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European Nation-Wide ETC Systems Re-Procurement Guidelines

ensuring a fair and open competitive environment



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National ETC System Re-Procurement

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Why this topic and why retendering at all ?

Overview of nation-wide ETC Systems in Europe and their status regarding re-procurement

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CH	AT	DE	CZ	SK	PL	HU	BE	SI
LSVA / RPLP / TTPCP 	GO Maut 	TOLL COLLECT 	MYTO CZ 	myto 	viaTOLL 	HU-GO 	Viapass 	DARS Go
01.01.2001	01.01.2004	01.01.2005 (originally planned for 31.08.2002) fully open 01.01.2005	01.01.2007	01.01.2010	01.07.2011	01.07.2013	01.04.2016 (01.01.2016)	01.04.2018 (01.01.2018)

2014-2017

Why this topic and why retendering at all ?

- ▶ **Procurement Directives 2014/23-25/EU**
- ▶ **Treaty of Rome**
 - ▶ **Equal treatment** → of bidders
 - ▶ **Non-discrimination** → of bidders
 - ▶ **Transparency** → of the entire procurement
- ▶ **Procurement Directive on Concession Contracts**
(2014/23/EU simplified)
 - ▶ PPP, DBO, ... contracts “to end with the end of all depreciations”.



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Procuring a new ETC service provider or a new ETC system ?

- ▶ If at all, the contracts of national ETC systems prepare for a handover of the ETC system itself as well as its operations to a new contractor, continuing operations and “taking over the toll collection services”.
 - ▶ In theory, this new ETC service provider seamlessly continues operations, is allowed to replace the system in parts or as a whole over time, and is obliged to expand the ETC system according to the requirements of the Employer in terms of road network, vehicles subject to the toll, etc.
- The existing ETC system hard- & software remains but will change over time.
- ▶ **but is that possible ?**

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Procuring a new ETC service provider or a new ETC system ?



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- ▶ Unfortunately **continuing ETC systems operations by another contractor is not possible** for a number of reasons, thereof
 1. **practical reasons**
 - ▶ ETC systems are no “commodity”, they are tailored to customer needs and apply mostly **proprietary H/W & S/W**;
 - ▶ **no other contractor** can provide the ETC services w/o support of the incumbent ETC contractor;
 - ▶ because of his insight knowledge of the existing system, its operations, user behavior, etc., **the incumbent ETC contractor largely determines the prices** of the next generation ETC services tender:
→ no fair and open competitive environment !



Procuring a new ETC service provider or a new ETC system ?



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- ▶ Unfortunately **continuing ETC systems operations by another contractor is not possible** for a number of reasons, thereof

2. competitive reasons

- ▶ to equalize the advantages of the incumbent ETC contractor, *retendering both the ETC system and the ETC services is the only solution,*
- ▶ resulting in the *replacement of the existing ETC system,*
- ▶ thus minimizing the competitive advantages of the existing contractor, and
- ▶ offering the chance for - but not necessarily requiring - a technology change.



Procuring a new ETC service provider or a new ETC system ?

- ▶ Unfortunately **continuing ETC systems operations by another contractor is not possible** for a number of reasons, thereof

3. legal reasons

- ▶ intellectual property rights and patents, as **the transfer of usage rights is prohibited by int'l legislation**, whatever the current ETC contract says.
- ▶ the current contractor can grant the use of his patents and those he has been licensed, but not the transfer of usage rights to third parties.



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Procuring a new ETC service provider or a new ETC system ?

▶ Conclusions

- ▶ legal reasons require the competitive advantages of the incumbent ETC contractor to be equalized;
- ▶ for legal and practical reasons no third party can continue operations of the existing ETC system;
- ▶ procuring a new ETC system **and** the operations thereof is the **only option**;
- ▶ developing a realistic time plan + migration scenarios is mandatory;
- ▶ the tender TORs must remain at strictly functional level **and shall not describe the existing solutions**, as this would already infringe intellectual property rights.



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Competitive advantages of the current ETC contractor



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▶ **Inter alia**

- ▶ **specific know-how** on the legal, procedural, and organizational context of the current ETC scheme;
- ▶ specific and detailed **business process & data structure knowledge**, providing a **substantial advantage** how the (practically unchanged) requirements of a new system can be matched;
- ▶ **existing organization** with experienced staff available
→ no recruitment, no training, no ramp-up, ...
- ▶ **advantages in risk assessment** due to 7+ years of practice;
- ▶ **specific knowledge** of each and every tolling / enforcement location including infrastructure, supplies, approval procedures and time spans, etc.



Competitive advantages of the current ETC contractor

▶ **And their equalization**

- ▶ requires **creating** (and not just enabling) a **fair and open competitive environment**;
- ▶ must be **carefully balanced** and has **certain limits**, as
 - ▶ **not every advantage can be extinguished**
 - ▶ **the current contractor must not be discriminated**
- ▶ every step needs to be **carefully evaluated** and **well documented** throughout the entire procurement process in order to withstand court proceedings.



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Recommended approach



- ▶ **Legal Basis** (EU directive 2014/24/EU, article 30 + 21, excerpt)
 - ▶ During the entire procurement process, the Employer shall ensure **equality of treatment among all participants**.
 - ▶ The Employer shall not provide information in a **discriminatory manner** which may give some participants an advantage over others.
 - ▶ The Employer shall not reveal to the other participants **solutions proposed by bidders** or other confidential information.
- ▶ **But what does that mean in practice ?**

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Recommended approach



▶ Best practice

- ▶ Do not reveal solutions proposed by or other IPR relevant information received from a bidder without specific agreement of that bidder to communicate his “idea” to other bidders .
- ▶ Define the ETC system functionality in terms of business processes, technical and functional requirements, service levels (SLA 's, KPI's), etc. - and *not* by solutions in place - only. Carefully maintain that documentation throughout the entire procurement process.
- ▶ Minute meetings with bidders exactly and think audio(video) recording them for evidence purposes.
- ▶ Prepare a virtual data room for accessing procurement and system documentation using access credentials per bidder's and employer's team member and log all accesses carefully.

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Recommended approach



▶ Best practice

- ▶ Follow practices widely applied within PPP procurement:
 - ▶ Whenever appropriate, **exclude bidders for formal reasons**, as it is much easier to succeed at court with formal issues rather than discussing assessment model *and* bid evaluation results with the judge.
 - ▶ **Do not exclude bidders before you as Employer have a clear, comprehensive, and concluding view on the result of the bid evaluation process.**
 - ▶ Make use of **preclusion** when setting forth tender conditions !
 - ▶ Procurement legislation does not comprise marginal thresholds. It is proven to **exclude bidders for very little inconsistencies** found within e.g. a system-, operations-, or maintenance-concept or the pricing or time schedule, provided there was at least one attempt to clarify the issue.

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Recommended approach



▶ Best practice

- ▶ Consider global de facto standards on PPP project contracting (by using e.g. FIDIC contract templates) and **don't shift risks** to bidders not assessable by them.
- ▶ **Structure** the remuneration model (CAPEX + OPEX for ETC system deployment and operations over time (incl. prolongation periods) and **prepare** a pricelist for system extensions.
- ▶ **Focus on TCO in your price assessment model !**
- ▶ **Define the contract duration from a TCO point of view.**
- ▶ **Lower target KPIs** for the initial op's phase
 - ▶ it is much easier for the incumbent ETC contractor to archive KPI targets than for his competitors !
- ▶ **Abstain from performance testing** during the bid phase
 - ▶ within an unchanged tolling context the incumbent ETC contractor always has advantages regarding charging performance, vehicle classification, etc.

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Recommended approach



▶ Best practice

- ▶ Independently assess the mechanical roadside infrastructure allowing *all* bidders an unbiased evaluation of the risks involved to be liable for and to maintain that infrastructure.
- ▶ Keep in mind also GNSS/CN based charging systems will make use of that roadside infrastructure for enforcement purposes !
- ▶ Regarding the backoffice systems, explicitly request
 - ▶ **either** the re-use of central system *application* software (as the Employer has all intellectual property rights on that - and only that - software), including the migration of that software to the new central system platform, its further maintenance and extension during the lifetime of the contract
 - ▶ **or** the delivery of a completely new central system *application* software, including maintenance and extension during the lifetime of the contract.

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Recommended approach



▶ Best practice

- ▶ Carefully document fields no equalization of the competitive advantage of the incumbent ETC provider is possible and
- ▶ do so well in advance and with all justification available in order to survive any court procedures challenging that.
- ▶ Regarding bid assessment, establish
 - ▶ a group of acknowledged experts challenging and finally rating the concepts of all bidders against the functional requirements raised with the tender (system concept, operations concept, maintenance concept, migration concept, etc.)
 - ▶ hearings with the lead specialists of each bidder, evaluating the interaction of the key personnel and the ability of interdisciplinary assessing and resolving an issue that team is confronted with in that hearing.

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Wrap Up

Enabling and securing a fair and open competitive environment within re-procuring ETC systems and services

- ▶ **is mandatory**, there is no way around.
- ▶ **is a continuous activity**, starting with the selection of the procurement procedure, managing contents and quality of the procurement documentation but then also **closely managing the entire procurement process throughout all stages** until the new contract is signed.
- ▶ **is requiring specific expertise** in (re-)procuring ETC systems and services.

Within re-procuring national ETC systems the risk to fail is immanent and typically stalls toll revenue streams. Mitigate it !



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Thank you for your attention !

The presentation and the more
detailed technical paper is
available for download at

www.primeconsulting.at



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