

OFE Procurement Monitoring Report:

Discrimination in Public Procurement Procedures for Computer Software in the EU Member States

December 2009

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1 Summary

OFE's annual public procurement monitoring of notices for computer software published on Tenders Electronic Daily results point that non-discrimination on public procurement processes has barely improved from 2008 exercise. 171 contact notices were scanned for trademarks in the period from February 1 to April 30, 2009. OFE's monitoring exercise shows that in 37 tender notices out of 171 (21.6 percent, against 25 percent on 2008 exercise), trademarks were mentioned in procurement documents. In 22 cases (12.8 percent), tender notices mentioned Microsoft or one of Microsoft's products.

On this basis, it would seem that the use of trademarks in public procurement in the EU member states is still widespread - almost a common practice. Clearly, the use of trademarks discriminates against other suppliers/contractors and is either directly prohibited by EU legislation or allowed only under very strict conditions. We invite the EU as well as the concerned Contracting Authorities (CA) to address non-compliance in the cases identified in this report.

EU and Member State procurement authorities should note that our data is likely to show only the tip of the iceberg. The present OFE study was limited in time and scope, and encountered significant linguistic barriers. Due to the multilingual nature of the EU, the full tender notices (especially supporting documentation) usually only exists in the national language. Moreover, most additional documentation and technical specifications are unavailable after the contract is been awarded and thus, OFE was not able to deeply analyze a significant part of the monitored notices.

Last year's report and other similar studies supports our findings¹. There is enough evidence to argue that a comprehensive monitoring with a proper technical and linguistic support, would prove that the discriminatory use of trade marks in public procurement has been a common practice the EU, at least in some of the Member States. We urge the EU to undertake such a study, to document the discrimination. It would seem that continuing to let non-compliance proliferate would undermine core objectives of the European internal market and its corresponding Directives and Regulations, notably Directive 2004/18/EC.

¹ The Polish business consultancy Ubik BC issued a report concerning public procurement based on analysis of procurement of office and system software covering the period July 2006 to July 2007. Tender notices were analysed for compliance with the articles of the Polish public procurement law. Out of 170 tender notices, in 150 cases a contract object was described only by providing a name of a specific application or its producer. The report is available from <http://ubikbc.pl/page/?id=78>

2 Introduction

Public procurement constitutes an important share of the market for companies in the EU. In 2002, the total EU procurement market (purchases of goods, services and public works by governments and public utilities) was worth €1.5 trillion or over 16% of EU GDP². It should be noted that these figures include procurement only in the EU of 15 Member States at that time. In addition, the value of public procurement contracts has been growing constantly. The total amount of public procurement in EU 15 increased by 31% from 1995 to 2002.

OFE and its members have a profound interest in the openness, transparency, and efficiency of the European software market. EU efforts in public eProcurement are proof the EU and its Member States share that concern³. Software procurement, a key enabler of eGovernment, is indeed both a private and a public sector concern.

Over the last few years, we have seen a number of notices in the Official Journal of the EU (OJEU) seeking offers by contract authorities (CAs) for the purchase of IT related supplies and/or services, where the CAs use the name of a product to set out the technical, functional and other performance requirements of the supplies or services they require. Due to the lack of empirical evidence, the widespread nature of this practice has been missing from public debates to date.

² DG Internal Market: A report on the functioning of public procurement markets in the EU: benefits from the application of EU directives and challenges for the future, 2004. Available at: http://ec.europa.eu/internal_market/publicprocurement/docs/public-proc-market-final-report_en.pdf

³

http://ec.europa.eu/information_society/activities/egovernment/implementation/ict_psp/doc/eprocurement-factsheet.pdf

3 *Legal background*

EU public procurement law has been built on two guiding principles of transparency and non-discrimination originating from the EC treaty. These principles are reflected in the EU directives on public procurement of March 2004 (Directive 2004/17/EC and Directive 2004/18/EC). The legal act that covers public procurement for computer software across the public sector is Directive 2004/18/EC, of which Art. 23 provides that technical specifications that mention goods of specific make or source, or of a particular process, or trademarks, patents, types or a specific origin with the effect of favoring or eliminating certain undertakings or products are prohibited.

In addition, reference to trademarks shall be permitted on an exceptional basis where a sufficiently precise and intelligible description of the subject matter of the contract by reference to a national or international standard or in terms of performance or functional requirements is not possible. However, such references should be accompanied by the words “or equivalent”.⁴

According to EU law, public authorities in the EU Member States falling under the remit of the directive are obliged to observe the above rules when publishing public tenders. Under these rules, procurement must follow transparent open procedures ensuring fair conditions of competition for suppliers.

Some purchases can be exempted from Community rules under certain conditions (ex: arms, munitions and war material, if this is necessary for the protection of the essential interests of security) and contracts of low monetary value (below thresholds set out below) must respect the principles of the Treaty only. Although they are not covered by the EU Directives on public procurement, it is well established that their award should nevertheless comply with the internal market principles of transparency and non-discrimination. The Commission's guidance, which is in the form of an “Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives” (2006/C 179/02), contains suggestions on how public authorities should comply with these principles. This can be best achieved in practice through: “Non-discriminatory description of the subject-matter of the contract”; description of the characteristics required “should not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production unless such a reference is justified by the subject-matter of the contract and accompanied by the words ‘or equivalent’”. In any case, it would be preferable to use more general descriptions of performance or functions.”

⁴ Article 23(8) provides that unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring certain products or eliminating certain undertakings, or certain products. Such reference shall be permitted only on exceptional circumstances, where a sufficiently precise and intelligible description of the subject matter of the contract pursuant to Article 23(3) and (4) is not possible; in that case such reference must be accompanied by the words “or equivalent”.

4 *Results*

In the monitoring process, 171 tender notices were scanned for trademarks. In 37 tender notices out of 171, there were trademarks included (these 37 tender notices are listed at the end of this document), and in 22 of those, the trademark required was Microsoft or Microsoft's products were specifically mentioned. It is worth noticing that in all the cases the trademark was identified in the contract notices available publicly on TED website, confirmed when available through the technical specifications. However, access to specifications or additional documents reveals too limited (documentation received for the 19% of notices), since a quite large number of contract notices on TED website contain none or very poor description of the contract or purchase .

According to the principles described in EU law as above and the national public procurement laws that should be observing these, the 37 contract notices constitute examples of discriminatory public procurement practice. Hence, if this is confirmed by CAs themselves, they should re-issue such tenders.

5 *Tip of the iceberg*

However, while this report clearly shows that discrimination in public procurement of software occurs, it is merely the tip of the iceberg. The limitations of the current study include (please find the methodology of the monitoring at the end of this document):

The languages issue. Monitoring tender documents in 23 official EU languages is a daunting task. This has been undoubtedly the most important factor limiting the scope and results of the monitoring. For instance, given that Bulgarian and Greek use different symbols, contract notices in these two languages were “by definition” excluded from the monitoring, given the impossibility of identifying a trademark within a contract notice text;

Limited access to specifications and additional documentation. Access to tenders' technical specifications and additional documentation is in some cases necessary to pursue the monitoring process (to confirm findings from public TED notices or to identify the object and/or description of the contract when public TED notices contain none or very poor description of it). About half of the requests for additional information have been answered by contracting authorities; however the replies received argued, in the majority of the cases, the unavailability of tender documentation after the contract award;

The EU threshold. The monitoring covered only tenders above certain threshold which excludes a huge proportion of tenders at national levels; Eurostat⁵ calculates the proportion of total procurement that is published in the Official Journal and this has increased from 9.3 per cent in 1996 to 17.9 per cent in 2007. This means that in 2007, this monitoring would have excluded 82.1 per cent of public procurement contracts;

Limiting the scope to trademarks. Firstly, the monitoring was only seeking to identify the appearance of trademarks only; other examples of possible discriminatory use of, as singled out in Directive 2004/18/EC, “patents, types or of a specific origin” were not screened for in the procurement monitoring and neither were legal, economic, financial and technical conditions in contract notices analysed for discriminatory use due to the linguistic and technical expertise limitations in the process.

Secondly, the monitoring consisted of a simple scanning of contract notices texts for trademarks, given only a cursory understanding of the full text, this may have resulted in omission of, as reiterated before, possible discriminatory wording of contract notices in general.

⁵ http://epp.eurostat.ec.europa.eu/portal/page/portal/product_details/dataset?p_product_code=GOV_OTH_PROCUR

6 Four case studies from Poland, Norway, Germany and UK

Quantitative analysis has been followed by a closer look into examples of the contract notices with trademarks. We aim to explain how the discriminatory use of trademarks works in practice. The cases have been selected on the basis of the most explicit and visible use of (a) trademark(s) in tender documents, type of contracting authority (focus on educational bodies) and size of a given tender notice.

Case 1: Software procured by a Polish university

On February 4, 2009, the Technical University of Czestochowa published a contract notice for supply of computer hardware and software using an open procedure. The contract object is divided into 28 lots, 25 from which refer to 22 PCs and monitors, 3 laptops, 10 printers and network accessories. Uniquely under lots no. 3, 4 and 15 the contracting authority requires procurement for software.

Under lot no. 3 the contracting authority procures for a group Microsoft Vista Business license for 25 users. Lot no. 4 refers to three units of Adobe Acrobat 9.0 Pro in its polish version; and lot no. 15 object is the purchase of Microsoft Office 2007 home edition -for non-commercial users-. None of these references to specific brand's software was accompanied by reference to a standard, described in terms of functional requirements or mention the words “or equivalent”.

All lots' description refer to the item description contained in the specifications and additional documents of the contract. Additional documents and specifications were not received by the end of the monitoring period.

Case 2: Software procured by a public broadcasting company in Germany

The contract notice for software packages and information systems supplies was published by the Southwest Broadcasting company, SWR, on February 11, 2009. The contracting authority being a public broadcasting company in southwest Germany, it includes two TV stations and several radio stations.

Title of the contract notice available on TED website refer to the delivery of Microsoft Office 2007 licenses and services for the rollout support. It is specified under the contract's total quantity or scope (II.2) “supply of 5.600 MS Office 2007 licenses and 900 MS Office Professional 2007 licenses”, without being accompanied by reference to a standard or the words “or equivalent”. Thus, the total quantity of the contract order corresponds to 6.500 Microsoft Office 2007 licenses of an estimated value (excluding VAT) of 1.500.000 euros, constituting a clear example of discriminatory public procurement practice.

Response from the contracting authority not received to the request for additional documents and specifications.

Case 3: Software procured by the Norwegian Ministry of Defense

On February 4, 2009 the Norwegian Defense Logistics Organization in Kjeller, Norway published a contract notice for supplies of software package and information systems in an open

procedure. The object of the contract is the entrance of the armed forces into a framework agreement for ESRI licenses with accompanying services for up to 4 years, the contract being able to be used by all departments under the Ministry of Defense.

Under the short description of the contract, the notice specifies that “this includes software, maintenance and support contract and courses and competence raising measures”. ESRI licences lot, including support and maintenance, are valued dearly (excluding VAT) between 3.000.000 and 4.000.000 NOK -corresponding to between around 360 and 490 thousand euros.

This tender is a clear example of software lock-in (GIS software lock-in). Upon the receipt of tender specifications and additional documents, a detailed analysis of the documentation shows ESRI software is the unique GIS software used in all user environments in the armed forces.

GIS platforms are used for collecting, processing, management, analysis, distribution and presentation of spatial location information attached to both vector and raster format. It is worth noticing that ESRI software are supplying almost all NATO countries with GIS platforms, thus including the Norwegian army. It does exist, for instance, a hard geographic market split with ESRI software distributors. This is created due to interoperability issues, since as stated during a conversation with the contracting authority, “interoperability issues and very high costs of changing to another (proprietary or open source) GIS platform the Tender was on purpose for ESRI”.

However, it should also be mentioned as well that in Annex I of the tender specifications the CA emphasize that “the military has the right to acquire other, competing software outside of the framework agreement for research”.

Case 4: Software procured by university in the UK

The contract notice for software package and information systems supplies was published by the University of Glasgow on 31th March 2009.

The object of the contract is the provision of Matlab and Simulink licenses, both mathematical programming software. However, both in the tender notice available on TED website and in the tender's additional documents received from the contracting authority, the trademarks used in the contract object specification (Matlab and Simulink) is always accompanied with the words “or equivalent”.

For instance, under the short description part of the tender, as well as in its title, the wording says “provision of site licensing for MATLAB & SIMULINK or equivalent software”. Every reference to the purchase of those software is also accompanied by the words “or equivalent software” in the tender's technical specifications, being so the tender fully compliant with the Directive 2004/18/EC mentioned previously.

7 *Recommendations*

We recommend that the EU:

1. Address non-compliance in the cases from Poland, Germany and Norway
2. Consider acting on the the larger sample of 37 tender notices – or issuing a warning
3. Undertake a comprehensive monitoring of the discriminatory use of trademarks in particular in public procurement. Our small-scale study has shown that proper linguistic support, for instance, is essential.
4. Devotes increased resources to both checking on implementation of the existing EU legislation in the sector with national oversight authorities and on pursuing direct complaints

We recommend also that the concerned national oversight bodies of Contracting Authorities issue strong guidance to Contracting Authorities in their jurisdiction on non-compliance.

As a result of this report, OFE has recommended its members to engage with procurement authorities across the EU to ensure that: (a) no predatory behavior occurs and (b) that they encourage public authorities to mandate that procurement follows open standards – which is the crucial issue for software interoperability. In this domain, industry and government should be aligned. Openness, transparency, and efficiency serves all eGovernment stakeholders.

8 Methodology

The report has been based on a weekly monitoring of public procurement notices published on the Tenders Electronic Daily website (TED)⁶ between 1st February and 30th April 2009.

TED gives online access to tender notices published in the Supplement to the Official Journal of the European Union (OJS). All public tenders above specific contract values must be published by the authorities of all of the EU Member States in the Supplement to the OJS. The specific threshold criteria are defined in the European directives on public procurement and were the following during the period monitored under contracts for supplies (the subject of the monitoring): 412 000 or 133 000 EUR, excluding VAT (the threshold relevant to contracts awarded by central government authorities).

The monitoring covered tender notices for computer software. Having in mind that TED includes all tender notices published in the EU member states this amounts to around 1.000 notices per day, hence specific browsing criteria for computer software needed to be employed. For this purpose, common procurement vocabulary (CPV) codes from the 48000000 division (Software package and information systems supplies)

⁶ Tenders Electronic Daily: <http://ted.europa.eu/> were used. This proved to be a very effective criterion for browsing through numerous contract notices published on a daily basis in all the EU Member States as it showed notices for both software/software licenses supplies or services including from industry specific software to administration, Internet, web servers, word-processing, document management, database or anti-virus software packages⁷.

The monitoring had 2 phases:

1. Scanning through tender notices available on the TED website (a brief synopsis in English and the extended version in the original language);
2. Sending requests for a tender notice's "specifications and additional documents" to contracting authorities (request translated into the original language) and, upon receipt, scanning through the additional documents.

⁷ For a complete list and explanation of the classification system (CPV codes) for public procurement framework please refer to the information portal for European public procurement (SIMAP). <http://simap.europa.eu/>

9 ANNEX

1. Contract notices with trademarks identified in the framework of OFE's monitoring

Poland, Częstochowa: contract notice no. 2009/S 23-033043 for computer equipment and supplies published on 04.02.2009; Microsoft Vista Business licenses, Adobe Acrobat 9.0 Pro, Microsoft Office 2007.

Norway, Kjeller: contract notice no. 2009/S 23-033609 for software package and information systems supplies published on 04.02.2009; ESRI software licences.

Germany, Giessen: contract notice no. 2009/S 25-036209 for personal computer operating system software package supplies published on 06.02.2009; Microsoft.

Germany, Baden-Baden: contract notice no. 2009/S 28-040913 for software package and information systems supplies published on 11.02.2009; Licenses MS Office 2007 and MS Office plus Professional 2007.

Netherlands, Utrecht: contract notice no. 2009/S 30-044077 for database software package service published on 13.02.2009; Oracle Database Enterprise Edition.

Slovenia, Ljubljana: contract notice no. 2009/S 31-045244 for miscellaneous software package and computer systems supplies published on 14.02.2009; Microsoft OVS and OV.

Finland, Turku: contract notice no. 2009/S 32-046698 for software package and information systems supplies published on 17.02.2009; Microsoft School Agreement Licenses.

Austria, Vienna: contract notice no. 2009/S 32-047319 for software package and information systems supplies published on 17.02.2009; Microsoft.

Luxembourg, Luxembourg: contract notice no. 2009/S 34-049069 for software package and information systems supplies published on 19.02.2009; Oracle Licenses and SUN Solaris servers.

Poland, Warsaw: contract notice no. 2009/S 34-049655 for software package and information systems supplies published on 19.02.2009; SAP licenses.

Austria, Vienna: contract notice no. 2009/S 37-054504 for software package and information systems services published on 24.02.2009; Oracle database based implementation.

Belgium, Montigny-le Tilleul: contract notice no. 2009/S 45-065362 for software package and information systems published on 06.03.2009; Microsoft licenses.

Poland, Gdansk: contract notice no. 2009/S 47-068318 for software package and information systems supplies published on 10.03.2009; CorelDraw and Adobe Creative.

Portugal, Lisbon: contract notice no. 2009/S 47-068623 for software package and information systems supplies published on 10.03.2009; SAP ERP 6.0.

France, Paris: contract notice no. 2009/S 50-072221 for miscellaneous software package and computer systems supplies published on 13.03.2009; Weblogic Server Standard Edition.

Finland, Salo: contract notice no. 2009/S 50-072254 for software package and information systems supplies published on 13.03.2009; Microsoft EA.

Slovakia, Banská Bystrica: contract notice no. 2009/S 50-072270 for web server software package supplies published on 13.03.2009; IBM Websphere Application Server Network Deployment PVU License.

Poland, Warsaw: contract notice no. 2009/S 52-075045 for IT software package supplies published on 17.03.2009; Microsoft.

Estonia, Tallinn: contract notice no. 2009/S 54-077930 software package and information systems supplies published on 19.03.2009; Microsoft Licenses.

Poland, Krakow: contract notice no. 2009/S 56-080951 for educational software package supplies published on 21.03.2009; AutoCAD.

Poland, Częstochowa: contract notice no. 2009/S 56-080961 for software package and information systems supplies published on 21.03.2009; CorelDraw Graphics Suite, ABBYY FineReader 9.0 Professional Edition, MS Office professional 2007 .

Finland, Valtioneuvosto: contract notice no. 2009/S 61-087682 for software package and information systems supplies published on 23.03.2009; Microsoft School Agreement.

Poland, Warsaw: contract notice no. 2009/S 61-087716 for software package and information systems supplies published on 28.03.2009; Microsoft software.

France, Saint-Mandé: contract notice no. document creation software package supplies published on 28.03.2009; Microsoft licenses.

Romania, Bucuresti: contract notice no. 2009/S 67-096624 for miscellaneous networking software package supplies published on 07.04.2009; Citrix XenApp.

Finland, Hämeenlinna: contract notice no. 2009/S 68-098776 for IT services: consulting, software development, Internet and support supplies published on 08.04.2009; Microsoft.

Romania, Bucuresti: contract notice no. 2009/S 69-100037 for personal computer (PC) operating system software package supplies published on 09.04.2009; Microsoft.

Poland, Andrespol: contract notice no. 2009/S 69-100056 for software package utilities supplies published on 09.04.2009; Microsoft.

Belgium, Brussels: contract notice no. 2009/S 70-101421 for software package and information systems supplies published on 10.04.2009; Microosft Licenses.

Poland, Krakow: contract notice no. 2009/S 70-101503 for computer platforms supplies published on 10.04.2009; Windows Vista.

France, Avignon: contract notice no. 2009/S 70-101505 for personal computers supplies published on 10.04.2009; Microsoft Office 2007.

Poland, Warsaw: contract notice no. 2009/S 73-106037 for software package and information systems supplies published on 16.04.2009; Oracle.

Spain, Madrid: contract notice no. 2009/S 74-107191 for software package and information systems supplies published on 17.04.2009; Microsoft Licenses.

Lithuania, Vilnius: contract notice no. 2009/S 75-108539 for license management software package supplies published on 18.04.2009; Navision Attain software.

France, Toulon: contract notice no. 2009/S 76-109516 for servers supplies published on 21.04.2009; Solaris 8.

Finland, Turku: contract notice no. 2009/S 76-109600 for software package and information systems supplies published on 21.04.2009; Symantec.

Spain, Fuenlabrada: contract notice no. 2009/S 81-116785 For network operating system software package supplies published on 28.04.2009; Microsoft.

OpenForum Europe

OpenForum Europe (OFE) was originally launched in London in 2002 to encourage and accelerate the use of Open Source Software in business. The mission of OFE has now developed to encourage 'open, competitive choice for the IT user'. In doing so OFE is an active supporter of Open Standards, of wider use of the Open Source /Free Software business model, and the avoidance of lock-in through 'Openness'.

OFE is not-for-profit, limited by guarantee, independent of any organisation, business focussed and nonevangelical. OFE operates across Europe both directly and via a network of partners – both national and community based. Based in London, but increasingly important it focusses its European parliamentary and governmental programmes from its Brussels office. OFE draws its membership from both the user and supply (software, hardware, services, integrator and consultancy) communities.

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