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Dear Mrs Slabejová,

Thank you for your request of 25 May 2017 registered under the reference number 1625/3592/2017/OVO concerning the interpretation of some issues in the field of Information and Communication Technology (ICT).

Please find below our opinion that can only be considered as a working position of the European Commission services. The binding interpretation of the European legislation can only be given by the Court of Justice of the European Union (CJEU).

PART I

DESIGN CONTEST AND SUBSEQUENT USE OF THE NEGOTIATED PROCEDURE WITHOUT PRIOR PUBLICATION WITH THE WINNER OF THE DESIGN CONTEST:

Question 1

Is it possible to conclude with a candidate, whose bid was evaluated by a jury through a negotiated procedure without prior publication in the design contest as the winning one or one of the winning ones, a contract for:

- a. the development of a complete software work (from its design to implementation); or**

According to Article 78(1)(a) of Directive 2014/24/EU, Chapter II of Title III of Directive 2014/24/EU (Rules governing design contest) shall apply to *'design contests organised as part of a procedure leading to the award of a public service contract'*.

According to Article 32(4) of Directive 2014/24/EU *'The negotiated procedure without prior publication may be used for public service contracts, where the contract concerned follows a design contest (...) and is to be awarded, under the rules provided for in the design contest, to the winner or one of the winners of the design contest'*.

It follows from the abovementioned provisions that Directive 2014/24/EU foresees the situation you refer to in the question 1(a). It is therefore possible to continue with the winner or winners of a design contest in the subsequent negotiated procedure without prior publication in view of awarding a public service contract, the scope of which is not expressly limited by Directive 2014/24/EU. This intention of the contracting authority shall be, pursuant to Article 79(1) subparagraph 2 of Directive 2014/24/EU, indicated in the design contest notice.

Nevertheless, according to the toolbox approach of Directive 2014/24/EU, Member States enjoy a certain degree of flexibility that allows them to restrain the use of certain procedures listed in the Directive 2014/24/EU to specific circumstances or areas. In particular, Article 26(6) of Directive 2014/24/EU provides that *'[i]n the specific cases and circumstances referred to expressly in Article 32, Member States may provide that contracting authorities may apply a negotiated procedure without prior publication of a call for competition. Member States shall not allow the application of that procedure in any other cases than those referred to in Article 32.'*

b. Completing the bid solely up to the level of detailed design of the SW work (or its precise functional specification), which will then become a basis for an open contract awarding procedure (e.g. open procedure)?

Having regard to the answer provided to the question 1(a), we consider that Directive 2014/24/EU should not be interpreted in such way that a public service contract concluded with a winner(s) of a design contest on the basis of a negotiated procedure without publication can only pertain to the completion of a winning design to the level of a detailed software project or plan that would need to be followed by a separate open or restricted procedure leading to its implementation.

Nevertheless, it remains as possibility for a contracting authority to organise a design contest that gives rise to a public service contract awarded on the basis of a subsequent negotiated procedure that will only concern the detailed specifications of an IT system. These specifications can be further used for an award of a service contract on the basis of a separate open procedure.

Question 2

If the answer to Question No. 1 (a) was positive, is it sufficient, in order to take account of the economic aspect and cost-effectiveness of the bid in the design contest, for the contracting authority to determine the fixed (maximum) price of the SW work to be procured (Design-to-Cost principle) and invite all participants to offer the best possible functionality up to this fixed price limit?

According to Article 67(2) subparagraph 2 of Directive 2014/24/EU, the cost element in the contract award criteria *'may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only'*. This rule shall apply for the design contest as well.

Nevertheless, we would like to mention that in practice it may not always be the most appropriate approach to apply Design-to-Cost principle to the procurement of IT systems. Despite the fact that it is legally admissible, an appropriate assessment of needs of the contracting authority and market research should be performed in order to determine the most suitable approach.

Question 3

Is it, in relation to Question No. 2, also appropriate to identify the lowest price or the lowest lifecycle costs as one of the bid evaluation criteria, to which a certain relative weight will be assigned, and which the jury will take into account when evaluating?

We understand this question as an alternative to question n. 2 on Design-to-Cost principle.

From the legal point of view, Directive 2014/24/EU does not prevent organising a design contest on the basis of lowest price or lowest lifecycle cost award criterion. This presupposes that design contest contains a list of functionalities that are to be satisfied by competing designs and the winning design will be the one presenting the lowest price or lowest lifecycle cost while encompassing all functionalities.

If such a design contest is intended to be followed by a negotiated procedure without publication, we remind that clear information to this effect has to be mentioned in the design contest notice.

The question whether using the lowest price or lowest life-cycle cost is equally appropriate as Design-to-Cost principle is difficult to answer on theoretical level. It depends on the nature and complexity of the individual projects and on the market potential, which alternative is more appropriate in a given case.

At this occasion, we would like to remind that the very nature of the specific procedure of design contest resides in the assessment by a jury of design proposals. The jury (composed of independent members) offers the possibility to evaluate subjective aspects of design proposals (aesthetics, ergonomics, user-friendliness, etc.) that are difficult to measure in scientific terms in a relatively objective manner. It may be therefore reductive to use design contests in both abovementioned manners, as the same result can be obtained by regular procedures (open or restricted procedures) with either maximum or lowest price/cost used as award criteria and fixed technical specifications.

Finally, we would like to remind the fact that regular procedures (open, restricted and also competitive procedure with negotiation) can be effectively used for public procurement involving creative and innovative aspects, such as procurement of IT systems, by referring in technical specifications to a minimum descriptive standard combined with functional and/or performance criteria that leave the market players with sufficient margin of manoeuvre to propose creative and/or innovative solutions and by assessing the tenders on the basis of combined criteria involving the initial price and lifecycle cost, quality (in terms of various performance indicators such as rapidity, reliability or flexibility of the system) and best price-quality-ratio that corresponds to the peculiar subjective criteria (aesthetics, ergonomics, user-friendliness, comfort, etc.).

Question 4

If the answer to Question No. 1 was positive, is it permissible to incorporate any modifications to the winning bid at the request of the contracting authority in the phase of the negotiated procedure without prior publication following the design contest, for example by adding/removing certain functionalities to/from the bid of the bidder, if neither of them substantially reduces or extends the original assignment of the design contest?

The negotiated procedure without publication that may eventually follow a design contest allows by its nature a certain degree of flexibility that may be necessary for the final service contract. Nevertheless, this flexibility should not encompass such modifications that would be considered substantial with regard to the original design contest notice. Any flexibility should be described to the best extent in the design contest notice in order to prevent any future litigation.

Adding and/or removing functionalities is always a delicate exercise that exposes the procurement procedure to a litigation risk and therefore we recommend reducing it to the strict minimum.

Best Practice Examples

Please find below the list of documents and guidance that is available at the European level.

We attach also a Discussion paper of the IT Procurement Expert workshop that took place on 4 April 2017 in Brussels. The representatives of the Slovak authorities are welcome for future meetings. Along with the traditional contracts, a copy of the invitation will be send also to: branislav.hudec@vicepremier.gov.sk.

EC calls for use of ICT standards to battle IT vendor-lock

- <https://joinup.ec.europa.eu/node/67797>

Communication 'Against lock-in: building open ICT systems by making better use of standards in public'

- <https://ec.europa.eu/digital-single-market/news/against-lock-building-open-ict-systems-making-better-use-standards-public>

Guide for the procurement of standards-based ICT — Elements of Good Practice

- <https://ec.europa.eu/digital-single-market/en/news/guide-procurement-standards-based-ict-%E2%80%94-elements-good-practice>

European Interoperability Reference Architecture (EIRA)

- <https://joinup.ec.europa.eu/node/99464>

European Catalogue of ICT Standards for Procurement

- https://joinup.ec.europa.eu/community/european_catalogue/description

Guidelines on procuring IT solutions (2015) – DIGIT/PWC

- [https://joinup.ec.europa.eu/sites/default/files/ckeditor_files/files/D04_01%20Guideline%20on%20procuring%20re-usable%20solutions%20-%20v1_00\(2\).pdf](https://joinup.ec.europa.eu/sites/default/files/ckeditor_files/files/D04_01%20Guideline%20on%20procuring%20re-usable%20solutions%20-%20v1_00(2).pdf)

The Sharing and Reuse of IT Solutions Framework (2016) – DIGIT

- <https://joinup.ec.europa.eu/community/srs/home>

- https://joinup.ec.europa.eu/sites/default/files/sharing_and_reuse_of_it_solutions_framework_final.pdf

PART II

SERVICE CONTRACTS TO THE SOFTWARE WORKS

Question 5.1

If the contracting authority wishes to form the basis in order to continue in providing services with the same contractor, please, confirm whether, as was provisionally presented by the European Commission's representatives (DG Growth) at the Working Group's meeting on 19 April 2017, the public procurement of the SW work may result in a contract, which would include:

- a) Development of the SW work;
- b) Ensuring the operation of the SW work (including support, extension and upgrades of the work), through contractual clauses on adjustments and/or options, for a specified period of time, such as 7 or 10 years, or for an indefinite period of time, with an option of giving notice without any grounds?

The European public procurement rules allow for procuring for tailor-made software as:

1. a supply that becomes fully or partly property of the contracting authority;
2. a service where the ownership remains usually with the service supplier.

In case of a public supply contract, the contracting authority has the freedom to ensure the operation, support, updates or upgrade (hereinafter referred to as the "Operational Services"):

1. internally by its own means,
2. by the supplier of the tailor-made software, by means of:
 - a. the specific provisions of the original supply contract providing for these Operational Services, or
 - b. a separate service contract, if the supplier wins a separate public procurement procedure or a separate lot in the original public procurement procedure for the Operational Services.
3. by any other economic operator who wins a separate public procurement procedure or a separate lot in the original public procurement procedure for the Operational Services.

Nature of the Operational Services Contract

Depending on the wording and contractual structure, this contract may be drafted either as a Framework Agreement or as a Service Contract. Both forms are legally admissible; the distinction lies in the level of detail that is foreseen for the obligations of the parties.

Duration of the Operational Services Contract

Awarding a contract for Operational Services should cover an appropriate period of time that is convenient for the contracting authority and allows it to arrange for the necessary modifications due to evolution of its needs and available technologies. Therefore, the

optimum contract duration varies according to the specific project requirements and it is impossible to set a general rule.

An indefinite term service contract is legally admissible, Directive 2014/24/EU refers to it in Article 5(14)(b), it is however questionable whether it is recommended to use an indefinite term service contract for the purposes of Operational Service Contract. *Inter alia*, it may be problematic to set the estimated value of such contract and the termination of an indefinite term contract by a contract notice may raise questions either at an early or late stage from the economic operator.

The duration of Framework Agreements is limited to 4 years by Article 33 of Directive 2014/24/EU.

Is such a procedure in line with Article 72 (1) (a) of the EP and Council Directive on Public Procurement No. 2014/24/EU (adjustment of contracts during their validity)? We are based on the legal view that such a service contract is not deemed as a framework agreement under Article 33 of the Directive 2014/24/EU on Public Procurement.

It is highly recommended that all foreseeable circumstances of service contracts and framework agreements are provided for in the contract in order to manage any foreseeable needs relating to updates, extensions, reductions and transfers into other systems. Article 72 in its entirety is applicable to both service contracts and framework agreements. *'1. Contracts and framework agreements may be modified without a new procurement procedure in accordance with this Directive in any of the following cases: (...)'*

Question 5.2

What does the wording '*clear, precise and unambiguous*' under Article 72(1)(a) of the Directive 2014/24/EU mean?

The CJEU has not delivered the interpretation of these terms yet. It is therefore on the contracting authority to decide, after considering the circumstances of the individual case, when the contractual provision fulfils these requirements.

Question 6.1

Can the contracting authority within a '*transitional period*' for a SW work to be procured without any further extension clauses under Article 72(1)(a) of the Directive No. 2014/24/EU, use the negotiated procedure without prior publication pursuant to the Article 32(2)(b)(ii) of the Directive 2014/24/EU, if it proves that:

- (i) the competition does not exist due to the technical reasons;**
- (ii) no reasonable alternative or substitute exists and the absence of competition is not the result of an artificial narrowing of the parameters of the procurement?**

We understand that by the reference to the '*transitional period*' you would like to point to the willingness of a contracting authority to procure the future contracts in accordance with the requirements of the public procurement law and the '*transitional period*' would be used to bridge the period between the expiry of an old contract and the entry in force of a newly tendered contract. During the '*transitional period*', the service would be

performed on the basis of a service contract awarded by a negotiated procedure without publication (direct award) due to the absence of competition for technical reasons.

To our regret, we found neither a provision nor an indication of any special regime relating to the '*transition period*' between for the old contracts that cannot be legally extended in line with the provisions of Article 72(1)(a) of Directive 2014/24/EU and the entry into force of a new contract.

It follows therefore that no '*transitional period*' can be systematically accounted for. Contracting authorities enforcing contracts during the '*transitional period*' run the risk of implementing contracts that have not been awarded in compliance with the European and national public procurement legislation and may be applied applicable sanctions.

In practice, contracting authorities should perform in their interest an audit of their public contracts and start with the preparation of retendering with sufficient advance in order to ensure a smooth follow-up of contracts or transfer to IT systems.

Question 6.2

How long can we refer to a 'transitional period'? Is it sufficient if the contracting authority proves that it is dealing with the situation by:

- a. intending to launch a new public procurement procedure in the way of the competition (i.e. the negotiated procedure without prior publication is applied only until the new procurement procedure is completed), while proving that the procurement procedure is planned (by submitting the procurement documents, carrying out the preparatory market consultations etc.),**
- b. having launched a new public procurement as a competition (i.e. it uses the negotiated procedure without prior publication until the end of the new public procurement procedure)?**

Taking into account the fact that the EU law does not recognise the term '*transitional period*' we consider that this question has been answered in our reply to the previous question.

Question 6.3

With regard to the objectives and wording of paragraph 50 contained in the comments to the EP and Council Directive on Public Procurement No. 2014/24/EU, in conjunction with Article 32 (2) (b) (ii) of the Directive, may a possibility of developing a completely new SW work instead of an originally operated SW work that will include all the functions of the work being in operation, but also the functions required in the framework of the planned service, the serviceability for the required period, the upgrades, the updates, or the development, be deemed

- a) Always as a reasonable alternative or substitution within the meaning of Article 32 (2) (b) of Directive 2014/24/EU; or***
- b) Only conditionally as a reasonable alternative or substitution within the meaning of Article 32 (2) (b) of Directive 2014/24/EU, and only in case, if this alternative or substitution would not be disproportionately demanding in terms of economy, time and technicality?***

If our understanding of this question is correct, you would like to know whether replacing an existing IT system by a new one containing the current and additional features shall:

- a) always be considered as a '*reasonable alternative or substitution*' in terms of Article 32(2)(b) last paragraph, in which case the use of the negotiated procedure without publication with the current supplier would never be admissible for the absence of competition for technical reasons according to Article 32(2)(b)(ii), or
- b) shall be considered as a '*reasonable alternative or substitution*' in terms of Article 32(2)(b) last paragraph only when it is not disproportionately demanding in terms of economy, time and technicality, in which case the use of the negotiated procedure without publication with the current supplier would be possible only when the contracting authority demonstrates that any other alternative solution is disproportionately more demanding.

In this context, we would like to underline that the reasoning to be followed in these cases is different. It is impossible to answer your question, as it is asked in such way that it may miss the essential point that is the basis of the given exception: absence of competition for technical reasons.

First of all, it must be demonstrated that there is no other economic operator on the market being capable of performing the contract. In terms of tailor made software, such evidence seems problematic, unless based on intellectual property rights.

Furthermore, the absence of competition for technical reasons receives three detailing precisions by the directive:

- The absence of competition, *i.e.* the exclusivity must not be created by the contracting authority (e.g. by unbalanced distribution of intellectual property rights in relation to a previous contract/IT system) (Recital 50);
- There is no reasonable alternative or substitute (Article 32(2)(b) last paragraph);
- The absence of competition is not the result of artificial narrowing down of parameters of procurement (Article 32(2)(b) last paragraph).

Your question relates only to the second precision, existence of a reasonable alternative or substitute. This question comes into consideration only after having verified that there is an absence of competition for technical reasons, which does not result from previous action of the contracting authority and an artificial narrowing down of the current parameters of the procurement.

It is only when these questions are safely replied – the absence of competition for technical reasons has not been created by the contracting authority itself and does not result for an artificial narrowing down of the procurement parameters - that the contracting authority should consider the availability of '*reasonable alternative or substitute*' solutions.

The exact interpretation of this term may only be given by the CJEU. Nevertheless, in our opinion, it is impossible to reply to the question whether replacing an IT system is always a reasonable alternative or substitute or is a reasonable alternative or substitute, if it is not disproportionately more expensive or technically complicated than directly awarding the contract to the incumbent.

Finally, in line with the restrictive interpretation of exceptions, we consider that in order to demonstrate the existence of no reasonable alternative or substitute, it will not be

sufficient to demonstrate that an alternative or substitute would be disproportionately demanding in terms of economy, time and technicality.

Question 6.4

If the answer to the question 6.3(b) was positive, what proof of the contracting authority may be considered sufficient to demonstrate the absence of a reasonable alternative or substitution (for example, an expert analysis, expert opinion, results of the own survey, etc.)?

The answer to the question 6.3(b) was not positive.

I hope that you find these replies helpful and we remain available for any further discussions that may be needed.

[e-Signed]
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