



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 27 March 2012**

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**Interinstitutional File:  
2011/0438 (COD)**

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**8073/12**

**MAP 30  
MI 198  
CODEC 786**

**NOTE**

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from: General Secretariat  
to: Working Party on Public Procurement  
on: 3 April 2012

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No. prev. doc.: 6575/12 MAP 13 MI 109 CODEC 438  
No Cion prop.: 18966/11 MAP 10 MI 686

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Subject: Proposal for a Directive of the European Parliament and of the Council on  
public procurement  
- Cluster 4: E-procurement

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In view of the Working Party on Public Procurement on 3 April 2012, delegations will find in the Annex a compromise proposal on the above cluster prepared by the Presidency.

Changes compared to the previous text (6575/12) are underlined, deletions are marked [...].

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Cluster 4

E-procurement

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**1. Electronic communication**

Revised Recital 19

*NB! In the context of cluster 1, modifications have already been proposed to Recital 19. This text sets out in track-changes the **additional** changes that are proposed for the purposes of this cluster.*

(19) Electronic means of information and communication can greatly simplify the publication of contracts and increase the efficiency and transparency of procurement processes. They should become the standard means of communication and information exchange in procurement procedures, as they greatly enhance the possibilities of economic operators to participate in procurement procedures across the Internal Market. Moreover, electronic means of information and communication including adequate functionalities can enable contracting authorities to prevent, detect and correct errors that occur during procurement procedures. For that purpose, transmission of notices in electronic form, electronic availability of the procurement documents and – after a transition period of two years – fully electronic communication, meaning communication by electronic means as set out in Article 19(1)(a) at all stages of the procedure, including the transmission of requests for participation and, in particular, the transmission of the tenders (e-submission) should be made mandatory. While Member States and contracting authorities should remain free to go further if they so wish, mandatory use of electronic means of communications pursuant to this Directive should not, however, oblige contracting authorities to carry out electronic processing of tenders, nor should it mandate electronic evaluation or automatic processing. Furthermore, pursuant to this Directive, no elements of the public procurement process after the award of the contract should be covered by the obligation to use electronic means of communication.

(19a) Differing technical formats or process and messaging standards could potentially create obstacles to interoperability, not only within each Member State but also and especially between the Member States. For example, in order to participate in a procurement procedure in which use of electronic catalogues (a format for the presentation and organisation of information in a manner that is common to all the participating bidders and which lends itself to electronic treatment) is permitted or required, economic operators would, in the absence of standardisation, be required to customise their own catalogues, providing very similar information in different formats depending on the specifications of the individual contracting authority concerned. Standardising the catalogue format would improve the level of interoperability, enhance efficiency and would also - and perhaps above all - reduce the effort required of economic operators.

*\*[Additional remark: It is recalled that, because the technical development is too rapid to be catered for by using the ordinary legislative procedure for these important but non-essential parts, it is important to be able to ensure the application of common technical specifications by means of delegated acts. Use of delegated acts in these cases is hence provided for in Recital 54 and Article 89, to be examined under cluster 10.]*

(19b) Before specifying the level of security required for the electronic means of communications to be used at the various stages of the award procedure, contracting authorities should evaluate the proportionality between on the one hand the requirements aimed at ensuring correct and reliable identification of the senders of the communication concerned as well as the integrity of its content and on the other hand the risk of problems e. g. in situations where messages are sent by a different sender than the one indicated. All other things being equal, this would mean that the level of security required of, for instance, an email requesting confirmation of the exact address at which an information meeting will be held would not need to be set at the same level as for the tender itself which constitutes a binding offer for the economic operator.

[...]

*Article 92*  
*Transposition and transitional provisions*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 30 June 2014 at the latest. They shall forthwith communicate to the Commission the text of those provisions.
2. Notwithstanding paragraph 1, Member States may postpone the application of Article 19(1) until 30 June 2016.

Where a Member State chooses to postpone the application of Article 19(1), that Member State shall provide that contracting authorities, except where use of electronic means is mandatory pursuant to Articles 32, 33, 34, Articles 35(4) or 49(2) or Article 51, may choose between the following means of communication for all communication and information exchange:

- (a) electronic means in accordance with Article 19 (3), (4) and (5);
  - (b) post;
  - (c) a combination of those means.
3. When Member States adopt the measures referred to in paragraphs 1 and 2, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.
  4. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

*Article 19*  
*Rules applicable to communication*  
*[Directive 2004/18/EC: Art. 42, 71 and 79(2)(g)]*

1. Member States shall ensure that, at the latest 2 years after the date provided for in Article 92(1), all communication and information exchange under this Directive are performed using electronic means of communication, in particular e-submission, in accordance with the requirements of this Article.

This obligation shall not apply where the use of electronic means would require specialised tools or file formats that are not generally available in all the Member States within the meaning of paragraph 3. It is the responsibility of the contracting authorities using other means of communication for submission of tenders to demonstrate in the procurement documents that the use of electronic means, due to the particular nature of the information to be exchanged with the economic operators, would require specialised tools or file formats that are not generally available in all the Member States.

Contracting authorities shall be deemed to have legitimate reasons not to request electronic means of communication in the submission process in the following cases:

- (a) the description of the tenders, due to the specialised nature of the procurement, cannot be rendered using file formats that are generally supported by generally available applications;
- (b) the applications supporting file formats that are suitable for the description of the tenders are under a proprietary licensing schema and cannot be made available for downloading or remote use by the contracting authority;
- (c) the applications supporting file formats that are suitable for the description of the tenders use file formats that cannot be handled by any other open or downloadable applications.

Where electronic means of communication are not used pursuant to subparagraphs 2 and 3, communication shall be done by post or by a combination of post and electronic means.

2. The means of communication chosen must be generally available and not restrict economic operators' access to the procurement procedure.

In all communication, exchange and storage of information, contracting authorities shall ensure that the integrity of data and the confidentiality of tenders and requests to participate are preserved. They shall examine the content of tenders and requests to participate only after the time limit set for submitting them has expired.

3. The tools to be used for communicating by electronic means, as well as their technical characteristics, shall be non-discriminatory, generally available and interoperable with the information and communication technology products in general use and shall not restrict economic operators' access to the procurement procedure. [...]

The Commission shall be empowered to adopt delegated acts in accordance with Article 89 to amend the technical details and characteristics set out in Annex IV due to technical developments or reasons relating to the appropriate procedures for the use of the tools and devices for the electronic receipt.

To ensure the interoperability of technical formats as well as of process and messaging standards, especially in a cross-border context, the Commission shall be empowered to adopt delegated acts in accordance with Article 89 to establish the mandatory use of such specific technical standards, in particular with regard to the use of e-submission, electronic catalogues and means for electronic authentication, only where technical standards have been thoroughly tested and proved their usefulness in practice.

4. Contracting authorities may, where necessary, require the use of tools and devices which are not generally available, provided that the contracting authorities offer alternative means of access.

Contracting authorities shall be deemed to offer suitable alternative means of access in any of the following situations, where they:

- (a) offer unrestricted and full direct access free of charge by electronic means to these tools and devices from the date of publication of the notice in accordance with Annex IX or from the date when the invitation to confirm interest is sent; the text of the notice or the invitation to confirm interest shall specify the internet address at which these tools are accessible;
- (b) ensure that tenderers [...] having no access to the tools and devices concerned, or no possibility of obtaining them within the relevant time limits, provided that the lack of access is not attributable to the tenderer concerned, may access the procurement procedure through the use of provisional tokens made available free of charge online;
- (c) support an alternative channel for electronic submission of tenders.

5. In addition to the requirements set out in Annex IV, the following rules shall apply to tools and devices for the electronic transmission and receipt of tenders and for the electronic receipt of requests to participate:

(a) information on specifications for the electronic submission of tenders and requests to participate, including encryption and time-stamping, shall be available to interested parties;

[...]

(c) contracting authorities shall specify the level of security required for the electronic means of communication in the various stages of the specific procurement procedure; the level shall be proportionate to the risks attached;

(d) where contracting authorities conclude that the level of risks, assessed in conformity with point c, is such that advanced Electronic Signatures as defined by Directive 1999/93/EC of the European Parliament and of the Council<sup>1</sup> are required, contracting authorities shall, as long as the signature is valid, accept signatures supported by a qualified electronic certificate referred to in the Trusted List provided for in the Commission Decision 2009/767/EC<sup>2</sup>, created with or without a secure signature creation device, subject to compliance with the following conditions:

(i) they must establish the required advanced signature format on the basis of formats established in Commission Decision 2011/130/EU<sup>3</sup> and put in place necessary measures to be able to process these formats technically;

(ii) where a tender is signed with the support of a qualified certificate that is included in the Trusted list, they must not apply additional requirements that may hinder the use of those signatures by tenderers.

[...]

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<sup>1</sup> OJ L 13, 19.1.2000, p. 12.

<sup>2</sup> OJ L 274, 20.10.2009, p. 36.

<sup>3</sup> OJ L 53, 26.2.2011, p. 66.

8. To the extent compatible with the applicable rules on data protection, contracting authorities may use the data processed electronically for public procurement procedures in order to prevent, detect and correct errors occurring at each stage by developing appropriate tools and devices.

#### ANNEX IV

### REQUIREMENTS RELATING TO TOOLS AND DEVICES FOR THE ELECTRONIC RECEIPT OF TENDERS, REQUESTS FOR PARTICIPATION AS WELL AS PLANS AND PROJECTS IN CONTESTS

*[Directive 2004/18/EC: Annex X]*

Tools and devices for the electronic receipt of tenders, requests for participation as well as plans and projects in contests must at least guarantee, through technical means and appropriate procedures, that:

- (a) the exact time and date of the receipt of tenders, requests to participate and the submission of plans and projects can be determined precisely;
- (b) it may be reasonably ensured that, before the time limits laid down, no-one can have access to data transmitted under these requirements;
- (c) where that access prohibition is infringed, it may be reasonably ensured that the infringement is clearly detectable;
- (d) only authorised persons may set or change the dates for opening data received;
- (e) during the different stages of the procurement procedure or of the contest access to all data submitted, or to part thereof, must be possible only through simultaneous action by authorised persons;
- (f) simultaneous action by authorised persons must give access to data transmitted only after the prescribed date;
- (g) data received and opened in accordance with these requirements must remain accessible only to persons authorised to acquaint themselves therewith.

[...]



## **2. Electronic availability of procurement documents**

### *Article 51*

#### *Electronic availability of procurement documents*

*[Directive 2004/18/EC: Art. 38(6), 39(2)]*

1. Contracting authorities shall offer unrestricted and full direct access free of charge by electronic means to the procurement documents from the date of publication of the notice in accordance with Article 49 or the date on which the invitation to confirm interest is sent. The text of the notice or the invitation to confirm interest shall specify the internet address at which this documentation is accessible.

Where unrestricted and full direct access free of charge by electronic means to certain procurement documents cannot be offered for the reasons set out in Article 19(1), subparagraphs 2 and 3, contracting authorities may indicate in the notice or the invitation to confirm interest that the procurement documents concerned will be transmitted by other means than electronically in accordance with paragraph 2 of this Article. In such case, the time limit for the submission of tenders shall be prolonged by 5 days.

2. Provided that it has been requested in good time, the contracting authorities [...] shall supply additional information relating to the specifications and any supporting documents not later than six days before the time limit fixed for the receipt of tenders. In the event of an accelerated procedure as referred to in Articles 25(3) and 26(5), that period shall be four days.

### **3. Electronic auctions**

#### *Article 33*

#### *Electronic auctions*

*[Directive 2004/18/EC: Art. 1(7), Art. 54]*

1. Contracting authorities may use electronic auctions, in which new prices, revised downwards, and/or new values concerning certain elements of tenders are presented.

For this purpose, contracting authorities shall use a repetitive electronic process (electronic auction), which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods.

2. In open, restricted or competitive procedures with negotiation, the contracting authorities may decide that the award of a public contract shall be preceded by an electronic auction when the tender specifications can be established with precision.

In the same circumstances, an electronic auction may be held on the reopening of competition among the parties to a framework agreement as provided for in Article 31(4)(b) and on the opening for competition of contracts to be awarded under the dynamic purchasing system referred to in Article 32.

3. The electronic auction shall be based on one of the following criteria:
  - (a) solely on prices where the contract is awarded on the basis of price only under the award criterion of the lowest cost;
  - (b) on prices and/or on the new values of the features of the tenders indicated in the specifications where the contract is awarded to the most economically advantageous tender or to the tender with the lowest cost using a cost-effectiveness approach.
4. Contracting authorities which decide to hold an electronic auction shall state that fact in the contract notice or in the invitation to confirm interest. The procurement documents shall include at least the information set out in Annex VII.

5. Before proceeding with an electronic auction, contracting authorities shall make a full initial evaluation of the tenders in accordance with the award criterion or criteria and with the weighting fixed for them.

A tender shall be considered admissible where it has been submitted by a tenderer, who has not been excluded pursuant to Article 55 and who meets the selection criteria, and where the tender is in conformity with the technical specifications without being irregular, unacceptable or unsuitable.

All tenderers that have submitted admissible tenders shall be invited simultaneously by electronic means to participate in the electronic auction using, as of the specified date and time, the connections in accordance with the instructions set out in the invitation. The electronic auction may take place in a number of successive phases. The electronic auction shall not start sooner than two working days after the date on which invitations are sent out.

6. Where the contract is to be awarded on the basis of the most economically advantageous tender, the invitation shall be accompanied by the outcome of a full evaluation of the relevant tenderer, carried out in accordance with the weighting provided for in the first subparagraph of Article 66(5).

The invitation shall also state the mathematical formula to be used in the electronic auction to determine the automatic re-rankings on the basis of the new prices and/or new values submitted. That formula shall incorporate the weighting of all the criteria established to determine the most economically advantageous tender, as indicated in the notice used as a means of calling for competition or in the specifications. For that purpose, any ranges shall, however, be reduced beforehand to a specified value.

Where variants are authorised, a separate formula shall be provided for each variant.

7. Throughout each phase of an electronic auction the contracting authorities shall instantaneously communicate to all tenderers at least sufficient information to enable them to ascertain their relative rankings at any moment and they may, where this has been previously indicated, communicate other information concerning other prices or values submitted as well as announcing the number of participants in any specific phase of the auction. In no case, however, may they disclose the identities of the tenderers during any phase of an electronic auction.

8. Contracting authorities shall close an electronic auction in one or more of the following manners:
- (a) at the previously indicated date and time;
  - (b) when they receive no more new prices or new values which meet the requirements concerning minimum differences, provided that they have previously stated the time which they will allow to elapse after receiving the last submission before they close the electronic auction;
  - (c) when the previously indicated number of phases in the auction has been completed.
- Where the contracting authorities have decided to close an electronic auction in accordance with point (c), possibly in combination with the arrangements laid down in point (b), the invitation to take part in the auction shall indicate the timetable for each phase of the auction.
9. After closing an electronic auction contracting authorities shall award the contract in accordance with Article 66 on the basis of the results of the electronic auction.

## ANNEX VII

### INFORMATION TO BE INCLUDED IN THE PROCUREMENT DOCUMENTS RELATING TO ELECTRONIC AUCTIONS

(Article 33(4))

*[Directive 2004/18/EC: Art. 54(3), ((a) to (f))]*

Where contracting authorities have decided to hold an electronic auction, the procurement documents shall include at least the following details:

- (a) the features, the values for which will be the subject of electronic auction, provided that such features are quantifiable and can be expressed in figures or percentages;
- (b) any limits on the values which may be submitted, as they result from the specifications relating to the subject of the contract;
- (c) the information which will be made available to tenderers in the course of the electronic auction and, where appropriate, when it will be made available to them;
- (d) the relevant information concerning the electronic auction process;

- (e) the conditions under which the tenderers will be able to bid and, in particular, the minimum differences which will, where appropriate, be required when bidding;
- (f) the relevant information concerning the electronic equipment used and the arrangements and technical specifications for connection.

#### **4. Electronic catalogues**

Revised recital 23:

(23) In addition, new electronic purchasing techniques are constantly being developed, such as electronic catalogues. Electronic catalogues are a format for the presentation and organisation of information in a manner that is common to all the participating bidders and which lends itself to electronic treatment; an example could be tenders presented in the form of a spreadsheet. Electronic catalogues help to increase competition and streamline public purchasing, particularly in terms of savings in time and money. Certain rules should however be laid down to ensure that the use of the new techniques complies with the rules of this Directive and the principles of equal treatment, non-discrimination and transparency. Thus, use of electronic catalogues for the presentation of tenders should not entail that economic operators may limit themselves to the transmission of their general catalogue. Economic operators should still have to adapt their general catalogues in view of the specific procurement procedure. Such adaptation will ensure that the catalogue that is transmitted in response to a given procurement procedure only contains products, works or services that the economic operators estimated - after an active examination - correspond to the requirements of the contracting authority. In so doing, economic operators should be allowed to copy information contained in their general catalogue, but they should not be allowed to submit the general catalogue as such. Furthermore, where sufficient guarantees are offered in respect of ensuring traceability, equal treatment and predictability, contracting authorities should be allowed to generate tenders in relation to specific purchases on the basis of previously transmitted electronic catalogues, in particular where competition has been reopened under a framework agreement or where a dynamic purchasing system is being used. Where tenders have been generated by the contracting authority, the economic operator concerned should be given the possibility to verify that the tender thus constituted does not contain any material errors. Where material errors are present, the economic operator should not be bound by the tender generated by the contracting authority unless the error is corrected.

In line with the requirements of the rules for electronic means of communication, contracting authorities should avoid unjustified obstacles to economic operators' access to procurement procedures in which tenders are to be presented in the form of electronic catalogues and which guarantee compliance with the general principles of non-discrimination and equal treatment.

*Article 34*

*Electronic catalogues*

*[New]*

1. Where the use of electronic means of communication is required [...], contracting authorities may require tenders to be presented in the format of an electronic catalogue.

Member States may render the use of electronic catalogues mandatory in connection with certain types of procurement.

Tenders presented in the form of an electronic catalogue may be accompanied by other documents, completing the tender.

2. Electronic catalogues shall be established by the candidates or tenderers with a view to participating in a given procurement procedure in accordance with the technical specifications and format established by the contracting authority.

Furthermore, electronic catalogues shall comply with the requirements for electronic communication tools as well as with any additional requirements set by the contracting authority in accordance with Article 19.

3. Where the presentation of tenders in the form of electronic catalogues is accepted or required, contracting authorities shall:
  - (a) state so in the contract notice or in the invitation to confirm interest where a prior information notice is used as a means of calling for competition;

- (b) indicate in the specifications all the necessary information pursuant to Article 19(5) concerning the format, the electronic equipment used and the technical connection arrangements and specifications for the catalogue.
4. Where a framework agreement has been concluded with more than one economic operator following the submission of tenders in the form of electronic catalogues, contracting authorities may provide that the reopening of competition for specific contracts takes place on the basis of updated catalogues. In such case, contracting authorities shall use one of the following alternative methods:
- (a) invite tenderers to resubmit their electronic catalogues, adapted to the requirements of the specific contract in question;
  - (b) notify tenderers that they intend to collect from the electronic catalogues which have already been submitted the information needed to constitute tenders adapted to the requirements of the specific contract in question [...]; provided that the use of this method has been announced in the procurement documents for the framework agreement.
5. Where contracting authorities reopen competition for specific contracts in accordance with point (b) of paragraph (4), they shall specify the date and time at which they intend to collect the information needed to constitute tenders adapted to the requirements of the specific contract in question and shall give tenderers the possibility to refuse such collection of information.

Contracting authorities shall allow for an adequate period between the notification and the actual collection of information.

Before awarding the contract, contracting authorities shall present the collected information to the tenderer concerned so as to give it the opportunity to contest or confirm the correctness of the tender thus constituted.

6. Contracting authorities may award contracts based on a dynamic purchasing system in accordance with point (b) of paragraph 4 and paragraph 5 [...] provided that the request for participation in the dynamic purchasing system is accompanied by an electronic catalogue in accordance with the technical specifications and format established by the contracting authority. This catalogue shall be completed subsequently by the candidates, when they are informed of the contracting authority's intention to constitute tenders by means of the procedure in point (b) of paragraph (4).

Contracting authorities may also award contracts based on a dynamic purchasing by requiring that offers for a specific contract shall be presented in the format of an electronic catalogue.

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