Decision (EU) 2020/380 of the European Central Bank of 18 February 2020 amending Decision (EU) 2016/245 laying down the rules on procurement (ECB/2020/10)

DECISION (EU) 2020/380 OF THE EUROPEAN CENTRAL BANK

of 18 February 2020

amending Decision (EU) 2016/245 laying down the rules on procurement (ECB/2020/10)

THE EXECUTIVE BOARD OF THE EUROPEAN CENTRAL BANK,

Having regard to the Statute of the European System of Central Banks and of the European Central Bank, and in particular Article 11.6 thereof,

Having regard to Decision ECB/2004/2 of 19 February 2004 adopting the Rules of Procedure of the European Central Bank[(1)], and in particular Article 19 thereof,

Whereas:

(1) In the light of developments in European Union case law and legislation as well as for the sake of clarity, certain rules laid down in Decision (EU) 2016/245 of the European Central Bank (ECB/2016/2)[(2)] need to be refined further or revised.

(2) The European Central Bank (ECB) ensures that appropriate measures are taken to effectively prevent, identify and remedy conflicts of interest of staff members arising in the conduct of procurement procedures in accordance with the Ethics Framework of the ECB[(3)], so as to avoid any distortion of competition and to ensure equal treatment of all tenderers.

(3) The thresholds for public tender procedures laid down in Directive 2014/24/EU of the European Parliament and of the Council[(4)] have been changed by Commission Delegated Regulation (EU) 2017/2365[(5)] and Commission Delegated Regulation (EU) 2019/1828[(6)]. Although Directive 2014/24/EU does not apply to it, the ECB intends to apply the same thresholds for its public tender procedures.

(4) In addition, the ECB intends to apply the same threshold for concessions as that set out in Directive 2014/23/EU of the European Parliament and of the Council[(7)].

(5) Therefore, Decision (EU) 2016/245 (ECB/2016/2) should be amended accordingly,

HAS ADOPTED THIS DECISION:

Article 1

Amendments

Decision (EU) 2016/245 (ECB/2016/2) is amended as follows:

(1) in Article 1, point (8) is replaced by the following:

Changes to legislation: *There are currently no known outstanding effects for the Decision (EU) 2020/380 of the European Central Bank. (See end of Document for details)*

(8) "dynamic purchasing system" means a completely electronic process for purchasing commonly used deliverables, the characteristics of which, as generally available on the market, meet the ECB's requirements;;

(2) in Article 2, paragraph 3 is amended as follows:

(a) point (h) is replaced by the following:

(h) research and development services unless the benefits related to the services accrue exclusively to the ECB for its own use and the services provided are wholly remunerated by the ECB;;

(b) point (j) is replaced by the following:

(j) contracts relating to the legal representation of the ECB during or in preparation for (i) judicial proceedings before the courts, tribunals or public authorities of a Members State or a third country or before international courts, tribunals or institutions or (ii) arbitration proceedings; and contracts for the exclusive services of notaries, trustees and court officials;;

(3) in Article 4, paragraph 3 is replaced by the following:

3. The following thresholds shall apply:

a for supply and service contracts: the threshold for public supply and service contracts awarded by contracting authorities set out in point (c) of Article 4 of Directive 2014/24/EU;

b for works contracts: the threshold for public works contracts set out in point (a) of Article 4 of Directive 2014/24/EU;

c for concession contracts: the threshold for concession contracts set out in Article 8(1) of Directive 2014/23/EU of the European Parliament and of the Council[8].;

(4) Article 8 is amended as follows:

(a) the title is replaced by the following:

Amendments to contracts during their term;

(b) the first sentence of paragraph 1 is replaced by the following:

The ECB may amend a contract where the amendment, irrespective of its value, has been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses, or options.;

(c) the first sentence of paragraph 2 is replaced by the following:

The ECB may amend a contract where the amendment, irrespective of its value, is not substantial.;

(d) paragraph 3 is replaced by the following:

3. In addition, the ECB may amend a contract in the following cases:

a where the need for an amendment has been brought about by circumstances which the ECB acting diligently, could not have

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foreseen, provided that the amendment does not alter the overall nature of the initial contract; or

b where additional products, services, or works have become necessary which cannot be technically or economically separated from the initial contract without significant inconvenience or substantial duplication of costs.

However, the increase in price shall in each single case not exceed 50 % of the initial value of the contract.;

(e) paragraph 6 is replaced by the following:

6. A new procurement procedure shall be required for amendments to the initial contract during its term other than those provided for under paragraphs 1 to 5.;

(5) Article 9 is amended as follows:

(a) paragraph 1 is replaced by the following:

1. The ECB shall award contracts of which the estimated value equals or exceeds the thresholds set out in Article 4(3) by open or restricted procedure. In justified cases the ECB may apply a negotiated procedure, a competitive dialogue or an innovation partnership, under the conditions set out in Articles 12 to 14.;

(b) the following paragraphs 6 and 7 are added:

6. The ECB may decide to award a contract in the form of separate lots and may determine the size and subject matter of such lots.

7 For the calculation of periods, dates and time-limits, Regulation (EEC, Euratom) No 1182/71 of the Council[9] shall apply.;

(6) in Article 11, paragraph 1 is deleted;

(7) Article 12 is amended as follows:

(a) paragraph 2 is replaced by the following:

2. The ECB may also use the negotiated procedure if only irregular or unacceptable tenders have been obtained in response to an open or restricted procedure or a competitive dialogue. The ECB may refrain from publishing a new contract notice if it includes in the negotiated procedure all of, and only, the tenderers that participated in the initial procedure, were eligible, met the selection criteria and submitted their tenders in accordance with the formal tender requirements. If no tenders or no suitable tenders have been obtained, the ECB may also start a new negotiated procedure without publishing a new notice and without submitting new procurement documents to the tenderers, provided that the initial conditions of the contract are not substantially altered.;

(b) in paragraph 5, the following sentence is added:

The ECB may award contracts on the basis of the initial tenders without negotiation.;

(8) in Article 18, paragraph 2 is replaced by the following:

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2. For the purpose of concluding a framework agreement, the ECB shall follow the procedures set out in Articles 10 to 14. The contract notice shall specify the scope and envisaged number of framework agreements to be awarded.

Specific contracts based on the framework agreement shall be awarded in accordance with the procedures laid down in this Article.;

(9) in Article 26, paragraph 4 is replaced by the following:

4. The ECB shall ensure that the information provided by candidates and tenderers is treated and stored in accordance with the principles of confidentiality and integrity and, to the extent personal data is processed, with Regulation (EU) 2018/1725 of the European Parliament and of the Council[10].;

(10) Article 28 is replaced by the following:

Article 28

Rectification of procurement documents and time limit for and preclusion of objections

1 If the ECB discovers a lack of precision, an omission or any other type of error in the text of the contract notice, invitation to tender or supporting documents, it shall rectify the error and inform all candidates or tenderers in writing.

2 If candidates or tenderers consider that the ECB's requirements laid down in the contract notice, the invitation to tender or supporting documents are incomplete, inconsistent or illegal or that the ECB or another candidate or tenderer has infringed the applicable procurement rules, they shall notify their objections to the ECB within 15 days after they become aware of such an irregularity. If the irregularity affects the invitation to tender or other documents sent by the ECB, the time limit shall start to run from the date of receipt of the documents. In other cases, the time limit shall start to run from the time the candidates or tenderers become aware or could reasonably have become aware of the irregularity. The ECB may then either correct or supplement the requirements or remedy the irregularity, or reject the request indicating the reasons for doing so. Objections which are not communicated to the ECB within the time limit may not be raised at a later stage, and candidates or tenderers shall be precluded from raising them in an appeal procedure under Article 39 and in proceedings before the Court of Justice of the European Union.;

(11) in Article 30, paragraph 3, the first sentence is deleted;

(12) Article 34 is amended as follows:

(a) paragraph 2 is replaced by the following:

2. The notification of the award decision shall be sent at least 10 days prior to the signature of the contract by the ECB if the notification is sent by fax or electronic means, or at least 15 days prior to the signature of the contract if other means of communication are used ("standstill period"). The ECB shall not sign the contract with the successful tenderer until this standstill period has elapsed.;

(b) paragraph 3 is replaced by the following