European Commission

Public Procurement and Utilities Directives

Presentation of the acquis: EU Public Procurement legal framework

Brussels, 6 December 2018

DG for Internal Market, Industry, Entrepreneurship and SME's (DG GROWTH). Unit G3

These slides accompany the explanation of the acquis to Albania and North Macedonia and can only be used for that purpose. Their content is subject to further development of the acquis and interpretation by the Court of Justice of the European Union

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Public Procurement legal framework

New framework since 2014 - transposition deadline for Member States (MS): 18 April 2016

*International context: Compliance with **GPA***

Directive 2014/24/EU "classical" Directive (CD)
Directive 2014/25/EU "utilities" Directive (UD)
Directive 2014/23/EU "concessions" Directive

+ PP Remedies Directives: 89/665/EEC and 92/13/EEC
+ Defense and security Directive 2009/81/CE

Old "generations" of PP Directives

The 1st "generation": in the 70s and 80s

The 2nd "generation": Directives 92/50/EC (services), 93/36/EC (goods), 93/37/EC (works) and 93/38/EC (utilities)

The 3rd "generation": Directives 2004/17/EC (utilities) and 2004/18/EC ("classical")

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Objectives for the 2014 reform

1. Simpler/ more flexible procedures

2. Strategic use

3. Better access (SMEs, cross-border trade)

4. Sound procedures

5. Governance, professionalization of procurement

PP Main objectives

to ensure the application of basic principles deriving from the EC Treaty:

- free Movement of Persons, Goods, Capital and Services,

- non-discrimination on grounds of nationality,

- equality of treatment

- transparency

PP Main concepts (1)

Valid for both Directives (2014/24/EU and Directive 2014/25/EU)

All definitions are given by EU law, not by national laws

Public procurement

- "acquisition (…) of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies and services are intended for a public purpose."

PP Main concepts (2)

Public contracts

- "contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services."

Public works contracts

Public supply contracts

Public service contracts

PP Main concepts (3)

Contracting authorities

- "the State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law."

PP Main concepts (4)

Bodies governed by public law

- a) established for the specific purpose of meeting needs in the general interest , not having an industrial or commercial character;
- b) having legal personality;
- c) financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or subjected to management supervision by those auhorities or bodies; or have a board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.

Thresholds (1)

Current thresholds (Directive 2014/24/EU)

Works contracts: €5,548,000

All services concerning social and other specific services listed in Annex XIV: €750,000

Service and supplies contracts and design contests:

- **awarded by Central Government authorities: €144,000**
- **awarded by Sub-central contracting authorities: €221,000**

Thresholds (2)

The directive provides for the methods for calculating the estimated value of the contract, but <u>in all cases:</u>

"The choice of the method used to calculate the estimated value of a procurement shall not be made with the intention of excluding it from the scope of this Directive. A procurement shall not be subdivided with the effect of preventing it from falling within the scope of this Directive, unless justified by objective reasons."

Thresholds (3)

Reminder:

And for contracts below the thresholds (i.e., which are excluded from the scope of the Directive) obligation to comply with the basic standards (Treaty principles):

- Transparency and non-discrimination, meaning:

- **Sufficient degree of advertising**
- **Impartial award of contracts**
- **Judicial protection**

Exclusions

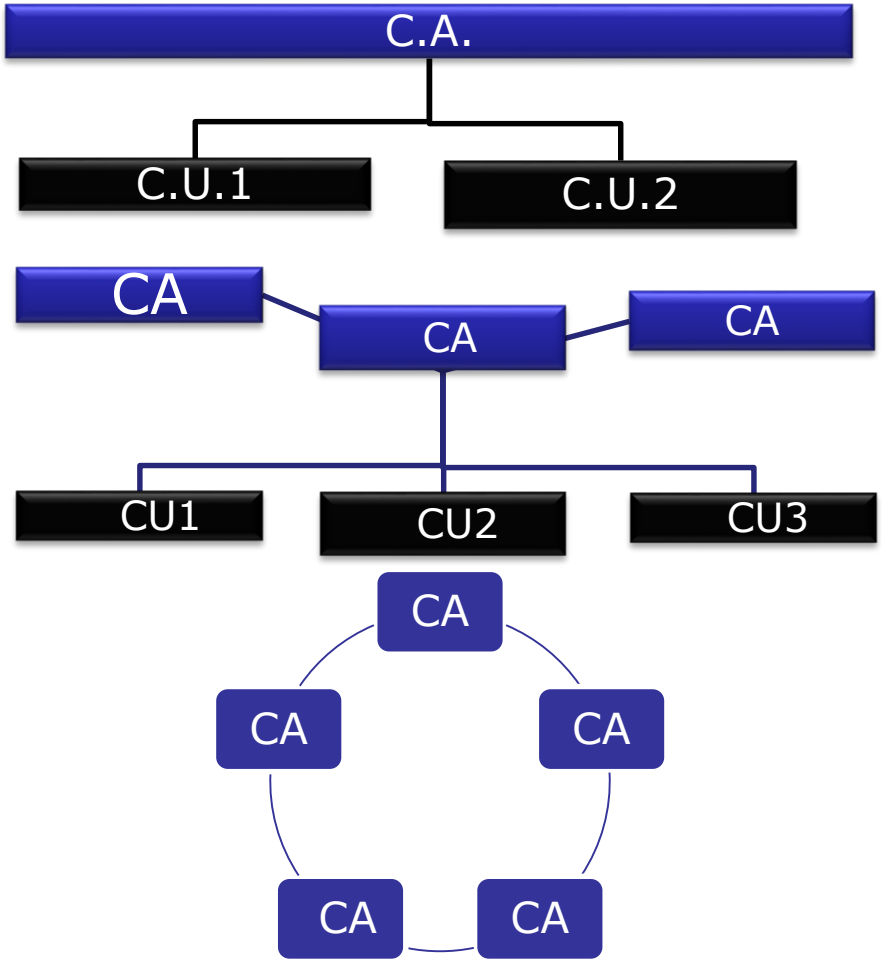
The Directive provides for a number of exclusions from its scope, namely:

- a number of specific exclusions for service contracts (for example, "the acquisition or rental (...) of land, existing buildings or other immovable property")

- certain public contracts between entities within the public sector ("in-house" and horizontal cooperation)

Public-Public cooperation – a few remarks

- Builds on jurisprudence
- *Covers **in house***:
  - **Sole** control
  - **Joint** control
- ***"Horizontal" cooperation***
- ***Plus***:
  - "bottoms-up"
  - "essential part" = more than 80%
  - private participation in very limited cases



A (very) specific situation

Contracts subsidised by contracting authorities

- **The Directive applies to certain works and services contracts which are subsidised by contracting authorities by more than 50%.**

- **This obligation concerns therefore contracts which are not, in principle, public contracts within the meaning of the Directive (i.e., the beneficiary of this subsidising is a private party).**

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Principles of procurement

- Equal treatment of economic operators (no discrimination)
- Transparent and proportionate action of the contracting authority
- No design of the contract to exclude it from the scope of the Directive or to narrow competition (no intention of unduly favouring or disadvantaging certain economic operators)

+ "Horizontal clause"

"in the performance of public contracts economic operators (shall) comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X."

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Procedures

- Member States are obliged to implement all procedures foreseen by the Directive:
  - open procedure (free)
  - restricted procedure (free)
  - competitive procedure with negotiation (under conditions)
  - competitive dialogue (under conditions)
  - innovation partnership (subject to the need of an innovative product, service or works)

The directive establishes the conditions to apply a competitive procedure with negotiation and a competitive dialogue.

Negotiated procedure without prior publication (Direct award)

- Only possible in the specific cases and circumstances established by the Directive

- Examples:
  - where the works, supplies or services can be supplied only by a particular economic operator for technical reasons (e.g. spare parts for a plane)
  - for reasons of extreme urgency brought about by events unforeseeable by the contracting authority. The circumstances invoked to justify extreme urgency shall not in any event be attributable to the contracting authority (e.g. needs resulting from a natural disaster)

Techniques and instruments for electronic and aggregated procurement (1)

Most common techniques and instruments

- **Framework agreements:**

a) a "closed system" to *"be applied only between those contracting authorities clearly identified for this purpose in the call for competition (…) and those economic operators party to the framework agreement as concluded"*

b) in principle, the term can not exceed 4 years

c) "Contracts based on a framework agreement may under no circunstances entail substantial modifications to the terms laid down in that framework agreement."

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Techniques and instruments for electronic and aggregated procurement (2)

- **Central purchasing bodies:**

a) **Member States may oblige contracting authorities to procure by having recourse to central purchasing bodies**

b) **Service contracts awarded by contracting authorities to a central purchasing body for the provision of centralised purchasing activities are excluded from the obligation to apply the procedures provided for in the Directive.**

- **Other techniques and instruments for electronic and aggregated procurement: dynamic purchasing systems (=« open » systems), electronic autions, electronic catalogues….**

Conduct of the procedure (1)

- **Technical specifications:**

a) ***"shall afford equal access of economic operators to the procurement procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition"***

b) **unless justified by the subject-matter of the contract, technical specifications shall not refer, namely, to a specific make or source, to trade marks, patents, types or a specific origin of production. Such reference shall only be permitted on an exceptional basis. In this case, such reference shall be accompanied by the words "or equivalent".**

Conduct of the procedure (2)

- **Division of contracts into lots:**

a) A SME friendly provision

b) « apply or explain »: contracting authorities are not obliged to subdivide contracts into lots, but they shall *"provide an indication of the main reasons for their decision"* for not doing so:

c) Possibility for contracting authorities to limit the number of lots that may be awarded to one tenderer

d) Member States may render obligatory to award contracts in the form of separate lots

Conduct of the procedure (3)

- **Setting time limits:**

  "When fixing the time limits for the receipt of tenders and requests to participate, contracting authorities shall take into account of the complexity of the contract and the time required for drawing up tenders, without prejudice to the minimum time limits set out in" **the Directive**

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Minimum time limits: 2014/24/EU

Procedure	Normal / e-tenders	No e-documents
Open	35 / 30	40
Open with PIN	15 / -	20
Open accelerated	15 / -	-
Requests for particip. (R, CPWN, CD, IP)	30 / -	-
Request for participation, accelerated (R, CPWN)	15 /-	-
Receipt of tenders (R, CPWN)	30 / 25 Subcentral: agree/10	35 Subcentral: agree/15
Receipt of tenders (R, CPWN) - PIN	10 / -	15
Receipt of tenders (R, CPWN) - accelerated	10 / -	-

Publication and transparency

- *Notices:*
  - **Prior information notices (PIN) (may be used as call for competition by subcentral authorities)**
  - **Contract notices**
  - **Contract award notices**

- *Publication of the notices at national level:*

  a) No publication at national level before publication at EU level (OJEU – Serie S/TED)

  b) No information in the notices published at national level other than that contained in the notices dispatched to EU level.

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Criteria for qualitative selection (1)

- Exclusion grounds:
  - **Mandatory exclusion grounds (e.g. conviction for terrorism):**

    apply not only to the economic operator

    but also to persons which are members of the administrative, management or supervisory board of that economic operator or have powers of representation, decision or control therein

  - **Facultative exclusion grounds (e.g. grave professional misconduct):**

    contracting authorities may exclude or may be required by the Member States to exclude for such reasons

  - **The exclusion grounds are applicable at any time during the procedure**

Criteria for qualitative selection (2)

- **Selection criteria:**

- ***"Contracting authorities may only impose criteria referred to in paragraphs 2, 3 and 4 [of Article 58] on economic operators for participation"***

- ***"All requirements shall be related and proportionate to the subject-matter of the contract"***

- ***"The minimum yearly turnover that economic operators are required to have shall not exceed two times the estimated contract value, except in duly justified cases (...)"***

- **+ Possibility to rely on the capacities of other entities**

Criteria for qualitative selection (3)

- **Documentary requirements:**
  - **Self-declaration: European Single Procurement Document (ESPD);**
  - **Up-dated documents already available;**
  - **Real-time access via databases;**
  - **e-Certis**
  - **Means of proof: only those provided by the Directive**

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Contract award criteria (1)

- General conditions set out in Article 67(4)– largely based on ECJ case C-448/01 *EVN Wienstrom* :
- Award criteria shall:
  - **not** have the effect of conferring an **unrestricted freedom** of choice
  - **ensure the possibility of effective competition**
  - be accompanied by **specifications** that **allow** the information provided by the tenderers to be **effectively verified** in order to assess how well the tenders meet the award criteria.
  - In case of doubt, contracting authorities shall verify effectively the accuracy of the information and proof provided by the tenderers.

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Contract award criteria (2)

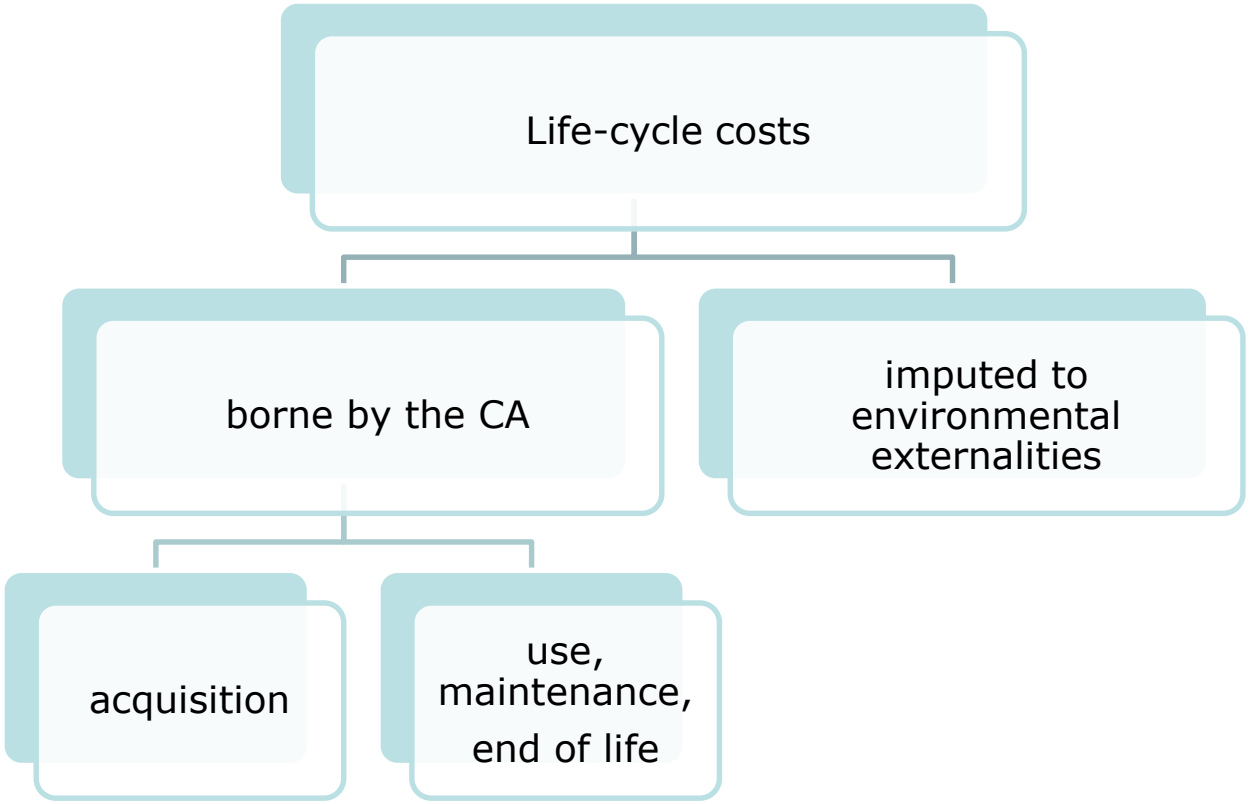
- Contract award criteria are **linked to the subject matter if** they **relate** to the works, supplies or services to be provided …in any respect and at any stage of their life cycle, including factors involved in:
  - the **specific process of production, provision or trading** of those works, supplies or services; or
  - a **specific process for another stage** of their life cycle

- even where such factors **do not form part of their material substance**:
  - Green e. g.: manufacturing of the purchased products did not involve toxic chemicals, or that the purchased services are provided using energy efficient machines
  - Social: e.g. social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract

Contract award criteria (3)

- ***Sole award criterion: MEAT – most economically advantageous tender -***
  to be assessed on the basis of
  - **price, or**
  - **cost**, using a cost-effectiveness approach such as life-cycle costing, **or**
  - **the best price-quality ratio** *(BPQR)to be assessed on the basis of award criteria linked to the subject-matter of the contract.*
  - organisation, qualification and experience of the **staff delivering the contract** where this can significantly impact the level of performance of the contract
- *MS can exclude or restrict the use of price or cost only as sole criterion.*

Life-cycle costing (1)



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Life-cycle costing (2)

- If a common methodology exists, then its use is obligatory – See Directive 2009/33/EC.

- Method to be used must:
  - be based on **objectively verifiable and non discriminatory criteria**. In particular, where it has not been established for repeated or continuous application, it shall not unduly favour or disadvantage certain economic operators;
  - be **accessible** to all interested parties;
  - the **data required can be provided with reasonable effort by normally diligent economic operators**, including economic operators from third countries party to the GPA or other international agreements by which the Union is bound.

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Award criteria: examples, procuring printers

- **Price:** acquisition price 100%
- **Cost:** 55% acquisition price, +
  - 15% cost of consumables (ink), +
  - 25% electricity consumption, +
  - 5% cost connected to dismantling and recycling;
- **BPQR:**
  - 50% cost (35%+5%+5%+5%) +
  - 10% user-friendliness, +
  - 5% level of noise emission, +
  - 10% use of recyclable materials for the production of the printers, +
  - 10% involvement of persons from a disadvantaged group in the production process, +
  - 5% imputed cost of transport of printers, and
  - 10% aftersales service

Abnormally low tenders

- **Obligation to ask** for explanations where tender appears abnormally low, **and** to **reject** a tender where it is abnormally low because it does not comply with the horizontal clause.

- An economic operator cannot be excluded without been given the possibility to explain the price or costs proposed.

- National law cannot establish automatic exclusions for abnormally low tenders.

Subcontracting

- **The Directive provides for some specific provisons on subcontracting such as:**

Observance of the obligations of 18(2) ("horizontal clause") by subcontractors, which is ensured through:

appropriate action by the competent national authorities acting ***within the scope of their responsibility and remit***.

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Contract modifications

- *"de minimis": below 10/15%* ***and*** *below threshold;* **+**

- *Contracts may be modified without new procurement:*
  - **clearly provided for** (options etc.)
  - **additional works, services and supplies which have become necessary – change significantly inconvenient – 50% limit**
  - **unforeseen circumstances – 50% limit**
  - **change of contractors (provided for or part of succession)**
  - **any modification that is not substantial**

- *Explicit criteria to determine when a modification is "substantial"*

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Light regime for social and other specific services

- *Starting point: all services are subject to the full set of rules, unless*
  - **The service concerned is explicitly excluded from the scope of the Directive (see "exclusions") or**
  - **The service concerned is explicitly listed in the exhaustive Annex XIV of the Directive**
- *Specific simplified rules for these services*
  - **higher threshold (EUR 750.000)**
  - **lighter obligations: ex-ante & ex-post publicity, remedies**
  - **principles of transparency and equal treatment only; for the procedure national rules apply**

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Utilities Directive 2014/25/EU

A quick overview

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Utilities Directive 2014/25/EU

- ***Why an "utilities" Directive? Because…***

- the entities operating in the utilities sectors are in some cases governed by public law and in others by private law

- the various ways in which national authorities can influence the behaviour of these entities, including participations in their capital and representation in the entities administrative, managerial or supervisory bodies

- the existence of special or exclusive rights granted by the national authorities, concerning the supply to, provision or operation of, networks for providing the service concerned, the exploitation of a given geographical area for a particular purpose

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Utilities Directive 2014/25/EU

Because of these specificities the application of procurement rules in these sectors requires that the entities to be covered must be identified on a different basis than by reference to their legal status

- Directive 2014/24/EU (the "classic" Directive) applies to "bodies (governed by public law)"

- Directive 2014/25/EU (the "utilities" Directive) applies to "entities" (including "bodies governed by public law") which pursue a certain activity

Utilities – Contracting entities

Contracting entities are either:

- **Contracting authorities pursuing one of the activities referred in the Directive,** either…

- **Public undertakings pursuing one of the activities referred in the Directive,** either…

- **Other entities which are not contracting authorities or public undertakings, and which have as one of their activities any of the activities referred in the Directive, and operate in the basis of special or exclusive rights granted by a competent authority of a Member State**

Utilities – scope : special & exclusive rights

- *"**special and exclusive rights**" clarified:*

  - No special or exclusive rights where:
    - rights granted following procedures ensuring adequate transparency, and
    - based on objective criteria

  - Non-exhaustive list of legislation (procedures) meeting the requirements:

a) procurement with prior call for competition under Directives 2009/81/EC, 2014/23/EU, 2014/24/EU, 2014/25/EU (or predecessors)
b) Natural gas (Article 4 of Directive 2009/73/EC);
c) Electricity production (Directive 2009/72/EC)
d) Postal services (Article 9 of Directive 97/67/EC)
e) Hydrocarbons (Directive 94/22/EC)
f) Public passenger transport services (Regulation (EC) No 1370/2007

Utilities – scope : activities

Utilities Directive covers:

- Gas and heat
- Electricity
- Water
- Transport services
- Ports and airports
- Postal services
- Extraction of oil and gas and exploration for, or extraction of, coal or solid fuels

Utilities - Exemption where sufficient level of competition

- **Material** aspects dealt with in Article 34 and Annex III;
- **Procedural** aspects regulated in Art. 35 and Annex IV;

- Material conditions:
  - **free access (liberalisation) and**
  - **(sufficient) competition**

- Burden of proof on Member State or contracting entity requesting exemption

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Utilities – General features

- **A legal framework quite similar to the one established by the "classical" Directive 2014/24/EU but**
  - **with some adaptations resulting from the specificities of the scope of the Utilities Directive**
  - **and, above all, a more flexible and light framework imposing less obligations on contracting entities**

Utilities - Differences with the "Classical" Directive (1)

Just some examples:

- **Framework agreements**
- **a) The term can not exceed, in principle, 8 years (4 in the CD)**
- **b) "Lighter" requirements for the award of contracts based on a framework agreement**

- **Division of contracts into lots**
- **No obligation to justify if contract not divided into lots**

- **Notices (publication and transparency)**
- **"Lighter" regime including the possibility of "periodic indicative notices", valid as contract notice for several contracts**

Utilities – Differences with the "Classical" Directive (2)

- **Other examples:**
  - **Qualification and qualitative selection:**

a) **"Lighter" regime** with more freedom for contracting entities when establishing and applying exclusion grounds and selection criteria but

b) **"Where the contracting entity is a contracting authority**, those criteria and rules shall include the exclusion grounds listed in Article 57(1) and (2) of Directive 2014/24/EU on the terms and conditions et out in that Article"

c) **Possibility of "qualification systems"** (an "open" system allowing contracting entities to limit the tendering of specific contracts to economic operators already qualified in the system)

Utilities – Differences with the "Classical" Directive (3)

- **Other examples:**

  - **Light regime for social and other specific services:**
    - Same regime as in the "classical" Directive but higher threshold (EUR 1.000.000 instead of EUR 750.000)

  - **Exclusion of contracts between entities within the public sector ("in-house" and horizontal cooperation)**
    - Same regime as in the "classical" Directive but only possible for "contracting authorities"

  - **Exclusion of contracts awarded to affiliated undertakings**
    - A specific exclusion of the Utilities Directive – applicable to all contracting entities

Utilities – Award criteria

- **Last but not least:**

- **Provisions on:**
  - **contract award criteria and**
  - **life-cycle costing**
  - **subcontracting**
  - **modifications of contracts (except the 50% limit)**
  - **abnormally low tenders**

are identical in both Directives

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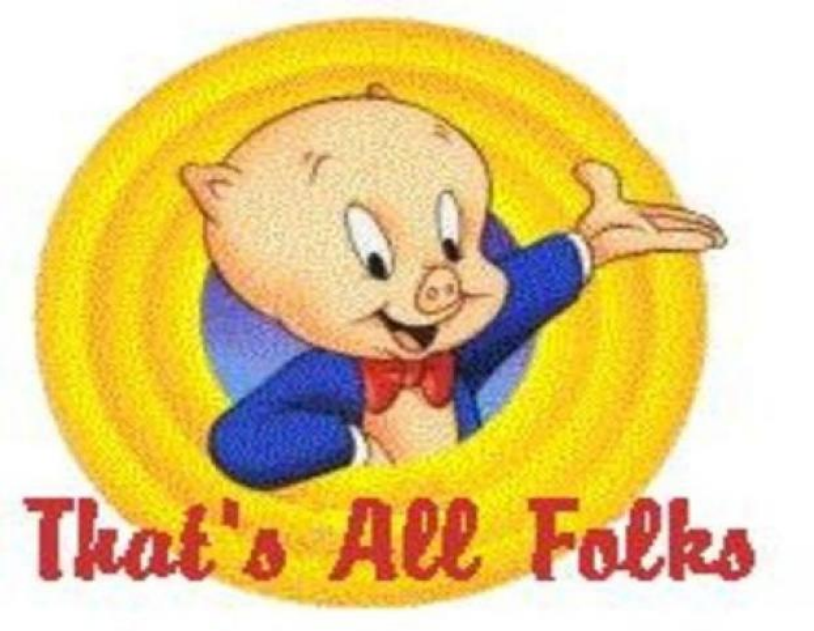

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