

Administration in International Organizations

**LAW OF PUBLIC CONTRACTS**

18 Mar 2015

Krzysztof Rokita

# Public contracts

## **Definition of public contracts: Article 2(1)(5) Directive 2014/24/EU**

- Concept of EU law (an arrangement may be covered even if it is not a contract under domestic law);
- Requirement for writing – Art. 2(1)(18);
- Requirement for pecuniary interest – there should be an economic benefit to the provider for exchange of goods, works or services

# Public works contracts

## Definition of public works contracts: Article 2(1)(6) Directive 2014/24/EU

Three variants:

- Execution (or design and execution) of works related to one of the activities in Annex II;
- Execution (or design and execution) of a work (e.g. building, bridge, tunnel, but also wider projects with single purpose);
- Realisation of a work by any means: construction of a work not on the land of contracting authorities, an agent that awards contracts for realisation of a work

# **Public supply contracts**

## **Definition of public supply contracts: Article 2(1)(8) Directive 2014/24/EU**

- All products that can be valued in money and are capable of being the subject of commercial transactions;
- Incidental siting and installation operations

## **Public service contracts**

### **Definition of public service contracts: Article 2(1)(9) Directive 2014/24/EU**

- **2004 directive:** priority/non-priority services;
- **2014 directive:** normal/light regime services (Annex XIV services, limited cross-border dimension, subject to higher thresholds than other services, a special set of limited requirements);

# **Concessions**

## **Concessions Directive 2014/23/EU**

### **Article 5(1)(a)(b) – definitions**

**What is the main difference between concession contracts and public works/services contracts?**

## Concessions

- There must be exposure to the risks of the market (risks of competition from others, risk of non-payment, risk that cost will not be covered by revenues, risk that supply will not match demand, etc.);
- Consequently, if the contract removes all elements of risks or substantially reduces it the arrangement is not a concession (on the other hand it does not mean that there must be a risk of actual failure of the project);
- Traditional view: remuneration for exploitation should not come from the contracting authority itself (but see recital 18)

## **Mixed contracts**

- A mixed contract is a contract that involves more than one element, e.g. works and services, supplies and services, normal and light regime services;
- Such contracts must be classified as public works, supplies or services contracts;
- Art. 3 of Directive 2014/24 lays down relevant rules:
  - Contracts for works and services
  - Contracts for works and supplies
  - Contracts for supplies and services
  - Contracts for normal/light regime services

# Financial thresholds

- Thresholds amounts – Article 4 Directive 2014/24/EU
- Valuation of contracts – Article 5:
  - What (should one take into account?)
  - When (should the calculation be made?)
  - Specific rules for works contracts
  - Specific rules for supply contracts
  - Specific rules for services contracts

## Aggregation rules

- They prevent contracting authorities from evading procurement regulations by splitting their purchases into separate contracts each of which would fall below the thresholds;
- They provide for objective situations in which a contracting authority must add together the value of purchases made under a number of similar contracts;
- When the aggregation rules apply, contracting authorities may still split up their requirements into smaller contracts, but the value of those contracts will be aggregated and all those contracts must be awarded in accordance with the directive

## **Aggregation rules**

### **Goods and services:**

- Aggregation of different contracts of the same type awarded over a period of time: Article 5(11)
  - Contracts of the same type – comprising goods or services typically available from the same firm;
- Single requirement divided into lots: Article 5(8-9)

### **Works:**

- Carrying out of works – no aggregation;
- Carrying out of a work – Article 5(8)

# Aggregation rules

## Exemption – Article 5(10)

A contracting authority has decided to award a work contract divided into four lots: the main part valued at €3.2 million, and four other contracts worth €500,000 each.

Can the authority apply exemption and to what extent?

## **Aggregation rules**

- General prohibition on contract splitting – Article 5(3)
- The issue of separate operational units – Article 5(2)

## **Exclusions and limitations**

- See Articles 7-10
- Limits on the application of the directives to arrangements with public bodies – Articles 11-12

## **In-house arrangements and contracts with public bodies**

- Arrangements whereby a contracting authority supplies goods, works or services through its own employees and resources, that is „in-house” arrangements, are not subject to EU public procurement law
- Contracts with other public bodies are, in principle, covered by the EU procurement regime
- Exceptions:
  - Service contracts awarded on the basis of an exclusive right (Art. 11);
  - Contracts with central purchasing bodies (Art. 37(2, 4))
  - Quasi in-house arrangements – contracts with another entity which is controlled by the contracting authority (see below);
  - Co-operation in a public task (see below)

## Contracts with entities subject to the control of the contracting authority (Teckal/quasi in-house arrangements)

In *Teckal* (C-107/98) the CJ established that, under certain conditions EU procurement law does not apply to contracts with separate public body where that body is closely connected with the awarding entity. This doctrine is now codified in Art. 12 of the Public Sector Directive.

A public contract awarded by a contracting authority to **a legal person governed by private or public law** falls outside the scope of the Directive where all of the following conditions are fulfilled:

- The control condition (the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments)
- The activities condition (more than 80 % of the activities of the controlled legal person are carried out in the performance of tasks entrusted to it by the controlling contracting authority or by other legal persons controlled by that contracting authority)
- The private participation condition (there is no direct private capital participation in the controlled legal person with the exception of non- controlling and non-blocking forms of private capital participation required by national legislative provisions, in conformity with the Treaties, which do not exert a decisive influence on the controlled legal person)

## **Contracts with entities subject to the control of the contracting authority (Teckal/quasi in-house arrangements)**

This limitation also applies:

- where a controlled legal person which is a contracting authority awards a contract to its controlling contracting authority (child/subsidiary – parent), or to another legal person controlled by the same contracting authority (child/subsidiary – sibling) – Art. 12(2);
- when the contracting authority has joint control over the legal entity awarded a contract together with other contracting authorities - Art. 12(3)

## **Co-operation in public task**

### **Hamburg doctrine/horizontal co-operation:**

- EU directives do not apply to arrangements which establish co-operation between public entities with the aim of ensuring that a public task they all have to perform is carried out (Article 12(4))