

04 April 2011

Screening report

Iceland

Chapter 5 – Public procurement

Date of the screening meeting:

Bilateral meeting only: 15 November 2010

I. CHAPTER CONTENT

The *acquis* on public procurement is based on the **general principles** deriving from the Treaty on the Functioning of the European Union (TFEU), Part Three, Title IV und Title VII, and from the jurisprudence of the European Court of Justice (ECJ) such as transparency, equal treatment, free competition and non-discrimination. These principles apply to all procurement procedures including those falling outside the scope of the EU procurement directives for example in view of their value (procurement below the EU thresholds) or subject matter (service concessions).

The **award of public contracts** (public works, public supply and public service contracts) is coordinated by two specific directives: Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts regarding the so-called "traditional contracting authorities" (the "classical sector") and Directive 2004/17/EC concerning the coordination of procurement procedures of entities operating in the fields of water, energy, transport and postal services (the "utilities sector"). The respective scope of application of the directives is defined in terms of the contracting authorities or entities and contracts covered, application thresholds and specific exclusions. Within this framework, specific requirements are laid down to guarantee full respect of the general principles in the course of the procurement process. The directives also provide a framework for electronic procurement including electronic means of communication, dynamic purchasing systems and electronic auctions.

Compliance with the procurement directives requires an adequate implementation capacity. In particular, there is need for appropriate administrative structures to ensure the key functions of policy-making, drafting of primary and secondary legislation, provision of operational tools, help-desk, monitoring and statistics as well as controls in a coherent manner for all areas related to public procurement. Moreover, main purchasers at all levels have to possess the necessary administrative capacities to allow for an effective implementation of the procurement rules.

Further to the award of public contracts, the procurement *acquis* entails three directives on **remedies**: Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts; Directive 92/13/EEC on coordinating the laws, regulations and administrative provisions relating to the application of EU rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sector and Directive 2007/66/EC amending the other two directives to improve the effectiveness of review procedures concerning the award of public contracts. The remedies directives contain requirements for the establishment of effective and independent review procedures against any action or inaction of contracting authorities liable to produce legal effects. Review bodies have to be equipped with the adequate capacity to guarantee the effectiveness of the system as a whole.

The entire *acquis* in public procurement is covered by the EEA Agreement with the exception of two technical Directives (2006/97/EC and 2007/24/EC) and the new Remedies Directive (2007/66/EC).

II. COUNTRY ALIGNMENT AND IMPLEMENTATION CAPACITY

This section summarises the information provided by Iceland and the discussion at the screening meeting.

Iceland indicated that it can accept the *acquis* regarding public procurement. Iceland indicated that it already implements the *acquis* and does not expect any difficulties in continuing to implement the *acquis* in this chapter up to the date of accession.

II. a. General principles

Public contracts

Iceland indicated that its *Act No 84/2007 on Public Procurement (PPA)* transposed the Directive 2004/18/EC including works concessions (see below).

Essential parts of the PPA are a transposition of the Directive 2004/18/EC. Article 14 PPA mentions explicitly the procurement principles of equal treatment and transparency. Article 16 PPA extends the principle of non-discrimination to entities that are granted special or exclusive rights to carry out public services. The domestic thresholds in kronor are the equivalent of approximately €32,500 for supplies and €65,500 for both services and works. Relevant provisions of the Directive 2004/18/EC have also been transposed for procurement above these thresholds. Municipalities are not bound by the rules below the EEA value thresholds; but they are to enact their own rules on procurement in line with general principles applicable to public procurement. In addition, municipalities or groups of municipalities often draw upon a framework contract of the *State Trading Centre*, a central procurement body for state institutions. A model regulatory framework is used by municipalities.

A *Handbook* that describes the tender procedures and provides for legal interpretation and advice for practical implementation of the law is available to and used by all contracting authorities. Article 78 PPA empowers the government to act by decree in order to establish further rules on public procurement above the thresholds of the PPA for the purposes of implementing EEA rules on value thresholds, notices, publications and other EEA procurement aspects. Iceland indicated that this legal basis can be used to further align the Icelandic law to the EU public procurement rules if necessary. The related EU legal texts implemented through Article 78 PPA are annexed to the decree in the Icelandic Official Journal. On this basis standard forms and the EU Common Procurement Vocabulary (CPV) set out in Regulation No 2195/2001 have been incorporated in this way into Icelandic law.

The Utilities Directive 2004/17/EC has also been transposed through ministerial decrees, i.e. by the Regulations No. 755/2007 and No. 916/2008. The PPA covers certain aspects of public procurement in the field of utilities, above all the issues covered by the (old) Utilities Remedies Directive (92/13/EEC); see Chapters XIV and XV of the PPA, which deal with remedies, the validity of contracts and compensation.

Concessions

The PPA sets out the Icelandic legislative framework for work concessions following Directive 2004/18/EC. With the exception of Article 14 PPA, service concessions are excluded from the scope of the PPA, however allowing the Minister to enact a decree on service concessions by the state and state organs. The PPA transposes the respective provisions of EU law on public procurement applicable to procedures above the value thresholds.

International aspects

Iceland is party to the WTO Government Procurement Agreement (GPA). Free Trade Agreements on public procurement exist with Chile, Colombia, Mexico, Ukraine and the Gulf Cooperation Council (GCC).

II. b. Award of Public contracts

Public contracts

The Icelandic PPA and the Regulations No. 1300/2007, No. 755/2007 and No. 916/2008, covering both the “classical” and the “utilities” sectors, govern all public contracts above the kronor equivalent of approximately €32,500 for supplies and €65,500 for both services and works (*scope of application*). These thresholds are in conformity with the procurement Directives (2004/18/EC and 2004/17/EC).

The services Annex II of Directive 2004/18/EC is directly referred to in Article 4 PPA and annexed to the PPA. The different types of *contracting authorities and entities* include the state, local authorities, their institutions and other public entities in line with definitions in Directive 2004/18/EC. The definitions of the central purchasing body and design contests are transposed in Article 2 PPA. The PPA also provides for specific rules on design contests in line with this directive.

The *specific exclusions* set out in Article 9 PPA do not go beyond the procurement directives. Secret contracts and contracts requiring special security measures for the protection of the essential interests of the state are not covered. Iceland acknowledged that the *acquis* on defence procurement remains to be transposed into Icelandic law and indicated that the Defence Procurement Directive (Directive 2009/81/EC on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security) is expected to be transposed before the end of 2011. Particular problems are not expected; the country does not have armed forces. This legislation will however be applicable to coast guard services. The PPA does not apply either to contracts for the principal purpose of providing or exploiting public telecommunication networks or providing services of this kind.

As stated above, the domestic *value thresholds* are considerably lower than the value thresholds of the procurement directives. The rules in Articles 23 to 29 PPA on the calculation of the estimated value of public contracts reproduce the relevant provisions of the procurement directives.

Concerning *specifications and contract documents*, the PPA contains rules on the preparation and content of the tender documentation including the award criteria and their relative weighting in line with EU public procurement law. It prohibits references to a particular make, brand or origin. The detailed rules regarding technical specifications, variants and contract performance conditions are implemented in the PPA. Iceland stated that the PPA reflects the EU rules on sub-contracting, which are included in the directives.

The procurement directives do not oblige contracting authorities to apply social and environmental considerations, but leaves the decision up to the contracting authorities. Iceland indicated that it is committed to high standards in social and green procurement and is considering using guidance of the European Commission on how such aspects can be introduced into public contracts.

Iceland indicated that regarding the different *types of procurement procedures*, the PPA transposed EU rules and principles pertaining to open procedure, restricted procedure and negotiated procedure. Furthermore, Iceland stated that the competitive dialogue procedure, framework agreements, electronic auctions and dynamic purchasing systems are authorised and regulated in line with the procurement directives.

Iceland stated that concerning the *use of the procurement procedures*, the PPA imposes some procedural limitations on the use of the restricted procedure in line with the *acquis*. Based on the Utilities Directive, the PPA defines specific conditions for the use of the negotiated procedure without a prior call for competition.

In relation to *advertising and transparency*, the PPA contains publication requirements with regard to the contract notice, the award notice and other information referred to by the procurement directives. Regarding the rules on advertising and transparency applicable to procedures above the domestic thresholds (the equivalent of approximately €32,500 and €65,500), the PPA refers directly to the requirements of the EU public procurement law and subsequent amendments.

Regarding the *conduct of the procedure*, Article 71 PPA summarises the related EU requirements. The PPA refers to the formal criteria, the fulfilment of which makes tenders valid, and to the conduct of pre-selection procedures in restricted procedures, competitive dialogues and negotiated procedures contained in Article 56 PPA. Amongst others, the Act provides for rules on the content, form and submission of tenders, public opening and evaluation and for the mandatory cancellation of the procedure. Upon request, the contracting authority shall provide unsuccessful candidates with the reasons for its decision in line with EU public procurement law.

Iceland stated that its provisions concerning public contracts are in compliance with the applicable EU directives and regulations.

Electronic procurement

Iceland indicated that there has been ongoing work on e-procurement since 2000. The authorities used the TED database tool and built up related administrative capacity. However, EU-related reform projects have not been followed during the last 2 years due to the lack of financial resources. An e-procurement action plan has been discussed at ministerial level and will be presented to interested parties in the first half of 2011. The e-signature Directive 1999/93/EC has been transposed into Icelandic law. There is no regulatory framework for e-services. Even though e-procurement is currently not a priority, Iceland stated that a timetable for further actions will be prepared.

Concessions

Apart from the provisions of the PPA transposing EU rules on concessions, no specific legislation exists in Iceland on concessions. Iceland indicated that the PPA regulates *public work concessions* above certain thresholds in line with the *acquis*. Public work concessions with lower values are, however, not covered by the Act. At present, they are not governed by any specific act either, but the PPA allows for the enactment of a ministerial decree with regard to the concessions awarded by the state and state organs. Notwithstanding the lack of regulation in the field of concessions below EU value thresholds, Iceland informed that rules from the general principles of the Treaty and the case law of the European Court of Justice (ECJ) are constantly applied. Concessions are construed for the purposes of each and every procurement without any statutory model.

Iceland indicated that *Public-Private Partnerships* (PPPs) are increasingly used for large public infrastructure measures. The general tender procedure of the PPA is applied to PPPs on the basis of the economically most advantageous offer. A specific legislative framework for PPPs does not exist. Hence, the exact nature of the PPP is formulated on a case-by-case basis.

Implementation capacity

The general public procurement structure in Iceland follows a model established by the OECD in cooperation with the European Commission. The Ministry of Finance is responsible for the overall administration of public procurement, policy issues and the drafting of legislation. Technical support from external advisors is provided when needed. Each ministry has special employees for public procurement. The *State Trading Centre* plays an important role in the implementation of the laws as central procurement body for state institutions. Their services are also used by the municipalities. A *Public Procurement Advisory Council* is planned to be established by the end of 2011. Specific annual reports are not submitted to the Parliament. State institutions are however subject to regular audits and public procurement issues are inspected. The State Auditor has on several occasions published reports on certain procurement procedures and procurement issues more generally.

II. c. Remedies

The Icelandic remedies system does not reflect the EU Remedies Directive 2007/66/EC. The Ministry of Finance is currently drafting implementing legislation, which is expected to be adopted before the end of 2011. The existing legislation under the EEA is currently applied with the addition of a rule on 10 days stand-still period after an award decision has been made. The *Public Procurement Complaint Committee (PPCC)* is competent to review public procurement procedures and to review any decision of the contracting authority. The general courts are also competent to review the procurement decisions. However, procurement cases are usually not brought before the courts until after a decision by the PPCC, commonly for the purposes of claiming damages.

As a rule, complaints must be lodged in writing within four weeks from the date that the complainant knew, or should have known, of the decision, action or failure to act, which he considers a violation of his rights (Article 94 PPA). The PPA also addresses deficiencies in an application for review or in providing the PPCC with information it has requested. The obligation of a complainant to pay a fee (approximately €300) serves the purpose to deter unfounded complaints. If the PPCC considers the complaint not unfounded – even if a claim for annulment cannot be granted - the fee is reimbursed to the party as part of costs.

The PPCC may annul a decision by the contracting authority. It may also instruct the contracting authority to put certain procurements out for tender, re-advertise a tender or alter a tender notice, tender description or other aspects of the tender documents. The decisions of the PPCC are subject to review by Iceland's courts. Although the PPCC can express itself on damages, it is for the courts to rule on damages. The review procedure described above applies to all types of public procurement procedures covered by the PPA both in the "classical" and the "utilities sectors".

Implementation capacity

The PPA requires from the PPCC to settle complaints quickly and impartially. The three members of the PPCC are appointed by the government for a period of four years. The chairman of the PPCC must satisfy the criteria applicable to district judges. Other members are to have profound knowledge of procurement. The committee is administratively separated from the Ministry of Finance and acts independently as a quasi-judicial body. Although not expressly stated in the PPA, it may submit requests to the EFTA Court for an advisory opinion. The PPCC does not have the competence to rule on damages. As stated above, this task is left to the Icelandic courts, which will also review appeals concerning decisions of the PPCC.

III. ASSESSMENT OF THE DEGREE OF ALIGNMENT AND IMPLEMENTATION CAPACITY

Iceland's rules in the field of public procurement are highly in line with the EU *acquis*. This is due in particular to Iceland's EEA membership. Even though the transposition of the Remedies Directive 2007/66/EC, the Defence Procurement Directive 2009/81/EC and the two technical Directives 2006/97/EC and 2007/24/EC is still outstanding and the legal framework for concessions and PPPs are still to be further developed, Iceland is well prepared for the full implementation of the EU *acquis* on public procurement and its legislation is expected to be fully aligned before the end of 2011.

III.a. General principles

In the field of public contracts, Iceland complies with the general principles of transparency, free competition and equal treatment. As concerns the principle of non-discrimination, the PPA foresees equal access for all economic operators, irrespective of their residence, registered seat or the origin of goods.

The requirements concerning the economic and financial standing and technical ability of the economic operator are in line with the *acquis*. The provision of Article 78 PPA (ministerial decrees) ensures that the provisions of the procurement directives and the amendments or developments made thereof can be directly incorporated into the Icelandic regulatory framework. The swiftness of this procedure facilitates Iceland's continuous compliance with the requirements of this chapter. The adoption of the Regulations No. 1300/2007 on Standard Forms and No. 411/2008 on the CPV attest this.

Iceland needs to clarify if the procedure of applying ministerial decrees can also be used for the transposition of the two technical Directives 2006/97/EC (adapting certain rules on contracting entities by reason of the accession of Bulgaria and Romania) and 2007/24/EC (concerning the abolition of restrictions to contractors acting through agencies or branches).

In the area of concessions the current rules of the PPA only cover public works concessions above certain value thresholds transposed directly from EU legislation. The principles of equal treatment, transparency and non-discrimination on grounds of nationality or other similar reason are respected. A proper legal basis for concessions is recommended, albeit not required by EU law. The EU rules on service concessions can be transposed into Icelandic law by means of a decree according to Article 78 PPA.

III.b. Award of public contracts

Regarding public contracts, the Icelandic regulatory framework is largely in line with the *acquis*. The scope of application of the PPA is sufficiently wide as to comprise all contracts covered by the public procurement directives. The different types of contracting authorities and entities are also covered. The exclusions from contracts such as those requiring special security measures do not go beyond the procurement directives. The provisions related to defence procurement are still to be transposed.

Icelandic regulations are in line with European requirements with regard to *specifications and contract documents*. They contain appropriate award criteria, their relative weighting as well as prohibitions to references to a particular make or origin. Sub-contracting is regulated in line with the EU directives. The different types of procedures are covered and the limitations on the use of restricted procedures are in accordance with EU law. Requirements on *advertising and transparency* are transposed in Icelandic law; the applicable provisions refer directly to the related EU rules.

Regarding electronic procurement, Iceland has transposed the e-signature Directive, used the TED database tool and built up related administrative capacity. Iceland stated that in the first half of 2011 it will present an e-procurement action plan to interested parties. This aims at introducing further adaptations.

In the field of concessions, there is no specific regulation in Iceland. Only the public works concessions are covered by the PPA, service concessions being exempted from it. The general principles of the *acquis* are however applied to service concessions.

Iceland's increasing use of *Public-Private Partnerships* would imply the creation of a legislative framework although the *acquis* does not require this.

The implementation capacity is satisfactory. The *State Trading Centre*, in its role as central procurement body for state institutions, is well staffed and competent. It assists the municipalities with their more limited administrative capacity. Furthermore, a *Public Procurement Advisory Council* is planned to be established by the end of 2011. This should further strengthen the implementation capacity also with regard to municipalities.

III.c. Remedies

The Icelandic legislation on review procedures is not fully in line with general EU Treaty principles and the directives. The implementation of the EU Remedies Directive 2007/66/EC is outstanding. The current legislation being applied under the EEA covers some of the *acquis* requirements. The persons entitled to request a review are the same as provided in the directives, also allowing associations or organisations to file class actions. Based on the principle of proportionality, the timeframe for the procedure is adequate, as is the establishment of a period to remedy any deficiency in the application or to provide more information. The fee charged to initiate the proceedings does not unduly hinder any complaints which are not unfounded, since its value is low, again based on the proportionality principle, and it can be reimbursed.

It is expected that Iceland will be able to transpose all outstanding legislation (see above part III) before the end of 2011. The Commission will continue to closely monitor the developments in this area.

The implementation capacity of Iceland in the field of remedies is adequate. The *Public Procurement Complaint Committee* is well staffed; it has the necessary power to exercise its functions and it is sufficiently autonomous in order to deal with complaints in an impartial and independent manner. As regards the issues it does not cover, such as the ruling on damages, they are assigned to the Icelandic courts. The Icelandic legal framework also provides for sufficient possibilities for review from the courts, the State Auditor, the parliament's Ombudsman and the EFTA Surveillance Authority.