

## New Belgian Regulatory Framework Governing Public Procurement – Overview of Main Novelties

Please find below an overview of the main changes brought about by the new Belgian regulatory framework governing public procurement which entered into force on 30 June 2017.

This note focuses on the changes that are relevant to the life sciences sector (e.g., in the context of hospital tenders for the supply of medicinal products or medical devices). The overview therefore mainly discusses the changes in the classical sectors, while ignoring the specific rules for the so-called “special” sectors (i.e., the water, energy, transport and postal services sectors). It will also disregard the concession contracts.

### 1. BACKGROUND

A set of three EU Directives<sup>1</sup> adopted in 2014 profoundly changed the European public procurement landscape. EU Member States were required to implement the Directives in their national laws by 18 April 2016.

In Belgium, the Directives were tardily implemented in national law by (i) the Law of 17 June 2016 on public procurement (the **Law on public procurement**);<sup>2</sup> (ii) the Law of 17 June 2016 on concession contracts;<sup>3</sup> and (iii) the Law of 16 February 2017 amending the Law of 17 June 2013 concerning the reasons, the information and the legal remedies with regard to public procurement contracts and certain contracts for works, supplies and services.<sup>4</sup>

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<sup>1</sup> The three Directives are (i) Directive 2014/23/EU of 26 February 2014 on the award of concession contracts; (ii) Directive 2014/24/EU of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (**Directive 2014/24/EU**); and (iii) Directive 2014/25/EU of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC.

<sup>2</sup> *Wet inzake overheidsopdrachten van 17 juni 2016/Loi du 17 juin 2016 relative aux marchés publics.*

<sup>3</sup> *Wet van 17 juni 2016 betreffende de concessieovereenkomsten/Loi du 17 juin 2016 relative aux contrats de concession.*

<sup>4</sup> *Wet van 16 februari 2017 tot wijziging van de wet van 17 juni 2013 betreffende de motivering, de informatie en de rechtsmiddelen inzake overheidsopdrachten en bepaalde opdrachten voor werken, leveringen en diensten/Loi du 16 février 2017 modifiant la loi du 17 juin 2013 relative à la motivation, à l'information et aux voies de recours en matière de marchés publics et de certains marchés de travaux, de fournitures et de services.*

In the past few months, these Laws have been further implemented and complemented by the following Royal Decrees:

- a Royal Decree of 18 April 2017 on the award of public procurement contracts in the classical sectors<sup>5</sup> (published in the *Belgian Official Journal* on 9 May 2017) (the **Royal Decree on the award of public procurement contracts in the classical sectors**);
- a Royal Decree of 18 June 2017 on the award of public procurement contracts in the special sectors<sup>6</sup> (published in the *Belgian Official Journal* on 23 June 2017);
- a Royal Decree of 22 June 2017 containing new rules on the performance of public works contracts and concession contracts for public works<sup>7</sup> (published in the *Belgian Official Journal* on 27 June 2017); and
- a Royal Decree of 25 June 2017 on the award and performance of concession contracts<sup>8</sup> (published in the *Belgian Official Journal* on 29 June 2017).

Following the adoption of the above Royal Decrees, the new Belgian regulatory framework on public procurement entered into force on 30 June 2017.

## 2. FAIR COMPETITION IN PUBLIC PROCUREMENT PROCEEDINGS

The core idea of the European rules on public procurement is that fair competition leads to the most efficient allocation of resources. Therefore, the equal treatment of bidders must be guaranteed at all stages of the public procurement process and tenders must be assessed on an objective basis. The new rules aim to enhance fairness in various ways. For instance:

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<sup>5</sup> *Koninklijk Besluit van 18 april 2017 plaatsing overheidsopdrachten in de klassieke sectoren/Arrêté royal du 18 avril 2017 relatif à la passation des marchés publics dans les secteurs classiques.*

<sup>6</sup> *Koninklijk Besluit van 18 juni 2017 plaatsing overheidsopdrachten in de speciale sectoren/Arrêté royal du 18 juin 2017 relatif à la passation des marchés publics dans les secteurs spéciaux.*

<sup>7</sup> *Koninklijk Besluit van 22 juni 2017 tot wijziging van het Koninklijk Besluit van 14 januari 2013 tot bepaling van de algemene uitvoeringsregels van de overheidsopdrachten en van de concessies voor openbare werken en tot bepaling van de datum van inwerkingtreding van de Wet van 16 februari 2017 tot wijziging van de Wet van 17 juni 2013 betreffende de motivering, de informatie en de rechtsmiddelen inzake overheidsopdrachten en bepaalde opdrachten voor werken, leveringen en diensten/Arrêté royal du 22 juin 2017 modifiant l'Arrêté royal du 14 janvier 2013 établissant les règles générales d'exécution des marchés publics et des concessions de travaux publics et fixant la date d'entrée en vigueur de la Loi du 16 février 2017 modifiant la Loi du 17 juin 2013 relative à la motivation, à l'information et aux voies de recours en matière de marchés publics et de certains marchés de travaux, de fournitures et de services.*

<sup>8</sup> *Koninklijk Besluit van 25 juni 2017 betreffende de plaatsing en de algemene uitvoeringsregels van de concessieovereenkomsten/Arrêté royal du 25 juin 2017 relatif à la passation et aux règles générales d'exécution des contrats de concession.*

- The new Article 5 of the Law on public procurement provides that the design of the procurement will not be made with the intention of excluding it from the scope of the Law or of artificially narrowing competition. Competition will be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging specific economic operators.
- The Law on public procurement introduces a new definition of “*conflicts of interest*”. Pursuant to Article 6, the concept of “*conflicts of interest*” will at least cover any situation where staff members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure have, directly or indirectly, a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.

Article 51 of the Royal Decree on the award of public procurement contracts in the classical sectors seeks to counter a “*revolving door mechanism*”, which targets the situation where a physical person previously working for a contracting authority is now being employed by an economic operator involved in a public procurement procedure established by that contracting authority. This person is presumed to have a conflict interest in the two-year period following the termination of his/her employment at the contracting authority.

- Contracting authorities may hold market consultations before they start the award procedure. However, Article 52 of the Law on public procurement requires contracting authorities to ensure that (i) the participation of a previously consulted company does not affect competition within the tender procedure; and (ii) any information shared with a company in the consultation phase should be shared with the other participants in the tender as well.
- The rules for modifying contracts during the post-award period have been clarified and simplified. Article 9 of the Law on public procurement provides that public contracts are awarded on the basis of a fixed price. No substantive changes may be effected during the execution of the contract. However, a price review in light of economic and social criteria is possible when the initial procurement document provides for a clear, precise and unequivocal price review clause (See, Article 10 of the Law on public procurement).
- Contracting authorities must retain copies of contracts of higher value (EUR 1,000,000 for contracts for supplies or services and EUR 10,000,000 for contracts for works) for at least ten years (starting from the date of conclusion of the contract) and make them available to the public (See, Article 163, paragraph 8 of the Law on public procurement).

### 3. INCREASED DIGITALISATION - THE ROAD TO E-PROCUREMENT

#### 3.1 Electronic communication

**Mandatory electronic communication** - Article 14 of the Law on public procurement provides that any communications and information exchanges between contracting authorities and economic operators, including the electronic submission of the tenders, should at all times be performed using electronic means of communication, except in exceptional circumstances (e.g., in situations where, because of the specialised nature of the public contract, specialised means or file formats that are not generally available are required for the submission or in situations where it is necessary to submit a scale model). The tools and devices to be used for electronic communications, as well as their technical characteristics, should be non-discriminatory, generally available and interoperable with the ICT products in general use and should not restrict economic operators' access to the procurement procedure. The use of electronic means of communication is beneficial to both contracting authorities and economic operators in that they make public procurement cheaper and more efficient.

**Postponed in Belgium** - Article 90 of Directive 2014/24/EU allows EU Member States to postpone the mandatory use of electronic means of communication until 18 October 2018. Article 128 of the Royal Decree on the award of public procurement contracts in the classical sectors provides that for contracts of which the estimated value exceeds the European thresholds, contracting authorities may decide not to make use of electronic means of communication until 17 October 2018. For contracts of which the estimated value is below these thresholds, the relevant date is 31 December 2019.

#### 3.2 European Single Procurement Document (ESPD)

**Self-declaration** - Article 73 of the Law on public procurement creates the European Single Procurement Document (**ESPD**). The ESPD is a self-declaration form which serves as preliminary evidence in replacement of certificates issued by public authorities or third parties confirming that the relevant economic operator satisfies the following conditions:

(i) it is not in one of the situations in which economic operators can or should be excluded from the procurement procedure (as described in Articles 67 to 69 of the Law on public procurement);

(i) it meets the relevant selection criteria (as established in accordance with Article 71 of the Law on public procurement);

(i) where applicable, it fulfils the objective rules and criteria used to limit the number of candidates (as set out in Article 79 of the Law on public procurement).

**Electronic use** - The ESPD is meant to be used exclusively electronically (Article 73, §2 of the Law on public procurement). An e-ESPD can be prepared in two ways. First, the European Commission has developed a free online service for buyers, bidders and other parties interested in filling in the ESPD electronically.<sup>9</sup> Second, a structured data exchange model is available for public buyers, providers of e-procurement solutions or any other party interested in integrating it into their solutions.

### 3.3 Mandatory use of e-Certis

**E-Certis** - Article 76 of the Law on public procurement makes the use of the e-Certis database mandatory. E-Certis is a mapping tool that helps participants in public procurement procedures to identify and compare different certificates requested in procurement procedures across the EU.<sup>10</sup>

### 3.4 Electronic availability of procurement documents

**Access to procurement documents** - Article 64 of the Law on public procurement requires contracting authorities to provide, by electronic means, unrestricted and full direct access, free of charge, to the procurement documents from the date of publication of a notice. The text of the notice must specify the internet address at which the procurement documents are accessible.

## 4. AWARD PROCEDURES

### 4.1 Greater flexibility in choice of tender procedures

**Overview** - Article 35 of the Law on public procurement lists the various award procedures which the contracting authority can use. The so-called “open procedures” and “restricted procedures” are still put forward as the standard procedures to be used by contracting authorities. However, compared to the situation under the previous Law, the open and restricted procedures are no longer given absolute priority. The Law on public procurement thus marks an important shift in the choice of tender procedures open to the contracting authority by promoting the use of more flexible procedures, other than the open and restricted procedures.

**No terminological distinction** - The Law on public procurement no longer makes a distinction between “*adjudication*” (*aanbesteding/adjudication*), which referred to the procedure in which price was the sole award criterion, and “*call for tender*”

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<sup>9</sup> Accessible at <https://ec.europa.eu/tools/espd/filter?lang=en>.

<sup>10</sup> The e-Certis database can be accessed at <https://ec.europa.eu/growth/tools-databases/ecertis/>.

(*offerteaanvraag/appel d'offres*), which referred to the procedure in which multiple award criteria were taken into account.

**Open procedures** - In open procedures, any interested economic operator may submit a tender in response to a call for competition. The tender will be accompanied by the information for qualitative selection that is requested by the contracting authority. In this case, the qualitative selection phase and the award of the contract are handled in one procedure.

**Restricted procedures** - In restricted procedures, any economic operator may submit a request to participate in response to a call for competition by providing the information for qualitative selection that is requested by the contracting authority. Only those economic operators invited to do so by the contracting authority following its assessment of the information provided may submit a tender. Contracting authorities may also limit the number of suitable candidates to be invited to participate in the procedure.

**The competitive procedure with negotiation** - The conditions for using the competitive procedure with negotiation, previously known as the negotiated procedure with prior publication, have been relaxed. Essentially, this procedure can now be used for all purchases of works, supplies or services that are not available “off-the-shelf”.

**The competitive dialogue** - The use of the competitive dialogue is no longer restricted to “particularly complex” contracts. This procedure can now be used in the same circumstances as where the competitive procedure with negotiation is allowed.

**The innovation partnership** - The innovation partnership is a new, flexible tender procedure. This procedure is specifically designed for situations where a need for the development of an innovative product or service or innovative works and the subsequent purchase of the resulting supplies, services or works cannot be met by solutions already available on the market. In such situations, the new procedure allows contracting authorities to establish a long-term innovation partnership for the development and subsequent purchase of a new, innovative product, service or work provided that these can be delivered to agreed performance levels and costs, without the need for a separate procurement procedure for the purchase. According to the preparatory works of the Law on Public Procurement, this new procedure is intended to give a positive signal to innovative sectors.

**The simplified negotiated procedure with prior publication** - Article 41 of the Law on public procurement provides that the simplified negotiated procedure with prior publication can be used for the award of (i) public contracts for supplies and services of which the estimated value is below the threshold for European publication; and (ii) public contract for works where the estimated value is below EUR 750,000.

**The negotiated procedure without prior publication** – In view of the detrimental effects on competition, negotiated procedures without prior publication of a contract notice can be used only in very exceptional circumstances, as detailed in Article 42 of the Law on public procurement.

#### 4.2 Instruments for electronic and aggregated procurement

**Dynamic purchasing systems** - The use of a dynamic purchasing system is no longer restricted to purchases of commonly used services and supplies, but is now also available for purchases of commonly used works. Furthermore, since 30 June 2017, in order to procure under a dynamic purchasing system, contracting authorities will have to follow the rules of the restricted procedure.

**Electronic catalogues** - This is a completely new procurement technique. If the use of electronic means of communication is mandatory, contracting authorities may require tenders to be presented in the format of an electronic catalogue or to include an electronic catalogue.<sup>11</sup> Electronic catalogues must be drawn up according to the technical characteristics and the format established by the contracting authority.

#### 4.3 Shorter time periods

**30 or 35 days** - In line with Directive 2014/24/EU, the Law on public procurement introduces shorter minimum time limits for the receipt of tenders and requests to participate. In an open procedure, the minimum time limit for the receipt of tenders is now 35 days. In a restricted procedure, the minimum time limit for the receipt of requests to participate and of tenders is 30 days, respectively from the date on which (i) the contract notice was sent; and (ii) the invitation to tender was sent to the shortlisted companies.

#### 4.4 Simplified regimes

**Flexible procurement regime for social and other specified services** – Instead of the former distinction between so-called “A” (“priority”) services and “B” (“non-priority”) services, a new, simplified regime is put in place for social, health, cultural and similar services. For these services, the contracting authority can make use of: (i) the simplified negotiated procedure with prior publication; (ii) the negotiated procedure without prior publication for public contracts of which the estimated value is below EUR 750,000; (iii) one of the other procedures mentioned under point 4.1 above, without the conditions necessarily being fulfilled; or (iv) a *sui generis* procedure with prior publication for which the contracting authority defines the rules itself.

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<sup>11</sup> The Belgian e-Catalogue can be accessed at <https://ecat.publicprocurement.be/ecat/home.action>.

**Very flexible procurement regime for public contracts “with limited value”** - Similarly to Article 110 of the now repealed<sup>12</sup> Royal Decree of 15 July 2011 on the award of public procurement contracts in the classical sectors, Article 92 of the Law on public procurement provides for a flexible regime for contracts “with limited value”. However, this regime now applies to contracts with an estimated value below EUR 30,000. That threshold is more than three times higher than the previous one (EUR 8,500). In these cases, the contracting authorities must only take into account the general principles of Title 1 of the Law on public procurement and the rules on the personal and material scope of the Law. Public contracts which fall under this regime can be awarded by means of an “accepted invoice” (*aanvaarde factuur/facture acceptée*).

#### 4.5 Division of contracts into lots

**‘Apply or explain’** - Contracting authorities may decide to award a contract in the form of separate lots and may determine the size and subject-matter of such lots. Article 58 of the Law on public procurement determines that for contracts for supplies, services and works of which the estimated value is equal to or higher than the European threshold applicable to public contracts for supplies and services awarded by the federal government (*i.e.*, currently EUR 135,000), all contracting authorities must consider the division into lots. If the contracting authority decides not to divide the contract into lots, it must explain its decision. The obligation at least to consider the division into lots is meant to make public procurement proceedings more easily accessible to small and medium-sized enterprises.

**Limitation** - Contracting authorities may, even if tenders may be submitted for several or all lots, limit the number of lots that may be awarded to one tenderer, provided that the maximum number of lots per tenderer is specified in the contract notice or in the invitation to confirm interest.

**Price reductions** - Article 50 of the Royal Decree on the award of contracts in the classical sectors provides that, unless the procurement documents were to prohibit so, tenderers can offer price reductions in case they are awarded multiple lots.

## 5. SELECTION AND EXCLUSION

**New grounds for exclusion** - Pursuant to Article 67 of the Law on public procurement, contracting authorities must now also mandatorily exclude economic operators previously convicted for practices linked to terrorism and human trafficking. Moreover, pursuant to Article 68 of the Law on public procurement, an economic operator must be

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<sup>12</sup> Article 127 of the Royal Decree of 18 June 2017 on the award of public procurement contracts in the classical sectors.



mandatorily excluded from the public procurement procedure if he is in breach of his obligations involving taxes and social security contributions.

Furthermore, Article 69 of the Law on public procurement provides a list of facultative exclusion grounds, such as the situation where tenderers (i) presented significant or persistent deficiencies in the performance of a substantive requirement under a prior public contract; or (ii) violated the applicable obligations under environmental, social and labour law in the context of a prior public contract.

**Periods of exclusion** - The mandatory exclusion grounds apply for five years from the day of the final conviction, while the facultative exclusion grounds can be applied for three years from the date of the event.

**Self-cleaning principle** - Article 70 of the Law on public procurement provides that any economic operator that is in one of the situations referred to in Articles 67 or 69 of the Law on public procurement may demonstrate that he has adopted sufficient measures to show his reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient by the contracting authority, the economic operator concerned will not be excluded from the procurement procedure.

**Selection** - Article 73 of the Law on public procurement tries to reduce the burden on economic operators by making the use of the European Single Procurement Document (ESPD) mandatory (*See also*, section 3.2 above).

## 6. CONTRACT AWARD

**Terminological, but no substantive changes** – Under the previous Belgian and EU regulatory framework on public procurement, a contract could be awarded on the basis of the most economically advantageous tender (“MEAT”), taking into account multiple award criteria such as quality, price, technical value or functional characteristics, or on the basis of the sole criterion of the lowest price. However, in line with Directive 2014/24/EU, the new Law on public procurement now uses MEAT as an umbrella term. Article 81 provides that a contract should be awarded on the basis of the most economically advantageous tender from the point of view of the contracting authority, be it on the basis of the price, on the basis of costs, or on the basis of the best price/quality ratio (*i.e.*, the “old MEAT”).

- **On the basis of price:** an evaluation of the tender purely based on the price is still possible.

- **On the basis of costs:** the cost criterion is broader than the price criterion, since it takes into account both the price and the cost-efficiency of the purchase. Article 82 of the Law on public procurement defines what life-cycle costs are and article 84 gives guidance on price and cost investigations.

- **On the basis of the best price/quality ratio:** this criterion encompasses both the price and costs, as well as other criteria, such as quantitative, environmental or social aspects related to the contract.

**Experience of staff** - It is noteworthy that in assessing tenders, contracting authorities may take into account the qualifications and experience of the staff assigned to perform the contract if these elements can significantly impact the level of performance, in particular for service contracts (Article 81, §2, 3°, b of the Law on public procurement).

**Van Bael & Bellis**

**27 July 2017**