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EUROPEAN INFORMATION - SIA

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# PUBLIC PROCUREMENT

## ICELANDIC GUIDELINES

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RÍKISKAUP

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## Information

### PUBLIC PROCUREMENT IN EUROPE

#### 1. Legislative framework

##### Directives

Iceland joined the EEA-agreement 1st. january 1994.

The following Community Directives on public procurement have been implemented in the domestic legal system of Iceland:

- Council Directive 92/50/EEC of 18 June 1992 relating to the co-ordination of procedures for the award of public service contracts
- Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts
- Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts
- European Parliament and Council Directive 97/52/EC of 13 October 1997 amending Directives 92/50/EEC, 93/36/EEC and 93/37/EEC concerning the coordination of procedures for the award of public service contracts, public supply contracts and public works contracts respectively
- Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors
- Council Directive 89/665/EEC of 21 December 1989 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
- Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors
- Commission Directive 2001/78/EC of 13 September 2001 amending Annex IV to Council Directive 93/36/EEC, Annexes IV, V and VI to Council Directive 93/37/EEC, Annexes III and IV to Council Directive 92/50/EEC, as amended by Directive 97/52/EC, and Annexes XII to XV, XVII and XVIII to Council Directive 93/38/EEC, as amended by Directive 98/4/EC (Directive on the use of standard forms in the publication of public contract

notices)

- Directive 98/4/EC of the European Parliament and of the Council of 16 February 1998 amending Directive 93/38/EEC coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors

### General principles

The EC Treaty lays down some fundamental principles which are generally applicable and which contracting authorities have to observe when awarding all contracts, including those whose value fall below the threshold for application of the specific rules laid down in the Directives. All general principles governing public contracts constitute the basis of the Icelandic legislation on public procurement. Among those are the principles of equal treatment, non-discrimination, transparency, proportionality and mutual recognition.

### Legislation currently in force

The public procurement directives have been implemented by the following governmental orders:

The public procurement Act No. 94/2001

The public projects procedures Act no. 84/2001

The above mentioned Acts implemented the procurement directives on public works, supplies and services as amended by the European Parliament and Council Directive 97/52/EC, the utilities directive as amended by Directive 98/4/EC of the European Parliament and of the Council and the Remedies directives. The Act contains further detailed rules concerning the Complaints Board competence and organisations, the procedures before the Board etc.

Furthermore the above mentioned Act contains provisions, which implement the Commission Directive 2001/78/EC on standard forms.

Furthermore the public procurement Act in Iceland contains instructions to the state authorities concerning purchasing of construction and work contracts, services and goods below the thresholds of the EU-directives.

### The Government Procurement Policy of the Icelandic State

The Government of Iceland has approved in November 2002 the Government Procurement Policy which principally aims at creating trust and dependable environment for public procurement. The procurement policy has a reach over ministries and state institutions. The policy stipulates as well special emphasis and goals for government purchasing in the years 2003-2006. The government emphasizes the conduct of purchasing in the manner that procurement in general is efficient, open, conducted responsibly and in a fair manner. The

arrangement of purchasing aims at fortifying market competition.

The policy includes defined, measurable goals for the State in general, for individual ministries and particular schemes. Moreover, general preconditions are defined that make the fundament for preparation and execution of government purchasing. Finally special emphasis and tasks that will be in the forefront in the next years are identified. It is made clear that purchasing not only regards the product, the service or the work that is being purchased, but also the total process from the time the purchasing is being prepared until the use of the relevant purchasing has ended.

It is important that managers within the government are conscious of the cost of each internal operation and the cost of comparable operations in the market. By entrusting private entities to carry out certain tasks it is possible to achieve goals on efficiency, increased competitiveness and diversity of the service, which is suited to build up knowledge in the society and is of use for other actors in the market. The government procurement policy does therefore encapsulate operations or tasks that now are carried out by official institutions.

- **Definition of purchasing:** Each ministry is expected to issue their defined individual procurement policy also applicable for their subsidiary institutions, before the end of 2003. The policy shall contain their main emphasis in purchasing, procedures that are to ensure successful implementation and savings objectives that are based on the procurement policy. The ministries are expected to publish their individual policy and introduce it's content to their institutions and their employees. The ministries are as well expected to make annually a report on the results of the policy.

### Legislation being prepared

At the moment there is no legislative activity in the field of public procurement.

## **2. Institutional framework**

### The structures responsible for public procurement (legal nature and composition)

The Ministry of Finance is responsible for the government procurement policy and for the legislative framework.

### Duties

Among the essential tasks of the Ministry of Finance is to ensure the proper understanding and application of the procurement rules.

Ríkiskaup -The State Trading Centre which is part of the Ministry of Finance takes care of public procurement and it's task is to provide advice concerning the interpretation and the application of the rules on public procurement.

Another important task of the Ministry of Finance is to participate in EU-negotiations and

other international co-operation in the field of public procurement. The Ministry of Finance is also responsible for the implementation of the EU rules.

In Iceland all contracting authorities governmental departments and agencies, local authorities etc. are solely responsible for ensuring that their own procurement procedures are in line with the law. Contracting authorities can consult the State Trading Centre for advice and guidance. However ultimately the decision and the responsibility over a given procurement remains with the contracting authorities.

### Bodies responsible for appeals

If a company in Iceland finds that a public procurement entity does not fulfil the procedure requirements, the company can complain directly to the Complaints Board or can raise the matter in a less formal manner with the Ministry of Finance (“informal problem solving”). They can also complaint to ESA (EFTA Surveillance Authority) in Brussels.

#### 1) *The Icelandic Complaints Board*

The Complaints Board for Public Procurement is a specialised administrative board, which has been set up by law to act as review body as required by the two Remedies Directives. It functions as a quasi-judicial administrative body. Its function is to hear complaints and settle disputes arising from alleged violations of EU rules and Icelandic laws on public procurement.

The Complaints Board was set up by regulation in 1996 to comply with the Remedies Directives. Initially, the Complaints Board was an advisory body for the Minister of Finance who entered into rulings. However, according to the public procurement Act no. 94/2001, which entered into force as of June 1st 2001, the Complaints Board became an independent body, entering into ruling under its own auspices.

Detailed rules regarding the functioning of the Board are laid down in a ministerial order issued by the Icelandic Minister of Finance.

Appeal of decisions made by the Complaints Board lies with the ordinary courts.

Bringing a complaint about an alleged violation of EU procurement rules before the Complaints Board is an option it can also be taken to ESA (EFTA surveillance authority) in Brussels. Such a complaint can not be taken directly before the ordinary courts. It has to be taken first to the Complaints Board.

Very few decisions by the Board, however, have subsequently been brought before the courts.

#### 2) *The courts*

Complaint body resolutions can be appealed to the ordinary courts.

So far, no criminal proceedings have been instituted by the prosecution service against a public contracting authority or entity for violation of the procurement rules.

### **3. Types of public procurement and award procedures**

#### Types of public procurement contracts

For any given contracting authority in Iceland, the types of public procurement contracts available correspond with those available under the EC Directives i.e. public works, public supply and public services contracts etc.

For contracts, which are not covered by the EC Directives on public procurement the Treaty free movement provisions and the Treaty based principles of equal treatment, transparency, proportionality and mutual recognition apply.

#### Forms of Advertising

Individual contracts falling within the EC Directives must normally be advertised at the start of the award procedure. In addition, there is a possibility to publish advance notices or purchases which the authority intends to make in the future, referred to as Prior Information Notices (PIN's). The contract notice must be published in the Official Journal of the EU and its electronic equivalent Tenders Electronic Daily and are published in the biggest Icelandic newspaper Morgunblaðið every Sunday.

Even if a competition is not required under the EC Directives, for example because the estimated value of the contract falls below the relevant threshold, the authorities must ensure competition and to abide by EC Treaty principles.

#### Procedures for awarding contracts

In Iceland the public procurement directives apply directly for contracts which are above the threshold of the Directives. Thus contracts covered by the Directives must be awarded in compliance with the procedures regulated in the Directives. The following two sections describe shortly the types of award procedures, which are regulated in the Public Sector Directives and the Utilities Directive.

##### a) Award procedures in the Public Sector Directives

Contracting authorities can use one of the following types of procedure:

- 1) *The open procedure*. This is a formal tendering procedure under which the call for tender is publicly advertised and all interested parties are able to tender.
- 2) *The restricted procedure*. This is also a formal tendering procedure, whereby a notice is publicly advertised to invite potential suppliers to express an interest. Tenders are then invited from a limited number of companies selected by the authority.
- 3) *The negotiated procedure*. Under this procedure the authority simply selects potential contractors with whom to negotiate, and awards the contract to one of these firms without necessarily following any formal tendering procedure. There are two types of negotiated procedure:
  - *the negotiated procedure with advertisement*, under which the authority must advertise to find suitable firms with which to negotiate; and
  - *the negotiated procedure without advertisement*, whereby the authority is permitted to select a

firm or firms with whom to negotiate without any prior advertisement.

4) *The accelerated procedure.* Under this procedure the authorities may use shorter time limits than the time limits for the normal restricted procedure. The accelerated procedure may only be used in exceptional cases, where urgency renders the time limits for the restricted procedure impractical.

5) *The design contest.* The design contest is a competition, in which a contracting authority invites the entry of plans and designs, which under the rules of the competition are to be judged by a jury and as a result of which the authority is to acquire the use or ownership of the plans or designs which the jury selects.

As a general rule the contracting authorities must use either the open or the restricted procedure. The negotiated procedure both with and without advertisement is an exceptional procedure, which may be used, only in a limited number of cases, which are carefully defined in the Directives.

Individual contracts falling within the Works Directive, Supplies Directive or Services Directive must normally be advertised at the start of the award procedure. In addition, there is a possibility to publish advance notices or purchases which the authority intends to make in the future, referred to as Prior Information Notices (PIN's).

#### b) Award procedures in the Utilities Directive

According to article 20, paragraph 1 in the Utilities Directive the contracting entities may choose to use one of the following types of award procedures:

- 1) The open procedure
- 2) The restricted procedure
- 3) The negotiated procedure (with advertisement)
- 4) Design contest

The rules for the open procedure are the same as in the Public Sector Directives. The time limit for the procedure is 52 days or 36 days where a PIN has been published.

Furthermore according to article 20, paragraph 2 of the Utilities Directive the contracting entities may use a procedure without prior call for competition in certain cases. This procedure is parallel to the negotiated procedure without advertisement in the Public Sector Directives.

The Utilities Directive does not contain an explicit provision for accelerated procedure.

#### c) Contracts, which are not covered by the public procurement Directives

For contracts, which are not covered by the EC Directives on public procurement the Treaty free movement provisions and the Treaty based principles of equal treatment, transparency, proportionality and mutual recognition apply.

Furthermore within the public works sector the national law on tendering covers all contracts from ISK 10.819.000,- to the EU-threshold. In fact it also covers works contracts concluded by private persons or entities if state or local authorities subsidise the concrete

work. However the national regulatory framework offers flexible procurement methods, especially as regards the use of the negotiated procedure or negotiation within other procedures.

As regards goods and services there is a general procurement policy from the Ministry of Finance dated November 2002, applicable to state institutions.

### Appeal procedures

The following sections contain a brief description of the appeal procedures in Iceland.

#### **1) The Complaints Board**

##### *a) Organisation and Competence*

The Complaints Board is an independent administrative board for the hearing of complaints concerning violation of the EU rules for the award of public contracts. The competence of the Board relates both to the public procurement directives and the relevant rules of the Treaty on non-discrimination and the free movement of goods and services.

The Complaints Board shall be comprised of three persons appointed by the Minister of Finance for a four-year term. Alternates shall be appointed in the same manner. The chairman of the Committee and alternate must fulfil the legal requirements made of district court judges. Other members of the Committee must have comprehensive commercial knowledge and experience. Committee members must be independent of interests of the state or other public authorities.

##### *b) Claimants*

The role of the Complaints Board is to resolve promptly and impartially complaints by individuals and legal entities concerning claimed violations of this Act and rules adopted pursuant to it.

The Committee shall work independently. Its rulings and decisions as provided for in the Act may not be referred to other public authorities.

At the request of the Ministry of Finance or a relevant contracting authority, the Complaints Board may deliver an advisory opinion on particular procurement even in the absence of any complaint.

Complaints may be referred to the Complaints Board by individuals and legal entities who enjoy rights as provided for by the Act and have legitimate interests in the resolution of the complaint.

A complainant may transfer the right to submit a complaint to an association or organisation which safeguards his interests.

##### *c) Procedures (including costs)*



A complaint is submitted to the Complaints Board for handling of the case at no charge.

A complaint must be submitted in writing with the Complaints Board within four weeks of the complainant having learned, or having been able to learn, of the decision, action or failure to act which he considers a violation of his rights.

The complaint shall provide information on the complainant, the party against which the complaint is directed and the decision, action or failure to act which is the grounds for the complaint. A complaint must state the claims of the complainant together with a brief description of the circumstances of the case, developments and reasoning. Claims advanced by a complainant must concern the remedies available to the Committee as provided for in Act.

If a complaint does not fulfil the conditions laid down by the Act, the Complaints Board shall request that the complainant remedy the deficiencies within a reasonable time limit. If the complainant fails to do so the Complaints Board shall dismiss the complaint.

The Complaints Committee may as a rule, invite a complainant to submit further documentation or information to explain a question if it feels the question is not sufficiently clear and may grant him a certain time limit for so doing.

It takes on average a period of 2 to 3 months for the Complaints Board to decide on a complaint brought before it. The Board handles on average 30-40 complaints yearly.

#### *d) Possible Reactions*

The Complaints Committee may with a ruling invalidate or alter a decision by the contracting authority for public procurement, cf. however the Act (Once a contract has been concluded it shall not be invalidated or altered, even though the decision of the purchaser on the tendering or awarding of the contract may have been contrary to law)

The Complaints Committee may instruct the contracting authority to tender certain procurement, advertise a tender once again or alter a tender notice, description of tender or other aspect of tender documents.

The Complaints Committee may express its opinion on the liability of the contracting authority for damages towards the complainant, but shall not express itself concerning the amount of damages.

The Complaints Committee may decide that the party against whom a complaint is directed shall pay the complainant the cost of lodging the complaint. If a complaint is clearly unjustified or lodged for the purpose of delaying the implementation of public procurement the Complaints Committee may rule that the complainant pay legal costs of the case, which shall accrue to the national treasury.

If a ruling of the Complaints Committee as provided for in the Act is not complied with, it may levy per diem fines on the party at which the ruling is directed. Fines may amount to up to ISK 500,000 for each day which elapses without compliance with the Complaints Committee's ruling. If a ruling is referred to a court the per diem fines shall not commence

until final judgement is pronounced.

Per diem fines as provided for in the here above shall accrue to the national treasury. Per diem fines and a ruling on legal costs, as provided for here above, are enforceable by execution without prior court judgement.

The Complaints Board being an administrative body does not have the power to annul a contract that has been concluded.

However this will have to go to the ordinary courts.

#### *e) Sanctions*

The Complaints Board may demand that the parties to the case submit any documentation or other information concerning the case. If a complainant fails to respond to such a demand his complaint may be dismissed immediately. If the party against whom a complaint is directed fails to respond to such a demand, his disregard may serve to his disadvantage in resolution of the question.

The Complaints Board may decide that the party against whom a complaint is directed shall pay the complainant the cost of lodging the complaint. If a complaint is clearly unjustified or lodged for the purpose of delaying the implementation of public procurement the Committee may rule that the complainant pay legal costs of the case, which shall accrue to the national treasury.

The defendant contracting authority/entity, however, will not have its costs covered, even if the claim is dismissed.

Contracting authorities/entities are liable to punishment if the procurement rules are violated. Moreover, failure on their part to comply with a prohibition or enforcement notice, wilfully or by gross negligence, issued by the Complaints Board is punishable by a fine. For criminal sanctions to be initiated the contracting entity must be notified to the prosecution service. Criminal proceedings have never been instituted by the prosecution against a public contracting authority or entity for violation of the procurement rules.

## **2) *The Courts***

The appeal procedure in the Courts is regulated by the Administration of Justice Act.

## **3) *ESA (EFTA Surveillance Authority)***

Cases can be taken to ESA (EFTA Surveillance Authority), in Brussels.

## **4. New organisational and managerial arrangements**

There is no Icelandic legal definition on "PPP" or Public Private Partnership.

The term PPP covers broadly any commercial relation between a state or local authority

and a private party on production and/or delivery of services to the authority and/or directly to the citizens for which the authority is responsible.

The notion of public responsibility excludes pure privatisation (where the market and not the public sector decides the amount of supply).

Thus PPP contracts are not a homogenous type of contracts. The term may include inter alia:

1. Traditional public procurement contracts, e.g. on the collection of waste;
2. Concessions, where the risks inherent in exploitation are transferred at least partly to the concessionaire, e.g. a cafeteria in side a public pool facility;
3. Private Finance Initiative (PFI) normally pairing a work contract with a service contract (e.g. on maintenance), eventually combining different payment methods under 1 or 2 above.
4. Free choice of the citizens, whereby the public authority undertakes to pay to any approved Any qualified supplier or eventually chosen through tendering. private or public supplier for services to a citizen in accordance with specified quality-standards. This could include a degree of privatisation where a citizen out of his own pocket pays the supplier for extra services.
5. Public/private companies established by an authority *and* a private company to provide public services.

### *Legal framework*

There is no specific legislation on PPP in Iceland, but specific legislation for various types of contracts.

The legal bases for public procurement contracts in Iceland are:

- EU-directives on public procurement
- EU-Treaty (transparency etc.)
- Icelandic legislation.

There is no general legislation on concessions (apart from the EU-rules on works concessions). The ruling of the TELEAUSTRIA case is of course noted.

There is no general PFI-legislation. However, elements in a PFI-contract may be subject to public procurement rules referred to above.

## **5. Models adopted**

### *Usual forms of PPP in Iceland*

Apart from traditional public procurement PPP is not commonly used in Iceland. We can mention a few projects that the Icelandic government has initiated, ag. a tunnel under Hvalfjord; a nursing home for elderly people; a technical school.. This procurement form can therefore be seen as being in the pilot stage in Iceland until now.

## 6. The e-procurement

In Iceland there is no specific legislation concerning e- procurement, besides the procurement directives and the legislation on electronic signatures.

One electronic marketplace called the ANZA Procurement Portal is in function in Iceland. It is operated in collaboration with IBX a Swedish company, that is operating such a marketplace in other Nordic countries.

### a) *The ANZA Procurement Portal*

It is an electronic market place to which both private and public purchasers and their suppliers have access, and whose functionality, interface, security and transaction costs are initiated by Ministry of finance through tender that took place in the year 2001/2002. The portal was fully launched in June 2002. It is operating by a private enterprise and the users suppliers and public entities pay solely for the use of the system per transaction that go through it.

The Ministry of Finance with Ríkiskaup initiated this project after consultations with the business community and public institutions in the year 2000.

The Ministry of Finance and Ríkiskaup play an active part in the further development of the portal, giving special focus to the creation of tools, which are to promote both the private and public sectors' use of e-commerce. Thus the focus of the portal is for the time being the development of facilities addressing the after-contract stage, such as ordering and invoicing.

The use of the procurement portal is based on a contract with the private provider ANZA. The establishment of the Procurement Portal is an important part in the government's strategy to make procurement efficient. It aims also at creating a common infrastructure for the electronic trade between public entities and suppliers.

### b) *Ríkiskaup – The State Trading Centre –*

Ríkiskaup is a central purchasing organisation, which is organised as a directorate under the auspices of the Ministry of Finance and is considered to be a contracting authority as defined in the EU-directives on public procurement and is self-financed.

Ríkiskaup is directly involved in public procurement for individual state institutions a.g. the Road administration, National hospital etc. Ríkiskaup enters into a number of framework agreements concerning various standard products, these framework agreements are concluded in accordance with the procedures and the requirements in the procurement directives.

The Ríkiskaup framework agreements normally have a maximum duration of 4 years.

Ríkiskaup is also contributing consulting in legal and commercial matters to state institutions.

