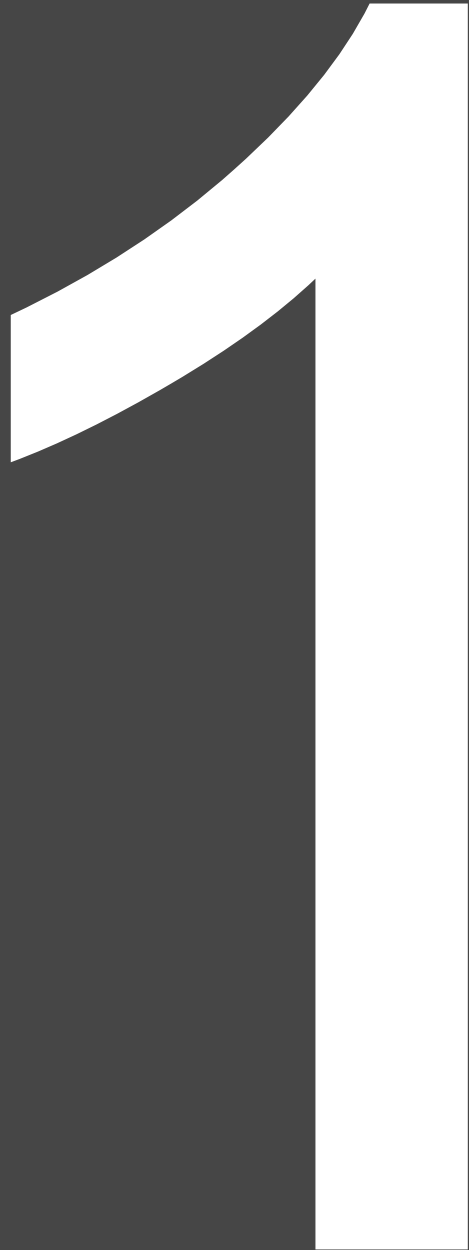# Outsourcing and public procurement in ICT

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Introduction to public procurement

Introduction to public procurement

What is outsourcing (outside resourcing)?

Agreement in which one entity hires another entity to deliver goods/services, instead of produce goods / perform services internally (instead of using in-house capacity)

Both private and public sector (including the outsourcing of public services to private entities)

Both foreign and domestic contracting

Offshoring: transferring the activity to a distant country

Nearshoring: transferring the activity to a nearby country

Why (not) to outsource?

Introduction to public procurement

What is public procurement?

The term used in EU legislation (in other jurisdictions also government procurement or government contracts)

Activity of purchasing works, supplies and services by public bodies (contracting authorities)

Who are contracting authorities?

State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law

Introduction to public procurement

Applicable law?

DIRECTIVE 2014/24/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on public procurement and repealing Directive 2004/18/EC

DIRECTIVE 2014/25/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC

DIRECTIVE 2014/23/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on the award of concession contracts

14%

Government procurement in the European Union accounts for more than 14% EU GDP

*https://ec.europa.eu/growth/single-market/public-procurement_en

Introduction to public procurement

Why to regulate public procurement?

Competition

3E – economy, effectiveness, efficiency

Right to compete in any EU country (if the entity is established in the EU)

See also: Agreement on Government Procurement (GPA) - WTO

2.2

Government procurement in the European Union accounts for more than EUR 2.2 trillion

*https://ec.europa.eu/growth/single-market/public-procurement_en

Introduction to public procurement

Procedures

Universal procedures:

Open procedure

Restricted procedure

Other procedures:

Competitive procedure with negotiation (with and without prior publication)

Competitive dialogue

Innovation partnership

What are the differences between universal procedures and other procedures?

Introduction to public procurement

Categorization:

Works (constructions)

Supplies (products)

Services

Which categories would be applicable in the area of ICT?

Above/under the threshold (higher x lower value tenders); the main limits are:

EUR 144 000 for most types of services and supplies purchased by central government authorities

EUR 5 548 000 for construction contracts

Introduction to public procurement

Choice of the procedure

Compliance with the legal requirements

Purchase of the works, products and services of the adequate quality

Compliance with the principles of the public investment law (at the time of the procurement, as well as in the future)

What are the principles of the public investment law?

Equal treatment

Non-discrimination

Transparency

+

Competition and 3E

Can you find 3E as a stated principle in the relevant directives (or local rules)?

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ICT public procurement

Specifics of ICT public procurement

What are the specifics of ICT public procurement?

One of the fastest growing areas

Need of specific know-how

Complexity

Need of implementation

Occurrence of the vendor lock-in

Impalpability of the software

Need of legal, technical and economical knowledge

" Competitive procedure with negotiation (with prior publication) and competitive dialogue

- the needs of the contracting authority cannot be met without adaptation of readily available solutions;

- they (procurement) include design or innovative solutions;

- the contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, the complexity or the legal and financial makeup or because of the risks attaching to them;

- the technical specifications cannot be established with sufficient precision by the contracting authority with reference to a standard, European Technical Assessment, common technical specification or technical reference.

What are the practical examples of aforementioned situations?

The needs of the contracting authority cannot be met without adaptation of readily available solutions

Examples

Need for adjustment of the software to work with a particular type of database
(e.g. content management systems)

Need to adapt the software to work with a specific format (e.g., network lock-in)

Cybersecuritiy "training" in the relevant industry

Modular planning (the use of standardized units)

(Based on the objective grounds)

They (procurement) include design or innovative solutions

Examples

Typically: consulting services

Designing a software purchasing concept (based on already purchased hardware
or licensing)

Designing measures to prevent vendor lock-in

The contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, the complexity or the legal and financial makeup or because of the risks attaching to them

Examples

Complex ICT systems

Extensive and complicated, variously conditional license agreements

If the contracting entity stipulates individual technical information and details in the subject of the contract, in a manner proving that the contracting authority is able to clearly define the legal and financial conditions, it is not possible to apply competitive procedure with prior publication on the basis of the above mentioned conditions. Czech Office for the Protection of Competition: S270,325/2008/VZ-909/2009/510/MON, decision from 13/2/2009

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Vendor lock-in at ICT public procurement

Vendor lock at ICT public procurement

Vendor lock-in (proprietary lock-in / lock-in)

A form of a dependence when a contracting authority (customer) founds itself unable to use another vendor without substantial switching costs (in general based on the decision taken in past)

42%

surveyed contracting authorities across the EU found themselves in some form of ICT vendor lock-in, according to the survey from 2015 (by PwC)

*https://joinup.ec.europa.eu/sites/default/files/inline-files/Task_4_Survey_results'_analysis.pdf

Vendor lock-in and related matters

Monopoly

Intellectual Property Rights

Technology dependence

Early adopter lock-in

Network lock-in

Incompatibility

Personal lock-in

Switching costs

Vendor lock-in

How to avoid vendor lock-in?

Ensuring compatibility (with both HW and SW)

Standardization (to enable updating and upgrading by third parties): The open Element Framework, Cloud Data Management Inference…

Ensuring updates and upgrades

Modification by the contracting authority and third parties (what about know-how?)

Modular planning (standardized plug-ins, containers and other standard units)

Open source software

Is the implementation needed?

Is the maintenance needed?

Exit strategy

Exit strategy

Data processing is often part of the outsourcing in ICT

Contracting authorities often lost the control over the data processed by contractor

-> Vendor lock-in (when the data migration to contracting authority is needed)

How to ensure the control over the processed data after the end of the contractual relationship?

The contractor, at the choice of the controller (contracting authority), deletes or „returns" all the *data and operational information* to the controller after the end of the provision of services relating to processing, and deletes existing copies

Structured, commonly used, machine-readable and interoperable format

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Open procedure

Open procedure

Subject of the contract (public procurement)

Selection criteria (e.g. technical and professional ability)

(Contract) award criteria (for example price, technical characteristics, functionalities, compatibility, life-cycle costing: LLC, environmental impact, software ergonomics)

Contract itself

Publishing (TED)

Thank you for your attention

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