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**Requirements for conducting public procurement using electronic means under the new
public procurement Directives 2004/18/EC and 2004/17/EC**

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1. INTRODUCTION

The introduction of electronic means in the public procurement process raises a number of legal questions. However, few of these are new or specific to the use of electronic means: most deal with the issue of how to organise electronically procedures initially designed for paper. Electronic public procurement (hereafter e-procurement) is therefore firmly rooted in a well understood legal framework which provides the principles and rules which regulate the awarding process. The basic guiding principle is that in the absence of specific provisions to the contrary the use of electronic means does not change any of the steps of the relevant procedure.

The *rationale* for the legal provisions specifically devoted to e-procurement in the new public procurement Directives (Directive 2004/18/EC¹ and 2004/17/EC²), is that each and every economic operator across the Union should be able to participate, with simple and commonly used equipment and basic technical know-how, in a public procurement process which takes place partially or entirely by electronic means.

The aim of this document is to present the rules and principles governing e-procurement under the new public procurement Directives. First, the general rules and principles and the features that are relevant to all communications in an e-procurement process will be examined. Second, the rules governing notices and access to contract documents will be presented. Third, the rules related to the reception of requests to participate and tenders will be analysed in relation to both, individual “one-off” purchases and to repetitive purchases under framework agreements and dynamic purchasing systems. Finally, the new purchasing technique of electronic auctions will be examined more closely, followed by a consideration of the main features of the electronic dynamic systems.

This analysis will cover those aspects of a procurement procedure that are regulated by the Directives, i.e. from the publication of the contract notice to the receipt of tenders, and the re-opening of competition.³ Other aspects of the procurement cycle that may also impact on e-procurement (i.e. electronic invoicing, electronic payments etc.) are addressed by other relevant Community policies and legislation and discussed in the Commission Action Plan on e-procurement (COM 2004/841/EC).

As electronic procurement processes and methods are under constant development, the Directives do not pretend to regulate in detail the use of all such methods. Other electronic purchasing techniques may be used, “providing such use complies with the

¹ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, L 134, 30.4.2004, p.114.

² Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 134, 30.4.2004, p. 1.

³ A project was initiated under the Commission’s IDA programme and is currently continued under the new IDABC programme translating the legal framework into functional requirements, so as to facilitate technical implementation of operational systems for conducting electronic public procurement (<http://europa.eu.int/idabc/eprocurement>).

rules drawn up under this Directive and the principles of equal treatment, non-discrimination and transparency” (cf. recitals 12 and 20).

2. RULES APPLICABLE TO COMMUNICATIONS

2.1. Electronic means of communication and their use in the procurement process

2.1.1. Electronic means of communication

The new public procurement Directives define electronic means as those using electronic equipment for the processing (including digital compression) and storage of data which is transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means (Article 1(13) of Directive 2004/18/EC and Article 1(12) of Directive 2004/17/EC).

Electronic means of communication typically rely upon a network which is able to handle and transmit digital signals. According to Articles 42(2) and 48(2)⁴ the chosen means must be generally available and thus not restrict access to the tendering procedure. This means that the network in question must be open and everybody must be able to connect to it.

Today such generally available electronic means of communication would include Internet and e-mail. However technology is constantly and rapidly evolving. In order to define generally available means, it is preferable therefore not to interpret the provision restrictively in terms of a specific standard but rather to try to identify the relevant criteria.

These are most obviously the geographic coverage, the terminal equipment and the formalities/procedures needed for connection to the network, the level of ICT literacy required and the costs involved. If a means of communication implies a connection to a network which is not available everywhere and to everybody and/or the use of equipment which is not in common use (i.e. satellite communication today) and/or the costs of which are unreasonably high for the use to which it is destined, the means cannot be deemed to satisfy the requirement of general availability.

Therefore, only a pragmatic approach focusing on the obligation not to restrict the operators' access to the tendering procedures will help contracting authorities to determine if the chosen means of communication is indeed generally available and thus satisfies the first requirement of the Directives.

Freely available and reliable access to the contracting authority's connection to an open network is another important factor needed to guarantee that access to the tendering procedure is not restricted and to ensure equal treatment and effective competition.

⁴ The reference is hereunder always made first to the relevant article of Directive 2004/18/EC immediately followed by the reference to the corresponding relevant article of Directive 2004/17/EC, unless otherwise indicated.

Since the Internet is available 24 hours a day, the access to most operations (browsing, registration, downloading of documents, submission of requests to participate or tenders) should in principle be available round the clock. Reasonable access limitations can be envisaged, mainly for maintenance reasons; however they should never extend into normal business hours. In contrast, those operations that require interaction (i.e. e-auctions) may only be accessible during normal business hours. Only if tenders are to be collected in real time, as in some e-auctions, might it be necessary to modify opening hours in order to allow all tenderers to participate. To avoid any ambiguity the deadline for submitting offers should be clearly specified, i.e. with reference to Coordinated Universal Time (UTC) or by adding “local time”.

The contracting authority’s system should also be set up so as to provide adequate protection against unauthorised actions aimed at disrupting its normal operation and so as to provide a reasonable level of protection and guarantee of security to economic operators.

Technical problems within the contracting authority’s network, service disruptions and system failures may impede access to contract documents, or may disrupt the procurement process at a critical moment (e.g. during the transmission of requests for clarification or the corresponding answers, during receipt of tenders or requests to participate, or during auctions). Problems within the public or open network and problems specific to the device or the platform of the contracting authority should be distinguished: only in the latter case must the contracting authority remedy the failure by, for example extending the deadlines and providing the relevant information to all interested parties. The contracting authority is not responsible for the open network failure and is not obliged to take any remedial actions, even though it may do so where this seems appropriate (respective disclaimers may be included in an appropriate location).

The new provisions on e-procurement do not address the issue of charges for accessing the contracting authority’s system. It is reasonable to envisage that each party covers its own costs. Economic operators would bear the communication costs to access the procurement system or the costs of obtaining a digital signature. Contracting authorities would bear the cost of the system for receiving tenders and for making available the contract documents. Depending on the services offered by the system (alert mechanisms, database management etc.) certain fees could be charged to economic operators, except where dynamic purchasing systems are involved, provided that such fees are justified, proportionate and do not discriminate or restrict access to the procurement procedure.

2.1.2. The use of electronic means in the procurement process

Electronic means are for the first time put on par with traditional means of communication (Recitals 35 and 46; Articles 1(12) and 1(11)).

Contracting authorities may decide that all communications and exchanges of information with economic operators will be performed exclusively by electronic means (Articles 42(1) and 48(1)) or by a combination of electronic means and paper. If a combination is chosen it may continue in parallel at every stage of the procedure, or in successive stages in which only one or the other is used (e.g. only electronic

means for the request of contract documents and only traditional means for the submission of tenders). Contracting authorities can also leave the choice of means up to economic operators.

The right of contracting authorities to choose the means of communication is nonetheless limited by the Directives:

- The receipt of documents, certificates and declarations that do not exist in electronic format must be organised following the traditional procedures on paper (Articles 42(5)(d) and 48(5)(d))⁵;
- Some procuring methods/instruments such as auctions and dynamic purchasing systems (hereafter DPS) may only be conducted by electronic means (Articles 1(7) second indent and 1(6));
- When there are reasons to believe that, due to the volume and/or complexity of the data to be submitted, the communication, exchange and storage of it cannot be properly handled by electronic means, and therefore the requirements of Articles 42(3) and 48(3) are not satisfied, they should be handled by traditional means of communication. In such cases data shall be exchanged on physical supports like paper or generally used supports for electronic storage of data such as floppy disks, CD-ROMs or memory sticks.

2.2. Tools for communicating by electronic means

Articles 42(4) and 48(4) provide that the tools for communicating by electronic means, as well as their technical characteristics, *must be non-discriminatory, generally available and interoperable with the information and communication technology products in general use.*

2.2.1. General availability and non discrimination

The pragmatic approach described above for determining the general availability of the chosen means of communication also applies to the tools to be used for communicating by electronic means.

In contrast to electronic means, electronic tools do not imply the presence of a network. The term refers to products, mainly software products, which are used by contracting authorities and economic operators in order to communicate effectively. The requirement for electronic tools to be generally available is therefore slightly different. Bearing in mind that the guiding principle is always that whoever can have access to the Internet via a normal computer with standard applications and programs shall be able to participate in the public procurement procedure, two different cases may occur.

The tool for communicating has to be owned by the economic operator: in this scenario the necessary tool must be off-the shelf software which is easy to buy (available everywhere at a cost which is proportionate to the use to which it is

⁵ It must be noted that economic operators shall in any case respect the time limits set by the contracting authority and submit the certificates that exist only on paper before the expiry of the deadline.

destined), easy to install if need be, and reasonably easy to use. The general principle of proportionality can be used to assess the level of technical knowledge the tool requires (i.e. when procuring computer services or products, the contracting authority may probably require a higher level of ICT literacy from potential suppliers).

The tool is made available by the contracting authority to the interested economic operators: this is mainly where the chosen tool would not be “easy to buy” for economic operators. However, this apart, the same requirements of general availability and non-discrimination will apply as for a tool owned by economic operators. This is also the case where the requirement of interoperability is more important.

The level of ICT literacy required for using the tool should be considered. If the contracting authority can choose between two families of software for presenting drawings and plans, the exclusive choice of one of them could benefit some operators to the detriment of others. In such cases, in order to comply with the requirement of non-discrimination, if the contracting authority really cannot accept both tools it should consider providing longer time limits to allow economic operators to get acquainted with the tool.

Finally, and without prejudice to the right of the contracting authority to require tenders to be drafted in its own language (Annexes VII A (12)(d) and XIII A (10)(c)), the issue of the language of the tool should be taken into account by the contracting authority. Software in or at least the presence of some minimum indications in another language may be advisable to facilitate the installation and use of the tool made available by the contracting authority, to facilitate access to contract documents or uploading of tenders especially when complex instructions are needed.

2.2.2. *Interoperability of the tools for communicating by electronic means*

‘Interoperability’ is used here to refer to the capability of ICT systems (and of the business processes they support) to exchange information or services directly and satisfactorily between them and/or their users, so as to operate effectively together. This requires the capability to provide interchange of electronic data among, e.g. different signal formats, transmission media, applications or performance levels.

Interoperable tools permit unhindered communication between different and distinct systems, bringing together heterogeneous technologies and software. This is the case, i.e. when suppliers connect to a contracting authority’s system, electronically access tender documents from a mainframe, or upload an offer by connecting to a different application written in a different programming language.

Different and incompatible technical solutions – lack of interoperability - can render suppliers’ access to e-procurement systems impossible or discourage their participation because of additional difficulties or increased costs. Barriers may arise in terms of either functional or technical characteristics, or both, of the systems and tools used. These barriers should be addressed on a case by case basis.

For the purposes of the legal framework, the requirement of interoperable electronic tools is that the chosen tool must be able to function and to interact with commonly used equipment and applications, i.e. allowing the main functionalities for

communicating and exchanging data with basic office tools. It does not mean that it must be interoperable which each single specific application of economic operators' electronic equipment.

The legal framework is technology-neutral and does not distinguish between open source and commercial products as long as they are interoperable with information and communication technology products in general use.

2.3. Integrity and security of data

Articles 42(3) and 48(3) determine the conditions to be fulfilled by the chosen means of communication during the communication, exchange and storage of information. These conditions have to guarantee the data-integrity and confidentiality of tenders or requests to participate, and ensure that they are kept securely locked away until the deadline set for their opening.

These are not typically conditions specific to electronic means, because they also apply traditionally to paper based communication, exchange and storage of information. *Ad hoc* solutions may be required, however, in order to meet these conditions in an electronic environment.

In particular, neither signatures nor encryption should be used by economic operators unless they are invited to do so by the contracting authority. Member States may regulate the level of electronic signature required and restrict the choice of contracting authorities to qualified signatures (Articles 42(5)(b) and 48(5)(b) and Annexes X and XXIV). In any case the provisions of Article 5 of Directive 1999/93, in particular its Para. 2⁶ apply.

Secure channels (https, SSL) and/or encryption may be used to preserve the data-integrity and the confidentiality of tenders and requests to participate, although encryption may require higher levels of ICT literacy from economic operators. In any case in order to comply with the general principles of non discrimination, general availability and transparency as well as Articles 42(5)(a) and 48(5)(a), information about encryption must be made available to interested parties together with all necessary information regarding the specifications for the electronic submission of tenders and of requests to participate.

⁶ “Article 5 Legal effects of electronic signatures
1. Member States shall ensure that advanced electronic signatures which are based on a qualified certificate and which are created by a secure-signature-creation device:
(a) satisfy the legal requirements of a signature in relation to data in electronic form in the same manner as a handwritten signature satisfies those requirements in relation to paper-based data; and
(b) are admissible as evidence in legal proceedings.
2. Member States shall ensure that an electronic signature is not denied legal effectiveness and admissibility as evidence in legal proceedings solely on the grounds that it is:
- in electronic form, or
- not based upon a qualified certificate, or
- not based upon a qualified certificate issued by an accredited certification-service-provider, or
- not created by a secure signature-creation device.”

Contracting authorities may refuse to accept messages which could harm their system or their reception devices and they can take appropriate steps to this end⁷. Information on the antivirus mechanism should preferably be specified on the website and in the contract documents. Antivirus checks are normally operated upon receipt of the message. However, concerning a message that is a tender (or a request to participate) the antivirus check shall be conducted in a way that guarantees the confidentiality and the inaccessibility of the tender before its formal opening as required by Articles 42(3) and 48(3) and annexes X and XXIV. When this is not possible, the antivirus check shall be conducted upon the formal opening of tenders.

Whatever the solution, the senders of messages which are rejected because they are infected by a virus should be instantaneously informed in order to allow them, where possible, to re-submit the message within any deadlines that may be in force. No re-submission after the expiry of a deadline shall be allowed.

These requirements are further developed in section 4.1.2 with specific reference to the devices for receiving tenders, requests for participation, and plans and projects in design contests.

2.4. Traceability

Contracting authorities shall take appropriate steps to document the progress of award procedures conducted by electronic means (Art. 43, second indent and 50(1) last indent).

This requirement of traceability must be understood as referring to each stage of the procurement process conducted electronically, including the stage at which contract documents are made available.

There should be equipment and functionalities in place to maintain the original version of all documents and a true and faithful record of all exchanges with economic operators in order to provide any of the evidence which might be needed in case of litigation.

For the secure locking of tenders until the expiry of the deadline for the submission and the protection of data against unauthorised access, the traceability of operations, including the exact time and date of receipt of data is very important.

Traceability should make it possible to verify what message/data has been transmitted or made available, by whom, to whom, and when, including the duration of the communication. It should also be possible to reconstitute the sequence of events including any automatic data processing or automated calculations.

While it is not mandatory to record who visited or accessed contract documents over the open network, this may well be advisable. Contracting authorities generally welcome functionality capable of identifying who has accessed the contract documents and provided such identification is kept to a minimum, this is admissible.

⁷ A document infected by a virus could also be sent by the contracting authority or hosted in its website. In case this occurs, the correspondent stage of the procedure should be cancelled and reinitiated.

The traceability of operations should also make it possible to establish whether the site hosting the procurement process has been compromised or tampered with.

3. NOTICES AND ELECTRONIC ACCESS TO CONTRACT DOCUMENTS

Providing for the electronic submission of notices to the Office for Official Publications of the European Communities and the electronic access to tender documents allows contracting authorities to significantly save time in the procurement process; in both cases, time-limits can be reduced for the procedure as a whole.

3.1. Electronic submission of notices to the Commission

If sent electronically to the Publications Office, procurement notices are published on TED⁸ within five days of being sent, instead of the current twelve days (Art. 36(3) and 44(3)). The time limits for the receipt of tenders and for the receipt of requests to participate can consequently be shortened by seven days (Art. 38(5) and 45(3)). This applies to all procedures, including the competitive dialogue.

To effectively achieve publication in such a short time, the notices have to be sent in the format required by the Directives, using the standard forms available for this purpose (Art. 35(1), 36(2), Annex VIII points 1, 3 and Art. 41(1), 44(2), Annex XX points 1, 3)⁹. Currently, this refers to the standard forms contained in Directive 2001/78/EC. These will be replaced by a new set of forms in the forthcoming Regulation on Standard Forms, to be adopted as an Implementing Measure of the Commission. The templates for these standard forms are made available online in the SIMAP website (<http://www.simap.eu.int>) as well as technical documentation for sending notices in structured electronic format (XML).

In order to correctly identify in the standard forms the goods or services to be purchased, the Directives make mandatory the use of the Common Procurement Vocabulary (CPV) (Art. 1(14), 35 (1)(a) and Art. 1(13), 41(1)).

In addition, contracting authorities are encouraged to have and maintain an Internet website, the so called “buyer profile”, where they may publish prior information notices (in this case, a notice of the publication on the buyer’s profile shall be sent electronically to the Publications Office), and other notices also published by the Publications Office, as well as specifications and additional documents (Art. 35(1), Annex VIII points 1, 2 and Art. 41(1), 44(5), Annex XX points 1, 2). The buyer profile may also include information on ongoing invitations to tender, scheduled purchases, contracts concluded, procedures cancelled and any useful general information, such as the contact details of the contracting authority (Annexes VIII and XX point 2(b)).

⁸ Tenders Electronic Daily, the EU electronic publication board (<http://ted.publications.eu.int>).

⁹ The standard forms in the most frequently used electronic formats are available on the website. The Commission envisages organising soon the electronic submission of notices only in a structured XML format.

3.2. Electronic access to tender documents by economic operators

Tender documents can be either made available to, or sent to, economic operators by electronic means. In both cases all the rules on electronic communications apply.

The choice between these two possibilities belongs to the contracting authority except in dynamic purchasing systems, for which it is mandatory to offer unrestricted and full direct electronic access from the date the notice setting up the system is published until the expiry of the DPS (Art. 33(3)(c) and 15(3)(c)).

3.2.1. *Unrestricted and full direct access to tender documents by electronic means*

Electronic availability of tender documents can be provided in various ways, which must be indicated in the notice.¹⁰ However, only the provision of *unrestricted and full direct access by electronic means* entitles contracting authorities to shorten the time limits as prescribed by Articles 38(6) and 45(6).

To achieve unrestricted and full direct access to the contract documents *all* relevant documents must be accessible round the clock, from the date of publication of the notice until the expiry of the deadline for submitting tenders (or the expiry of the DPS) at the website indicated in the notice itself, without any intermediary stage. This means i.e. that if an access fee has to be paid then payment can take place instantaneously (i.e. at present by accepting all common international payment cards). No other way of making available the tender documents electronically (i.e. by automatic response email or by sending electronic documents on physical supports like CD-ROMs or others) permits the deadlines for submitting tenders to be reduced.

The possibility to browse contract documents without previous registration should ideally be provided. Contracting authorities may want to ask interested economic operators to register before downloading documents. To this effect a simple user ID and password, a valid e-mail account and the use of properly dated e-mail accompanied by the automatic acknowledgement of receipt are the most appropriate tools. However, the requirement to use a qualified signature at this stage is not justified and constitutes a hindrance to the access of documents. Contracting authorities may also want to ask interested economic operators to accept the conditions of operation of their site upon registration.

3.2.2. *The reduction of deadlines for submitting tenders*

Deadlines can be reduced provided that the above requirements are satisfied, regardless of the means chosen for the other stages of the procurement process. According to Articles 38(6) and 45(6), the deadlines for the receipt of tenders in open and restricted procedures may be shortened by five days.¹¹

¹⁰ When inviting the selected candidates to submit their tenders or to negotiate or to take part in the competitive dialogue, contracting authorities shall make sure the invitation includes the reference to accessing the specifications and the other documents (Articles 40 and 47).

¹¹ In the Utilities Directive (2004/17/2004), such reduction of the deadline for the submission of tenders is also possible in respect of negotiated procedures, cf. Art. 45(6) provided the cumulative effect of reductions does not result in a time limit for the receipt of tenders of less than 10 days (Art. 45(8)(2)).

In open procedures¹² it is possible to cumulate the two possibilities of reduction, the one for electronic transmission of the notice and the one for the unrestricted and full direct access to tender documents, leading to a total reduction of the deadline for submitting tenders of twelve days.

4. ELECTRONIC DEVICE FOR THE RECEIPT OF TENDERS, REQUESTS TO PARTICIPATE AND PLANS AND PROJECTS IN CONTESTS

4.1. The electronic receipt of tenders and requests to participate in one-off purchases

Further into the procurement process, electronic means can be used to transmit and receive tenders and requests to participate, as well as plans and projects in design contests. Articles 42(5) and 48(5) determine the key rules and refer to Annexes X and XXIV for the specific minimum requirements for the security and confidentiality of electronic reception devices. Thus all requirements previously mentioned relating to the definition and use of electronic means and tools equally apply to the device, together with the specific requirements explained below.

Contracting authorities are free to choose the appropriate means of communication and are responsible for organising the electronic receipt of tenders and requests to participate with respect to the legal requirements set out in the Directives discussed above. Economic operators shall comply with the specifications of the reception device in order to present a valid tender or request to participate.

4.1.1. Access to the reception device

To guarantee access to the device, the first requirement is that the necessary specifications, including encryption, are made available to interested parties (Articles 42(5)(a) and 48(5)(a)). These specifications should be indicated in the contract notice or in the contract documents, including the type of formats to be used. Contracting authorities may require a specific format and that tenders be structured in a specific way.

4.1.2. Security of data

4.1.2.1. Identity of tenderers and electronic signatures

The device for the electronic receipt of tenders and requests to participate must guarantee that the electronic signatures used are in conformity with the national provisions adopted pursuant to Directive 1999/93/EC on electronic signatures (Annex X(a) and Annex XXIV(a)).

¹² In respect of the other procedures, the reduction of deadlines in case of electronic transmission of notices applies to the deadline for the presentation of requests to participate. That is why it is not possible to cumulate the two grounds for a reduction of deadlines in order to shorten the sole deadline for the presentation of tenders; for restricted procedures it is possible to cumulate in the sense of applying both reductions the one for the deadline for submitting requests to participate and the one for submitting tenders within the same award procedure, cf. Art. 38(6)(2) of Directive 2004/18/EC and Art. 45(6) and 45(8)(2) of Directive 2004/17/EC.

Member States are free to set the level of the type of signature required; in particular they can ask for the tenders and/or requests to participate to be accompanied by advanced qualified electronic signatures (Art. (42(5)(b) and 48(5)(b)).

The Directives require contracting authorities to accept any signature that was legally produced in any other Member State. Therefore, whilst the device should be organised with reference to the required level of signature it should also be equipped to receive and handle other signatures in conformity with Article 5 of Directive 1999/93/EC. In any case the device should be able to deal with extremely complex tenders (e.g. tenders emanating from *consortia* that combine different signatures, i.e. from public administrations and economic operators, of different level and origin from different Member States). In practice, this may lead to problems of interoperability of the different signatures, both at a technical level (effective receipt and processing of the foreign signatures) and at organisational level (definition and mutual recognition of specific types and levels of foreign signatures).

Until a solution to the interoperability issue is found, it seems that a viable provisional alternative would consist in organising a submission on paper in parallel to the electronic one or to accept simple electronic signatures, possibly followed by confirmation on paper.

If the national legislation requires that anonymity be preserved until the opening of tenders, the device should guarantee that sender-related information is inaccessible as well as the content of the tender.

4.1.2.2. Time stamping

The device shall guarantee the exact time stamping of the receipt (Annexes X (b) and XXIV (b)). This means that data should be automatically time stamped and locked. Irrefutable time stamping can be performed by an independent third party; however, other solutions providing a reasonable level of certainty are also acceptable. A time stamp should be made at the beginning and end of reception. The time zone should be part of the time stamp as where they are stored documents could depend on the location of the provider of the tendering platform service.

In practice transmission of data could take some time. The specification should indicate at which moment events will be taken into account. In the absence of any specific indication it shall be considered that the transmission must be completed before the expiry of the deadline.

An acknowledgement of the successful receipt of the tender should ideally be automatically issued by the device and sent to the tenderer's electronic address.

The device shall provide appropriate information to tenderers if the uploading or submission of the tender did not succeed particularly in cases where a virus is detected. In this case it shall be considered that no submission was made and re-submission should be possible provided the deadline is still running.

4.1.2.3. Access to the data transmitted

According to Annex X (c) and (d) and Annex XXIV (c) and (d), the device shall guarantee the locking of the data transmitted, including detection any unauthorised access.

This means that data transmitted should be received and stored automatically without anyone being able to tamper with it until the relevant deadline for opening it has passed. It is technically possible to document each server access. The system logs and any operation performed on the data should be recorded and safely stored to ensure the traceability of operations. Before the data is opened the system should confirm that no unauthorised access has been detected.

According to Annex X (e) and XXIV (e), the device shall guarantee that only authorised persons can set or change the dates for opening data received. It might be necessary, in fact, to delay the opening of some parts of the tenders. The device shall allow this without compromising the security for the unopened parts and in general it must guarantee that the modification of dates does not have any untoward consequences for the confidentiality of tenders.

Internal security measures based on the “four eyes” principle must be implemented. This means that at least two persons should by simultaneous action perform opening of tenders.

According to Annex X (f), (g), and (h) and XXIV (f),(g) and (h), the device shall guarantee that access to the data submitted is only possible through simultaneous action by authorised persons, only after the prescribed date has expired, and lastly, that data once received and opened remain accessible only to persons authorised to acquaint themselves therewith.

It can be assumed that the opening of data is an on-line function. *Simultaneous action*, in this context, means that the designated authorised persons within a time span of some few minutes, shall produce logs of what components have been opened and when.

The security features of the device may render the practice of opening tenders in public difficult to organise. However an on-line public opening can always be envisaged, at least insofar as the information normally disclosed during the public opening could be made immediately available electronically. Physical presence of the opening board in a specific location should not be a requirement unless paper documents exist as complete, separate tenders or as components of tenders.

Each authorised person would need an individualised key. Codes may be distributed in advance but preferably after the expiry of the deadline for submitting tenders. On the date and time fixed for the opening of tenders and requests to participate the authorised persons should proceed to the simultaneous unlocking of data for read-only access. Electronic signatures should be verified and the integrity of data should be confirmed. The timely submission of data should be checked as well. Paper copies could be distributed but only the electronic version shall be considered original. As long as documents are kept within the system they could be checked against master files.

Whatever modalities for the antivirus check have been adopted, the device shall ensure that the confidentiality and the inaccessibility of the tender or of the request to participate to anybody before the formal opening of offers, and to unauthorised persons afterwards, are in any circumstance fully respected, as well as the requirement for traceability of all operations.

If national law requires the tender to be presented in separate parts (e.g. as separate technical and economic offers) the device should allow the deferred opening of the separate files in the required sequence in the same way as with sealed envelopes. National law will also regulate which parts of the tender need to be signed and by whom.

In case data is encrypted and the key is owned by the tenderer, the latter must ensure that the key reaches the contracting authority before date set for the opening of tenders.

4.2. The electronic receipt of tenders in the re-opening of competition under multi-suppliers framework agreements and dynamic purchasing systems – the use of electronic catalogues

4.2.1. The electronic receipt of tenders in repetitive procedures and electronic catalogues

Everything said above on the receipt of tenders for one-off purchases applies to repetitive purchases.

The only difference is that in framework agreements and DPS, at the stage of the re-opening of competition, the contracting authority and the participants operate in a closed circuit, where all the actors are already known.

As a consequence, unless forbidden by the national legislation, the level of signature required by the contracting authority can be lowered even if the general rule is the qualified signature.

The stage of re-opening of competition in particular allows for the use of electronic catalogues (e-catalogues). Electronic catalogues are electronic documents established by the suppliers which describe products and prices which may, under certain conditions, constitute a tender; these are either transmitted or uploaded to the contracting authority website or made available in the suppliers' website.

Economic operators may use e-catalogues to present their tenders provided they comply with the above mentioned requirements for electronic communication tools as well as with possible requirements set by the contracting authority (i.e. the use of a specific format). In such cases appropriate indications following Articles 42(5)(a) and 48(5)(a) shall be provided.

In theory, e-catalogues can also be used to present the tender in a one-off procedure or the initial tender in a repetitive procedure. However, it is precisely when the supplier and products have already been admitted that e-catalogues may easily be used to update the indicative tender for a DPS or to submit a new tender.

In running framework agreements and DPSs, e-catalogues shall refer to the tender/product for which the supplier has been selected and shall not contain

substantial amendments to the terms laid down in the framework agreement (Article 32(2)). At the stage of setting up the multi-supplier framework agreement or of setting up or joining the DPS, e-catalogues can only be submitted in a ‘frozen’ or ‘snapshot’ format under the conditions specified in Articles 42 and 48 and Annexes X and XXIV, because the public purchaser operates in an open environment to which anyone must have access.

4.2.2. *The active collection of tenders*

Traditionally, the contracting authority passively receives the tenders submitted by suppliers.

The situation is different at the stage of the re-opening of competition when the contracting authority operates in a closed circuit where all possible suppliers (even the newcomers in a DPS) are already known. In a closed circuit it does not make any difference from a technical point of view whether the updated tender is transmitted by the supplier or retrieved from the supplier’s website by the contracting authority. All the requirements and procedural stages related to the submission of tenders including the invitation the time-limits and the locking of tenders shall be valid; the only thing that changes is the way the tender arrives.

In particular, in this scenario the contracting authority must take care to inform all suppliers in due time when and how the tender data – updated indicative offers or new offers – will be retrieved by it.

Provided the catalogues are in conformity with the requirements of the contracting authority (in terms of their content, presentation, format, and tools), and that all the requirements of Annexes X and XXIV are satisfied, the contracting authority may decide to have exclusive access to the catalogue on a dedicated platform or, if the supplier agrees, to have access to it via the supplier’s website.

5. ELECTRONIC AUCTIONS

Electronic auctions are reiterative processes involving an electronic device that allows tenderers to present new prices, and/or new values for some or all elements of their tenders (Articles 1(7) and 1(6)). Electronic auctions constitute a particular step of the awarding stage of the procurement procedure and as such they shall always be preceded by the full evaluation of the tenders received, which will result in a score (notation) that enables the contracting authority to rank the tenders using automatic evaluation methods.

Member States may regulate and limit the resort to e-auctions (Art. 54(1) and 56(1)) but if they are allowed, they must be organised in strict conformity with the requirements of the Directives.

5.1. Conditions for the use of electronic auctions

Electronic auctions can be used under most procedures¹³ but because they include automatic evaluation, they cannot be used for certain service contracts and certain works contracts having as their subject-matter intellectual performances, such as the design of works, (Art. 1(7) second indent and 1(6)).

The e-auction can be based either solely on prices (whether award criteria is the lowest price or the most advantageous tender) or on prices and/or new values for other features that are indicated in the specification. The features have to be quantifiable and expressed in figures. “2nd price” auctions, where the auction is won by the lowest price bidder but at the price of the second lowest one, are not allowed.

The e-auction must be based on the award criteria published in the contract notice or tender documents. What can be offered in the auction are new technical characteristics in terms of values referring to features that can be expressed in figures or percentages, and/or new prices. The criteria and their relative weighting stay the same; before the start of the auction any range must be reduced to a specific value.

Contracting authorities have to announce their intention to hold e-auctions in the contract notice (Art. 54(3) and 56(3)). Once the e-auction has been announced it becomes mandatory to hold it, unless only one valid tender is received.

5.2. Information to be provided in the specifications

The specification shall indicate those features, whose values will be the subject of the auction, information about the electronic equipment used and the arrangements and technical specifications for connection (Art. 54(3) and 56(3)).

It shall also contain the main rules of the auction, in particular:

- whether there are any limits on the new values which may be submitted, (limitations are inherent to the technical characteristics indicated in the specification which cannot be modified);
- what information will be made available to the tenderers in the course of the auction, and the relevant timetable, (the minimum requirement should be to ensure equal treatment by providing the same information to all participants at the same time);
- relevant information on the process,
- the bidding conditions (in particular the minimum amount by which a bid must be higher or lower to qualify as a new bid).

¹³ In open, restricted, negotiated procedures with prior publication of a contract notice justified by the presence of irregular or unacceptable tenders in the case of Article 30(1)(a), on the reopening of competition among the parties of a framework agreement and on the opening of competition under a DPS if it is possible to establish the contract specifications with precision (Art. 54(2) of Directive 2004/18/EC); in open, restricted or negotiated procedures with a prior call for competition and on the opening for competition of contracts to be awarded under a DPS (Article 56(2) of Directive 2004/17/EC).

Finally the specification should also indicate how the invitations to auction will be sent.

5.3. Information to be provided in the invitation to submit new prices/values

A full evaluation of the tenders based on the award criteria published in the notice or in the specification and their relative weighting must precede the auction. At the end of the full initial evaluation, all tenderers who have submitted admissible tenders shall be invited simultaneously to submit new prices and/or values (Art. 54(4) and 56(4)). Rejected tenderers shall be informed in conformity with Articles 41(2) and 49(2).

Invitations shall be sent individually by electronic means to each admissible tenderer. The use of e-mail with acknowledgement of receipt and compliance with the requirement of traceability can provide the necessary certainty. In comparison, the posting of the invitation on an internet site is not sufficient.

The invitation shall indicate the result of the full initial evaluation (Art. 54(5) and 56(5)) by communicating the notation (i.e. the number of points allocated to the individual tenderer). There is no obligation to communicate at this stage the precise ranking (i.e. the relative position of the individual tenderer compared to the other participants) so long as this is done when the auction starts.

The invitation shall also provide the mathematical formula (if it has not already been announced in the specifications) which will be used to determine new rankings on the basis of new values submitted. The formula shall incorporate the weighting of all the criteria used to determine the most advantageous tender. To this purpose any ranges must be reduced to a specified value beforehand and a separate formula provided for each variant. Making the formula available to interested parties constitutes the minimal safeguard against potential distortions in the application of the award criteria.

The invitation shall also contain all the details of the auction:

- the date and time of the start of the auction (no sooner than 2 working days after the date the invitations are sent) (Art. 54(4) and 56(4));
- how and when the auction will close (Art. 54(7) and 56(4));
- the timetable for each phase of the auction (Art. 54(7) and 56(7))

Finally the invitation shall indicate all relevant information concerning individual connection to the electronic equipment being used (Art. 54(4) and 56(4)).

Thus, while the specification indicates the general rules for the auction, the invitation should state practical details that could not be or were not fixed beforehand. For example, if the specification indicates the general number and duration of rounds to be completed before the end of the auction, the invitation should indicate the exact time and date for each round.

5.4. Auction device and running of the auction

Contracting authorities shall communicate instantaneously to all tenderers sufficient information to enable them to ascertain their relative ranking at any moment (Articles 54(6) and 56(6)). The ranking shall be provided at least as from the beginning of the auction but the contracting authority may also communicate this information before it starts.

Contracting authorities shall not disclose the identities of the tenderers at any point in the auction.

Apart from these mandatory requirements contracting authorities may choose to communicate other information provided this was stated in the specification, i.e. the number of participants, prices or values provided by all other participants or only by some of them, their relative ranking.

The rules of the auction can change if this possibility has been announced and precisely specified in the specifications.

If the device for running the auction is technically incapable of dealing with the number of admissible tenders, the auction must be postponed and participants must be informed. If the device runs out of capacity during the auction, it must be cancelled and postponed as well. In case of system failure it is the responsibility of the contracting authority to decide if either the entire auction or one of its phases must be postponed to a later date; only if it is possible to provide timely and appropriate information to each participant, can extension of deadlines and re-submission of bids be envisaged.

Secure transmission of data, confidentiality of communication, authentication and identification of participants, as well as traceability of communications and of processing/calculations must all be ensured appropriately.

The contracting authority could in theory require advanced signatures for each bid where this is technically feasible; however at this stage, the process takes place in a closed environment and this appears to be neither required nor necessary.

Incorrect or unacceptable entries should be registered for reasons of traceability but not taken into account and appropriate feedback provided to the participants.

If everything has been correctly organised there is no need to foresee any communications during the auction other than the submission of prices/values. In any case no human intervention by the contracting authority side should be allowed during the running of the auction.¹⁴ In case of errors, violations of the rules of the game or abnormal behaviour¹⁵, traceability shall ensure that events can be re-constituted.

¹⁴ A contact point external to the device for urgent communications concerning possible technical problems may be offered to participants.

¹⁵ National legislation on the behaviour in auctions, if any, is applicable provided it does not conflict with the rules and principles of the Directives. The Commission services have launched a “Legal study on unfair commercial practices within B2B e-markets” in order to assess the need for further action.

Contracting authorities must organise the closure of the auction by choosing one of the options given by Articles 54(7) and 56(7) or by combining them: on the date and time fixed in the invitation; when no more new prices/values are received after the time indicated in the invitation has elapsed; or when the number of phases fixed in the invitation has been completed.

The contracting authority must award the contract to the best tender following the auction, according to the criteria of the specification. This does not impede the application of Articles 55 and 57 on abnormally low tenders. Contracting authorities may not have improper recourse to e-auctions nor may they use them to prevent, restrict or distort competition or to change the subject-matter of the contract as indicated in the contract notice and in the specification (Article 54(7) and 56(9)).

6. DYNAMIC PURCHASING SYSTEMS

By deciding to resort to a dynamic purchasing system (DPS), contracting authorities place themselves and the purchasing process in an entirely electronic context. This means contracting authorities shall use solely electronic means to set up the DPS and to award the contracts, according to Articles 33 and 15.

Member States may regulate and limit the resort to DPSs (Art. 33(1) and 15(1)) but if they are allowed, they must be organised in strict conformity with the requirements of the Directives.

Contracting authorities may decide to set up a DPS in order to purchase over several years (maximum 4, except in duly justified cases) commonly used goods or services which are generally available on the market (i.e. off-the shelf products for which the evaluation can be quick).

The DPS is an open electronic multi-supplier system, which allows for repetitive purchases while granting tenderers the possibility to join throughout its duration. To join the DPS, economic operators shall satisfy the selection criteria and submit an indicative tender which is evaluated for compliance with the specification. Based on their indicative tender, which may be renewed at any time during the DPS life cycle, admitted economic operators can then submit tenders for the specific contracts advertised in a simplified procedure.

No charges may be billed to the interested economic operators or to parties to the DPS (Articles 33(7) and 15(7)) and the rules of the open procedures must be followed during all steps necessary to set up, to manage, and to award each single contract under the DPS (Articles 33(2) and 15(2)).

6.1. Admission to the DPS

To set up the DPS contracting authorities have to publish a contract notice that must indicate that a DPS is involved, how long it will last and the Internet address at which the specification and any additional documents may be consulted. Direct and full access to the specification and any additional documents shall be made available on publication of the notice and remain available as long as the DPS lasts. Award criteria have to be indicated already at this stage even if they can be formulated more

precisely later in the invitation to tender. The possible use of electronic auctions shall also be indicated at this stage.

The specification must describe the nature of the purchases envisaged as well as the necessary information concerning the DPS, the electronic equipment and the technical connection arrangements and specifications used.

To be admitted to the DPS tenderers shall satisfy the selection criteria and submit an indicative tender which complies with the specification. At any time during the entire period of validity of the DPS indicative tenders can be submitted and be evaluated within a maximum of 15 days. (The period for evaluation can be extended in which case no invitation to tender may be issued in the meantime).

Upon setting up of the DPS, the time limit for submitting the indicative tenders is that of the open procedure (which may be shortened because of the electronic transmission of the contract notice accompanied by the unrestricted and full and direct access to the specification). However, as the evaluation of indicative tenders is continuous against the selection criteria and the specification of the DPS, they can be opened progressively as they arrive. In this case therefore the device for the receipt of indicative tenders does not need to comply with the requirements of Annex X and XX related to the date for opening tenders.

6.2. Opening for competition of contracts to be awarded under the DPS

Each time contracting authorities want to award a contract under the DPS, they must publish a simplified contract notice inviting all interested economic operators (both those which are already part of the DPS and those who are not) to submit an indicative tender. The time limit for this may not be less than 15 days from the date the simplified notice is sent, to allow new tenderers to join the DPS.

All indicative tenders received by that deadline, either received in response to the simplified contract notice, or previously submitted, shall be evaluated before issuing the invitations to tender.

After evaluating all indicative tenders, contracting authorities send the invitation to tender to all the admitted tenderers (both those already in the DPS as well as those newcomers who satisfy the selection criteria and have submitted indicative tenders which comply with the specification) and set an appropriate deadline for the submission of tenders. At this stage, the award criteria which were already stated in the contract notice setting up the DPS may be formulated more precisely.

After full evaluation of the tenders received, contracting authorities have two possibilities to proceed: either they award the contract to the tenderer who submitted the best tender on the basis of the criteria set out in the contract notice setting up the DPS or the more precisely formulated ones indicated in the invitation to tender; alternatively, if they had announced in the contract notice setting up the DPS that they would run an auction, they determine the admissible tenders and proceed with the auction by sending the invitations to auction according to Article 54(4). All the rules related to electronic auctions are applicable to auctions held in the context of a DPS. c. .

The result of the award of the contracts based on the DPS shall be published. To this end, contracting authorities either send each contract award notice to the Publications Office within 48 days from the award of each contract, or they group such notices on a quarterly basis and send them within 48 days of the end of each quarter.