



Brussels, 9.9.2015  
COM(2015) 454 final

**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN  
PARLIAMENT AND THE COUNCIL**

**on Public Procurement rules in connection with the current asylum crisis**

The European Union currently faces numerous challenges due to a sudden, steeply increased influx of asylum seekers. Not least, Member States have to satisfy adequately and speedily the most immediate needs of the asylum seekers (housing, supplies and services).

This Communication provides an overview of the possibilities for public procurers, the contracting authorities<sup>1</sup>, to provide infrastructure (housing) as well as supplies and services of first necessity quickly.

European public procurement rules provide all the necessary tools to satisfy those needs, under the provisions of the current Directive 2004/18/EC<sup>2</sup> (the "Directive") as well as under the newest public procurement Directive 2014/24/EU<sup>3</sup>. This directive has to be transposed by 18 April 2016 and is currently only applicable in those Member States, where transposition measures have already entered into force.

The Communication is based on Directive 2004/18/EC, but indicates the specificities of Directive 2014/24/EU, where those are relevant in the present circumstances<sup>4</sup>.

This Communication does not create any new legislative rules. It reflects the Commission's understanding of the Treaties, the public procurement directives and the case-law of the Court of Justice of the European Union (the Court). It should be noted that, in any event, the binding interpretation of Union law is ultimately the role of the Court.

## **1. SCOPE OF UNION PUBLIC PROCUREMENT RULES**

### **1.1. Infrastructure - works**

Infrastructure (i.e. housing) can be provided either by renting existing buildings not requiring extensive adaptations (i.e. works) or by constructing ex novo or refurbishing existing buildings.

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<sup>1</sup> The State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law.

<sup>2</sup> 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, OJ L 134 of 30.4.2004, p. 114.

<sup>3</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94 of 28.3.2014, p. 65.

<sup>4</sup> This concerns especially the major change of the rules applicable to services (see point 1.3 below) and the introduction of an accelerated open procedure (see point 3 below).

Renting **existing buildings** is not subject to public procurement rules (Article 16(a) of the Directive<sup>5</sup>). Provided it is available, housing can be provided without public procurement procedures by renting existing buildings on the market or by allocating existing public infrastructure (e.g. barracks, schools, sports facilities) to such use. Where it becomes necessary to build ex novo, to refurbish or otherwise adapt existing buildings, Union public procurement rules may be applicable<sup>6</sup>.

For the Directive to be applicable, the estimated value of the concrete building/renovation/adaptation project must be equal to or greater than the current threshold of EUR 5 186 000 Euro<sup>7</sup>. This applies to each functionally independent project. A municipality, which plans to implement several different housing schemes, will, in general, calculate the value of each scheme separately in order to decide whether the threshold is reached. It is not allowed to subdivide works projects to prevent their coming within the scope of the Directive (Article 9(3) of the Directive).

Below this threshold, national law applies. However, the basic principles of Union law in this area – the principles of non-discrimination on the basis of nationality, equal treatment and transparency – apply, should the concrete project have a certain cross-border interest<sup>8</sup>.

## 1.2. Supplies

The arrival of numerous asylum seekers will also require the urgent provision of supplies (e.g. tents, containers, clothes, blankets, beds, food).

The Directive will apply to all **supply contracts** awarded by a contracting authority<sup>9</sup>, provided that their estimated value is equal to or greater than the applicable threshold,

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<sup>5</sup> Cf. also Article 10(a) of Directive 2014/24/EU.

<sup>6</sup> Article 1 (2)(b) of the Directive and Article 2(6) of Directive 2014/24/EU on the definition of public works contracts.

<sup>7</sup> Each two years, the applicable thresholds and their countervalue in the national currencies of the Member States, whose currency is not the euro, are revised following a purely mathematical methodology, set out directly in the public procurement directives themselves. The next revision will apply as of 1 January 2016.

<sup>8</sup> Whether a given procurement presents or not a “certain cross-border interest”, must be determined by a case-by-case analysis based on the different factors, see the Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the public procurement directives, OJ C 179, 1.8.2006, p. 2–7 and further developed in the recent jurisprudence of the European Court of Justice. See for instance point 46 of the judgment of the Court of 11 December 2014 in Case C-113/13, and the jurisprudence referred to therein.

<sup>9</sup> In specific cases, exceptions might apply as specified in the Directive.

which can be either EUR 134 000 or EUR 207 000<sup>10</sup>, depending on the nature of the contracting authority<sup>11</sup>.

Below these thresholds national law applies. The above-mentioned basic principles of Union law apply under the same conditions as for works contracts.

### 1.3. Services

Finally, the arrival of asylum seekers also requires the procurement of services (e.g. cleaning, health, catering, security).

For service contracts the rules of the current Directive and of Directive 2014/24/EU are fundamentally different.

Under Directive 2004/18/EC services are only subject to the Directive in full if they are exhaustively listed<sup>12</sup>. Of these services, bus transport and cleaning services especially might be needed for asylum seekers. For all other services than those exhaustively listed, the Directive<sup>13</sup> only requires ex post transparency<sup>14</sup> and application of the provisions governing technical specifications.

Service contracts are subject to the Directive from the same thresholds as supply contracts. In addition, the basic principles of Union law apply to service contracts if they have a certain cross-border interest under the same conditions as for works contracts<sup>15</sup>.

Directive 2014/24/EU is, in principle, applicable in full to all services. However, particular procurement rules apply to "social and other specific services"<sup>16</sup>, the 'light

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<sup>10</sup> See footnote 7.

<sup>11</sup> The lower threshold applies to supply contracts awarded by central government authorities (e.g. ministries), which are listed in the Directive's Annex IV, whereas the higher threshold applies to supply contracts awarded by any other contracting authority, including in particular regional and local authorities.

<sup>12</sup> Annex II A of the Directive: maintenance and repair services, land transport services, air transport services, mail transport, telecommunication services, financial services, computer and related services, research and development services, accounting, auditing and bookkeeping services, market research and public opinion polling services, management consulting services, architectural and engineering services, advertising services, building cleaning and property management services, publishing and printing services, sewage and refuse disposal services (further specified by their CPV-codes).

<sup>13</sup> Listed non-exhaustively in Annex II B of the Directive (it includes the catch-all category "other services").

<sup>14</sup> I.e. sending a notice to the *Office of Publication of the European Union*, for information or publication once the contract has been awarded.

<sup>15</sup> Below the relevant threshold for the services exhaustively listed in Annex II A, both above and below the thresholds for all other services.

<sup>16</sup> Articles 74 to 77 of Directive 2014/24/EU; those services are exhaustively listed in Annex XIV of Directive 2014/24/EU: Health, social and related services; administrative social, educational, healthcare and cultural services; compulsory social security services; benefit services; other community, social and personal services; religious services; hotel and restaurant services; legal

regime<sup>17</sup>. The light regime, in the context of providing services to asylum seekers, could be relevant for instance in respect of catering, health and social services. Some services are completely excluded from the application of Directive 2014/24/EU. This applies to rescue and ambulance services under certain conditions<sup>18</sup>.

In general, Directive 2014/24/EU will be applicable from the same threshold as under the previous Directive<sup>19</sup>. For the services subject to the light regime, the applicable threshold has been set at EUR 750 000<sup>20</sup>.

The light regime obliges contracting authorities to ensure publicity at EU level both before and after the contract award, and to respect some basic procedural obligations (in particular to ensure the principle of non-discrimination). The procedures for the award of these categories of services will be regulated under national law. The general principles of Union law will apply to these services below the threshold provided that they present a certain cross-border interest<sup>21</sup>.

## **2. CHOICE OF PROCEDURES AND DEADLINES UNDER EU PUBLIC PROCUREMENT RULES**

### **2.1. General**

For contracts falling within the scope of the Directive, the contracting authority can choose to award the contract following an **open** or a **restricted** procedure (Article 28 of the Directive)<sup>22</sup>. The minimum deadline to submit an offer in an open procedure is of 52 days, but it can be reduced to 40 days by using electronic means (Article 38 of the Directive). In a restricted procedure, the general deadlines are 37 days to submit a request for participation and an additional 40 days to submit a tender after selection by the contracting authority of those admitted to submit a tender (Article 38(3) of the Directive;

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services; other administrative and government services; provision of services to the community; prison related services, public security and rescue services; investigation and security services; international services; postal services (further specified by their CPV-codes).

<sup>17</sup> Recital 28 of Directive 2014/24/EU.

<sup>18</sup> Article 10 (h) of Directive 2014/24/EU.

<sup>19</sup> The lower threshold applies to service contracts awarded by central government authorities, whereas the higher threshold applies to service contracts awarded by any other contracting authority, including in particular regional and local authorities.

<sup>20</sup> This threshold will remain unaltered also after 1 January 2016, since it will not be revised as the other thresholds.

<sup>21</sup> Recitals 114 to 117 of Directive 2014/24/EU offer some clarifications on this notion in the particular context of the light regime.

<sup>22</sup> Negotiated procedures with prior publication or competitive dialogues would probably not be of interest in this context as the conditions for their use would not be met under the circumstances envisaged in this communication.

these deadlines may be set at respectively 30 and 35 days where electronic means are used<sup>23</sup>).

For open procedures subject to Directive 2014/24/EU, a deadline of 35 days for the submission of tenders will apply<sup>24</sup>. In the case of restricted procedures, Directive 2014/24/EU foresees a deadline of 30 days for the submission of requests to participate followed by an additional deadline of 30 days for the presentation of tenders<sup>25</sup>. This last deadline may, where the national legislation has implemented this option, be agreed between sub-central contracting authorities, such as regional or local authorities, and the participants; if an agreement cannot be reached, then a minimum deadline of 10 days may be applied<sup>26</sup>.

## **2.2. Urgency**

If urgency requires it, the Directive foresees a substantial reduction of the general deadlines. In this case, contracting authorities can choose an "accelerated restricted procedure", in which the deadlines to submit a request for participation are 15 days and to submit an offer 10 days<sup>27</sup>. This allows for a speedy award of the contract.

Directive 2014/24/EU maintains this procedure<sup>28</sup> and introduces in addition an "accelerated open procedure", by providing that the deadline for the submission of tenders may be reduced to 15 days in cases of duly justified urgency<sup>29</sup>.

Using an "accelerated restricted procedure" means applying a minimum of equal treatment and transparency, making it possible to ensure some competition even in cases of urgency. In many cases, it might be possible to award the necessary contracts using such "accelerated restricted procedures" (or, under Directive 2014/24/EU, "accelerated open procedures").

## **3. NEGOTIATED PROCEDURE WITHOUT PUBLICATION IN CASES OF EXTREME URGENCY**

With the "negotiated procedure without publication", Union law provides an additional tool, which will allow awarding contracts to provide for the asylum seekers' need also in the most urgent cases.

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<sup>23</sup> Article 38(5) and (6) of the Directive.

<sup>24</sup> Article 27 of Directive 2014/24/EU.

<sup>25</sup> Article 28 of Directive 2014/24/EU.

<sup>26</sup> Article 28(4) of Directive 2014/24/EU.

<sup>27</sup> Article 38(8) of the Directive.

<sup>28</sup> Article 28(6) of Directive 2014/24/EU.

<sup>29</sup> Article 27(3) of Directive 2014/24/EU.

Contracting authorities may award public contracts by a negotiated procedure without publication *"insofar as is strictly necessary when, for reasons of extreme urgency brought about by events unforeseeable by the contracting authorities in question, the time limit for the open, restricted or negotiated procedures with publication cannot be complied with. The circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority."* (Article 31(1)(c) of the Directive<sup>30</sup>).

As contracting authorities derogate in this case from the basic principle of the Treaty concerning transparency, the European Court of Justice requires that the use of this procedure remains exceptional. All the conditions have to be met cumulatively and they have to be interpreted restrictively (see, for instance cases C-275/08, Commission v Germany, and C-352/12, Consiglio Nazionale degli Ingegneri). A "negotiated procedure without publication" allows contracting authorities to negotiate directly with potential contractors; it does not allow for a direct award to a preselected economic operator unless only one will be able to deliver within the technical and time constraints imposed by the extreme urgency.

Each contracting authority will have to evaluate whether the conditions for using such a "negotiated procedure without prior publication" are met. It will have to justify its choice of such a procedure in an individual report.<sup>31</sup> In the individual assessment of each case the following cumulative criteria will have to be fulfilled:

### **3.1. "Events unforeseeable by the contracting authority in question"**

In many Member States, the number of persons seeking asylum has increased significantly over a relatively short period.

It can be expected that, in general, a concrete contracting authority did not and could not know sufficiently in advance how many asylum seekers it would have to provide for. The specific need for an individual municipality to provide housing, supplies or services to asylum seekers could, therefore, not be planned in advance, and would thus constitute an unforeseeable event for the municipality in question.

### **3.2. Extreme urgency making compliance with general deadlines impossible**

It cannot be doubted that the most immediate needs of the asylum seekers coming to the various Member States (housing, supplies and services) should be ensured with all possible speed.

Whether this makes it impossible to respect even the very short deadlines of the accelerated restricted procedure (or the accelerated open procedure provided for under Directive 2014/24/EU), will have to be assessed on a case-by-case basis.

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<sup>30</sup> A substantially identical provision is set out in Article 32(2)(c) of Directive 2014/24/EU.

<sup>31</sup> Article 43(f) of Directive 2004/18/EC and Article 84 (1) (f) of Directive 2014/24/EU.

As clarified in the Court's jurisprudence<sup>32</sup>, if extreme urgency is invoked, the procurement need has to be satisfied without delay. The exception cannot be invoked for the award of contracts that take longer than they would have taken if a transparent, open or restricted, procedure had been used, including accelerated (restricted) procedures.

### **3.3. Causal link between the unforeseen event and the extreme urgency**

For the provision of the most immediate needs to asylum seekers within a very short timeframe the causal link between the increase in asylum seekers and the need to provide for their needs cannot reasonably be doubted.

### **3.4. "Insofar as is strictly necessary"**

Negotiated procedures without prior publication may offer the possibility to meet adequately immediate needs. They cover only the gap until more stable solutions can be found, such as framework contracts for supplies and services, awarded by regular procedures (including accelerated procedures).

## **4. CONCLUSIONS**

Contracting authorities will have to assess on a case-by-case basis which procedure they choose for the award of contracts aiming at providing for the immediate needs of asylum seekers (housing, supplies or services).

For individual projects above the relevant thresholds for the application of Union public procurement directives, where the needs must be met through new procurement<sup>33</sup>, contracting authorities will, first, consider to avail themselves of all possibilities to substantially reduce the deadlines by using an accelerated (restricted or, under Directive 2014/24/EU, open) procedure.

Should those not allow for the sufficiently speedy provision of housing, supplies and services, a negotiated procedure without publication can be envisaged.

Union procurement rules provide for adequate rules to satisfy the most immediate needs of asylum seekers in the current exceptional circumstances.

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<sup>32</sup> See Judgment of the Court in case C-352/12 of 20 June 2013, par. 50 – 52.

<sup>33</sup> As opposed to meeting them e.g. through own resources, public-public cooperation, drawing on existing contracts.