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Scandinavia and the Baltics: Shopping made simple

Author: Carri Ginter and Reimo Hammerberg

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On 1 May, 2007, Estonia's new Public Procurement Act (PPA) entered into force. Utility services and traditional sectors are regulated by the PPA which replaced the earlier law from 2000. The law is supplemented by various government decrees.

The PPA was adopted in order to bring the Estonian public procurement legislation into line with the European Union directives on public procurement, which entered into force in 2004 with the Utilities Directive and Public Sector Directive.

To begin with, the value thresholds have been increased in comparison to the previous PPA, as the old thresholds had become financially unjustified. In the case of smaller public procurements, the costs for organising procurement procedures started to exceed the benefit that should result from procurements.

Under the new PPA, the value thresholds for 2007 are £20,900 for goods and services and £132,000 for construction works. Starting from 2008, the value thresholds for goods and services will be £28,000 and for construction works £174,000.

The contracting authority has no obligation to follow the procurement procedure provided for in the PPA if the estimated value of a procurement contract is lower than the value threshold for public procurement. In this event, the contracting authority is under an obligation to proceed from the general principles of public procurement in concluding a procurement contract and submit a public procurement report.

Contracting authorities involved in networks only need apply the procurement procedure if the estimated value of the contract is equal to, or greater than, the international value threshold.

One of the most important changes, as compared to previous regulation, involves the conditions for choosing the procurement procedure. If the estimated value of a procurement contract is below the international value threshold, then the contracting authority may freely choose the procedure, except for the negotiated procedure, without prior publication of a tender notice. The companies in which a local government or other public partner owns a majority holding are now subject to less strict requirements for public procurement. In most cases, these companies no longer need to organise a procurement procedure.

The PPA also incorporates a so-called in-house procurement exception by stating that a procurement procedure is not needed when goods or services are purchased from company shares of which 100% are owned by the contracting authority. This test, which is based solely on shares, does not fully correspond to that applied by the European Court of Justice (ECJ) for example in *Parking Brixen* (C-458/03).

Another new development of the law allows framework agreements of up to four years in duration to be concluded primarily for determining prices, or prices together with amounts or volumes subject to the principal conditions set forth in the framework agreement. Procurement contracts can be concluded under the simplified procedure. According to the new PPA, all contracting authorities are allowed to conclude framework agreements.

The new PPA emphasises that contracting authorities should favour environmentally-friendly solutions in procurement procedures. Contracting authorities are encouraged to include environmental requirements in technical specifications. The new PPA also contains provisions on the possibility for considering environmental management measures.

Among the new provisions the PPA introduces is 'competitive dialogue', a procedure that has been designed for use in case of particularly complex procurements. It is likely that contracting authorities will start to use competitive dialogue for awarding large infrastructure contracts, such as public-private partnership (PPP) projects. The PPA seems to allow competitive dialogue when the estimated value of a procurement contract is below the international value threshold. This differs from the basic idea behind the procedure originating from the European Union directive, as the

latter lays down as a precondition that competitive dialogue can be used only in case of particularly complex procurements. Still, as competitive dialogue is a rather expensive procedure, it is likely that it will be used mainly on projects exceeding the international value threshold.

The PPA introduces new possibilities for using electronic means for public procurements — for example, electronic auctions. The PPA still requires the adoption of government regulations regarding the use of these electronic means. The provisions concerning dynamic purchasing systems and electronic auctions will enter into force on 1 January, 2008.

After completing the procurement procedure, the contracting authorities must submit more detailed procurement reports than before to the public procurement register. This should improve the transparency of public procurement. Contracting authorities also have the obligation to submit an annex to the report after termination of the procurement contract, setting out any amendments to the contract and any specifications concerning the execution thereof. Contracting authorities must now indicate the basis for termination as well as the results of public procurement. In order to make state supervision more effective, the supervision is focused on procurements in progress.

The new PPA substantially changes review procedures and provisions for a compulsory pre-trial procedure are introduced. Disputes are resolved by an independent dispute resolution committee residing at the Riigihangete Amet Public Procurement Office (PPO). The committee is independent of the PPO and its members are appointed by the Government. The committee essentially replaces the administrative court in the first instance.

Only after completing the compulsory pre-trial phase in the dispute resolution committee, can the matter be taken to court. Parties and third persons have the right to appeal against a decision of the dispute resolution committee with a circuit court pursuant to the appellate procedure. The idea is to make the conditions for resolving disputes more efficient because the pre-trial procedure is faster. A tenderer may file a protest against the contracting authority in case they find that the contracting authority has damaged their rights by violating the provisions of the PPA. After receiving the protest, the dispute resolution committee notifies the contracting authority and third person and sends them the copy of the protest. Contracts signed after notification but before the committee has made a decision, are considered void. The PPA also foresees a possibility to apply for compensation for damage. The application must be submitted within one

year after concluding the contract.

The new PPA is generally better structured than the previous Act and places greater emphasis on the general principles of transparency and equal treatment.

There are still areas where the new regulation can be subject to criticism due to unclear wording or potential non-compliance with EC law. The new PPA aims to modernise public procurement legislation, introduces new procurement procedures and simplifies the rules governing public procurements. It is hoped that the new rules will make the Estonian public procurement system more flexible, efficient and transparent.

Carri Ginter and Reimo Hammerberg are partners and Tonis Saul an associate at Sorainen in Tallinn.

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