
Third CIS Local Counsel Forum

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"Doing Business with the State"
Public Procurement Panel

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"Doing Business with the State – Public Procurement in the EC"

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Jakoby Rechtsanwälte

- Berlin, Germany
- established 1997
- formerly Velten Franz Jakoby, since 2007 Jakoby Rechtsanwälte
- International network Legalink since 2001

Our services:

Structuring – Advising – Notarial recording

Our main fields of activity:

- Real estate and construction law
- Public procurement law
- Corporate law
- Inheritance law and law of succession
- Labor law
- Litigation/Arbitration
- Notary's office

„Doing Business with the State – Public Procurement in the EC“

Overview

- I. What is Public Procurement Law in the EC?
- II. On what kind of contracts does the
Public Procurement Law of the EC apply?
- III. Who can participate in public procurement procedures in the EU?
- IV. What are the Bidder's rights to guarantee a fair procedure?

I. What is Public Procurement Law in the EC?

1. Free competition and transparency

2. Harmonisation by EC-Directives of 31 March 2004

- 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and
- 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors
- Harmonisation period is elapsed – Directives are mandatory for all member states by now

- II. On what kind of contracts does the Public Procurement Law of the EC apply?
1. Kind of goods/services
 2. Thresholds
 3. What kind of contracts are exempted of the EC public procurement rules?
 4. Do the public procurement rules also apply on concessions?

1. Kind of goods/services

- public works contracts
- public supply contracts
- public service contracts
- water, energy, transport and postal services sectors

2. Thresholds

- Step 1: estimated value of the public contract
- Step 2: thresholds depending on kind of goods/services:
 - e.g. EUR 5.150.000 - for public works contracts;
(public work concessions EUR 6.242.000,00, acc. to Art 56, 2004/18/EC).
 - e.g. EUR 206.000 - for most other public supply/service contracts;

3. What kind of contracts are exempted of the EC public procurement rules?

- Contracts which are declared to be secret or affect the essential interests of a Member State (Art. 296 EC-Treaty)
- Contracts concluded pursuant to international agreements;
- Contracts concerning specific services (e.g. the acquisition or rental of existing buildings; arbitration and conciliation services; the purchase, sale or transfer of financial instruments; central bank services)
- Service contracts awarded on the basis of an exclusive right
- Concessions?

4. Do the public procurement rules/principles also apply on concessions?

- What are concessions according to the EC rules?

→ is a contract of the same type (works or services to be carried out) but consideration for the works/services consists either solely in the right to exploit the work or in this right together with payment

(definitions according to Art. I no. 3 and no. 4, 2004/18/EC)

4. Do the public procurement rules/principles also apply on concessions?

- The EC public procurement rules according to the directives 17/2004/EC and 18/2004/EC apply on
 - public works concessions? → partly (special rules)
 - public service concessions? → no
 - service or works concessions in the water, energy, transport and postal services sectors → no

Application of the main principles of the EC Treaty: Unless the most special rules of the directives are not applicable directly, nevertheless the main rules of the EC-contract apply directly (freedom of establishment, freedom to provide services, principles of equal treatment, non-discrimination, mutual recognition, proportionality, transparency)

- III. Who can participate in public procurement procedures in the EU?
1. Foreign entities
 2. Legal form
 3. Multinational bidding consortium

1. Foreign entities

- No special restrictions for foreign entities
- Contracting authorities may request evidences to
 - registration of the bidder in its country of origin
 - economic and financial standing
 - professional and technical knowledge and ability

2. Legal form

- Bidder does not need a special legal form or a registered office within EU prior to the award (in sector fields special aspects apply)

3. Multinational bidding consortium

- are allowed; all members have to be stated.
- One members is proxy representative

IV. What are the Bidder's rights to guarantee a fair procedure?

1. Information rights
2. Primary legal protection

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