EU financial threshold. These thresholds reflect the level at which it was assumed by the Community Legislator that cross-border trade was likely (although it is possible that, depending on the circumstances, tenderers may be interested in below-threshold contracts in other EU Member States – it is to be recalled that the general principles apply to the award of these contracts in any event). In order to prevent creative methods of calculating the value of the contracts to be awarded, the Directives also apply rules and methods of calculation as well as prohibition of methods designed to circumvent the Directives by splitting, aggregating or packaging contracts in such a way that the contracts do not properly fall within the appropriate provisions. For more discussion on this issue see *Public Procurement Brief 5: Understanding the EU Financial Thresholds*.

One important distinction made by the Directives is between 'contracts' and 'concessions', the latter being treated differently from contracts. Special rules apply to the award of works concessions in the Public Sector Directive, while services concessions are excluded from the scope of both the Public Sector Directive and the Utilities Directive.

Common characteristics: There are some general characteristics that are common to all types of contract covered by the Directives:

The Directives apply to contracts for pecuniary interest concluded in writing between an economic operator and a contracting entity, as follows:

- **The contract must be for pecuniary interest**, i.e. for money or money's worth. There must be a financial consideration, no matter how it is paid.
- **The contract must be in writing.** In the very unlikely event that a contract which falls within the Directives is not in writing, it will be subject to the general application of the rules contained in the Treaty
- **The contract must be between two parties:** the economic operator and the contracting authority.

When does a contract arise?

When a new contract is awarded, there is normally little difficulty in identifying it. Sometimes, however, this is not obvious. For example, an existing contract might be

amended or renewed. A contract may also be amended during its execution. All of these situations give rise to new obligations between the parties and may change the terms of the original contract.

If the result of the changes is so extensive that the renewed or amended contract is fundamentally different from the original contract, then it may be the case that a new contract will be established. If there is a new contract and all of the elements of a contract are present, then the contract should be subject to the procurement rules, i.e. it must be awarded according to the provisions of the Directives. This means that a simple extension, renewal or even amendment might not be permitted if it is made without competition.

What is a works contract?

Works contracts are defined as those contracts that:

- have as their object either the execution or both the execution and design of works related to one of the activities referred to in Annex I of the Public Sector Directive (Annex XII of the Utilities Directive); or
- have as their object the realisation, by whatever means, of work corresponding to the requirements specified by the contracting entity.

The possibility of including design works in a works contract means that ‘design and build’ contracts may fall within the definition of a works contract. This could include, for example, contracts covering the planning and financing of a project as well as its execution. Where design and construction are awarded separately, the design services would be a priority service or could, alternatively, be awarded by means of a design contest.

For the second part of the definition, a ‘work’ is the outcome of building or civil engineering works taken as a whole that is sufficient in itself to fulfil an economic and technical function. This definition is relevant for a number of reasons, notably in the context of the realisation of works by any means and for the purposes of assessing the threshold values and, consequently, when deciding whether a single requirement for works has been split up with a view to bringing contracts below the relevant threshold value.

What is a supplies contract?

The definition of supplies is rather more straightforward than that of works or services. ‘Public supply contracts’ are defined as contracts – other than works – involving the purchase, lease, rental or hire purchase, with or without option to buy, of products. In addition, the delivery of such products may include siting and installation operations.

The range of products covered by the Directives can be seen in the various nomenclatures used to describe products for the purposes of advertising. See, for example, the Common Procurement Vocabulary (CPV).

What is a services contract?

The term 'service contracts' essentially refers to contracts other than works or supply contracts that have as their object the provision of services referred to in Annex II of the Public Sector Directive (Annex XVII of the Utilities Directive). A number of services are specifically excluded, mainly because they are not amenable to purchase through the rules provided by the Directives.

Services contracts: The two-tier approach

The Directives make a distinction between priority and non-priority services. This distinction is not made on the basis of the nature of the particular activity but rather on the potential that exists for the provision of the services concerned across national borders and on the clear capability of those services to affect trade between member states.

This distinction becomes most readily apparent in the case of services, where those listed in Annex IIB as non-priority, whilst capable of attracting localised competition, are less amenable to international competition, either because of the nature of the services (e.g. legal and administrative services that are based on familiarity with national laws and jurisdiction) or because of the location in which they need to be provided (e.g. hotel and restaurant services).

This does not mean that competition for such contracts is not possible, certainly at local or national level, or even that international competition for them is inconceivable, but only that the nature of the services or their value is such that this is less likely.

The sixteen priority services, which are listed in Annex IIA of the Public Sector Directive, are subject to the detailed award procedures and other provisions of the Directives.

The non-priority services are subject only to a basic transparency regime that requires adherence to the Directives' rules on non-discriminatory technical specifications and the obligation to publish the results of the award.

How is a contract classified when it includes a mix of different elements?

Contracts do need to be classified as works, services or supplies contracts because different provisions of the Directive apply to different types of contract. Problems may arise in deciding how a contract is to be correctly classified where a contract is a combination of works and/or supplies and/or services. The Directives contain provisions on how this is dealt with, for example:

Mixed priority and non-priority services contracts – value test: The Directives apply an explicit value test to services contracts that contain both priority and non-priority services. Contracts will be for priority services where the value of the priority services contained in the contract is greater than the value of the non-priority services. Contracts will be for non-priority services where the value of the non-priority services contained in the contract is greater than the value of the priority services.

Supplies/services – value test: Essentially, contracts containing elements of both supplies and services will be treated as one or the other type of contract depending on the value represented by each element.

The contract will be considered to be a services contract where the value of the services performed is greater than the value of the products supplied. Where the value is equal, it

will be considered as a supplies contract. The definition makes no distinction between priority and non-priority services, with the effect that, where the value of non-priority services in a mixed contract is greater than the value of supplies, the whole contract will be treated as a contract for non-priority services.

Works/services – principal object test: In the case of works and services, the Directives do not provide for a value test but include a test based on the principal object of the contract. Insert example

Works/supplies: Under the Directives, supplies contracts that also cover, as an incidental matter, siting and installation operations, are defined as supplies contracts. For example, in the case of the purchase of a crane to be installed on a dockside, the object of the contract is the supply of the crane and not the works required to site it, even if those works are considerable.

This ‘principal object’ test, which mirrors the way in which works and services contracts are to be distinguished, would appear to apply even if the value of siting or installation services is greater than the value of the supplies itself, since it is a test based on the object of the contract and not the value-based test applied to distinguish between supplies and services.

Are there other types of contracts subject to the Directives?

Yes, the Directives apply to a number of other types of contract for which special award procedures apply. These include subsidised works or subsidised services contracts, contracts for subsidised housing schemes and works concession contracts.

Frequently Asked Question 1:

What is a PPP contract? The acronym PPP refers to “Public-Private Partnership”. There is no single or simple definition of a PPP contract as the term covers a range of different types of contracts and other delivery models. A PPP generally involves an arrangement under which the contracting authority (the public sector) enters into an agreement with a private sector organisation to deliver infrastructure or public services. The structure may be contractual or institutional, the latter involving the setting up of a joint venture company or other joint venture organisation in which both the contracting authority and the private sector party participate to deliver the infrastructure or services.

A key feature of PPPs tends to be the sharing or transfer of risk to the private sector party and PPPs are often, but not always of long duration. Payment and funding methods vary under PPPs. Payments may be by the contracting authority or derived from third parties, such as users of the facilities, or be from a combination of sources. Funding may come from the contracting authority, the private sector party, external funders such as banks or a combination of sources.

Most PPP contracts will be subject to the full application of the Directives. See FAQ 2 for comments on concession contracts.

Frequently Asked Question 2:

What is a concession and is it covered by the Directives? A concession is a contract of the same type as the contracts defined in the Directives except that consideration for the works or services to be carried out, for example, consists either solely in the right to exploit the work or service or in this right together with payment.

A concessionaire often accepts the operational and financial risk of providing a public service, in the broadest sense, in return for the chance of making a profit through the exploitation of the 'service'. Concessions may sometimes be classified as a form of PPP.

Concessions are used, for example, to carry out and finance major infrastructure projects, notably in respect of the construction of a road network, bridges or tunnels, where the concessionaire is remunerated by way of tolls charged to users. They are also used, however, simply to provide for the operation and maintenance (rather than construction) of facilities by concessionaires, such as where an operator is given the concession to operate an existing railway or underground railway infrastructure. The former types of concession are examples of works concessions; the latter is an example of a services concession.

Only public works concessions are dealt with comprehensively in the Public Sector Directive.

The Public Sector Directive explicitly excludes coverage of services concessions. The general principles of the Treaty continue to apply, however.

Exemptions

Even where contracts fall within the general definition of a public contract, some of these contracts will be excluded from the scope of the Directives for a number of reasons. Some are excluded because they are not, by their nature, amenable to competition. Some of the exclusions apply only to contracts of a specific type. Some are excluded because governments wish to exclude them from competition for specific reasons. There is also a category of 'reserved' contracts that, although not excluded, do benefit from preferential treatment.

In addition the Public Sector Directive provides an exemption for those public contracts that are otherwise covered by the Utilities Directive or for public contracts that, although covered by the Utilities Directive in principle, are exempt from the provisions of that Directive.

Exemptions due to the nature of the contract

Contracts for the acquisition of land: The Directives exclude contracts for the acquisition or rental, by whatever financial means, of land, existing buildings or other immovable property, or for the acquisition of rights thereon. These contracts are excluded because they relate to immovable property, which is naturally dependent on the geographic location. Such contracts take place essentially in local markets and their objects generally rule out any real prospect for cross-border competition.

It is important to note that development agreements and other types of property deals may not necessarily fall within this exemption, most commonly because a works contract is awarded a part of the overall arrangement.

Exclusions relating specifically to services: These exclusions apply to specific circumstances, either based on the award of exclusive rights to certain authorities to carry out certain services or on the nature of a number of specified services.

- Services contracts provided on the basis of exclusive rights
- Broadcasting material and time
- Arbitration and conciliation services
- Certain financial services
- Employment contracts
- Some research and development contracts

Exemptions by reason of choice

These exemptions relate to procurement of a military nature, procurement requiring secrecy, and procurement that, by agreement, is subject to different procurement rules. All three types of exemption concern the Public Sector Directive.

Defence procurement: for certain contracts awarded in the field of defence and security, and not covered by the Defence Directive 2009/81, where it is necessary to protect essential interests of security

Contracts requiring secrecy measures: The Directives do not apply to public contracts (i) that are declared secret, or (ii) the execution of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the member state concerned, or (iii) when the protection of the essential interests of that state's security so requires.

Contracts governed by other rules: The Directives does not apply to contracts that are governed by different procedural rules and awarded:

- pursuant to an international agreement concluded in conformity with the EEC Treaty between a member state and one or more third countries and covering works, supplies or services intended for the joint implementation or exploitation of a project by the signatory states;
- to undertakings in a member state or a third country in pursuance of an international agreement relating to the stationing of troops;
- pursuant to the particular procedure of an international organisation such as the United Nations, European Bank for Reconstruction and Development, or World Bank.

Reserved contracts

The Directives introduced a new category of 'reserved' contracts, which are not excluded from the scope of the Directive but are subject to specific conditions of eligibility being imposed on the participants.

EU Member States may reserve the right to participate in public contract award procedures concerning sheltered workshops or may provide for such contracts to be performed in the context of sheltered employment programmes, where most of the employees concerned are handicapped persons who, by reason of the nature or seriousness of their disabilities, cannot carry on occupations under normal conditions.

Utilities

Exemptions specific to the utilities sector

The Utilities Directive provides for sector-specific exemptions in a number of utility sectors, based essentially on the degree of competition in these markets. Examples of these exemptions include contracts for the purchase of fuel for the production of energy; purchases of water; bus transport services; and upstream oil and gas exploration and exploitation. The Utilities Directive has also introduced a new general exemption mechanism for activities exposed to competition in markets to which access is not restricted.

The Utilities Directive also contains a series of other exemptions specific to the utilities sector including:

- **Activities outside the Community:** The Directive does not apply to contracts awarded by contracting entities for purposes other than the pursuit of their relevant activities, or the pursuit of such activities in a third country, in conditions that do not involve the physical use of a network or geographical area within the Community.
- **Affiliated undertakings exemption:** Where 'undertakings' are made up of a number of mutually owned or mutually dependant companies, the Utilities Directive provides for a specific exemption for purchases made between these companies under certain conditions. These purchases are treated as 'in-house' contracts, known as intra-group transactions. The contracts excluded, subject to meeting certain conditions, are those that have been awarded to affiliates, whose essential purpose is to act as central service-providers to the group to which they belong, rather than selling their services commercially on the open market.
- **Purchases for re-sale or hire:** The Directive excludes from its scope of application any contracts that have been awarded for purposes of re-sale or hire to third parties. This exclusion is intended to include 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 if other entities are free to sell or hire the same goods under the same conditions as the contracting entity.

Further reading:

[SIGMA Public Procurement Training Manual](#)