



## NEW LAW ON PUBLIC PROCUREMENT: SPOTLIGHT ON THE MAJOR CHANGES

June 2017

On 30 June 2017, the new law of 17 June 2016 on public procurement, published in the Belgian State Gazette of 14 July 2016, will enter into force for traditional sectors (Royal Decree of 18 April 2017, published in the Belgian State Gazette of 9 May 2017).

Spotlight on the major changes brought by the new regulation.

### Introduction

The new law aims at implementing in the Belgian law the new Directive 2014/24/EU of 26 February 2014 on public procurement in traditional sectors and Directive 2014/25/EU of 26 February 2014 for utilities sectors.

Member States were required to transpose these Directives in their domestic legislation by 18 April 2016 at the latest. This substantial transposition work is now completed, and all actors involved in public procurement must adapt as from 30 June 2017.

In practice, must comply with the new regulation:

- (i) all public procurements published – or which should have been published – as from 30 June 2017; and
- (ii) public procurements where, in the absence of an obligation for prior publication, the invitation to submit a tender is sent as from 30 June 2017 (Article 131 of the Royal Decree above-mentioned).

In other words, this deadline implies that all public procurements which are published as from 30 June 2017 will have to comply with the new provisions, which replace the previous rules.

### Major changes in the new law

- **SOFTER CONDITIONS TO REFER TO NEGOTIATED OR DIALOGUE PROCEDURES**

The European legislator wished to allow the contracting authorities to refer more easily to the competitive procedure with negotiation (Articles 35 and 38 of the new law). The “competitive procedure with negotiation” is the new appellation of the negotiated procedure with prior publication.

- **INTRODUCTION OF A NEW AWARD PROCEDURE: THE INNOVATION PARTNERSHIP**

This procedure allows the contracting authority to define its needs, where such needs cannot be met by the acquisition of supplies, services or works already available on the market. Any economic operator may submit a request to participate in response to a contract notice by providing the information required for selection.

The contracting authority shall negotiate with tenderers the initial and all subsequent tenders submitted by them, except for the final tender, to improve the content thereof. However, the minimum requirements and award criteria shall not be subject to negotiations.

The contracting authority may decide to set up the innovation partnership with one partner or with several partners conducting separate research and development activities. This new procedure will allow implementing a new or significantly improved product, service or process, including but not limited to production, building or construction processes, a new marketing method or organisational method in business practices, workplace organisation or external relations inter alia with the purpose of helping to solve societal challenges or to support the European strategy for smart, sustainable and inclusive growth.

- **OPEN OR RESTRICTED PROCEDURES REMAIN THE COMMON PROCEDURES**

The contracting authorities can use these procedures without specific justification. The use of the negotiation procedure has, however, been facilitated.

- **THE BELGIAN TERMS “ADJUDICATION”/ “AANBESTEDING” AND “APPEL D’OFFRE”/ “OFFERTEAANVRAAG” WERE ABANDONED**

- **THE TIME LIMITS APPLICABLE TO THE SUBMISSION OF TENDERS WERE SHORTENED**

In an open procedure, the minimum time limit for the receipt of tenders shall now be 35 days, against 45 days in the previous legislation. This time limit can be reduced by five days if tenders may be submitted by electronic means. Where the contracting authority has published a prior information notice, the minimum time limit for the receipt of tenders may be shortened to 15 days, provided that some conditions are fulfilled. Where there is a state of urgency duly substantiated by the contracting authority, it may fix a time limit which shall be not less than 15 days.

- **DEFINITION OF NEW “IN-HOUSE” AND PUBLIC SERVICES COOPERATION EXCEPTIONS**

The new law foresees various exceptions to the application of public procurement rules. They implement the European Court of Justice’s case law on the subject. As a result, the well-known “simple in-house”, but also the “ascending”, “collateral” and “joined” in-house are now clearly regulated. The cooperation between two contracting authorities is also dealt with under the denomination “non-institutionalised horizontal cooperation” (Articles 30 and 31).

- **OBLIGATION TO USE ELECTRONIC MEANS FOR COMMUNICATION**

The implementation of this requirement will vary depending on whether the public procurement is above or below the European thresholds. For contracts above the thresholds where a European notification is required, all communications and exchanges shall be made by electronic means as of 18

October 2018 at the latest. This obligation shall apply to public procurements under the threshold requiring a European notification only as of 1 January 2020.

This obligation will not apply to a certain amount of public procurements: e.g. those involving the communication of sensitive data requiring confidentiality or involving the submission of physical models, those based on a negotiation procedure without prior publication where the estimated value is less than the European thresholds, or public procurements whose estimated value is less than 30.000 EUR (Article 14).

- **INTRODUCTION OF THE ESPD (EUROPEAN SINGLE PROCUREMENT DOCUMENT)**

As stated in the recitals of the Commission Implementing Regulation (EU) 2016/7 of 5 January 2016 establishing the standard form for the ESPD, this document reflects the European legislator's wish for administrative simplification, in such a manner to obviate the need to produce a substantial number of certificates or other documents related to exclusion and selection criteria. As a consequence, the new law states that, for contracts where the estimated value equals or is above the European thresholds, the contracting authority can, in an open procedure, control the tenders on the basis of the ESPD only, after verification of the absence of grounds for exclusion and the respect of the selection criteria. In such cases, the tenders can be evaluated, at this stage, without a deeper examination of the absence of grounds for exclusion and the respect of the selection criteria. Before referring to this option, the contracting authority must, however, have verified the absence of non-payment of taxes or social security contributions (Article 66).

- **REMOVAL OF THE DISTINCTION BETWEEN PRIORITY AND NON-PRIORITY SERVICES**

As from now on, the distinction between the services referred to in Annexes II.A and II.B of the law of 15 June 2006 is abrogated. Whereas the services mentioned in Annex II.B used to benefit from an alleviated obligation of prior publication, they are now also subject to all provisions of the Directives.

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