Public Procurement Regulation

Introduction

The regulation of public procurement in the European Union intends to insert a regime of competitiveness in the relevant markets and eliminate all non-tariff barriers to intra-community trade that emanate from preferential purchasing practices favouring national undertakings. Apart from the obvious reasons relating to accountability in public expenditure, avoidance of corruption and political manipulation, the regulation of public procurement does not only represent a best practice in the delivery of public service by the state and its organs, it most importantly qualifies as an instrument of policy.

The existing public procurement regime can be classified into the public supplies sector, the public works sector, the public utilities sector (entities operating in the water, energy, transport and telecommunications sectors) and the public services sector. Alongside the substantive regime, two Compliance Directives provide for review procedures at domestic levels in relation to public and utilities procurement respectively.

Part 1  The legal regime on public procurement

The supplies procurement

The Public Supplies Directive 93/36 covers contracts between a supplier (natural or legal persons) and a contracting authority, having as their objective the purchase and hire of goods. The supplies regime appears as the most straightforward. Directive 70/32 attempted to integrate markets relating to the supply of goods destined for the public sector from within and from outside the
Community. It indirectly made clear to national administration and law and policy makers that public supplies markets could not be confined within the geographical territory of the Community, or the national borders of Member States, but encompass a broader field of sourcing of goods, a fact that cultivated the ground for the introduction of common commercial policy consideration in public procurement. Indeed, ten years later the European Commission was concluding on behalf of the Member States the Agreement on Government Procurement during the GATT Tokyo Round, thus expanding the territorial application of the EC internal regime to members/signatories to the Agreement.

In 1977, the Council adopted Directive 77/625 pursuant to Articles 30 and 100 EC. This instrument was designed to ensure a more effective supervision of compliance with the negative obligations of Article 30 EC and Directive 70/32 by means of imposing a number of positive obligations on purchasing bodies [article 1(b): contracting authorities specified in Annex I]. However, the scope of the Directive was rather limited. It explicitly excluded from its coverage public supplies contracts by public utilities (authorities in the transport, energy water and telecommunications sectors). The Directive was also inapplicable to public supplies contracts awarded i) pursuant to an international agreement between a Member State and one or more non-Member countries; ii) pursuant to an international agreement relating to the stationing of troops between undertakings in a Member State or a non-Member country and iii) pursuant to a particular procedure of an international agreement.

In 1980 Directive 77/62 was amended by Directive 80/7676 in order to take account of the 1979 GATT Agreement on Government Procurement.7 The Agreement, through the application of lower thresholds, committed the Community and its Member States in providing to suppliers from third countries access to central government purchasing and to some defence procurement, access which was better than that afforded to European suppliers enjoyed under Directive 77/62. Clearly, Directive 80/767 instituted an element of multilaterality in access to international public markets based on the principle of reciprocity. That Agreement became part of Community law as it was approved by Council Decision 80/271.8

The Commission’s White Paper on the Completion of the internal market9 reiterated that there was a serious and urgent need for improvement and clarification of the relevant Public Procurement Directives. In accordance with the Commission’s action programme,