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*****I**
REPORT

on the proposal for a directive of the European Parliament and of the Council
on public procurement
(COM(2011)0896 – C7-0006/2012 – 2011/0438(COD))

Committee on the Internal Market and Consumer Protection

Rapporteur: Marc Tarabella

Symbols for procedures

- * Consultation procedure
- *** Consent procedure
- ***I Ordinary legislative procedure (first reading)
- ***II Ordinary legislative procedure (second reading)
- ***III Ordinary legislative procedure (third reading)

(The type of procedure depends on the legal basis proposed by the draft act.)

Amendments to a draft act

In amendments by Parliament, amendments to draft acts are highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the draft act which may require correction when the final text is prepared – for instance, obvious errors or omissions in a language version. Suggested corrections of this kind are subject to the agreement of the departments concerned.

The heading for any amendment to an existing act that the draft act seeks to amend includes a third line identifying the existing act and a fourth line identifying the provision in that act that Parliament wishes to amend. Passages in an existing act that Parliament wishes to amend, but that the draft act has left unchanged, are highlighted in **bold**. Any deletions that Parliament wishes to make in such passages are indicated thus: [...].

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DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

**on the proposal for a directive of the European Parliament and of the Council on public procurement
(COM(2011)0896 – C7-0006/2012 – 2011/0438(COD))**

(Ordinary legislative procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to Parliament and the Council (COM(2011)0896),
 - having regard to Article 294(2) and Article 53(1), Article 62 and Article 114 of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C7-0006/2012),
 - having regard to Article 294(3) of the Treaty on the Functioning of the European Union,
 - having regard to the reasoned opinions submitted, within the framework of Protocol No 2 on the application of the principles of subsidiarity and proportionality, by the United Kingdom House of Commons and by the Swedish Parliament asserting that the draft legislative act does not comply with the principle of subsidiarity,
 - having regard to the opinion of the European Economic and Social Committee of 26 April 2012¹,
 - having regard to the opinion of the Committee of the Regions of 9 October 2012²,
 - having regard to Rule 55 of its Rules of Procedure,
 - having regard to the report of the Committee on the Internal Market and Consumer Protection and the opinions of the Committee of International Trade, the Committee on Employment and Social Affairs, the Committee on the Environment, Public Health and Food Safety, the Committee on Industry, Research and Energy, the Committee on Transport and Tourism, the Committee on Regional Development, and the Committee on Legal Affairs (A7-0007/2013),
1. Adopts its position at first reading hereinafter set out;
 2. Calls on the Commission to refer the matter to Parliament again if it intends to amend its proposal substantially or replace it with another text;
 3. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

¹ OJ C 191, 29.6.2012, p. 84..

² OJ C 391, 18.12.2012, p. 49..

Amendment 1

Proposal for a directive

Recital 1

Text proposed by the Commission

(1) The award of public contracts by or on behalf of Member States authorities has to comply with the principles of the ***Treaty on the Functioning of the European Union***, and in particular the free movement of goods, freedom of establishment and the freedom to provide services as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that these principles are given practical effect and public procurement is opened up to competition.

Amendment

(1) The award of public contracts by or on behalf of Member States authorities has to comply with the principles of the ***Treaty on the European Union and the Treaty on the Functioning of the European Union (TFEU)***, and in particular the free movement of goods, freedom of establishment and the freedom to provide services as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, ***advertising*** proportionality and transparency ***and efficient management of public funds, and with the distribution of competencies as enshrined in Article 14 of the TFEU and Protocol (No 26) on Services of General Interest. Union regulation of public procurement should respect the wide discretion of public authorities in carrying out their public service tasks.*** However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that these principles are given practical effect and public procurement is opened up to competition.

Justification

Adaptation to the new provisions of the Lisbon Treaty

Amendment 2

Proposal for a directive

Recital 1 a (new)

Text proposed by the Commission

Amendment

(1a) Contracting authorities should always consider carefully the economic impact of a given requirement on economic operators before it chooses to use such a requirement in the contract notice. Overly demanding requirements will raise transaction costs and can furthermore be an obstacle to the participation especially of small and medium-sized enterprises in public procurement.

Amendment 3

Proposal for a directive

Recital 2

Text proposed by the Commission

Amendment

(2) Public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the current public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts have to be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises in public procurement and to enable procurers to make better use of public procurement in

(2) Public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the current public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts have to be revised and modernised in order to increase the efficiency of public spending, ***ensure value for money, facilitate equal access and fair participation of small and medium-sized enterprises and craftsmen*** in public procurement, ***both at local and Union-***

support of common societal goals. There is also a need to clarify basic notions and concepts to ensure better legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.

wide level, and enable procurers to make better use of public procurement in support of *sustainable production and consumption*. There is also a need to clarify basic notions and concepts to ensure better legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.

Amendment 4
Proposal for a directive
Recital 3 a (new)

Text proposed by the Commission

Amendment

(3a) It is also appropriate to recall that this Directive should neither affect the social security legislation of the Member States nor should it deal with the liberalisation of services of general economic interest, reserved to public or private entities, or with the privatisation of public entities providing services. It should equally be recalled that Member States are free to organise the provision of compulsory social services or of other services such as postal services either as services of general economic interest or as non-economic services of general interest or as a mixture thereof. It is appropriate to clarify that non-economic services of general interest should not fall within the scope of this Directive.

Amendment 5
Proposal for a directive
Recital 4

Text proposed by the Commission

Amendment

(4) It has also proven necessary to clarify what should be understood as a single procurement, with the effect that the aggregate value of all contracts concluded

(4) It has also proven necessary to clarify what should be understood as a single procurement, with the effect that the aggregate value of all contracts concluded

for the purpose of this procurement has to be taken into account with regard to the thresholds of this directive, and that the procurement should be advertised as a whole, possibly split into lots. The concept of single procurement encompasses all supplies, works and services needed to carry out a particular project, for instance a works project or an entirety of works, supplies and/or services. ***Indications for the existence of one single project can for instance consist in overall prior planning and conception by the contracting authority, the fact that the different elements purchased fulfil a single economic and technical function or that they are otherwise logically interlinked and carried out in a narrow time frame.***

for the purpose of this procurement has to be taken into account with regard to the thresholds of this directive, and that the procurement should be advertised as a whole, possibly split into lots. The concept of single procurement encompasses all supplies, works and services needed to carry out a particular project, for instance a works project or an entirety of works, supplies and/or services.

Justification

This notion is too vague and creates no legal security and is contrary to the idea of dividing contracts into lots.

Amendment 6

Proposal for a directive Recital 5

Text proposed by the Commission

(5) Under Article 11 of the Treaty on the Functioning of the European Union, environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development. This Directive clarifies how the contracting authorities may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring that they can obtain the best value for money for their contracts.

Amendment

(5) This Directive clarifies how the contracting authorities may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring that they can obtain the best value for money for their contracts.

Justification

The Commission's text can be simplified.

Amendment 7

Proposal for a directive

Recital 6

Text proposed by the Commission

(6) Even if they do not necessarily lead to corrupt conduct, actual, potential or perceived conflicts of interest have a high potential to improperly influence public procurement decisions with the effect of distorting competition and jeopardising equal treatment of tenderers. Effective mechanisms should therefore be set up to prevent, identify and remedy conflicts of interest.

Amendment

(6) Even if they do not necessarily lead to corrupt conduct, actual, potential or perceived conflicts of interest have a high potential to improperly influence public procurement decisions with the effect of distorting competition and jeopardising equal treatment of tenderers. Effective mechanisms should therefore be set up to prevent, identify and remedy conflicts of interest. ***In addition, in order to ensure efficient protection of 'whistleblowers', Member States should ensure that any staff member who reports undisclosed conflicts in good faith is protected against retaliation, harassment or deleterious actions. In this context, retaliation means any direct or indirect detrimental action recommended, threatened or taken against an individual because of such action.***

Justification

Member States should implement a well-functioning whistleblowing system to ensure that these provisions have an impact.

Amendment 8

Proposal for a directive

Recital 10

Text proposed by the Commission

(10) The results of the Evaluation on the Impact and Effectiveness of EU Public Procurement Legislation demonstrated

Amendment

deleted

that the exclusion of certain services from the full application of the Directive should be reviewed. As a result, the full application of this directive is extended to a number of services (such as hotel and legal services, which both showed a particularly high percentage of cross-border trade).

Justification

This statement is too one-sided it takes not even the Parliaments statement on the Green Paper into consideration

Amendment 9

Proposal for a directive

Recital 11

Text proposed by the Commission

(11) **Other** categories of services continue by their very nature to have a limited cross-border dimension, **namely** what are known as services to the person, such as certain social, health and educational services. These services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. A specific regime should therefore be established for public contracts for these services, with a higher threshold of EUR **500 000**. Services to the person with values below this threshold will typically not be of interest to providers from other Member States, unless there are concrete indications to the contrary, such as Union financing for transborder projects. Contracts for services to the person above this threshold should be subject to Union-wide transparency. Given the importance of the cultural context and the sensitivity of these services, Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate. The rules of this directive take account of

Amendment

(11) **The results of the Commission Staff Working Paper of 27 June 2011 entitled 'Evaluation Report - the Impact and Effectiveness of EU Public Procurement Legislation' demonstrated that the exclusion of certain services from the full application of this Directive should be reviewed. Some** categories of services continue by their very nature to have a limited cross-border dimension, **for example** what are known as services to the person, such as certain social, health and educational services. These services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. A specific regime should therefore be established for public contracts for these services, with a higher threshold of EUR **750 000**. Services to the person with values below this threshold will typically not be of interest to providers from other Member States, unless there are concrete indications to the contrary, such as Union financing for transborder projects. Contracts for services to the person above this threshold should

that imperative, imposing only observance of basic principles of transparency and equal treatment and making sure that contracting authorities are able to apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee¹⁷. Member States and/or public authorities remain free to provide these services themselves or to organise social services in a way that does not entail the conclusion of public contracts, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority, without any limits or quotas, provided such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination.

be subject to Union-wide transparency. Given the importance of the cultural context and the sensitivity of these services, Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate. The rules of this directive take account of that imperative, imposing only observance of basic principles of transparency and equal treatment and making sure that contracting authorities are able to apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee. Member States and/or public authorities remain free to provide these services themselves or to organise social services in a way that does not entail the conclusion of public contracts, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority, without any limits or quotas, provided such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination. ***This Directive should not apply to tried and tested procedures in Member States that are based on the users' free choice of service providers for services of general interest (i.e. voucher system, free choice model, triangular relationship) provided that account is taken of the Treaties' general principles of equal treatment and transparency.***

Justification

In line with the general approach of simplifying the Directives, it would not be appropriate, at this time, to subject other categories of services to the full application of the Directives. These services should, however, be subject to the specific regime for social and other specific services and the results of the application of this regime should be reviewed (by the Commission) within three years of the date when this Directive is implemented by Member States.

Amendment 10

Proposal for a directive Recital 13

Text proposed by the Commission

(13) Being addressed to Member States, this directive does not apply to procurement carried out by international organisations on their own behalf and for their own account. There is, however, a need to clarify to what extent this directive should be applied to procurement governed by specific international rules.

Amendment

(13) Being addressed to Member States, this directive does not apply to procurement carried out by international organisations on their own behalf and for their own account. There is, however, a need to clarify to what extent this directive should be applied to procurement governed by specific international rules. ***The Union institutions should, in particular, take into account the changes provided for in this Directive and adjust their own procurement rules accordingly to reflect those changes.***

Justification

Many EU enterprises, in particular SMEs, have built their business around procurements of the EU institutions. The Financial Regulation should take on board the changes brought about by this modernisation exercise to ensure a level playing field.

Amendment 11

Proposal for a directive Recital 13 a (new)

Text proposed by the Commission

Amendment

(13a) The awarding of public contracts for certain audiovisual and radio media services by media providers should allow aspects of cultural or social significance to be taken into account which render application of procurement rules inappropriate. For those reasons, an exception should therefore be made for public service contracts, awarded by the media service providers themselves, for the purchase, development, production or co-production of off-the-shelf

programmes and other preparatory services, such as those relating to scripts or artistic performances necessary for the production of the programme. It should also be clarified that this exclusion should apply equally to broadcast media services as well as on-demand services (non-linear services). However, this exclusion should not apply to the supply of technical equipment necessary for the production, co-production and broadcasting of such programmes.

Amendment 12

Proposal for a directive Recital 13 b (new)

Text proposed by the Commission

Amendment

(13b) This Directive should not prevent Member States from keeping in place arrangements to ensure the continued provision and the quality of staff providing such services to users by organisations that were providing them prior to the entry into force of this Directive.

Amendment 13

Proposal for a directive Recital 14

Text proposed by the Commission

Amendment

(14) There is considerable legal uncertainty as to how far cooperation between public authorities should be covered by public procurement rules. The relevant case-law of the Court of Justice of the European Union is interpreted divergently between Member States and even between contracting authorities. It is therefore necessary to clarify in what cases contracts concluded between contracting authorities are not subject to the application of public

(14) There is considerable legal uncertainty as to how far cooperation between public authorities should be covered by public procurement rules. The relevant case-law of the Court of Justice of the European Union is interpreted divergently between Member States and even between contracting authorities. It is therefore necessary to clarify in what cases contracts concluded between contracting authorities are not subject to the application of public

procurement rules. Such clarification should be guided by the principles set out in the relevant case-law of the Court of Justice. The sole fact that both parties to an agreement are themselves contracting authorities does not as such rule out the application of procurement rules. However, the application of public procurement rules should not interfere with the *freedom* of public authorities to decide how to organise the way they carry out their public service tasks. Contracts awarded to controlled entities or cooperation for the joint execution of the public service tasks of the participating contracting authorities should therefore be exempted from the application of the rules if the conditions set out in this directive are fulfilled. This directive should aim to ensure that any exempted public-public cooperation does not cause a distortion of competition in relation to private economic operators. Neither should the participation of a contracting authority as a tenderer in a procedure for the award of a public contract cause any distortion of competition.

procurement rules. Such clarification should be guided by the principles set out in the relevant case-law of the Court of Justice. The sole fact that both parties to an agreement are themselves contracting authorities does not as such rule out the application of procurement rules. However, the application of public procurement rules should not interfere with the *right* of public authorities to decide *freely* how to organise the way they carry out their public service tasks. Contracts awarded to controlled entities or cooperation for the joint execution of the public service tasks of the participating contracting authorities should therefore be exempted from the application of the rules if the conditions set out in this directive are fulfilled. This directive should aim to ensure that any exempted public-public cooperation does not cause a distortion of competition in relation to private economic operators. Neither should the participation of a contracting authority as a tenderer in a procedure for the award of a public contract cause any distortion of competition. ***In the event that any of the cumulative conditions for an exemption from the scope of this Directive are no longer fulfilled during the term of a contract or cooperation that has been excluded from the procurement rules, that ongoing contract or cooperation has to be opened to competition through regular procurement procedures.***

Amendment 14

Proposal for a directive Recital 14 a (new)

Text proposed by the Commission

Amendment

(14a) In order to make procedures faster and more efficient, time limits for participation in procurement procedures should be kept as short as possible without creating undue barriers to access for

economic operators from across the internal market, in particular SMEs. When fixing the time limits for the receipt of tenders and requests to participate, contracting authorities should accordingly take into account the complexity of the contract and the time required for drawing up tenders in particular, even if this would entail setting time limits that are longer than the minima provided for under this Directive. Use of electronic means of information and communication, in particular full electronic availability of procurement documents and electronic transmission of communications, on the other hand, leads to increased transparency and time savings. Therefore, provision should be made for reducing the minimum periods in line with the rules set out in the WTO Government Procurement Agreement and subject to the condition that they are compatible with the specific mode of transmission envisaged at Union level. Furthermore, contracting authorities should have the opportunity to further shorten the time limits for receipt of requests to participate and tender submissions, in cases where a state of urgency renders the normal time limits impracticable, although running a procedure with publication is still possible. Only situations where extreme urgency brought about by unforeseeable events – and which are not attributable to the contracting authority— should be considered as exceptional, and only in such situations should it be deemed to be impossible to conduct a regular procedure even with shortened time limits. In such cases, contracting authorities should, wherever possible, award contracts though use of the negotiated procedure without prior publication, for instance where natural or man-made disasters require immediate action.

Justification

These are necessary clarifications on exceptions to the normal tendering timeframes, in view of ensuring speed and efficiency in rolling out public procurement.

Amendment 15 **Proposal for a directive** **Recital 15**

Text proposed by the Commission

(15) *There is a widespread need for additional flexibility **and in particular for wider access to a** procurement **procedure** providing for negotiations, **as is explicitly foreseen in the** Agreement, where negotiation is allowed in all procedures. Contracting authorities should, **unless otherwise provided in the legislation of the Member State concerned**, be able to use a competitive procedure with negotiation as provided for in this Directive, in various situations where open or restricted procedures without negotiations are not likely to **lead to** satisfactory **procurement** outcomes. This procedure should be accompanied by adequate safeguards ensuring observance of the principles of equal treatment and transparency. This will give greater leeway to contracting authorities to buy works, supplies and services perfectly adapted to their specific needs. At the same time, it should also increase cross-border trade, as the evaluation has shown that contracts awarded by negotiated procedure with prior publication have a particularly high success rate **of** cross-border tenders.*

Amendment

(15) *Contracting authorities require additional flexibility **to choose** procurement **procedures**. **The Union rules on public procurement should be aligned with the Government Procurement** Agreement, where negotiation is allowed in all procedures. Contracting authorities should be able to use a competitive procedure with negotiation as provided for in this Directive, in various situations where **the classic** open or restricted procedures without negotiations are not likely to **deliver** satisfactory outcomes. This procedure should be accompanied by adequate safeguards ensuring observance of the principles of equal treatment and transparency. This will give greater leeway to contracting authorities to buy works, supplies and services perfectly adapted to their specific needs. At the same time, it should also increase cross-border trade, as the evaluation has shown that contracts awarded by negotiated procedure with prior publication have a particularly high success rate **in attracting** cross-border tenders.*

Amendment 16 **Proposal for a directive** **Recital 15 a (new)**

Text proposed by the Commission

Amendment

(15a) For works contracts, such situations include works that are not standard building projects or works including the design of an innovative solution. For services or supplies that require adaptation or design, the use of a competitive procedure with negotiation or competitive dialogue is likely to deliver added value. Such adaptation or design requirements are particularly beneficial in the case of complex purchases such as sophisticated products, intellectual services or major ICT projects. In those cases, negotiations may be necessary to guarantee that the supply or service in question corresponds to the needs of the contracting authority. In relation to "off-the shelf" services or supplies that can be provided by many different economic operators, the competitive procedure with negotiation and the competitive dialogue should not be used.

Justification

This change introduces flexibility in the rules, allowing for negotiations in all procedures.

Amendment 17

Proposal for a directive Recital 15 b (new)

Text proposed by the Commission

Amendment

(15b) The competitive procedure with negotiation should also be followed in cases where use of an open or restricted procedure delivered only invalid or unacceptable tenders. In particular tenders which do not comply with the procurement documents, which were received late, where there is evidence of collusion or corruption, or which have been found by the contracting authority to

be abnormally low, should be considered invalid. Tenders submitted by tenderers that do not have the required qualifications, and tenders whose price exceeds the contracting authority's budget as communicated prior to the launching of the procurement procedure should also be considered as unacceptable.

Justification

This change introduces flexibility in the rules, allowing for negotiations in all procedures.

Amendment 18

**Proposal for a directive
Recital 15 c (new)**

Text proposed by the Commission

Amendment

(15c) The competitive procedure with negotiations should be accompanied by adequate safeguards ensuring that the principles of equal treatment and transparency are observed. In particular, contracting authorities should indicate up front the minimum requirements governing the nature of the procurement and which may not be changed in the course of negotiations. Award criteria and their weighting should remain stable throughout the entire procedure and not be subject to negotiations, in order to ensure equal treatment of all economic operators. Negotiations should aim at improving the tenders to allow contracting authorities to acquire works, supplies and services ideally suited to their specific needs. Negotiations may concern all aspects of the purchased works, supplies or services including, for instance, quality, quantities, commercial clauses as well as social, environmental and innovative characteristics, insofar as they do not constitute minimum requirements. The minimum requirements referred to are the conditions and characteristics

(particularly physical, functional and legal) that any tender should meet pursuant to this Directive in order to allow the contracting authority to award the contract in accordance with the chosen award criterion. To ensure transparency of the process, all negotiating stages should be documented in conformity with this Directive, so that contracting authorities can provide proof in writing, at the request of any candidate or tenderer, that they have ensured the equal treatment of all economic operators concerned. Furthermore, to ensure transparency, all tenders throughout the procedures should be submitted in writing or via electronic means.

Justification

Certain safeguards are required to ensure that the added flexibility in the use of procedures does not result in misuse.

Amendment 19

Proposal for a directive

Recital 17

Text proposed by the Commission

(17) Research and innovation, including eco-innovation and social innovation, are among the main drivers of future growth and have been put at the centre of the Europe 2020 strategy for smart, sustainable and inclusive growth. Public authorities should make the best strategic use of public procurement to *spur* innovation. Buying innovative goods and services plays a key role in improving the efficiency and quality of public services while addressing major societal challenges. It contributes to achieving best value for public money as well as wider economic, environmental and societal benefits in terms of generating new ideas, translating them into innovative products and services and *thus* promoting

Amendment

(17) Research and innovation, including eco-innovation and social innovation, are among the main drivers of future growth and have been put at the centre of the Europe 2020 strategy for smart, sustainable and inclusive growth. Public authorities should make the best strategic use of public procurement to *drive* innovation. Buying innovative goods and services plays a key role in improving the efficiency and quality of public services while addressing major societal challenges. It contributes to achieving best value for public money as well as wider economic, environmental and societal benefits in terms of generating new ideas, translating them into innovative products and services and promoting

sustainable economic growth. This *directive* should contribute to facilitating public procurement of innovation and help Member States in achieving the Innovation Union targets. *A specific procurement procedure should therefore be provided for which allows* contracting authorities to establish *a long-term* innovation partnership for the development and subsequent purchase of *a* new, innovative *product, service* or works provided *it* can be delivered to agreed performance levels and costs. The partnership should be structured in such a way that it can provide the necessary *'market-pull'*, incentivising the development of *an* innovative *solution* without foreclosing the market.

sustainable economic growth. *An innovative procurement model is detailed in the Commission's Communication of 14 December 2007 entitled 'Driving innovation to ensure high quality public services in Europe'.* This *model promotes take-up in the procurement of research and development services which do not fall within the scope of this Directive.* *That model, which has been incorporated into this Directive, is recognised and will be available for all contracting authorities to consider. This Directive should however* contribute to facilitating *the* public procurement of innovation *more generally,* and help Member States in achieving the Innovation Union targets. *Where a need for the development of an innovative product, service or works and the subsequent purchase of the resulting output cannot be met by solutions already available on the market, contracting authorities should have access to a specific procurement procedure in respect of contracts falling within the scope of this Directive. This new procedure should allow* contracting authorities to establish *an* innovation partnership for the development and subsequent purchase of new, innovative *products, services* or works, provided *that they* can be delivered to agreed performance levels and costs. *The procedure should be based on the rules applying to the competitive procedure with negotiations and contracts should be awarded on the sole basis of the most economically advantageous tender, which is the most suited to comparing tenders for innovative solutions. Whether the innovation partnership concerns a very large project or a smaller project, it should be structured in such a way that it can provide the necessary 'market pull', incentivising the development of innovative solutions without foreclosing the market. Contracting authorities should therefore not misuse innovation partnerships to prevent, restrict or distort*

competition. In addition, when setting the terms and conditions for procurement, contracting authorities should be allowed to establish innovative characteristics, including best available techniques, as a criterion relating to the subject of the contract concerned.

Justification

This Amendment details how the new innovation partnerships procedure should be used, adding to the Commission's original proposal, specifically by linking this new tool to the principles applying to the competitive procedure, where most relevant. This Amendment also clarifies that pre-commercial procurement as defined in a 2007 Commission Communication, and continues to apply, irrespective of this new innovation partnerships procedure, and has been built in separately into a new exemption.

Amendment 20

Proposal for a directive

Recital 19

Text proposed by the Commission

(19) Electronic means of information and communication can greatly simplify the publication of contracts and increase the efficiency and transparency of procurement processes. They should become the standard means of communication and information exchange in procurement procedures. The use of electronic means also leads to time savings. As a result, provision should be made for reducing the minimum periods where electronic means are used, subject, however, to the condition that they are compatible with the specific mode of transmission envisaged at Union level. Moreover, electronic means of information and communication including adequate functionalities can enable contracting authorities to prevent, detect and correct errors that occur during procurement procedures.

Amendment

(19) Electronic means of information and communication can greatly simplify the publication of contracts and increase the efficiency and transparency of procurement processes. They should become the standard means of communication and information exchange in procurement procedures. The use of electronic means also leads to time savings. As a result, provision should be made for reducing the minimum periods where electronic means are used, subject, however, to the condition that they are compatible with the specific mode of transmission envisaged at Union level. Moreover, electronic means of information and communication including adequate functionalities can enable contracting authorities to prevent, detect and correct errors that occur during procurement procedures. ***In addition, the submission of building information electronic modelling tools for works contracts should be encouraged in order***

to modernise the procurement process and ensure greater efficiencies are achieved in the public procurement of works covered by this Directive, in particular in relation to taking into account life cycle costs and sustainability criteria.

Amendment 21

Proposal for a directive Recital 19 a (new)

Text proposed by the Commission

Amendment

(19a) In order to ensure confidentiality during the procedure, contracting authorities should not disclose information that has been forwarded to it by economic operators which they have designated as confidential. Non-compliance with this obligation should render the contracting authority liable if harm can be clearly demonstrated by the economic operator.

Justification

Strengthening of the provisions on the confidentiality of the information forwarded by candidates or tenderers to the contracting authority during procurement procedures. The contracting authority must be liable if sensitive information, such as technical or trade secrets, is disclosed.

Amendment 22

Proposal for a directive Recital 20

Text proposed by the Commission

Amendment

(20) There is a strong trend emerging across Union public procurement markets towards the aggregation of demand by public purchasers, with a view to obtaining economies of scale, including lower prices and transaction costs, and to improving and

(20) There is a strong trend emerging across Union public procurement markets towards the aggregation of demand by public purchasers, with a view to obtaining economies of scale, including lower prices and transaction costs, and to improving and

professionalising procurement management. This can be achieved by concentrating purchases either by the number of contracting authorities involved or by volume and value over time. However, the aggregation and centralisation of purchases should be carefully monitored in order to avoid excessive concentration of purchasing power and collusion, and to preserve transparency and competition, as well as market access opportunities for small and medium-sized enterprises.

professionalising procurement management. This can be achieved by concentrating purchases either by the number of contracting authorities involved or by volume and value over time. However, the aggregation and centralisation of purchases should be carefully monitored in order to avoid excessive concentration of purchasing power and collusion, and to preserve transparency and competition, as well as market access opportunities for small and medium-sized enterprises. ***The Commission should provide guidance to Member States and contracting authorities on the required monitoring of aggregated and centralised purchases to avoid excessive concentration of purchasing power and collusion.***

Amendment 23

Proposal for a directive Recital 21

Text proposed by the Commission

(21) The instrument of framework agreements has been widely used and is considered as an efficient procurement technique throughout Europe. It should therefore be maintained largely as is. However, certain concepts need to be clarified, in particular the conditions for the use of a framework agreement by contracting authorities which are not themselves party to it.

Amendment

(21) The instrument of framework agreements has been widely used and is considered as an efficient procurement technique throughout Europe. It should therefore be maintained largely as is. However, certain concepts need to be clarified, in particular the conditions for the use of a framework agreement by contracting authorities which are not themselves party to it. ***It should be permissible to expand the range of parties entitled to be called upon under a framework agreement in accordance with the conditions laid down in this Directive).***

Amendment 24

Proposal for a directive Recital 21 a (new)

Text proposed by the Commission

Amendment

(21a) The objective conditions for determining which of the economic operators, party to the framework agreement, should perform a given task, such as supplies or services intended for use by natural persons, may include the needs or the choice of the natural persons concerned.

Amendment 25

Proposal for a directive

Recital 24

Text proposed by the Commission

Amendment

(24) Centralised purchasing techniques are increasingly used in most Member States. Central purchasing bodies are responsible for making acquisitions or awarding public contracts/framework agreements for other contracting authorities. In view of the large volumes purchased, such techniques help increase competition and professionalise public purchasing. Provision should therefore be made for a Union definition of central purchasing bodies dedicated to contracting authorities, without preventing the continuation of less institutionalised and systematic common purchasing or the established practice of having recourse to service providers that prepare and manage procurement procedures on behalf and for the account of a contracting authority. Rules should also be laid down for allocating responsibility for the observance of the obligations pursuant to this Directive, also in the case of remedies, among the central purchasing body and the contracting authorities procuring from or through the central purchasing body. Where the latter has sole responsibility for the conduct of the procurement procedures, it should also be solely and directly

(24) Centralised purchasing techniques are increasingly used in most Member States. Central purchasing bodies are responsible for making acquisitions or awarding public contracts/framework agreements for other contracting authorities. In view of the large volumes purchased, such techniques help increase competition and professionalise public purchasing. ***Specific attention should be paid to the accessibility of any such procedures for small and medium-sized enterprises.*** Provision should therefore be made for a Union definition of central purchasing bodies dedicated to contracting authorities, without preventing the continuation of less institutionalised and systematic common purchasing or the established practice of having recourse to service providers that prepare and manage procurement procedures on behalf and for the account of a contracting authority. Rules should also be laid down for allocating responsibility for the observance of the obligations pursuant to this Directive, also in the case of remedies, among the central purchasing body and the contracting authorities procuring from or through the central purchasing body.

responsible for the legality of the procedures. Where a contracting authority conducts certain parts of the procedure, for instance the reopening of competition under a framework agreement or the award of individual contracts based on a dynamic purchasing system, it should continue to be responsible for the stages it conducts.

Where the latter has sole responsibility for the conduct of the procurement procedures, it should also be solely and directly responsible for the legality of the procedures. Where a contracting authority conducts certain parts of the procedure, for instance the reopening of competition under a framework agreement or the award of individual contracts based on a dynamic purchasing system, it should continue to be responsible for the stages it conducts.

Amendment 26

Proposal for a directive Recital 25

Text proposed by the Commission

(25) Electronic means of communication are particularly well suited to support centralised purchasing practices and tools because of the possibility they offer to re-use and automatically process data and to minimise information and transaction costs. The use of such electronic means of communication should therefore, as a first step, be rendered compulsory for central purchasing bodies, while also facilitating converging practices across the Union. This should be followed by a general obligation to use electronic means of communication in all procurement procedures after a transition period of two years.

Amendment

(25) Electronic means of communication are particularly well suited to support centralised purchasing practices and tools because of the possibility they offer to re-use and automatically process data and to minimise information and transaction costs. The use of such electronic means of communication should therefore, as a first step, be rendered compulsory for central purchasing bodies, while also facilitating converging practices across the Union. This should be followed by a general obligation to use electronic means of communication in all procurement procedures after a transition period of two years. ***So as to ensure continued legal certainty, those provisions should not affect existing arrangements at national level for publishing information on public procurement contracts for amounts below the thresholds set in this Directive.***

Justification

The overall obligation to use electronic means of communication in all public procurement procedures shall not affect existing national rules on publishing information on public procurement contracts for amounts below the thresholds set in this directive.

Amendment 27

Proposal for a directive

Recital 27

Text proposed by the Commission

(27) The technical specifications drawn up by public purchasers need to allow public procurement to be ***opened up*** to competition. To that end, it must be possible to submit tenders that reflect the diversity of technical solutions ***so as to obtain a sufficient level of competition***. Consequently, technical specifications should be drafted in such a way to avoid artificially narrowing down competition through requirements that favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator. Drawing up the technical specifications in terms of functional and performance requirements generally allows this objective to be achieved in the best way possible and favours innovation. Where reference is made to a European standard or, in the absence thereof, to a national standard, tenders based on equivalent arrangements must be considered by contracting authorities. To demonstrate equivalence, tenderers can be required to provide third-party verified evidence; however, other appropriate means of proof such as a technical dossier of the manufacturer should also be allowed where the economic operator concerned has no access to such certificates or test reports, or no possibility of obtaining them within the relevant time limits.

Amendment

(27) The technical specifications drawn up by public purchasers need to allow public procurement to be ***open*** to competition ***as well as to achieve objectives of sustainability***. To that end, it must be possible to submit tenders that reflect the diversity of technical solutions, ***standards and technical specifications in the marketplace, including those drawn up on the basis of performance criteria linked to the life cycle and the sustainability of the production process of the works, supplies and services***. Consequently, technical specifications should be drafted in such a way to avoid artificially narrowing down competition through requirements that favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator. Drawing up the technical specifications in terms of functional and performance requirements generally allows this objective to be achieved in the best way possible and favours innovation. Where reference is made to a European standard or, in the absence thereof, to a national standard, tenders based on equivalent arrangements must be considered by contracting authorities. To demonstrate equivalence, tenderers can be required to provide third-party verified evidence; however, other appropriate means of proof such as a technical dossier of the manufacturer should also be allowed where the economic operator concerned has no access to such certificates or test reports, or no possibility of obtaining them within the relevant time limits. ***In order not to discriminate against tenderers who invest time and money for certificates or test reports, the burden to provide equivalence***

should be placed on the tenderer claiming equivalence.

Amendment 28

Proposal for a directive Recital 28

Text proposed by the Commission

(28) Contracting authorities that wish to purchase works, supplies or services with specific environmental, social or other characteristics should be able to refer to particular labels, such as the European Eco-label, (multi-)national eco-labels or any other label provided that the requirements for the label are linked to the subject-matter of the contract, such as the description of the product and its presentation, including packaging requirements. It is furthermore essential that these requirements are drawn up and adopted on the basis of objectively verifiable criteria, using a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors *and* environmental organisations, can participate, and that the label is accessible and available to all interested parties.

Amendment

(28) Contracting authorities that wish to purchase works, supplies or services with specific environmental, social or other characteristics should be able to refer to particular labels *or certificates*, such as the European Eco-label, (multi-) national eco-labels or any other label *or certificate* provided that the requirements for the label are linked to the subject-matter of the contract, such as the description of the product and its presentation, including packaging requirements. It is furthermore essential that these requirements are drawn up and adopted on the basis of objectively verifiable criteria, using a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors, environmental organisations *and social partners*, can participate, and that the label is accessible and available to all interested parties.

Amendment 29

Proposal for a directive

Recital 29 a (new)

Text proposed by the Commission

Amendment

(29a) For all procurement it is necessary that contracting authorities ensure that the products, services and works subject to the contract meet the requirements of data protection law. In order to ensure and demonstrate the protection of the rights and freedoms of data subjects with regard to the processing of personal data,

tenderers should adopt internal policies and implement appropriate technical and organisational measures at the time of the design of the processing of personal data (data protection by design).

Amendment 30

Proposal for a directive

Recital 30

Text proposed by the Commission

(30) In order to foster the involvement of ***small and medium-sized enterprises*** (SMEs) in the public procurement market, contracting authorities should be encouraged ***to divide*** contracts into lots, ***and be obliged to state the reasons for not doing so***. Where contracts are divided into lots, contracting authorities may, for instance in order to preserve competition or to ensure security of supply, limit the number of lots for which an economic operator may tender; they may also limit the number of lots that may be awarded to any one tenderer.

Amendment

(30) ***Public procurement should be adapted to the needs of small and medium-sized enterprises (SMEs). Contracting authorities should make use of the Code of Best Practices set out in the Commission Staff Working Document of 25 June 2008 entitled 'European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts'¹, providing guidance on how they may apply the public procurement framework in a way that facilitates SME participation.*** In order to foster the involvement of SMEs in the public procurement market, ***and to enhance competition***, contracting authorities should be encouraged ***in particular to give consideration to dividing*** contracts into lots, ***especially for products that require quality for welfare, such as food for passive consumers in hospitals, schools, care for children and other people.*** Where contracts are divided into lots, contracting authorities may, for instance in order to preserve competition or to ensure security of supply, limit the number of lots for which an economic operator may tender; they may also limit the number of lots that may be awarded to any one tenderer.

¹ (SEC (2008)COM 2193)

Justification

While there is clear need to promote SME access to public procurement, a near total obligation for contracting authorities to divide contracts into lots is the wrong approach. Moreover giving contracting authorities discretion to limit the number of lots won by individual suppliers is likely to work against rewarding innovative or otherwise competitive SMEs, and runs a serious risk of being abused in order to discriminate against "outsiders". Soft measures are preferable.

Amendment 31 **Proposal for a directive** **Recital 32**

Text proposed by the Commission

(32) Many economic operators, and not least SMEs, find that a major obstacle to their participation in public procurement consists in administrative burdens deriving from the need to produce a substantial number of certificates or other documents related to exclusion and selection criteria. Limiting such requirements, for example through self-declarations, can result in considerable simplification for the benefit of both contracting authorities and economic operators. The tenderer to which it has been decided to award the contract should, however, be required to provide the relevant evidence and contracting authorities should not conclude contracts with tenderers unable to do so. Further simplification can be achieved through standardised documents such as the European Procurement Passport, which should be recognized by all contracting authorities and widely promoted among economic operators, in particular SMEs, for whom they can substantially lessen the administrative burden.

Amendment

(32) Many economic operators, and not least SMEs, find that a major obstacle to their participation in public procurement consists in administrative burdens deriving from the need to produce a substantial number of certificates or other documents related to exclusion and selection criteria. Limiting such requirements, for example through self-declarations, can result in considerable simplification for the benefit of both contracting authorities and economic operators. The tenderer to which it has been decided to award the contract should, however, be required to provide the relevant evidence and contracting authorities should not conclude contracts with tenderers unable to do so. Further simplification can be achieved through standardised documents such as the European Procurement Passport, which should be recognized by all contracting authorities and widely promoted among economic operators, in particular SMEs, for whom they can substantially lessen the administrative burden. ***In addition, it should be possible for groups or consortia of economic operators, particularly of SMEs, to submit tenders or to put themselves forward together as candidates.***

Amendment 32

Proposal for a directive Recital 32 a (new)

Text proposed by the Commission

Amendment

(32a) Job creation depends heavily on SMEs. SMEs have been able to offer new, sustainable jobs even at times of economic crisis. As public authorities devote approximately 18 % of GDP to public procurement, the legislative regime governing public procurement has a significant impact on SMEs' ability to continue creating new jobs. Thus, public contracts should be made as accessible as possible for SMEs, both above and below the thresholds which are defined in this Directive. In addition to the specific tools, which are tailored to enhance the involvement of SMEs in the public procurement market, Member States and contracting authorities should be strongly encouraged to create SME-friendly public procurement strategies. The 'European Code of Best Practices facilitating access by SMEs to Public procurement contracts' aims at helping Member States create national strategies, programs and action plans in order to improve SMEs participation in these markets. Efficient public procurement policy should be coherent. National, regional and local authorities should rigorously apply the rules set in this Directive and on the other hand, implementing general policies designated to enhance SMEs access to public procurement markets will remain extremely important especially from the perspective of job creation.

Amendment 33

Proposal for a directive

Recital 34

Text proposed by the Commission

(34) Public contracts should not be awarded to economic operators that have participated in a criminal organisation or have been found guilty of corruption, fraud to the detriment of the Union's financial interests or money laundering. Non-payment of taxes or social security contributions should also be sanctioned by mandatory exclusion at the level of the Union. Furthermore, contracting authorities should be given the possibility to exclude candidates or tenderers for violations of environmental *or* social **obligations, including rules on accessibility for disabled persons or other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights.**

Amendment 34

Proposal for a directive

Recital 37

Text proposed by the Commission

(37) Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment. These criteria should guarantee that tenders are assessed in conditions of effective competition, also where contracting authorities require high-quality works, supplies and services that are optimally suited to their needs, for instance where the chosen award criteria include factors linked to the production process. As a result, contracting authorities should be allowed to adopt as award criteria **either** ‘the most economically advantageous tender’ **or** ‘*the lowest cost*’, taking into account that **in the latter case they are free to set adequate** quality standards by using

Amendment

(34) Public contracts should not be awarded to economic operators that have participated in a criminal organisation, **in exploitation of human trafficking and child labour** or have been found guilty of corruption, fraud to the detriment of the Union's financial interests or money laundering. Non-payment of taxes or social security contributions should also be sanctioned by mandatory exclusion at the level of the Union. Furthermore, contracting authorities should be given the possibility to exclude candidates or tenderers for violations of environmental, social or **labour law provisions referred to in the general principles of this Directive.**

Amendment

(37) Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment. These criteria should guarantee that tenders are assessed in conditions of effective competition, also where contracting authorities require high-quality works, supplies and services that are optimally suited to their needs, for instance where the chosen award criteria include factors linked to the production process. As a result, contracting authorities should adopt as award criteria ‘the most economically advantageous tender’, taking into account that **it should refer to quality and sustainability** standards by using technical specifications or contract

technical specifications or contract performance conditions.

performance conditions.

Justification

Articles 40 and 66.

Amendment 35
Proposal for a directive
Recital 38

Text proposed by the Commission

(38) *Where* contracting authorities **choose to award** a contract **to** the most economically advantageous tender, **they** must determine the award criteria on the basis of which they will assess tenders in order to identify which one offers the best value for money. The determination of these criteria depends on the subject-matter of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the subject-matter of the contract, as defined in the technical specifications, and the value for money of each tender to be measured. Furthermore, the chosen award criteria should not confer an unrestricted freedom of choice on the contracting authority and they should ensure the possibility of effective competition and be accompanied by requirements that allow the information provided by the tenderers to be effectively verified.

Amendment

(38) Contracting authorities **awarding** a contract **on the basis of** the most economically advantageous tender **criterion**, must determine the award criteria on the basis of which they will assess tenders in order to identify which one offers the best value for money. The determination of these criteria, **which may include economic, environmental and social sustainability**, depends on the subject-matter of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the subject-matter of the contract, as defined in the technical specifications, and the value for money of each tender to be measured. Furthermore, the chosen award criteria should not confer an unrestricted freedom of choice on the contracting authority and they should ensure the possibility of effective **and fair** competition and be accompanied by requirements that allow the information provided by the tenderers to be effectively verified.

Amendment 36

Proposal for a directive
Recital 38 a (new)

Text proposed by the Commission

Amendment

(38a) Particularly for public procurement of food for hospitals, schools, care for children and older people, it is necessary to ensure that passive consumers have full access to quality and nutritional products providing the best value for money.

Amendment 37

Proposal for a directive Recital 38 b (new)

Text proposed by the Commission

Amendment

(38b) In this respect, contracting authorities should be permitted to take into account stricter environmental considerations and production methodology, including in the formulation of the award criteria, subject to Union law.

Amendment 38

Proposal for a directive Recital 39

Text proposed by the Commission

Amendment

(39) ***It is of utmost importance*** to fully exploit the potential of public procurement to achieve the objectives of the Europe 2020 Strategy for sustainable growth. In view of the important differences between individual sectors and markets, it would however not be appropriate to set general mandatory requirements for environmental, social and innovation procurement. The Union legislature has already set mandatory procurement requirements for obtaining specific goals in the sectors of road transport vehicles (Directive 2009/33/EC of the European Parliament

(39) ***Efforts should be made*** to fully exploit the potential of public procurement to achieve the objectives of the Europe 2020 Strategy for sustainable growth, ***without encroaching on the powers of contracting entities. In particular public procurement is crucial to driving innovation, which is of great importance for future growth in Europe.*** In view of the important differences between individual sectors and markets, it would however not be appropriate to set general mandatory requirements for environmental, social and innovation procurement. The

and the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles) and office equipment (Regulation (EC) No 106/2008 of the European Parliament and the Council of 15 January 2008 on a Community energy-efficiency labelling programme for office equipment). In addition, the definition of common methodologies for life cycle costing has significantly advanced. It therefore appears appropriate to continue on that path, leaving it to sector-specific legislation to set mandatory objectives and targets in function of the particular policies and conditions prevailing in the relevant sector and to promote the development and use of European approaches to life-cycle costing as a further underpinning for the use of public procurement in support of sustainable growth.

Union legislature has already set mandatory procurement requirements for obtaining specific goals in the sectors of road transport vehicles (Directive 2009/33/EC of the European Parliament and the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles) and office equipment (Regulation (EC) No 106/2008 of the European Parliament and the Council of 15 January 2008 on a Community energy-efficiency labelling programme for office equipment). In addition, the definition of common methodologies for life cycle costing has significantly advanced. It therefore appears appropriate to continue on that path, leaving it to sector-specific legislation to set mandatory objectives and targets in function of the particular policies and conditions prevailing in the relevant sector and to promote the development and use of European approaches to life-cycle costing as a further underpinning for the use of public procurement in support of sustainable growth.

Amendment 39

Proposal for a directive

Recital 40

Text proposed by the Commission

(40) These sector-specific measures must be complemented by an adaptation of the public procurement Directives empowering contracting authorities to pursue the objectives of the Europe 2020 Strategy in their purchasing strategies. It should hence be made clear that contracting authorities can determine the most economically advantageous tender **and the lowest cost** using a life-cycle costing approach, provided that the methodology to be used is established in an objective and non-discriminatory manner and accessible to all

Amendment

(40) These sector-specific measures must be complemented by an adaptation of the public procurement Directives empowering contracting authorities to pursue the objectives of the Europe 2020 Strategy in their purchasing strategies. It should hence be made clear that contracting authorities can determine the most economically advantageous tender using a life-cycle costing approach, provided that the methodology to be used is established in an objective and non-discriminatory manner and accessible to all interested parties. The

interested parties. The notion of life-cycle costing includes all costs over the life cycle of works, supplies or services, both their internal costs (such as development, production, use, maintenance and end-of-life disposal costs) and their external costs, provided they can be monetised and monitored. ***Common methodologies should be developed at the level of the Union for the calculation of life-cycle costs for specific categories of supplies or services; whenever such a methodology is developed its use should be made compulsory.***

notion of life-cycle costing includes all costs over the life cycle of works, supplies or services, both their internal costs (such as ***research***, development, production, ***transport***, use, maintenance and end-of-life disposal costs) and their external costs, provided they can be monetised and monitored.

(See amendments on Article 66)

Justification

Life-cycle costing should be one of the options in order to determine the most economically advantageous tender (MEAT) rather than an alternative to it.

Amendment 40

Proposal for a directive

Recital 41

Text proposed by the Commission

(41) Furthermore, in technical specifications ***and*** in award criteria, contracting authorities should be allowed to refer to a specific production process, a specific mode of provision of services, or a specific process for any other stage of the life cycle of a product or service, provided that they are linked to the subject-matter of the public contract. In order to better integrate social considerations in public procurement, procurers may ***also be allowed to*** include, in the award criterion ***of the most economically advantageous tender***, characteristics related to the working conditions ***of the persons directly participating in the process of production or provision in question***. Those characteristics may ***only*** concern the

Amendment

(41) Furthermore, in technical specifications, in award criteria ***and in contract performance clauses***, contracting authorities should be allowed to refer to a specific production process ***including for example social and environmental aspects***, a specific mode of provision of services, or a specific process for any other stage of the life cycle of a product or service, provided that they are linked to the subject-matter of the public contract. In order to better integrate social considerations in public procurement, procurers may include, in the award ***criteria and in contract performance clauses***, characteristics related to the working, ***employment and environmental conditions and require the*** production of

protection of health of the staff involved in the production process or the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract, including accessibility for persons with disabilities. Any award criteria which include those characteristics should in any event remain limited to characteristics that have immediate consequences on staff members in their working environment. They should be applied in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services²² and in a way that does not discriminate directly or indirectly against economic operators from other Member States or from third countries parties to the Agreement or to Free Trade Agreements to which the Union is party. For service contracts and for contracts involving the design of works, contracting authorities should also be allowed to use as an award criterion the organisation, qualification and experience of the staff assigned to performing the contract in question, as this may affect the quality of contract performance and, as a result, the economic value of the tender.

certificates or labels drawn up by independent bodies attesting compliance by the economic operator with rules and standards set in those fields, which apply where the works are executed, services provided or goods produced or supplied, as set out in international conventions and in Union and national law as well as in collective agreements concluded in accordance with national law and practices which respect Union law. Those characteristics may concern *among others* the protection of health of the staff involved in the production process or the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract, including accessibility for persons with disabilities. Any award criteria which include those characteristics should in any event remain limited to characteristics that have immediate consequences on staff members in their working environment. They should be applied in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services²² and in a way that does not discriminate directly or indirectly against economic operators from other Member States or from third countries parties to the Agreement or to Free Trade Agreements to which the Union is party. For service contracts and for contracts involving the design of works, contracting authorities should also be allowed to use as an award criterion the organisation, qualification and experience of the staff assigned to performing the contract in question, as this may affect the quality of contract performance and, as a result, the economic value of the tender *which offers the best value for money.*

Justification

Social considerations are not enough covered by the Commission proposal. Their application should be allowed in all phases of the procurement process as long as they are clearly linked to the subject matter of the contract.

Amendment 41

Proposal for a directive Recital 41 a (new)

Text proposed by the Commission

Amendment

(41a) Taking into account the recent case-law of the Court of Justice of the European Union, contracting authorities should be permitted to choose an award criterion which refers to the fact that the product concerned is of fair trade origin, including the requirement to pay a minimum price and price premium to producers.

Amendment 42

Proposal for a directive Recital 42

Text proposed by the Commission

Amendment

(42) Tenders that appear abnormally low in relation to the works, supplies or services might be based on technically, economically or legally unsound assumptions or practices. In order to prevent possible disadvantages during contract performance, contracting authorities should be obliged to ask for an explanation of the price charged where a tender significantly undercuts the prices demanded by other tenderers. Where the tenderer cannot provide a sufficient explanation, the contracting authority should be entitled to reject the tender. Rejection should be mandatory in cases where the contracting authority has established that the abnormally low price

(42) Tenders that appear abnormally low in relation to the works, supplies or services might be based on technically, economically or legally unsound assumptions or practices. In order to prevent possible disadvantages during contract performance, contracting authorities should be obliged to ask for an explanation of the price charged where a tender significantly undercuts the prices demanded by other tenderers. Where the tenderer cannot provide a sufficient explanation, the contracting authority should be entitled to reject the tender. Rejection should be mandatory in cases where the contracting authority has established that the abnormally low price

charged results from non-compliance with ***mandatory Union legislation in the fields of social, labour or environmental law or international labour law provisions.***

charged results from non-compliance with social, labour or environmental law ***provisions referred to in the general principles of this Directive.***

Amendment 43
Proposal for a directive
Recital 43

Text proposed by the Commission

(43) Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory, are linked to the subject-matter of the contract and are indicated in the contract notice, the prior information notice used as a means of calling for competition or the procurement documents. They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment, protection of the environment or animal welfare. For instance, mention may be made, amongst other things, of the requirements — applicable during performance of the contract — to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with fundamental International Labour Organisation (ILO) Conventions, even where such Conventions have not been implemented in national law, and to recruit more disadvantaged persons than are required under national legislation.

Amendment

(43) Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory, are ***directly*** linked to the subject-matter of the contract ***and to the principle of the procurement related to compliance with environmental, social and labour law provisions*** and are indicated in the contract notice, the prior information notice used as a means of calling for competition or the procurement documents. They may, in particular, be intended to favour on-site vocational ***or professional*** training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment, protection of the environment or animal welfare. For instance, mention may be made, amongst other things, of the requirements — applicable during performance of the contract — to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with fundamental International Labour Organisation (ILO) Conventions, even where such Conventions have not been implemented in national law, and to recruit more disadvantaged persons than are required under national legislation.

Amendment 44

Proposal for a directive
Recital 43 a (new)

Text proposed by the Commission

Amendment

(43a) The Commission should assist Member States to provide training and guidance on competitive dialogue to SMEs, providing examples of its application and value, in order to encourage uptake.

Amendment 45

Proposal for a directive
Recital 44

Text proposed by the Commission

Amendment

(44) The laws, regulations and collective agreements, at both national and Union level, that are in force in the areas of employment conditions and safety at work apply during the performance of a public contract, provided that such rules, and their application, comply with Union law. In cross-border situations, where workers from one Member State provide services in another Member State for the purpose of performing a public contract, Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services lays down the minimum conditions that must be observed by the host country in respect of such posted workers. Where national law contains provisions to this effect, non-compliance with those obligations ***may*** be considered to be grave misconduct on the part of the economic operator concerned, ***liable to*** lead to the exclusion of that economic operator from the procedure for the award of a public contract.

(44) Member State should ensure that economic operators comply with the environmental, social and labour law provisions which apply at the place where the works are executed, services provided or goods produced or supplied, as set out in international conventions listed in Annex XI and in Union and national law as well as in collective agreements concluded in accordance with national law and practices which respect Union law. In cross-border situations, where workers from one Member State provide services in another Member State for the purpose of performing a public contract, Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services lays down the minimum conditions that must be observed by the host country in respect of such posted workers. Where national law contains provisions to this effect, non-compliance with those obligations ***should*** be considered to be grave misconduct on the part of the economic operator concerned, ***which may*** lead to the exclusion of that

economic operator from the procedure for the award of a public contract.

Amendment 46

Proposal for a directive Recital 48 a (new)

Text proposed by the Commission

Amendment

(48a) Contracting authorities should respect time-limits for payment as provided for in Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payments in commercial transactions¹.

¹ *OJ L 148, 23.2.2011, p. 1.*

Amendment 47

Proposal for a directive Recital 49

Text proposed by the Commission

Amendment

(49) The evaluation has shown that ***Member States do not consistently and systematically monitor the implementation and functioning of public procurement rules. This has a negative impact on the correct implementation of provisions stemming from these directives, which is a major source of cost and uncertainty. Several Member States have appointed a national central body dealing with public procurement issues, but the tasks entrusted to such bodies vary considerably across Member States. Clearer, more consistent and authoritative monitoring and control mechanisms would increase knowledge of the functioning of procurement rules, improve legal certainty for businesses and contracting authorities, and contribute to establishing a level playing field. Such mechanisms could***

(49) The evaluation has shown that ***there is still considerable room for improvement in the application of the Union public procurement rules. With a view to ensuring a more efficient and consistent application of the rules, it is on the one hand essential to get a good overview on possible structural problems and general patterns in national procurement policies, in order to address possible problems in a more targeted way. Such an overview should be gained through appropriate monitoring, the results of which should be regularly published, in order to allow for an informed debate on possible improvements of procurement rules and practice. On the other hand, better guidance and assistance to contracting authorities and economic operators could also greatly contribute to enhancing the***

serve as tools for the detection and early resolution of problems, especially with regard to projects cofunded by the Union, and for the identification of structural deficiencies. There is in particular a strong need to coordinate these mechanisms to ensure consistent application, control and monitoring of public procurement policy, as well as systematic assessment of the outcomes of procurement policy across the Union.

efficiency of public procurement, through better knowledge, increased legal certainty and professionalisation of procurement practices. Such guidance should be made available to contracting authorities and economic operators wherever necessary, to ensure correct application of the rules. For that purpose, Member States should ensure that competent authorities or structures are in charge of monitoring, implementation and control of public procurement.

Justification

Alternative proposals on governance.

Amendment 48

Proposal for a directive Recital 50

Text proposed by the Commission

Amendment

(50) Member States should designate a single national authority in charge of monitoring, implementation and control of public procurement. Such a central body should have first-hand and timely information, particularly in relation to different problems affecting the implementation of public procurement law. It should be able to provide immediate feedback on the functioning of the policy and the potential weaknesses in national legislation and practice and contribute to the quick identification of solutions. In view of efficiently fighting corruption and fraud, this central body and the general public should also have the possibility to inspect the texts of concluded contracts. High-value contracts should hence be transmitted to the oversight body with a possibility of interested persons to have access to these documents, to the extent that legitimate public or private interests are not

deleted

jeopardized.

Justification

These articles cause unnecessary administrative burdens. It is up to the Member States to organise their interior administration. Member States can decide to create an over-sight body (article 84) without European regulation. Article 84 is contrary to the principle of subsidiarity.

Amendment 49

**Proposal for a directive
Recital 52**

Text proposed by the Commission

*(52) **Monitoring, oversight and support structures or mechanisms exist already at national level and can of course be used to ensure monitoring, implementation and control of public procurement and to provide the required support to contracting authorities and economic operators.***

Amendment

*(52) **Traceability and transparency of decision-making in procurement procedures is essential for ensuring sound procedures, including effectively fighting corruption and fraud. Contracting authorities should keep copies of concluded high-value contracts to be able to provide access to those documents to interested parties in accordance with applicable rules on access to documentation. Furthermore, the essential elements and decisions of individual procurement procedures should be documented in a procurement report. To limit administrative burdens, the procurement report should refer to information already contained in the relevant contract award notices. The electronic systems for publication of those notices, managed by the Commission, should also be improved with a view to facilitating data entry while making it easier to extract reports and exchange data between systems.***

Justification

Alternative proposals on governance.

Amendment 50

Proposal for a directive
Recital 53

Text proposed by the Commission

Amendment

(53) Effective cooperation is necessary to ensure consistent advice and practice within each Member State and across the Union. Bodies designated for monitoring, implementation, control and technical assistance should be able to share information and cooperate; in the same context, the national authority designated by each Member State should act as the preferred contact point with the Commission services for the purpose of collecting data, exchanging information and monitoring the implementation of Union public procurement law.

deleted

Justification

Alternative proposals on governance.

Amendment 51

Proposal for a directive
Recital 53 a (new)

Text proposed by the Commission

Amendment

(53a) The way this Directive is transposed is of utmost importance to the efforts of simplification, as well as to ensure a uniform approach to the interpretation and application of Union rules on public procurement, thus contributing to the necessary legal certainty required by contracting authorities, in particular at sub-central level, and by SMEs. The Commission and the Member States should therefore ensure that this Directive is transposed taking into account the major impact of the public procurement national legislation on the process of accessing Union funds. Therefore it is of utmost importance for the Member States

to avoid as far as possible any fragmentation in interpretation and application, while also contributing to simplification at national level.

Justification

It is necessary to ensure that transposition does not hamper the efforts of simplification and harmonisation, in order to avoid the fragmentation of rules across the Union, which would affect mostly SMEs and smaller contracting authorities, at regional and local level.

Amendment 52

Proposal for a directive

Recital 56

Text proposed by the Commission

(56) In order to ensure uniform conditions for the implementation of this Directive, as for the drawing up of the standard forms for the publication of notices, the standard form for the European Procurement Passport ***and the common template to be used by the oversight bodies for drawing up the implementation and statistical report***, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No. 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers. The advisory procedure should be used for the adoption of these implementing acts, which do not have any impact either from the financial point of views or on the nature and scope of obligations stemming from this Directive. On the contrary, these acts are characterised by a mere administrative purpose and serve to facilitate the application of the rules set by this Directive.

Amendment

(56) In order to ensure uniform conditions for the implementation of this Directive, as for the drawing up of the standard forms for the publication of notices ***and*** the standard form for the European Procurement Passport, implementing powers should be conferred on the Commission. Those powers should be exercised in accordance with Regulation (EU) No. 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by the Member States of the Commission's exercise of implementing powers. The advisory procedure should be used for the adoption of these implementing acts, which do not have any impact either from the financial point of views or on the nature and scope of obligations stemming from this Directive. On the contrary, these acts are characterised by a mere administrative purpose and serve to facilitate the application of the rules set by this Directive.

Amendment 53

Proposal for a directive Article 1 – paragraph 2

Text proposed by the Commission

2. Procurement within the meaning of this Directive is the ***purchase or other forms of*** acquisition of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, ***whether or not the works, supplies or services are intended for a public purpose.***

An entirety of works, supplies and/or services, even if purchased through different contracts, constitutes a single procurement within the meaning of this Directive, if the contracts are part of one single project.

Amendment 54

Proposal for a directive Article 1 – paragraphs 2 a and 2 b (new)

Text proposed by the Commission

Amendment 55

Proposal for a directive Article 2 – paragraph 1 – point 6 – point a

Amendment

2. Procurement within the meaning of this Directive is the acquisition of works, supplies or services as referred to in this Directive by one or more contracting authorities from economic operators chosen by those contracting authorities.

Amendment

2a. This Directive is without prejudice to the right of public authorities at all levels to decide whether, how and to what extent they want to perform public functions themselves pursuant to Protocol (No 26) on Services of General Interest and Article 14 TFEU.

2b. This Directive does not affect the way in which the Member States organise their social security legislation.

Text proposed by the Commission

(a) they are established for or have the specific ***purpose of meeting needs in the general interest, not having an industrial or commercial character; for that purpose, a body which operates in normal market conditions, aims to make a profit, and bears the losses resulting from the exercise of its activity does not have the*** purpose of meeting needs in the general interest, not having an industrial or commercial character;

Amendment

(a) they are established for or have the specific purpose of meeting needs in the general interest, not having an industrial or commercial character;

Amendment 56

**Proposal for a directive
Article 2 – paragraph 1 – point 8 – point c**

Text proposed by the Commission

(c) the realisation, ***by whatever means,*** of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work;

Amendment

(c) the realisation of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work;

Amendment 57

**Proposal for a directive
Article 2 – paragraph 1 – point 15**

Text proposed by the Commission

(15) ‘procurement documents’ means ***all documents*** produced or referred to by the contracting authority to describe or determine elements of the procurement or the procedure, including the contract notice, the prior information notice where it is used a means of calling for competition, the technical specifications, the descriptive document, proposed conditions of contract, formats for the presentation of documents by candidates

Amendment

(15) ‘procurement documents’ means ***any document*** produced or referred to by the contracting authority to describe or determine elements of the procurement or the procedure, including the contract notice, the prior information notice where it is used a means of calling for competition, the technical specifications, the descriptive document, proposed conditions of contract, formats for the presentation of documents by candidates

and tenderers, information on generally applicable obligations and any additional documents.

and tenderers, information on generally applicable obligations and any additional documents.

Amendment 58

Proposal for a directive Article 2 – point 22

Text proposed by the Commission

(22) ‘life cycle’ means all consecutive **and/or** interlinked stages, including production, transport, use and maintenance, **throughout the existence of a product or a works or the provision of a service**, from raw material acquisition or generation of resources to disposal, clearance and finalisation.

Amendment

(22) ‘life cycle’ means all consecutive or interlinked stages **throughout the existence of a product or a work or the provision of a service**,, including **research, development**, production, transport, use and maintenance, from raw material acquisition or generation of resources to disposal, clearance and finalisation.

Amendment 59

Proposal for a directive Article 2 – point 23 a (new)

Text proposed by the Commission

Amendment

(23a) ‘innovation’ means the implementation of a new or significantly improved good, service or process, a new marketing method, or a new organisational method in business practices, workplace organisation or external relations that helps solve societal challenges or supports the Europe 2020 strategy for smart, sustainable and inclusive growth.

Amendment 60

Proposal for a directive Article 4 – paragraph 1 – point d

Text proposed by the Commission

(d) EUR **500 000** for public contracts for

Amendment

(d) EUR **750 000** for public contracts for

social and other specific services listed in Annex XVI.

social and other specific services listed in Annex XVI.

Amendment 61

Proposal for a directive

Article 6 – paragraph 1 – subparagraph 1

Text proposed by the Commission

Every two years from 30 June 2014, the Commission shall verify that the thresholds set out in points (a), (b) and (c) of Article 4 correspond to the thresholds established in the Government Procurement Agreement and shall, where necessary, revise them.

Amendment

Every two years from 30 June 2014, the Commission shall verify that the thresholds set out in points (a), (b) and (c) of Article 4 correspond to the thresholds established in the Government Procurement Agreement and shall, where necessary ***and after consulting the Member States on the application of the thresholds to certain sectors and types of contracts***, revise them. ***The Commission shall increase the thresholds, where possible, and, should they be established in the Government Procurement Agreement, give priority to increasing them during the next round of negotiations.***

Amendment 62

Proposal for a directive

Article 7 a (new)

Text proposed by the Commission

Amendment

Article 7a

Exclusion for contracts falling under a fixed price regime

This Directive shall not apply to contracts which are subject by law to a fixed price, where the procured products or services do not differ significantly in terms of their composition or characteristics.

Amendment 63

Proposal for a directive
Article 7 b (new)

Text proposed by the Commission

Amendment

Article 7b

Exclusion for services awarded on the basis of an exclusive right

This Directive shall not apply to public service contracts awarded by a contracting authority to another contracting authority or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a published law, regulation or administrative provision which is compatible with the Treaties.

Amendment 64
Proposal for a directive
Article 10 – paragraph 1 – point b

Text proposed by the Commission

Amendment

(b) the acquisition, development, production or co-production of programme material intended for ***audiovisual*** media services, ***that are awarded by broadcasters***, or contracts for broadcasting ***time that are awarded to audiovisual media service providers***;

(b) the acquisition, development, production or co-production of programme material intended for media services, or contracts for broadcasting ***or distribution and transmission***; ***for the purposes of this Directive, 'media services' means all forms of transmission and distribution using any form of electronic network***;

Amendment 65

Proposal for a directive
Article 10 – paragraph 1 – point c

Text proposed by the Commission

Amendment

(c) arbitration and conciliation services;

(c) arbitration and conciliation services ***and any of the following legal services***:
(i) legal representation of a client in judicial or administrative proceedings

before courts, tribunals or public authorities by a lawyer within the meaning of Article 1 of Directive 77/249/EEC;

(ii) legal services provided by trustees, appointed guardians or other legal services the providers of which are designated by a court or tribunal in the Member State concerned;

(iii) legal services which in the Member State concerned are connected with the exercise of official authority;

(iv) certification and authentication of documents by notaries;

Amendment 66
Proposal for a directive
Article 10 – paragraph 1 – point d

Text proposed by the Commission

(d) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive 2004/39/EC of the European Parliament and of the Council central bank services and operations conducted with the European Financial Stability Facility;

Amendment

(d) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive 2004/39/EC of the European Parliament and of the Council, ***or transactions by contracting authorities to raise money or capital***, central bank services and operations conducted with the European Financial Stability Facility

Amendment 67
Proposal for a directive
Article 10 – paragraph 1 – point e a (new)

Text proposed by the Commission

(ea) civil defence, civil protection services and danger prevention;

Amendment

Amendment 68
Proposal for a directive
Article 10 – paragraph 1 – point f a (new)

Text proposed by the Commission

Amendment

*(fa) provision of international assistance,
including development aid;*

Amendment 69
Proposal for a directive
Article 10 – paragraph 2

Text proposed by the Commission

Amendment

*The audiovisual media services referred to
in point (b) of the first paragraph shall
include any transmission and distribution
using any form of electronic network.*

deleted

Amendment 70
Proposal for a directive
Article 11 – title

Text proposed by the Commission

Amendment

Relations between public authorities

Cooperation between public authorities

Amendment 71

Proposal for a directive
Article 11 – paragraph 1 – subparagraph 1 – point a

Text proposed by the Commission

Amendment

(a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments.

(a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments, *that is to say it exerts a decisive influence over both strategic objectives and significant decisions of the controlled legal person.*

Amendment 72
Proposal for a directive
Article 11 – paragraph 1 – subparagraph 1 - point b

Text proposed by the Commission

(b) at least **90 %** of the **activities** of that legal person are carried out for the controlling contracting authority or for other legal persons controlled by that contracting authority;

Amendment

(b) at least **80 %** of the **average total turnover** of that legal person are carried out for the controlling contracting authority or for other legal persons controlled by that contracting authority;

Amendment 73
Proposal for a directive
Article 11 – paragraph 1 – subparagraph 1 - point c

Text proposed by the Commission

(c) there is no private participation in the controlled legal person.

Amendment

(c) there is no private participation in the controlled legal person, **with the exception of non-controlling or legally enforced forms of private participation, in conformity with the Treaties, and which do not exert any influence on the decisions of the controlling contracting authority.**

Amendment 74
Proposal for a directive
Article 11 – paragraph 1 – subparagraph 2

Text proposed by the Commission

A contracting authority shall be deemed to exercise over a legal person a control similar to that which it exercises over its own departments within the meaning of point (a) of the first subparagraph where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person.

Amendment

deleted

Amendment 75
Proposal for a directive
Article 11 – paragraph 2

Text proposed by the Commission

2. Paragraph 1 also applies where a controlled entity which is a contracting authority awards a contract to its controlling entity, or to another legal person controlled by the same contracting authority, provided that there is no private participation in the legal person being awarded the public contract.

Amendment

2. Paragraph 1 also applies where a controlled entity, **or entities**, which is/**are** **(a)** contracting authority/**authorities** award(s) a contract to its controlling entity, **or entities**, or to another legal person controlled by the same contracting authority, provided that there is no private participation in the legal person being awarded the public contract, **with the exception of non-controlling or legally enforced forms of private participation, in conformity with the Treaties, and which do not exert any influence on the decisions of the controlling contracting authority.**

Amendment 76
Proposal for a directive
Article 11 – paragraph 2

Text proposed by the Commission

2. Paragraph 1 also applies where a controlled entity which is a contracting authority awards a contract to its controlling entity, or to another legal person controlled by the same contracting authority, provided that there is no private participation in the legal person being awarded the public contract.

Amendment

(Does not affect English version.)

Amendment 77

Proposal for a directive
Article 11 – paragraph 3 – subparagraph 1 – introductory part

Text proposed by the Commission

3. A contracting authority, which does not exercise over a legal person control within

Amendment

3. A contracting authority, which does not exercise over a legal person control within

the meaning of paragraph 1, may nevertheless award a public contract **without applying this** Directive to a legal person which it controls jointly with other contracting authorities, where the following conditions are fulfilled:

the meaning **of point (a)** of paragraph 1 **subparagraph 1 of this Article**, may nevertheless award a public contract **outside the scope of** this Directive to a legal person which it controls jointly with other contracting authorities, where the following conditions are fulfilled:

Amendment 78

Proposal for a directive

Article 11 – paragraph 3 – subparagraph 1 - point b

Text proposed by the Commission

(b) **at least 90 %** of the **activities** of that legal person are carried out for the controlling contracting authority or for other legal persons controlled by that contracting authority;

Amendment

(b) at least **80 %** of the **average total turnover** of that legal person are carried out for the controlling contracting authority or for other legal persons controlled by that contracting authority;

Amendment 79

Proposal for a directive

Article 11 – paragraph 3 – subparagraph 1 - point c

Text proposed by the Commission

(c) there is no private participation in the controlled legal person.

Amendment

(c) there is no private participation in the controlled legal person, **with the exception of non-controlling or legally enforced forms of private participation, in conformity with the Treaties, and which do not exert any influence on the decisions of the controlling contracting authorities.**

Amendment 80

Proposal for a directive

Article 11 – paragraph 3 – subparagraph 2 – point a

Text proposed by the Commission

(a) the decision-making bodies of the controlled legal person are composed of

Amendment

(a) the decision-making bodies of the controlled legal person are composed of

representatives of **all** participating contracting authorities;

representatives of **the** participating contracting authorities, **while one representative may represent one or many participating contracting authorities**;

Amendment 81

Proposal for a directive

Article 11 – paragraph 3 – subparagraph 2 – point c

Text proposed by the Commission

Amendment

(c) the controlled legal person does not pursue any interests which are **distinct from** that of the public authorities affiliated to it;

(c) the controlled legal person does not pursue any interests which are **in conflict with** that of the public authorities affiliated to it;

Amendment 82

Proposal for a directive

Article 11 – paragraph 3 – subparagraph 2 – point d

Text proposed by the Commission

Amendment

(d) the controlled legal person does not draw any gains other than the reimbursement of actual costs from the public contracts with the contracting authorities.

deleted

Amendment 83

Proposal for a directive

Article 11 – paragraph 4

Text proposed by the Commission

Amendment

4. An agreement concluded between two or more contracting authorities **shall not be deemed to be a public contract within the meaning of Article 2(6)** of this Directive where the following cumulative conditions are fulfilled:

4. An agreement concluded between two or more contracting authorities **shall fall outside the scope** of this Directive where the following cumulative conditions are fulfilled:

(a) the agreement establishes a genuine cooperation between the participating

(a) the agreement establishes a genuine cooperation between the participating

contracting authorities aimed at carrying out jointly their public service tasks and involving mutual rights and obligations of the parties;

(b) the agreement is governed only by considerations relating to the public interest;

(c) the participating contracting authorities do not perform on the open market more than 10 % in terms of turnover of the activities which are relevant in the context of the agreement;

(d) the agreement does not involve financial transfers between the participating contracting authorities, other than those corresponding to the reimbursement of actual costs of the works, services or supplies;

(e) there is no private participation in any of the contracting authorities involved.

contracting authorities aimed at carrying out jointly their public service tasks and involving mutual rights and obligations of the parties ***for the purpose of the performance of a shared public service task or the pooling of resources in order to enable them to perform their own tasks;***

(b) the agreement is governed only by considerations relating to the public interest;

(c) there is no private participation in any of the contracting authorities involved. with the exception of non-controlling or legally enforced forms of private participation, in conformity with the Treaties, and which do not exert any influence on the decisions of the controlling contracting authorities.

Amendment 84
Proposal for a directive
Article 11 – paragraph 4 – point a

Text proposed by the Commission

(a) the agreement establishes a genuine cooperation between the participating contracting authorities aimed at carrying out jointly their public service tasks and involving mutual rights and obligations of the parties;

Amendment

Does not concern the English version.

Amendment 85

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Proposal for a directive
Article 11 – paragraph 4 a (new)

Text proposed by the Commission

Amendment

4a. This Directive shall not apply to agreements, decisions or other legal instruments, concluded between several contracting authorities or groupings of contracting authorities, which make provision, in the context of the internal institutional and administrative organisation of a Member State and pursuant to applicable national law or regulation, for the transfer of powers or for the transfer of a public service task between the parties.

There shall be no private participation in any of the contracting authorities or entities involved.

Amendment 86
Proposal for a directive
Article 11 – paragraph 5 – subparagraph 2

Text proposed by the Commission

Amendment

The exclusions provided for in paragraphs 1 to 4 shall cease to apply from the moment any private participation takes place, with the effect that ongoing contracts need to be opened to competition through regular procurement procedures.

deleted

Amendment 87

Proposal for a directive
Article 14 – paragraph 1

Text proposed by the Commission

Amendment

1. Subject to Article 346 of the Treaty on

1. Subject to Article 346 of the Treaty on

the Functioning of the European Union, this Directive shall apply to the awarding of public contracts and to design contests organised in the fields of defence and security, with the exception of the following contracts:

(a) contracts *falling within the scope of Directive 2009/81/EC*;

(b) contracts *to which Directive 2009/81/EC does not apply pursuant to Articles 8, 12 and 13 thereof*.

the Functioning of the European Union, this Directive shall apply to the awarding of public contracts and to design contests organised in the fields of defence and security, with the exception of the following contracts:

(a) contracts *for which the application of the rules of this Directive would oblige a Member State to supply information the disclosure of which it considers contrary to the essential interests of its security, or contracts for which the procurement and performance of the contract is accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in a Member State where the Member State has determined that the essential interests concerned cannot be guaranteed by less intrusive measures as for instance those referred to in paragraph 2*;

(b) contracts *awarded in the framework of a cooperative programme referred to in point (c) of Article 13 of Directive 2009/81/EC*;

(ba) contracts awarded by a government to another government relating to works and services directly linked to military equipment or sensitive equipment, or works and services specifically for military purposes, or sensitive works and sensitive services;

(bb) contracts awarded in a third country, carried out when forces are deployed outside the territory of the Union where operational needs require them to be concluded with economic operators located in the area of operations.

Amendment 88

Proposal for a directive Article 14 – paragraph 2

Text proposed by the Commission

2. This Directive shall not apply to public contracts and design contests other than those referred to in paragraph 1 to the extent that the protection of the essential security interests of a Member State cannot be guaranteed in a procurement procedure as provided for in this Directive.

Amendment

2. This Directive shall not apply to public contracts and design contests other than those referred to in paragraph 1 to the extent that the protection of the essential security interests of a Member State cannot be guaranteed in a procurement procedure as provided for in this Directive ***not otherwise exempted under paragraph 1, to the extent that the protection of the essential security interests of a Member State cannot be guaranteed by less intrusive measures, for instance by imposing requirements aimed at protecting the confidential nature of information which the contracting authority makes available in a contract award procedure as provided for in this Directive.***

Amendment 89

**Proposal for a directive
Article 15**

Text proposed by the Commission

Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate way.

The design of the procurement shall not be made with the objective of excluding it from the scope of this Directive or of artificially narrowing competition.

Amendment

1. Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate way.

The design of the procurement shall not be made with the objective of excluding it from the scope of this Directive or of artificially narrowing competition.

2. Member States shall ensure that economic operators comply with the environmental, social and labour law provisions which apply at the place where the works are executed, services provided or goods produced or supplied, as set out in international conventions listed in Annex XI and in Union and national law as well as in collective agreements

concluded in accordance with national law and practices which respect Union law.

Amendment 90

Proposal for a directive

Article 16 – paragraph 1 – subparagraph 2

Text proposed by the Commission

However, in the case of public service and public works contracts as well as public supply contracts covering in addition services or siting and installation operations, legal persons may be required to indicate, in the tender or the request to participate, *the names* and relevant professional *qualifications* of the staff to be responsible for the performance of the contract in question.

Amendment

However, in the case of public service and public works contracts as well as public supply contracts covering in addition services or siting and installation operations, legal persons may be required to indicate, in the tender or the request to participate, *the number* and relevant professional *qualification levels* of the staff to be responsible for the performance of the contract in question.

Justification

The current text seems to indicate that, for the provision of services which in their largest part consist of professional staff (such as engineering consultancy), the project teams may need to be defined by the candidates in the request to participate. It is in practical terms impossible for a tenderer to commit the allocated staff at this stage, taking into consideration the whole duration of the selection and award procedure

Amendment 91

Proposal for a directive

Article 16 – paragraph 2 – subparagraph 1 a (new)

Text proposed by the Commission

Amendment

Contracting authorities shall give the possibility to a temporary association of economic operators to fulfil all technical, legal and financial requirements as a single entity, summing up the individual characteristics of the components of the group.

Amendment 92

Proposal for a directive
Article 18 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. This Article shall not prevent public disclosure of non-confidential parts of concluded contracts, including any subsequent changes.

Amendment 93
Proposal for a directive
Article 19 – paragraph 1 – subparagraph 1 – point c

Text proposed by the Commission

Amendment

(c) telephone in the cases and circumstances referred to in paragraph 6;

deleted

Amendment 94

Proposal for a directive
Article 19 – paragraph 2 – subparagraph 1

Text proposed by the Commission

Amendment

The means of communication chosen must be generally available and not restrict economic operators' access to the procurement procedure.

The means of communication chosen must be generally available, **accessible to persons with disabilities**, and not restrict economic operators' access to the procurement procedure.

Amendment 95

Proposal for a directive
Article 19 - paragraph 2 – subparagraph 2

Text proposed by the Commission

Amendment

In all communication, exchange and storage of information, contracting authorities shall ensure that the integrity of data and the confidentiality of tenders and requests to participate are preserved. They

In all communication, exchange and storage of information, contracting authorities shall ensure that the integrity of data and the confidentiality of tenders and requests to participate **as well as of**

shall examine the content of tenders and requests to participate only after the time limit set for submitting them has expired

information referred to in Article 18, are preserved. They shall examine the content of tenders and requests to participate only after the time limit set for submitting them has expired.

Amendment 96

Proposal for a directive

Article 19 – paragraph 3 – subparagraph 3

Text proposed by the Commission

To ensure the interoperability of technical formats as well as of process and messaging standards, especially in a cross-border context, the Commission ***shall be empowered to adopt delegated acts in accordance with Article 89 to establish the mandatory*** use of specific technical standards, at least with regard to the use of e-submission, electronic catalogues and means for electronic authentication.

Amendment

To ensure the interoperability of technical formats as well as of process and messaging standards, especially in a cross-border context, the Commission ***may recommend the*** use of specific technical standards, at least with regard to the use of e-submission, electronic catalogues and means for electronic authentication.

(This amendment applies throughout the text. Adopting it will necessitate corresponding changes throughout.)

Amendment 97

Proposal for a directive

Article 19 – paragraph 6 – subparagraph 1 – point a

Text proposed by the Commission

(a) requests to participate in procedures for the award of public contracts may be made in writing ***or by telephone; in the latter case, a written confirmation must be sent before expiry of the time limit set for their receipt;***

Amendment

(a) requests to participate in procedures for the award of public contracts may be made in writing;

Amendment 98

Proposal for a directive

Article 19 – paragraph 7 – subparagraph 1 a (new)

Text proposed by the Commission

Amendment

For works contracts above the threshold set out in Article 4, Member States may require the use by both contracting authorities and tenderers of building information electronic modelling tools following the general timescales for the implementation of electronic procurement set out in the first subparagraph.

Amendment 99

Proposal for a directive Article 21 – paragraph 1

Text proposed by the Commission

Amendment

1. Member States shall ***provide for rules*** to effectively prevent, identify and immediately remedy conflicts of interests arising in the conduct of procurement procedures ***that are subject to this Directive, including the design and preparation of the procedure, the drawing-up of the procurement documents, the selection of candidates and tenderers and the award of the contract***, so as to avoid any distortion of competition and ensure equal treatment of all ***tenderers***.

The ***notion of conflict*** of interests shall at least cover any situation where ***the categories of persons referred to in paragraph 2*** have, directly or indirectly, a ***private interest in the outcome of the procurement procedure***, which ***may*** be perceived to ***impair the impartial and objective performance of their duties***.

1. Member States shall ***put in place mechanisms*** to effectively prevent, identify and immediately remedy conflicts of interests arising in the conduct of procurement procedures so as to avoid any distortion of competition and ensure equal treatment of all ***economic operators***.

The ***concept of conflicts*** of interests shall at least cover any situation where ***staff or decision-making members of the contracting authority or of a procurement service provider acting on behalf of the contracting authority who are involved in the conduct of the procurement procedure or may influence the outcome of that procedure*** have, directly or indirectly, a ***financial, economic or other personal or common*** interest which might be perceived to ***compromise their impartiality and independence in the context of the procurement procedure***.

For the purposes of this Article, ‘private interests’ means any family, emotional life, economic, political or other shared interests with the candidates or the tenderers, including conflicting professional interests.

Amendment 100

Proposal for a directive Article 21 – paragraphs 2, 3 and 4

Text proposed by the Commission

Amendment

2. The rules referred to in paragraph 1 shall apply to conflicts of interests involving at least the following categories of persons: *deleted*

(a) staff members of the contracting authority, procurement service providers or staff members of other service providers who are involved in the conduct of the procurement procedure;

(b) the chairperson of the contracting authority and members of decision-making bodies of the contracting authority who, without necessarily being involved in the conduct of the procurement procedure, may nevertheless influence the outcome of that procedure.

3. Member States shall ensure in particular:

(a) that staff members referred to in paragraph 2(a) are required to disclose any conflict of interests in relation to any of the candidates or tenderers, as soon as they become aware of such conflicts, in order to enable the contracting authority to take remedial action;

(b) that candidates and tenderers, are required to submit at the beginning of the procurement procedure a declaration on the existence of any privileged links with the persons referred to in paragraph 2(b),

which are likely to place those persons in a situation of conflict of interests; the contracting authority shall indicate in the individual report referred to in Article 85 whether any candidate or tenderer has submitted a declaration.

In the event of a conflict of interests, the contracting authority shall take appropriate measures. Those measures may include the recusal of the staff member in question from involvement in the affected procurement procedure or the re-assignment of the staff member's duties and responsibilities. Where a conflict of interests cannot be effectively remedied by other means, the candidate or tenderer concerned shall be excluded from the procedure.

Where privileged links are identified, the contracting authority shall immediately inform the oversight body designated in accordance with Article 84 and take appropriate measures to avoid any undue influence on the award process and ensure equal treatment of candidates and tenderers. Where the conflict of interests cannot be effectively remedied by other means, the candidate or tenderer concerned shall be excluded from the procedure.

4. All measures taken pursuant to this Article shall be documented in the individual report referred to in Article 85.

Amendment 101

Proposal for a directive Article 23 – paragraph 1

Text proposed by the Commission

1. As far as covered by Annexes I, II, IV and V and the General Notes to the European Union's Appendix 1 to the Government Procurement Agreement and

Amendment

1. As far as covered by Annexes I, II, IV and V and the General Notes to the European Union's Appendix 1 to the Government Procurement Agreement and

by the other international agreements by which the Union is bound, as listed in Annex V to this Directive, contracting authorities shall accord to the works, supplies, services and economic operators of the signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the Union. By applying this Directive to economic operators of the signatories to those agreements, contracting authorities shall comply with those agreements.

by the other international agreements by which the Union is bound — ***including commitments within the framework of bilateral trade agreements*** — as listed in Annex V to this Directive, contracting authorities shall accord to the works, supplies, services and economic operators of the signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the Union. By applying this Directive to economic operators of the signatories to those agreements, contracting authorities shall comply with those agreements.

Amendment 102

Proposal for a directive

Article 24 – paragraph 1 – subparagraph 3

Text proposed by the Commission

Member States ***may*** provide that contracting authorities may apply innovation partnerships as regulated in this Directive.

Amendment

Member States ***shall*** provide that contracting authorities may apply innovation partnerships as regulated in this Directive.

Amendment 103

Proposal for a directive

Article 24 – paragraph 1 – subparagraph 4 – introductory part

Text proposed by the Commission

They may also provide that contracting authorities may use a competitive procedure with negotiation or a competitive dialogue in any of the following cases:

Amendment

Member States shall provide that contracting authorities may use a competitive procedure with negotiation or a competitive dialogue in any of the following cases:

Amendment 104

Proposal for a directive

Article 24 – paragraph 1 – subparagraph 4 – point c a (new)

Text proposed by the Commission

Amendment

(ca) with regard to knowledge-based services;

Justification

The competitive procedure with negotiation is the only possible procedure that is appropriate for creative services because their result cannot be anticipated. Therefore "intellectual or knowledge-based services" (definition proposed in Article 1), should be clearly mentioned as such and the transposition of the competitive procedure with negotiation made compulsory.

Amendment 105

Proposal for a directive

Article 24 – paragraph 1 – subparagraph 4 – point e

Text proposed by the Commission

Amendment

(e) due to specific circumstances related to the nature or the complexity of the works, supplies or services or the risks attaching thereto, the contract cannot be awarded without prior negotiations.

(e) where contracting authorities justify in the call for competition that due to specific circumstances related to the nature, ***the legal or financial makeup or*** the complexity of the works, supplies or services or the risks attaching thereto, the contract cannot be awarded without prior negotiations.

Justification

Making the negotiated procedure also explicitly accessible for the complex contracts, we need a limited broadening of the proposed scope by the Commission proposal.

Amendment 106

Proposal for a directive

Article 24 – paragraph 1 – subparagraph 4 – point e a (new)

Text proposed by the Commission

Amendment

(ea) where the specific procurement requirements of the contracting authority

cannot be met without exclusive recourse to standardised solutions.

Justification

Contracting authorities should be able to choose the competitive procedure with negotiation if they cannot have exclusive recourse to standardised products or services in the procurement procedure.

Amendment 107
Proposal for a directive
Article 24 – paragraph 1 – subparagraph 5

Text proposed by the Commission

Amendment

Member States may decide not to transpose into their national law the competitive procedure with negotiation, the competitive dialogue and the innovation partnership procedures.

deleted

Amendment 108

Proposal for a directive
Article 24 – paragraph 2

Text proposed by the Commission

Amendment

2. The call for competition ***may*** be made by ***one of the following means***:

2. The call for competition ***shall*** be made by ***means of a contract notice pursuant to Article 47.***

(a) a contract notice pursuant to Article 47,

(b) where the contract is awarded by restricted or competitive procedure with negotiation by a sub-central contracting authority, by means of a prior information notice pursuant to Article 46(2).

Where the contract is awarded by restricted or competitive procedure with negotiation by a sub-central contracting authority, Member States shall provide, notwithstanding the first subparagraph of this paragraph, that the call for competition may be made by means of a

prior information notice pursuant to Article 46(2). Member States may also reserve this possibility to specific categories of sub-central contracting authorities.

In the case referred to in point (b), economic operators having expressed their interest following the publication of the prior information notice shall subsequently be invited to confirm their interest in writing by means of an 'invitation to confirm interest' in conformity with Article 52.

Where the call for competition is made by means of a prior information notice pursuant to Article 46(2), economic operators, having expressed their interest following the publication of the prior information notice, shall subsequently be invited to confirm their interest in writing by means of an 'invitation to confirm interest' in conformity with Article 52.

Justification

This Amendment adds flexibility on the use of negotiations.

Amendment 109

Proposal for a directive Article 24 – paragraph 3

Text proposed by the Commission

3. Member States *may* provide that contracting authorities may apply a negotiated procedure without prior publication *only in the specific cases and circumstances* referred to *expressly* in Article 30.

Amendment

3. *In the specific cases and circumstances referred to in Article 30*, Member States *shall* provide that contracting authorities may apply a negotiated procedure without prior publication. *Member States shall not allow the use of that procedure in any other cases than those* referred to in Article 30.

Amendment 110

Proposal for a directive Article 26 – paragraph 4

Text proposed by the Commission

4. *Sub-central* contracting authorities may set the time limit for the receipt of tenders by mutual agreement between the contracting authority and the selected

Amendment

4. *Member States shall provide that all or specific categories of sub-central* contracting authorities may set the time limit for the receipt of tenders by mutual

candidates, provided that all candidates have the same time to prepare and submit their tenders. ***Where it is not possible to reach*** agreement on the time limit for the receipt of tenders, the contracting authority shall fix a time limit which shall be at least 10 days from the date of the invitation to tender.

agreement between the contracting authority and the selected candidates, provided that all candidates have the same time to prepare and submit their tenders. ***In the absence of an*** agreement on the time limit for the receipt of tenders, the contracting authority shall fix a time limit which shall be at least 10 days from the date of the invitation to tender.

Amendment 111

Proposal for a directive

Article 27 – paragraph 1 – subparagraph 1

Text proposed by the Commission

1. In competitive procedures with negotiation, any economic operator may submit a request to participate in response to a call for competition by providing the ***requested*** information for qualitative selection.

Amendment

1. In competitive procedures with negotiation, any economic operator may submit a request to participate in response to a call for competition ***containing the information set out in Annex VI parts B and C*** by providing the information for qualitative selection ***that is requested by the contracting authority.***

Amendment 112

Proposal for a directive

Article 27 – paragraph 1 – subparagraph 2

Text proposed by the Commission

In the ***contract notice or in the invitation to confirm interest*** contracting authorities shall ***describe*** the ***procurement and the*** minimum requirements to be met and ***specify*** the award criteria so as to enable economic operators to identify the nature and scope of the procurement and decide whether to request to participate in the ***negotiations. In the technical specifications, contracting authorities shall specify which parts thereof define the minimum requirements.***

Amendment

In the ***procurement documents,*** contracting authorities shall ***describe*** the minimum requirements to be met and the award criteria. ***That description shall be sufficiently precise*** so as to enable economic operators to identify the ***precise*** nature and scope of the procurement and decide whether to request to participate in the ***procedure.***

Amendment 113

Proposal for a directive Article 27 – paragraph 2

Text proposed by the Commission

2. Only those economic operators invited by the contracting authority following their assessment of the requested information may submit **a written** tender which shall be the basis for the subsequent negotiations. Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 64.

Amendment

2. Only those economic operators invited by the contracting authority following their assessment of the requested information may submit **an initial** tender which shall be the basis for the subsequent negotiations. Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 64.

Amendment 114

Proposal for a directive Article 27 – paragraph 3 – subparagraph 2

Text proposed by the Commission

The **following shall not be changed in the course of the negotiations:**

- (a) the description of the procurement;**
- (b) the part of the technical specifications which define the minimum requirements;**
- (c) the award criteria.**

Amendment

The minimum requirements, **the object of the procurement and the award criteria shall not be subject to negotiations.**

Amendment 115

Proposal for a directive Article 27 – paragraph 4 – subparagraph 1

Text proposed by the Commission

4. During the negotiations, contracting authorities shall ensure the equal treatment of all tenderers. To that end, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others. They shall **take**

Amendment

4. During the negotiations, contracting authorities shall ensure the equal treatment of all tenderers. To that end, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others. They shall **inform**

particular care to ensure that all tenderers, whose tenders have not been eliminated pursuant to paragraph 5, are informed in writing of any changes to the technical specifications other than those setting out the minimum requirements, in adequate time to allow such tenderers to modify and re-submit amended tenders following these changes, as appropriate.

all tenderers, whose tenders have not been eliminated pursuant to paragraph 5, in writing of any changes to the technical specifications **or other procurement documents, other** than those setting out the minimum requirements, **providing sufficient time for** such tenderers to modify and re-submit amended tenders following these changes.

Amendment 116

Proposal for a directive Article 27 – paragraph 4 – subparagraph 2

Text proposed by the Commission

Contracting authorities shall not reveal to the other participants **solutions proposed or other** confidential information communicated by a candidate participating in the negotiations without its agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific **solutions or other confidential** information.

Amendment

In accordance with Article 18, contracting authorities shall not reveal to the other participants confidential information communicated by a candidate participating in the negotiations without its agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

Amendment 117

Proposal for a directive Article 28 – paragraph 1 – subparagraph 3

Text proposed by the Commission

Only those economic operators invited by the contracting authority following the assessment of the requested information may participate in the dialogue. Contracting authorities **may limit** the number of suitable candidates to be invited to participate in the procedure in

Amendment

Only those economic operators invited by the contracting authority following the assessment of the requested information may participate in the dialogue. Contracting authorities **shall have the option of appointing from among their staff a project leader to ensure**

accordance with Article 64. ***The contract shall be awarded on the sole basis of the award criterion of the most economically advantageous tender in accordance with Article 66(1)(a).***

compliance with reasonable deadlines by means of effective coordination at each stage of the dialogue. The number of suitable candidates to be invited to participate in the procedure ***may be limited*** in accordance with Article 64.

Amendment 118

Proposal for a directive Article 28 – paragraph 3 – subparagraph 3

Text proposed by the Commission

Contracting authorities shall not reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the dialogue without its agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific ***solutions or other specific confidential*** information.

Amendment

In accordance with Article 18, contracting authorities shall not reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the dialogue without its agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

Amendment 119

Proposal for a directive Article 28 – paragraph 4

Text proposed by the Commission

4. Competitive dialogues may take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria defined in the contract notice or in the descriptive document. In the contract notice or the descriptive document, the contracting authority shall indicate whether it will *us* this option.

Amendment

4. Competitive dialogues may take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria defined in the contract notice or in the descriptive document. In the contract notice or the descriptive document, the contracting authority shall indicate whether it will *use* this option.

Amendment 120

Proposal for a directive
Article 28 – paragraph 5

Text proposed by the Commission

5. The contracting authority **shall** continue the dialogue until it can identify the solution or solutions which are capable of meeting its needs.

Amendment

5. The contracting authority **may either:**

(a) set a timeframe for the dialogue, which shall be given in the contract notice; or

(b) continue the dialogue until it can identify the solution or solutions which are capable of meeting its needs.

Amendment 121

Proposal for a directive
Article 28 – paragraph 6

Text proposed by the Commission

6. Having declared that the dialogue is concluded and having so informed the participants, contracting authorities shall ask **them** to submit their final tenders on the basis of the solution or solutions presented and specified during the dialogue. Those tenders shall contain all the elements required and necessary for the performance of the project.

Amendment

6. Having declared that the dialogue is concluded and having so informed the participants, contracting authorities shall ask **each participant** to submit their final tenders on the basis of the solution or solutions presented and specified during the dialogue. Those tenders shall contain all the elements required and necessary for the performance of the project.

Those tenders may be clarified, specified and optimized at the request of the contracting authority. However, such clarification, specification, optimization or additional information shall not involve changes to the essential aspects of the tender or of the public procurement, including the needs and requirements set out in the contract notice or in the descriptive document, where variations to those aspects, needs and requirements are likely to distort competition or have a discriminatory effect.

Justification

To be consistent with points on confidentiality not all tenderers may offer same solution, especially important in innovative solutions.

Amendment 122

Proposal for a directive

Article 28 – paragraph 7 – subparagraph 2

Text proposed by the Commission

*Where necessary, in order to finalise financial commitments or other terms of the contract, the contracting authority **may negotiate the final terms of the contract with the** tenderer identified as having submitted the most economically advantageous tender in accordance with Article 66(1)(a) provided **such negotiations do** not have the effect of modifying essential aspects of the tender or of the public procurement, including the needs and requirements set out in the contract notice or in the descriptive document and does not risk distorting competition or causing discrimination.*

Amendment

*At the **request of** the contracting authority, the tenderer identified as having submitted the most economically advantageous tender in accordance with Article 66(1) **may be asked to clarify aspects of the tender or confirm commitments contained in the tender** provided **this does** not have the effect of modifying essential aspects of the tender or of the public procurement, including the needs and requirements set out in the contract notice or in the descriptive document and does not risk distorting competition or causing discrimination.*

Justification

The proposed new wording is dangerous as it introduces the possibility for the contracting authorities to put a pressure on the price towards the tenderer identified as having submitted the most economically advantageous tender. The existing wording of directive 2004/18/EC (art. 29 par. 7) is therefore more appropriate, with slight adaptations to the terminology of the Commission proposal.

Amendment 123

Proposal for a directive

Article 28 – paragraph 8

Text proposed by the Commission

8. The contracting authorities **may** specify prizes or payments to the participants in the dialogue.

Amendment

8. The contracting authorities **shall** specify prizes or payments to the participants in the dialogue **based on terms laid down by the**

contract.

Amendment 124

Proposal for a directive Article 29 – paragraph 1

Text proposed by the Commission

1. In innovation partnerships, any economic operator may submit a request to participate in response to a contract notice with a view to establishing a structured partnership for the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works provided that they correspond to the agreed performance levels and costs.

Amendment

1. In innovation partnerships, any economic operator may submit a request to participate in response to a contract notice with a view to establishing a structured partnership for the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works, provided that they correspond to the agreed performance levels and costs. ***The contract setting up the innovation partnership shall be awarded on the sole basis of the award criterion of the most economically advantageous tender in accordance with Article 66(1).***

Justification

Streamlining the procurement process and improving the new innovation partnerships procedure.

Amendment 125

Proposal for a directive Article 29 – paragraph 2

Text proposed by the Commission

2. The partnership shall be structured in successive stages following the sequence of steps in the research and innovation process, ***possibly up to*** the manufacturing of the supply or the provision of the services. ***It shall provide for*** intermediate targets to be attained by the partner and provide for ***payment of the*** remuneration in appropriate instalments. Based on those

Amendment

2. The partnership shall be structured in successive stages following the sequence of steps in the research and innovation process, ***which may include*** the manufacturing of the supply, or the provision of the services ***or the completion of the works***. ***The partnership shall set*** intermediate targets to be attained by the partner and provide for remuneration in

targets, the contracting authority may decide after each stage to terminate the partnership and launch a new procurement procedure for the remaining phases, provided that it *has acquired the relevant intellectual property rights*.

appropriate instalments. Based on those targets, the contracting authority may decide after each stage to terminate the partnership and launch a new procurement procedure for the remaining phases, provided that *the contracting authority has indicated in the procurement documents under which conditions it may make use of this discretion to terminate the partnership*.

Justification

Streamlining the procurement process and improving the innovation partnerships procedure.

Amendment 126

Proposal for a directive Article 29 – paragraphs 3 to 3 f (new)

Text proposed by the Commission

3. The contract *shall be awarded in accordance with the rules for a competitive procedure with negotiation set out in Article 27*.

Amendment

3. *In the procurement documents, contracting authorities shall describe the minimum requirements to be met and the award criteria. That description shall be sufficiently precise so as to enable economic operators to identify the nature and scope of the procurement and to decide whether to request to participate in the procedure.*

The minimum time limit for receipt of requests to participate shall be 35 days from the date on which the contract notice, or where a prior information notice is used as a means of calling for competition, from the date on which the invitation to confirm interests is sent. The minimum time limit for the receipt of initial tenders shall be 35 days from the date on which the invitation is sent.

3a Contracting authorities shall negotiate with tenderers the initial and all subsequent tenders submitted, to improve the content to and ensure that those tenders better fulfil the award criteria

specified in the procurement documents.

3b During the negotiations, contracting authorities shall ensure the equal treatment of all tenderers. To that end, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others. They shall inform all tenderers, whose tenders have not been eliminated pursuant to subparagraph 3e, in writing of any changes to procurement documents other than those setting out the minimum requirements. They shall provide such tenderers with sufficient time to allow them to modify and re-submit amended tenders following those changes.

3c In accordance with Article 18, contracting authorities shall not reveal to the other participants confidential information communicated by a candidate participating in the negotiations without that candidate's agreement. Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific information.

3d The minimum requirements and the award criteria shall not be subject to negotiations.

Once the deadline for submitting tenders has expired, and prior to their examination, contracting authorities may specify a relative weighting attached to the elements composing an award criterion defined in advance to determine the MEAT, in accordance with Article 66(5), provided that:

(a) the contract award criteria set out in the contract documents or the contract notice are unaltered;

(b) this does not include new elements which would have affected the preparation of the tenders; and

(c) this does not give rise to discrimination

against any of the tenderers.

3e Innovation partnership procedures may take place in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria specified in the contract notice, in the invitation to confirm interest or in the procurement documents. In the contract notice, the invitation to confirm interest or in the procurement documents, the contracting authority shall clearly indicate whether it will use that option.

In selecting candidates, contracting authorities shall pay particular attention to criteria concerning the ***tenderers'*** capacity ***and experience*** in the field of research and development and of developing innovative solutions. They may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 64.

Only those economic operators invited by the contracting authority following its assessment of the requested information may submit research and innovation projects aimed at meeting the needs identified by the contracting authority that cannot be met by existing solutions. ***The contract shall be awarded on the sole basis of the award criterion of the most economically advantageous tender in accordance with Article 66(1)(a).***

3 f In selecting candidates, contracting authorities shall pay particular attention to criteria concerning the ***candidates'*** capacity in the field of research and development and of developing innovative solutions. They may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 64.

Only those economic operators invited by the contracting authority following its assessment of the requested information may submit research and innovation projects aimed at meeting the needs identified by the contracting authority that cannot be met by existing solutions.

Justification

Key AM on innovation partnerships tying the procedure to the competitive procedure with negotiation, but allowing for more negotiating possibilities in the case of innovation partnerships, given that these are required for the types of procurement which will fall under the new procedure, which explains why only certain most important parts of Article 27 to ensure transparency and fairness apply.

Amendment 127

Proposal for a directive Article 29 – paragraph 4

Text proposed by the Commission

4. The structure of the partnership and, in particular, the duration and value of the different phases shall reflect the degree of innovation of the proposed solution and the sequence of the research and innovation activities required for the development of an innovative solution not yet available on the market. The value **and duration of a contract for the purchase of the resulting supply, service or works shall remain within appropriate limits, taking into account the need to recover the costs, including those incurred in developing an innovative solution, and to achieve an adequate profit.**

Contracting authorities shall not use innovation partnerships in such a way as to prevent, restrict or distort competition.

Amendment

4. The **contracting authority shall ensure that the** structure of the partnership and, in particular, the duration and value of the different phases shall reflect the degree of innovation of the proposed solution and the sequence of the research and innovation activities required for the development of an innovative solution not yet available on the market. The **estimated** value of **supplies, services or works shall not be disproportionate in relation to the investment required for their development.**

Justification

This AM ensures that the use of innovation partnerships is appropriate to the core objective behind this new procedure and that they deliver value for money.

Amendment 128

Proposal for a directive

Article 30 – paragraph 2 – subparagraph 1 – introductory part

Text proposed by the Commission

2. The negotiated procedure without prior publication may be **foreseen** for public works contracts, public supply contracts and public service contracts in any of the following cases:

Amendment

2. The negotiated procedure without prior publication may be **used** for public works contracts, public supply contracts and public service contracts in any of the following cases:

Amendment 129

Proposal for a directive

Article 30 – paragraph 2 – subparagraph 1 – points a and b

Text proposed by the Commission

(a) where no tenders or no suitable tenders or no requests to participate have been submitted in response to an open procedure **or** a restricted procedure, provided that the initial conditions of the contract are not substantially altered and that a report is sent to the Commission or the ***national oversight body designated according to Article 84*** where they so request.

(b) where the aim of the procurement is the creation or obtention of a work of art;

Amendment

(a) where no tenders or no suitable tenders or no requests to participate have been submitted in response to an open procedure, a restricted procedure **or a negotiated procedure with prior publication**, provided that the initial conditions of the contract are not substantially altered and that a report is sent to the Commission or the ***Member States' competent authorities*** where they so request.

(b) where the aim of the procurement is the creation or obtention of a work of art **or an artistic performance**;

Amendment 130

Proposal for a directive

Article 30 – paragraph 2 – subparagraph 1 – point c – point iii

Text proposed by the Commission

iii) the protection of other exclusive rights.

Amendment

iii) the protection of other exclusive rights, ***including ownership of a property site***.

Amendment 131

Proposal for a directive

Article 30 – paragraph 2 – subparagraph 1 – point c – subparagraph 2

Text proposed by the Commission

This exception only applies when ***no reasonable alternative or substitute exists and*** the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement;

Amendment

This exception only applies when the absence of competition is not the result of an artificial narrowing down of the parameters of the procurement;

Amendment 132

Proposal for a directive

Article 30 – paragraph 2 – subparagraph 1 – point d

Text proposed by the Commission

(d) insofar as is strictly necessary where, for reasons of extreme urgency brought about by *force majeure*, the time limits for the open, restricted or competitive procedures with negotiation cannot be complied with; the circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority;

Amendment

(d) insofar as is strictly necessary where, for reasons of extreme urgency brought about by *events unforeseeable by the contracting authority*, the time limits for the open, restricted or competitive procedures with negotiation cannot be complied with; the circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority;

Amendment 133

Proposal for a directive

Article 30 – paragraph 4

Text proposed by the Commission

4. The negotiated procedure without prior publication may be *foreseen* for public service contracts, where the contract concerned follows a design contest organised in accordance with this Directive and is to be awarded, under the applicable rules, to the winner or one of the winners of the design contest; in the latter case, all winners must be invited to participate in the negotiations.

Amendment

4. The negotiated procedure without prior publication may be *used* for public service contracts, where the contract concerned follows a design contest organised in accordance with this Directive and is to be awarded, under the applicable rules, to the winner or one of the winners of the design contest; in the latter case, all winners must be invited to participate in the negotiations.

Justification

The negotiated procedure is a procedure to be used, not just foreseen.

Amendment 134

Proposal for a directive

Article 30 – paragraph 5 – subparagraph 1

Text proposed by the Commission

The negotiated procedure without prior publication may be **foreseen** for new works or services consisting in the repetition of similar works or services entrusted to the economic operator to which the same contracting authorities awarded an original contract, provided that such works or services are in conformity with a basic project for which the original contract was awarded according to a procedure in accordance with Article 24(1). The basic project shall indicate the extent of possible additional works or services and the conditions under which they will be awarded.

Amendment

The negotiated procedure without prior publication may be **used** for new works or services consisting in the repetition of similar works or services entrusted to the economic operator to which the same contracting authorities awarded an original contract, provided that such works or services are in conformity with a basic project for which the original contract was awarded according to a procedure in accordance with Article 24(1). The basic project shall indicate the extent of possible additional works or services and the conditions under which they will be awarded.

Amendment 135

Proposal for a directive

Article 31 – paragraph 1 – subparagraphs 3 and 3 a (new)

Text proposed by the Commission

The term of a framework agreement shall not exceed **four** years, save in **exceptional** cases **duly justified, in particular by the subject of the framework agreement.**

Amendment

The term of a framework agreement shall not exceed **five** years, save in **the following** cases:

a) the subject of the framework agreement concerns works or services that will take longer than five years to carry out; or

(b) economic operators need to make investments for which the amortisation period is longer than five years or which are linked to maintenance, the recruitment of suitable staff to perform the contract or the training of staff to perform the contract.

The term of a framework agreement shall be calculated on the basis of the life cycle of the work, service or supply.

Amendment 136

Proposal for a directive

Article 31 – paragraph 2 – subparagraph 4 a (new)

Text proposed by the Commission

Amendment

After conclusion of the framework agreement, the number of participating contracting authorities may only be increased where the following conditions are met:

(a) the framework agreement has been concluded by a central purchasing body;

(b) the possibility of such an increase is expressly provided for in the contract notice;

(c) the scope for the increase can be determined on the basis of clear criteria; and

(d) all parties to the framework agreement agree to the increase.

Amendment 137

Proposal for a directive

Article 32 – paragraph 1

Text proposed by the Commission

Amendment

1. For commonly used purchases the characteristics of which, as generally available on the market, meet the requirements of the contracting authorities, contracting authorities may use a dynamic purchasing system. The dynamic purchasing system shall be operated as a completely electronic process, open throughout its validity to any economic operator that satisfies the selection criteria.

1. For commonly used ***goods and services*** purchases the characteristics of which, as generally available on the market, meet the requirements of the contracting authorities, contracting authorities may use a dynamic purchasing system. The dynamic purchasing system shall be operated as a completely electronic process, open throughout its validity to any economic operator that satisfies the selection criteria.

Amendment 138

Proposal for a directive
Article 32 – paragraph 3 – point a

Text proposed by the Commission

(a) publish a call for competition making it clear that a dynamic purchasing system is involved;

Amendment

(a) publish a call for competition making it clear that a dynamic purchasing system **and describe how the procedure operates**;

Amendment 139

Proposal for a directive
Article 32 – paragraph 7

Text proposed by the Commission

7. No charges may be billed to the interested economic operators or to parties to the dynamic purchasing system.

Amendment

7. No charges may be billed **during the award procedure** to the interested economic operators or to parties to the dynamic purchasing system.

Amendment 140

Proposal for a directive
Article 33 – paragraph 1 – subparagraph 1

Text proposed by the Commission

Contracting authorities may use electronic auctions, in which new prices, revised downwards, and/or new values concerning certain elements of tenders are presented.

Amendment

For commonly used goods and services, contracting authorities may use electronic auctions, in which new prices, revised downwards, and/or new values concerning certain elements of tenders are presented.

Justification

Electronic auctions may be appropriate for commonly used goods and services, but, as a rule, they are unsuitable or indeed counter-productive where award procedures are complex. For works award procedures, they are fundamentally unsuitable.

Amendment 141
Proposal for a directive
Article 33 – paragraph 3 – point a

Text proposed by the Commission

3. The electronic auction shall be based ***on one of the following criteria:***

(a) solely on prices where the contract is awarded to the tender offering the lowest cost;

(b) on prices and/or on the new values of the features of the tenders indicated in the specifications where the contract is awarded to the most economically advantageous tender.

Amendment 142

Proposal for a directive

Article 33 – paragraph 5 – subparagraph 1

Text proposed by the Commission

5. Before proceeding with an electronic auction, contracting authorities shall make a full initial evaluation of the tenders in accordance with the award ***criterion or*** criteria and with the weighting fixed for them.

Amendment 143

Proposal for a directive

Article 33 – paragraph 6 – subparagraph 1

Text proposed by the Commission

6. ***Where the contract is to be awarded on the basis of the most economically advantageous tender,*** the invitation shall be accompanied by the outcome of a full evaluation of the relevant tenderer, carried out in accordance with the weighting provided for in the first subparagraph of Article 66(5).

Amendment

3. The electronic auction shall be based on prices and/or on the new values of ***certain elements*** of the tenders indicated in the specifications.

Amendment

5. Before proceeding with an electronic auction, contracting authorities shall make a full initial evaluation of the tenders in accordance with the award criteria and with the weighting fixed for them.

Amendment

6. The invitation shall be accompanied by the outcome of a full evaluation of the relevant tenderer, carried out in accordance with the weighting provided for in the first subparagraph of Article 66(5).

Amendment 144

Proposal for a directive

Article 35 – paragraph 3 – subparagraph 1

Text proposed by the Commission

3. A contracting authority fulfils its obligations pursuant to this Directive when it procures by having recourse to centralised purchasing activities, to the extent that the procurement procedures concerned and their performance are conducted by the central procurement body **alone** in all its stages from the publication of the call for competition to the end of the execution of the ensuing contract or contracts.

Amendment

3. A contracting authority fulfils its obligations pursuant to this Directive when it procures by having recourse to centralised purchasing activities, to the extent that the procurement procedures concerned and their performance are conducted by the central procurement body in all its stages from the publication of the call for competition to the end of the execution of the ensuing contract or contracts.

Amendment 145

Proposal for a directive

Article 37 – paragraph 1

Text proposed by the Commission

1. **One** or more contracting authorities may agree to perform certain specific procurements jointly.

Amendment

1. **Two** or more contracting authorities may agree to perform certain specific procurements jointly.

Amendment 146

Proposal for a directive

Article 38 – paragraph 3 – subparagraph 2

Text proposed by the Commission

When determining the applicable national law in accordance with point (a), contracting authorities **may** choose the national provisions of any Member State in which at least one of the participating authorities is located.

Amendment

When determining the applicable national law in accordance with point (a), contracting authorities **shall** choose the national provisions of any Member State in which at least one of the participating authorities is located.

Justification

The possibility for the parties to choose which law is to apply should be tied to the objective necessities of the contract concerned.

Amendment 147

Proposal for a directive

Article 38 – paragraph 5 – introductory part

Text proposed by the Commission

5. In the absence of an agreement determining the applicable public procurement law, the national legislation governing the contract award shall be determined following the rules set out below:

Amendment

5. In the absence of an agreement determining the applicable public procurement law ***made in accordance with paragraph 3***, the national legislation governing the contract award shall be determined following the rules set out below:

Justification

The concrete situation of a lack of agreement to which this paragraph applies should be specified as well.

Amendment 148

Proposal for a directive

Article 39 – paragraph 1 – subparagraph 2

Text proposed by the Commission

For this purpose, contracting authorities may seek or accept advice from administrative support structures or from third parties or market participants, ***provided that such advice does not have the effect of precluding competition and does not result in a violation of the principles of non-discrimination and transparency.***

Amendment

For this purpose, contracting authorities may seek or accept advice from administrative support structures or from third parties or market participants.

Justification

The second half of the sentence should be deleted, since there would be difficulties in applying

it in practice. It is virtually incomprehensible what the criteria would be for determining that particular advice precludes competition. Nor is it clear, furthermore, when the contracting authority would make such a judgment (ex ante or ex post). In addition, non-discrimination and transparency are general requirements by which public authorities are bound as it is.

Amendment 149

Proposal for a directive

Article 39 – paragraph 2 – subparagraph 2 a (new)

Text proposed by the Commission

Amendment

Contracting authorities shall:

(i) clarify in their invitation to participate in a market consultation what information will be considered relevant and thus may be shared with all potential bidders; and

(ii) set out in detail the rights of and procedures available to market consultation participants that allow them to protect confidential information.

Justification

Although the measures proposed by the Commission in Article 39(2) provide a necessary balance between the possibility for procurers to conduct market consultations and the assurance for bidders that participation will not lead to exclusion provided that the established provisions are respected, there is a potential practical difficulty in identifying and agreeing with contracting authorities in each case what constitutes “relevant information” to be shared in a preliminary market consultation and what should be kept confidential. Allowing contracting authorities to clearly set out either information that could become relevant for sharing or procedures to protect confidential information will bring more clarity to the different parties and safeguard the interests of economic operators.

Amendment 150

Proposal for a directive

Article 40 – paragraph 1 – subparagraph 1

Text proposed by the Commission

Amendment

The technical specifications as defined in point 1 of Annex VIII shall be set out in the procurement documents. They shall define the characteristics required of a

The technical specifications shall be set out in the procurement documents. They shall define the characteristics required of a works, service or supply ***provided that they***

works, service or supply.

are linked to the subject-matter of the contract and proportionate to its value and its objectives.

Amendment 151

Proposal for a directive

Article 40 – paragraph 1 – subparagraph 4 a (new)

Text proposed by the Commission

Amendment

For all procurements, technical specifications shall be drawn up so as to ensure that the products, services and works subject to the contract meet the requirements of data protection law at the time of the design of the processing of personal data (data protection by design).

Amendment 152

Proposal for a directive

Article 40 – paragraph 1 – subparagraph 5

Text proposed by the Commission

Amendment

Where mandatory accessibility standards are adopted by a legislative act of the Union, technical specifications shall, as far as accessibility criteria are concerned, be defined by reference thereto.

Where mandatory accessibility standards are adopted by a legislative act of the Union, technical specifications shall, as far as accessibility criteria *for persons with disabilities or design for all users* are concerned, be defined by reference thereto.

Amendment 153

Proposal for a directive

Article 40 – paragraph 3 – point b

Text proposed by the Commission

Amendment

(b) by reference to technical specifications and, in order of preference, to national standards transposing European standards, European technical approvals, common technical specifications, international

(b) by reference to technical specifications and, in order of preference, *and without discrimination as to the development method*, to national standards transposing European standards, European technical

standards, other technical reference systems established by the European standardisation bodies or □ when those do not exist □ national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies; each reference shall be accompanied by the words ‘or equivalent’;

approvals, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or □ when those do not exist □ national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies; each reference shall be accompanied by the words ‘or equivalent’;

Justification

Technical specifications should be non-discriminatory and technology neutral. These fundamental principles should apply equally to the use of standards and specifications in procurement. Non-discriminatory, technology neutral specifications require economic operators to compete to produce the best solutions, which drives innovation and economic growth. Technology neutrality also ensures that authorities can pick from the widest range of products and services, promoting best value for money.

Amendment 154

Proposal for a directive

Article 41

Text proposed by the Commission

Article 41

Labels

Where contracting authorities lay down environmental, social or other **characteristics of a works, service or supply in terms of performance or functional requirements as referred to in point (a) of Article 40(3)** they may require that these works, services or supplies **bear a specific label**, provided that all of the following conditions are fulfilled:

(a) the requirements **for the label only concern characteristics which are linked to the subject-matter of the contract and** are appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract;

Amendment

Article 41

Certificates and labels

Where contracting authorities lay down environmental, social or other requirements **or criteria in the technical specifications, the award criteria or the contract performance clauses**, they may require **a specific label or certificate as means of proof** that these works, services or supplies **correspond to such requirements or criteria** provided that all of the following conditions are fulfilled:

(a) the requirements **to be met in order to obtain the label or the certificate** are appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract;

(b) the requirements *for* the label are drawn up on the basis of scientific information or based on other objectively verifiable and non-discriminatory criteria;

(c) the labels are established in an open and transparent procedure in which all stakeholders, including *government bodies, consumers, manufacturers, distributors and environmental organisations, may participate,*

(d) the labels are accessible to all interested parties;

(e) the *criteria of* the label are set by a third party which is independent from the economic operator applying for the label.

Contracting authorities requiring a specific label shall accept all equivalent labels that fulfil the requirements of the label indicated by the contracting authorities. ***For products that do not bear the label,*** contracting authorities shall also accept a technical dossier of the manufacturer or other appropriate means of proof.

2. Where a label fulfils the conditions provided in points (b), (c), (d) and (e) of paragraph 1 but also sets out requirements not linked to the subject-matter of the contract, contracting authorities may define the technical specification by reference to ***those of*** the detailed specifications of that

(b) the requirements ***to be met in order to obtain*** the label ***or the certificate*** are drawn up on the basis of scientific information or based on other objectively verifiable and non-discriminatory criteria and data;

(c) the labels ***or certificates*** are established in an open and transparent procedure in which all ***relevant*** stakeholders, including ***government bodies and non-governmental organisations, have a substantial role;***

(d) the labels ***or certificates*** are accessible to all interested parties;

(e) the ***requirements to be met in order to obtain*** the label ***or certificate*** are set by a third party which is independent from the economic operator applying for the label ***or certificate*** ***The third party may be a specific national or government body or organisation.***

Contracting authorities requiring a specific label ***or certificate*** shall accept all equivalent labels that fulfil the requirements of the ***specific*** label ***or certificate*** indicated by the contracting authorities. Contracting authorities shall also accept ***other appropriate means of proof for such requirements which may include*** a technical dossier of the manufacturer or other appropriate means of proof ***where the economic operator concerned has no access to the label, or no possibility of obtaining them within the relevant time limit, provided that the lack of access is not attributable to the economic operator concerned. It shall be the responsibility of the tenderer to prove equivalence with the label requested.***

2. Where a label ***or certificate*** fulfils the conditions provided in points (b), (c), (d) and (e) of paragraph 1 but also sets out requirements not linked to the subject-matter of the contract, contracting authorities may define the technical specification by reference to of the detailed

label, or, where necessary, parts thereof, that are linked to the subject-matter of the contract and are appropriate to define characteristics of this subject-matter.

specifications of that *or certificate*, or, where necessary, parts thereof, that are linked to the subject-matter of the contract and are appropriate to define characteristics of this subject-matter.

Amendment 155

Proposal for a directive

Article 42 – paragraph 1 – subparagraph 1

Text proposed by the Commission

1. Contracting authorities may require that economic operators provide a test report from a recognised body or a certificate issued by such a body as means of proof of conformity with the technical specifications.

Amendment

1. Contracting authorities may require that economic operators provide a test report from a recognised body or a certificate issued by such a body as means of proof of conformity with *requirements or criteria set out in* the technical specifications, *the award criteria or the contract performance clauses*.

Amendment 156

Proposal for a directive

Article 42 – paragraph 1 – subparagraph 2

Text proposed by the Commission

Where contracting authorities require the submission of certificates drawn up by *recognised bodies attesting conformity with a particular technical specification*, certificates from equivalent other recognised bodies shall also be accepted by the contracting authorities.

Amendment

Where contracting authorities require the submission of certificates drawn up by *a specific conformity assessment body*, certificates from equivalent other recognised bodies shall also be accepted by the contracting authorities.

Amendment 157

Proposal for a directive

Article 42 – paragraph 2

Text proposed by the Commission

2. Contracting authorities shall accept other

Amendment

2. Contracting authorities shall accept other

appropriate means of proof than those referred to in paragraph 1, **such as** a technical dossier of the manufacturer where the economic operator concerned has no access to the certificates or test reports referred to in paragraph 1, or no possibility of obtaining them within the relevant time limits.

appropriate **and equivalent** means of proof than those referred to in paragraph 1, **which may include** a technical dossier of the manufacturer where the economic operator concerned has no access to the certificates or test reports referred to in paragraph 1, or no possibility of obtaining them within the relevant time limits, **provided that the lack of access is not attributable to the economic operator concerned. It shall be the responsibility of the tenderer to prove equivalence with the required test reports or certificates.**

Amendment 158

Proposal for a directive Article 42 – paragraph 4

Text proposed by the Commission

4. Member States shall make available to other Member States, upon request, any information related to the evidence and documents submitted in accordance with Article 40(6), Article 41 and paragraphs 1, 2 and 3 of this Article **to prove compliance with technical requirements**. The competent authorities of the Member State of establishment shall provide this information in accordance with Article 88.

Amendment

4. Member States shall make available to other Member States, upon request, any information related to the evidence and documents submitted in accordance with Article 40(6), Article 41 and paragraphs 1, 2 and 3 of this Article. The competent authorities of the Member State of establishment **of the economic operator** shall provide this information in accordance with Article 88.

Amendment 159

Proposal for a directive Article 43 – paragraph 1

Text proposed by the Commission

1. Contracting authorities **may** authorise tenderers to submit variants. **They shall** indicate in the contract notice or, where a prior information notice is used as a means of calling for competition, in the invitation to confirm interest **whether or not they authorise variants. Variants shall not be**

Amendment

1. Contracting authorities **shall** authorise tenderers to submit variants **along with a basic proposal, as long as they are linked to the subject matter of the contract.**

authorised without such indication.

In duly justified cases, contracting authorities may decide not to authorise variants, provided that they indicate the reasons for their decision in the contract notice or, where a prior information notice is used as a means of calling for competition, in the invitation to confirm interest.

Amendment 160

Proposal for a directive Article 43 – paragraph 2

Text proposed by the Commission

2. **Contracting authorities authorising variants shall state** in the procurement documents the minimum requirements to be met by the variants and any **specific** requirements for their presentation. They shall also ensure that the chosen award criteria can be usefully applied to variants meeting those minimum requirements as well as to conforming tenders which are not variants.

Amendment

2. **Contracting authorities may authorise variants** in the procurement documents **which define** the minimum requirements to be met by the variants and any requirements for their presentation. **Those minimum requirements shall be mandatory in order to ensure that variants will not affect the subject matter of the contract.** They shall also ensure that the chosen award criteria can be usefully applied to variants meeting those requirements as well as to conforming tenders which are not variants.

Amendment 161

Proposal for a directive Article 43 – paragraph 3 – subparagraph 2

Text proposed by the Commission

In procedures for awarding public supply or service contracts, contracting authorities **that have authorised variants** shall not reject a variant on the sole ground that it would, where successful, lead to either a service contract rather than a public supply contract or a supply contract rather than a

Amendment

In procedures for awarding public supply or service contracts, contracting authorities shall not reject a variant on the sole ground that it would, where successful, lead to either a service contract rather than a public supply contract or a supply contract rather than a public service contract.

public service contract.

Amendment 162

Proposal for a directive

Article 44 – paragraph 1 – subparagraph 1

Text proposed by the Commission

1. Public contracts may be subdivided into *homogenous or heterogeneous* lots. *For contracts with a value equal to or greater than the thresholds provided for in Article 4 but not less than EUR 500 000, determined in accordance with Article 5, where the contracting authority does not deem it appropriate to split into lots, it shall provide in the contract notice or in the invitation to confirm interest a specific explanation of its reasons.*

Amendment

1. *To facilitate greater access to public procurement by small and medium-sized enterprises, public contracts may be subdivided into lots.*

Amendment 163

Proposal for a directive

Article 44 – paragraph 3

Text proposed by the Commission

3. *Where more than one lot may be awarded to the same tenderer, contracting authorities may provide that they will either award a contract per lot or one or more contracts covering several or all lots.*

Contracting authorities shall specify in the procurement documents whether they reserve the right to make such a choice and, if so, which lots may be grouped together under one contract.

Contracting authorities shall first determine the tenders fulfilling best the award criteria set out pursuant to Article 66 for each individual lot. They may award a contract for more than one lot to a tenderer that is not ranked first in respect of all individual lots covered by

Amendment

deleted

this contract, provided that the award criteria set out pursuant to Article 66 are better fulfilled with regard to all the lots covered by that contract. Contracting authorities shall specify the methods they intend to use for such comparison in the procurement documents. Such methods shall be transparent, objective and non-discriminatory.

Justification

Simplification of procurement rules.

Amendment 164

**Proposal for a directive
Article 48 – paragraph 1 – subparagraph 1**

Text proposed by the Commission

Not later than **48** days after the award of a contract or the conclusion of a framework agreement, contracting authorities shall send a contract award notice on the results of the procurement procedure.

Amendment

Not later than **14** days after the award of a contract or the conclusion of a framework agreement, contracting authorities shall send a contract award notice on the results of the procurement procedure. ***In the case of an incomplete or incoherent contract award notice, the Commission shall contact the contracting authority with the aim to receive completion or clarification of the contract award notice.***

Justification

TED data is not reliable because Contracting Authorities often forget to send contract award notices. By shortening the deadline, this pillar of data gathering would be made more effective. Furthermore, CANs are often incomplete or incoherent and in practice, the Commission does not get back to the Contracting Authorities for clarification. It would therefore be helpful to introduce a clear obligation of the Commission to check data for completeness and coherence.

Amendment 165

**Proposal for a directive
Article 51 – paragraph 2 a (new)**

Text proposed by the Commission

Amendment

2a. The additional information referred to in paragraph 2 shall be provided to all tenderers taking part in the procurement procedure.

Amendment 166

Proposal for a directive Article 52 – paragraph 2

Text proposed by the Commission

Amendment

2. The invitations referred to in paragraph 1 shall include a reference to the electronic address *on* which the specifications or the descriptive document and any other supporting documents **have been made directly available by electronic means**. In addition, they shall include the information set out in Annex X.

2. The invitations referred to in paragraph 1 shall include a reference to the electronic address *at* which the specifications or the descriptive document and any other supporting documents **are accessible to tenderers**. In addition, they shall include the information set out in Annex X.

Justification

Clarification that it is sufficient to make the information available on the Internet. Informing individual tenderers should not be a requirement. Tenderers must themselves take responsibility for this.

Amendment 167

Proposal for a directive Article 54 – paragraph 2

Text proposed by the Commission

Amendment

2. Contracting authorities **may decide not to** award a contract to the tenderer submitting the best tender where they have established that the tender does not comply, **at least in an equivalent manner, with obligations established by Union legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XI.**

2. Contracting authorities **shall** not award a contract to the tenderer submitting the best tender where **it has been established, based on clear and sufficient evidence**, that the tender does not comply with environmental, **social and labour** law provisions **referred to in Article 15(2)**.

Amendment 168
Proposal for a directive
Article 55 – paragraph 1 – subparagraph 1 – point e a (new)

Text proposed by the Commission

Amendment

(ea) participation in exploitation of human trafficking and child labour covered by Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims¹.

¹ OJ L 101, 15.4.2011.

Amendment 169
Proposal for a directive
Article 55 – paragraph 1 – subparagraph 2

Text proposed by the Commission

Amendment

The obligation to exclude a candidate or tenderer from participation in a public contract shall also apply where the conviction by final judgment has condemned company directors or any other *any persons* having powers of representation, decision or control in respect of the candidate or tenderer.

The obligation to exclude a candidate or tenderer from participation in a public contract shall also apply where the conviction by final judgment has condemned company directors or any other person having powers of representation, decision or control in respect of the candidate or tenderer. ***Where they arise in the course of the procedure to select the contractor, the reasons for exclusion listed in the first subparagraph shall likewise serve to exclude the company concerned from the contract award procedure.***

Amendment 170
Proposal for a directive
Article 55 – paragraph 3 – subparagraph 1 – point a

Text proposed by the Commission

Amendment

a) where it is aware of any **violation** of obligations **established by Union legislation** in the field of social and labour law **or environmental law or of the international social and environmental law provisions listed in Annex XI. Compliance with Union legislation or with international provisions also includes compliance in an equivalent manner.**

a) where it is aware of any **serious or repeated violations** of obligations in the field of social, **environmental or** labour law, **as referred to in Article 15(2).**

Amendment 171

Proposal for a directive

Article 55 – paragraph 3 – subparagraph 1 – point b

Text proposed by the Commission

Amendment

(b) where the economic operator is the subject of insolvency or winding-up proceedings, where its assets are being administered by a liquidator or by the court, **where it has entered into an arrangement with creditors**, where it has suspended business activities or is in any analogous situation arising from a similar procedure under national laws and regulations;

(b) where the economic operator is the subject of insolvency or winding-up proceedings, where its assets are being administered by a liquidator or by the court, where it has suspended business activities or is in any analogous situation arising from a similar procedure under national laws and regulations; **a contracting authority cannot exclude an economic operator from participation in a public contract which has entered into an arrangement with creditors or whose assets are under administration if the economic operator can prove that it is capable of pursuing its activities for the foreseeable duration of contract;**

Justification

The common situation where an economic operator has entered into an arrangement with creditors must not be considered as a ground for exclusion by itself.

Amendment 172

Proposal for a directive
Article 55 – paragraph 3 – subparagraph 1 – point c

Text proposed by the Commission

Amendment

(c) where the contracting authority can demonstrate by any means that the economic operator is guilty of other grave professional misconduct; ***deleted***

Justification

In the light of the serious legal consequences of exclusion from an award procedure - also in connection with the optional exclusion grounds - the wording is too vague. That is particularly so in view of the fact that, in the Commission draft, misconduct can be demonstrated 'by any means'. The concept of "grave professional misconduct" is not defined objectively in the directive, while any decision to exclude an economic operator from a procurement procedure should be based on objective and measurable criteria and the discretion of the contracting authority should be limited.

Amendment 173

Proposal for a directive
Article 55 – paragraph 3 – subparagraph 1 – point d

Text proposed by the Commission

Amendment

(d) where the economic operator has shown significant or persistent deficiencies in the performance of any substantive requirement under a prior contract or contracts of a similar nature **with the same contracting authority.**

(d) where the economic operator has shown significant or persistent deficiencies in the performance of any substantive requirement under a prior contract or contracts of a similar nature **whether intentionally or through negligence.**

Amendment 174

Proposal for a directive
Article 55 – paragraph 3 – subparagraph 1 – point d a (new)

Text proposed by the Commission

Amendment

(da) where a conflict of interests could not have been effectively remedied in accordance with the procedure laid down in Article 21(3);

Amendment 175
Proposal for a directive
Article 55 – paragraph 3 – subparagraph 2

Text proposed by the Commission

Amendment

In order to apply the ground for exclusion referred to in point (d) of the first subparagraph, contracting authorities shall provide a method for the assessment of contractual performance that is based on objective and measurable criteria and applied in a systematic, consistent and transparent way. Any performance assessment shall be communicated to the contractor in question, which shall be given the opportunity to object to the findings and to obtain judicial protection. **deleted**

Amendment 176
Proposal for a directive
Article 56 – paragraph 1 – subparagraph 3

Text proposed by the Commission

Amendment

Contracting authorities shall limit any conditions for participation to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the commercial and technical abilities to perform the contract to be awarded. All requirements shall be ***related and strictly proportionate*** to the subject-matter of the contract, taking into account the need to ensure genuine competition.

Contracting authorities shall limit any conditions for participation to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the commercial and technical abilities to perform the contract to be awarded. All requirements shall be ***linked*** to the subject-matter of the contract, taking into account the need to ensure genuine competition.

Amendment 177
Proposal for a directive
Article 56 – paragraph 3 – subparagraph 2

Text proposed by the Commission

Amendment

The minimum yearly turnover shall not exceed ***three*** times the estimated contract

The minimum yearly turnover shall not exceed ***two*** times the estimated contract

value, except in duly justified circumstances relating to the special risks attached to the nature of the works, services or supplies. The contracting authority shall indicate such exceptional circumstances in the procurement documents.

value, except in duly justified circumstances relating to the special risks attached to the nature of the works, services or supplies. The contracting authority shall indicate such exceptional circumstances in the procurement documents.

Justification

The minimum level of turnover required should not be too high in order not to excessively limit the number of economic operators participating in the award procedure.

Amendment 178

**Proposal for a directive
Article 57 – paragraph 2 a (new)**

Text proposed by the Commission

Amendment

2a. An extension may be granted for the submission of declarations and proof requested by the contracting authority which were not provided by the deadline for submitting tenders.

Justification

In formal procedures it should be possible to make minor changes or improvements to tenders. Contracting authorities would then be able to ask undertakings to provide missing supporting documents. In the absence of such a rule, a contracting authority would automatically be forced to exclude even what it knows is the most economically advantageous tender from a known, suitable undertaking because only one supporting document requested by the contracting entity to prove the undertaking's suitability is missing.

Amendment 179

**Proposal for a directive
Article 57 – paragraph 3 – subparagraph 2**

Text proposed by the Commission

Amendment

Candidates and tenderers shall not be required to re-submit a certificate or other documentary evidence that has already been submitted to the same contracting

Candidates and tenderers shall not be required to re-submit a certificate or other documentary evidence that has already been submitted to the same contracting

authority within the past **four** years in an earlier procedure and is still valid.

authority within the past **two** years in an earlier procedure and is still valid. ***The contracting authority shall however be entitled to demand more recent evidence in the event of questionable validity of such certificates or documentary evidence during the procedure.***

Amendment 180
Proposal for a directive
Article 59 – paragraph 1 – subparagraph 1

Text proposed by the Commission

The Commission shall be empowered to adopt delegated acts in accordance with Article 89 in order to modify Annex XIII due to technical progress or for administrative reasons. It shall also establish the standard form for the European Procurement Passport. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 91.

Amendment

The Commission shall be empowered to adopt delegated acts in accordance with Article 89 in order to modify Annex XIII due to technical progress or for administrative reasons. It shall also establish, ***by means of implementing acts,*** the standard form for the European Procurement Passport. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 91.

Amendment 181
Proposal for a directive
Article 59 – paragraph 3

Text proposed by the Commission

3. The authority issuing the passport shall seek the relevant information directly from the competent authorities, except where prohibited by national rules on the protection of personal data.

Amendment

3. The authority issuing the passport shall seek the relevant information directly from the competent authorities, except where prohibited by national rules on the protection of personal data ***and except where the information can only be obtained from the economic operator itself. In those cases, the economic operator shall deliver the information to the authority to obtain the European Procurement Passport.***

Justification

A Public Procurement Passport will lower the transaction costs in public procurement procedures but should contain more information than what can be gathered by authorities themselves. They must ask the economic operator for information that cannot be gathered elsewhere.

Amendment 182

Proposal for a directive Article 59 – paragraph 4

Text proposed by the Commission

4. The European Procurement Passport shall be recognised by all contracting authorities as proof of fulfilment of the conditions for participation covered by it and shall not be questioned without justification. Such justification may be related to the fact that the passport was issued more than **six months** earlier.

Amendment

4. The European Procurement Passport shall be recognised by all contracting authorities as proof of fulfilment of the conditions for participation covered by it and shall not be questioned without justification. Such justification may be related to the ***nature of the individual case or the*** fact that the passport was issued more than ***one year*** earlier. ***In that case the contracting authority may request more recent or other- types of certificates concerning topics listed in Annex XIII.***
The economic operator shall confirm by signature of the European Procurement Passport that the information contained therein is correct.

Amendment 183

Proposal for a directive Article 61 – paragraph 2

Text proposed by the Commission

2. Where contracting authorities require the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain environmental management schemes or standards, they shall refer to the European Union Eco-Management and Audit Scheme (EMAS) or to other environmental

Amendment

2. Where contracting authorities require the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain environmental management schemes or standards, they shall refer to the European Union Eco-Management and Audit Scheme (EMAS) or to other environmental

management schemes as recognized in accordance with Article 45 of Regulation (EC) No 1221/2009 of the European Parliament and of the Council⁴¹ or other environmental management standards based on the relevant European or international standards by accredited bodies. They shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other evidence of equivalent environmental management measures from economic operators that have no access to such certificates, or no possibility of obtaining them within the relevant time limits.

management schemes as recognized in accordance with Article 45 of Regulation (EC) No 1221/2009 of the European Parliament and of the Council⁴¹ or other environmental management standards based on the relevant European or international standards by accredited bodies. They shall recognise equivalent certificates from bodies established in other Member States. ***For services this may be Ecolabel certificates which also include environmental management criteria.*** They shall also accept other evidence of equivalent environmental management measures from economic operators that have no access to such certificates, or no possibility of obtaining them within the relevant time limits. ***In order not to discriminate against tenderers who invest time and money for certificates or test reports, the burden to provide equivalence shall be placed on the tenderer claiming equivalence.***

Amendment 184

Proposal for a directive

Article 64 – paragraph 1 – subparagraph 1

Text proposed by the Commission

In restricted procedures, competitive procedures with negotiation, competitive dialogue procedures and innovation partnerships, contracting authorities may limit the number of candidates meeting the selection criteria that they will invite to tender or to conduct a dialogue, provided ***a sufficient*** number of qualified candidates is available.

Amendment

In restricted procedures, competitive procedures with negotiation, competitive dialogue procedures and innovation partnerships, contracting authorities may limit the number of candidates meeting the selection criteria that they will invite to tender or to conduct a dialogue, provided ***the minimum*** number, ***in accordance with paragraph 2,*** of qualified candidates is available.

Justification

In order to avoid misinterpretations of the provisions, the criterion should be clearer and easier to determine.

Amendment 185
Proposal for a directive
Article 66 – paragraph 1

Text proposed by the Commission

Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the **criteria** on which contracting authorities shall base the award of public contracts shall be **one of the following**:

(a) the most economically advantageous tender;

(b) the lowest cost.

Costs may be assessed, on the choice of the contracting authority, on the basis of the price only or using a cost-effectiveness approach, such as a life-cycle costing approach, under the conditions set out in Article 67.

Amendment 186
Proposal for a directive
Article 66 – paragraph 2 – introductory part

Text proposed by the Commission

2. The most economically advantageous tender referred to in **point (a) of** paragraph 1 from the point of view of the contracting authority shall be identified on the basis of criteria linked to the subject-matter of the public contract in question. **Those** criteria **shall** include, in addition to the price or costs **referred to in point (b) of paragraph 1, other criteria linked to the subject-matter of the public contract in question,** such as:

Amendment 187

Amendment

Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the **criterion** on which contracting authorities shall base the award of public contracts shall be **the most economically advantageous tender.**

Amendment

2. The most economically advantageous tender referred to in paragraph 1 from the point of view of the contracting authority shall be identified on the basis of criteria linked to the subject-matter of the public contract in question. **Those** criteria **may** include, in addition to the price or costs, **qualitative, environmental and social considerations,** such as:

Proposal for a directive
Article 66 – paragraph 2 – points a, b and c

Text proposed by the Commission

(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, environmental *characteristics* and innovative *character*;

(b) *for service contracts and contracts involving the design of works, the organisation*, qualification and experience of the staff assigned to performing the contract in question may be taken into consideration, *with the consequence that, following the award of the contract, such staff may only be replaced with the consent of the contracting authority, which must verify that replacements ensure equivalent organisation and quality*;

(c) after-sales service *and* technical assistance, delivery date and delivery period or period of completion;

Amendment

(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, *social*, environmental and innovative *characteristics, including cost-effectiveness of short-distance procurement where relevant, and the costs over the life-cycle in accordance with Article 67*;

(b) *where relevant for the performance of the contract*, qualification and experience of the staff assigned to performing the contract in question;

(c) after-sales service, technical assistance, *and delivery conditions such as* delivery date and delivery period or period of completion;

Amendment 188
Proposal for a directive
Article 66 – paragraph 3

Text proposed by the Commission

3. Member States may provide that the award of certain types of contracts shall be based on the most economically advantageous tender as referred to in point (a) of paragraph 1 and in paragraph 2.

Amendment

deleted

Amendment 189
Proposal for a directive
Article 66 – paragraph 5 – subparagraph 1

Text proposed by the Commission

5. ***In the case referred to in point (a) of paragraph 1*** the contracting authority shall specify, in the contract notice, in the invitation to confirm interest, in the procurement documents or, in the case of a competitive dialogue, in the descriptive document, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

Amendment

5. The contracting authority shall specify, in the contract notice, in the invitation to confirm interest, in the procurement documents or, in the case of a competitive dialogue, in the descriptive document, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

Amendment 190

Proposal for a directive
Article 67 – paragraph 1 – introductory part

Text proposed by the Commission

1. Life-cycle costing shall to the extent relevant cover the following costs over the life cycle of a product, service or works as defined in point (22) of Article 2:

Amendment

1. Life-cycle costing shall to the extent relevant cover ***parts or all of*** the following costs ***borne by the contracting authorities*** over the life cycle of a product, service or works as defined in point (22) of Article 2:

Amendment 191

Proposal for a directive
Article 67 – paragraph 1 – point b

Text proposed by the Commission

(b) external environmental costs directly linked to the life cycle, provided their monetary value can be determined and verified, which may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.

Amendment

(b) external ***costs, such as social or*** environmental costs, directly linked to the life cycle, provided their monetary value can be determined and verified, which may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.

Amendment 192

Proposal for a directive Article 67 – paragraph 2

Text proposed by the Commission

2. Where contracting authorities assess the costs using a life-cycle costing approach, they shall indicate in the procurement documents the **methodology used for the calculation of** the life-cycle costs. The **methodology** used must fulfil all of the following conditions:

(a) it has been drawn up **on the basis of scientific information or** is based on **other** objectively verifiable and non-discriminatory criteria;

(b) it has been established for repeated or continuous application;

(c) it is accessible to all interested parties.

Contracting authorities shall allow economic operators, including economic operators from third countries, to apply a different methodology for establishing the life-cycle costs of their offer, provided that they prove that this methodology complies with the requirements set out in points a, b and c and is equivalent to the methodology indicated by the contracting authority.

Amendment 193

Proposal for a directive Article 67 – paragraph 3 – subparagraph 1

Amendment

2. Where contracting authorities assess the costs using a life-cycle costing approach, they shall indicate in the procurement documents the **data to be provided by the tenderers and the method which the contracting authority will use to determine the** life cycle costs. The **method** used must fulfil all of the following conditions:

(a) it has been drawn up **in close consultation with stakeholders and** is based on objectively verifiable and non-discriminatory criteria;

(c) it is accessible to all interested parties;

(ca) the data required can be provided with reasonable effort by normally diligent economic operators, including operators from third countries.

Text proposed by the Commission

3. ***Whenever a*** common methodology for the calculation of life-cycle costs ***is*** adopted as part of a legislative act of the Union, including by delegated acts pursuant to sector specific legislation, ***it shall be applied where life-cycle costing is*** included in the award criteria referred to in Article 66(1).

Amendment

3. ***Any*** common methodology for the calculation of life-cycle costs adopted as part of a legislative act of the Union, including by delegated acts pursuant to sector specific legislation ***or as part of a European technical specification shall be deemed to meet the criteria set out in paragraph 2 and may be*** included in the award criteria referred to in Article 66(1).

Amendment 194

Proposal for a directive Article 69 – paragraph 1

Text proposed by the Commission

1. ***Contracting authorities shall require economic operators to explain the price or costs charged, where all of the following conditions are fulfilled:***

(a) the price or cost charged is more than 50 % lower than the average price or costs of the remaining tenders

(b) the price or cost charged is more than 20 % lower than the price or costs of the second lowest tender;

(c) at least five tenders have been submitted.

Amendment

1. ***Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.***

Amendment 195

Proposal for a directive Article 69 – paragraph 2

Text proposed by the Commission

2. ***Where tenders appear to be abnormally low for other reasons, contracting authorities may also request such***

Amendment

deleted

explanations.

Amendment 196
Proposal for a directive
Article 69 – paragraph 3 – introductory part

Text proposed by the Commission

3. The explanations referred to in **paragraphs 1 and 2** may in particular relate to:

Amendment

3. The explanations referred to in **paragraph 1** may in particular relate to:

Amendment 197
Proposal for a directive
Article 69 – paragraph 3 – point d

Text proposed by the Commission

(d) compliance, ***at least in an equivalent manner, with obligations established by Union legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XI or, where not applicable, with other provisions ensuring an equivalent level of protection;***

Amendment

(d) compliance with social, environmental ***and labour*** law provisions ***referred to in Article 15(2);***

Amendment 198
Proposal for a directive
Article 69 – paragraph 3 – point d a (new)

Text proposed by the Commission

Amendment

(da) compliance with subcontracting requirements set out in Article 71.

Amendment 199
Proposal for a directive
Article 69 – paragraph 4 – subparagraph 2

Text proposed by the Commission

Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with ***obligations established by Union legislation in the field of social and labour law or environmental law or by the international social and environmental law provisions listed in Annex XI.***

Amendment 200

**Proposal for a directive
Article 69 a (new)**

Text proposed by the Commission

Amendment

Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with ***social, environmental and labour law provisions referred to in Article 15(2) or with data protection law.***

Amendment

Article 69a

Tenders comprising products originating in third countries

1. This Article shall apply to tenders covering products or services originating in third countries with which the Union has not concluded, whether multilaterally or bilaterally, an agreement ensuring comparable and effective access for Union undertakings to the markets of those third countries. It shall be without prejudice to the obligations of the Union or its Member States in respect of third countries.

2. Contracting authorities may ask tenderers to provide information on the origin of the products in their tender and their value. Declarations on the tenderer's honour shall be accepted as a preliminary means of proof. A contracting authority may, at any time in the procedure, ask for part or all of the documentation required. Any tender submitted for the award of a supply contract may be rejected where the value of the products originating in third countries, as determined in accordance with

Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, exceeds 50 % of the total value of the products constituting the tender. For the purposes of this Article, software used in telecommunications network equipment shall be regarded as products.

3. Subject to the second subparagraph of this paragraph, where two or more tenders are equivalent in the light of the contract award criteria defined in Article 66, preference shall be given to those tenders which may not be rejected pursuant to paragraph 2. The prices of those tenders shall be considered equivalent for the purposes of this Article, if the price difference does not exceed 3 %.

A tender shall not be preferred to another pursuant to the first subparagraph where its acceptance would oblige the contracting authority to acquire equipment having technical characteristics different from those of existing equipment, resulting in incompatibility, technical difficulties in operation and maintenance, or disproportionate costs.

4. For the purposes of this Article, those third countries to which the benefit of the provisions of this Directive has been extended by a Council Decision in accordance with paragraph 1 shall not be taken into account for determining the proportion, referred to in paragraph 2, of products originating in third countries.

5. The Commission shall submit an annual report to the European Parliament and the Council, commencing in the second half of the first year following the entry into force of this Directive, on progress made in multilateral or bilateral negotiations regarding access for Union undertakings to the markets of third countries in the fields covered by this

Directive, on any result which such negotiations may have achieved, and on the implementation in practice of all the agreements which have been concluded.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may, in the light of these developments, amend the provisions of this Article.

Justification

Pending the adoption of a regulation on reciprocity, it is appropriate to maintain the current provisions of the public procurement legislation.

Amendment 201

**Proposal for a directive
Article 69 b (new)**

Text proposed by the Commission

Amendment

Article 69b

Relations with third countries as regards works, supplies and service contracts

1. Member States shall inform the Commission of any general difficulties, in law or in fact, encountered and reported by their undertakings in securing the award of works, supplies or service contracts in third countries.

2. The Commission shall report to the European Parliament and to the Council before 31 December 2014, and periodically thereafter, on the opening up of service contracts in third countries and on progress in negotiations with those countries on this subject, particularly within the framework of the WTO.

3. The Commission shall endeavour, by approaching the third country concerned, to remedy any situation whereby it finds, on the basis either of the reports referred to in paragraph 2 or of other information, that, in the context of the award of service

contracts, a third country:

(a) does not grant undertakings established in the Union effective access comparable to that granted by the Union to undertakings established in that third country;

(b) does not grant undertakings established in the Union national treatment or the same competitive opportunities as are available to undertakings established in that third country; or

(c) grants undertakings established in other third countries more favourable treatment than undertakings established in the Union.

4. Member States shall inform the Commission of any difficulties, in law or in fact, encountered and reported by the undertakings established in their territories and which are due to the non-observance of the international social and environmental law provisions listed in Annex XI when those undertakings have tried to secure the award of contracts in third countries.

5. In the circumstances referred to in paragraphs 3 and 4, the Commission may at any time propose that the Council decide to suspend or restrict, over a period to be laid down in the decision, the award of service contracts to:

(a) undertakings governed by the law of the third country in question;

(b) undertakings affiliated to the undertakings specified in point (a) and having their registered office in the Union but having no direct and effective link with the economy of a Member State;

(c) undertakings submitting tenders which have as their subject-matter services originating in the third country in question.

The Council shall act, by qualified majority, as soon as possible.

The Commission may propose these measures on its own initiative or at the request of a Member State.

6. This Article shall be without prejudice to the commitments of the Union in relation to third countries ensuing from international agreements on public procurement, particularly within the framework of the WTO.

Amendment 202

Proposal for a directive Article 70

Text proposed by the Commission

Contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are indicated in the call for competition or in the specifications. Those conditions may, *in particular, concern social and environmental* considerations. *They may also include the requirement that economic operators foresee compensations for risks of price increases that are the result of price fluctuations (hedging) and that could substantially impact the performance of a contract.*

Amendment

Contracting authorities may lay down special conditions *linked to the subject matter and* relating to the performance of a contract, provided that they are indicated in the call for competition or in the *technical* specifications. Those conditions may *include economic, innovation-related, environmental, social or employment-related* considerations.

Amendment 203

Proposal for a directive Article 71 – paragraph 1

Text proposed by the Commission

1. In the procurement documents, the contracting authority *may ask or may be required by a Member State to* ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract

Amendment

1. In the procurement documents, the contracting authority *shall* ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to

to third parties *and any proposed subcontractors*.

third parties.

Amendment 204
Proposal for a directive
Article 71 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

1a. After the tenderer has been selected, it shall indicate to the contracting authorities the name, contact details and legal representatives of the subcontractors and any changes related to that information during the course of the contract. The information shall be provided to the tenderer by each subcontractor in the subcontracting chain through the subcontractor's direct contractor. Each subcontractor shall keep the information up to date during the course of the contract.

Amendment 205
Proposal for a directive
Article 71 – paragraphs 3 a and 3 b (new)

Text proposed by the Commission

Amendment

3a. Member States shall ensure that subcontractors respect all mandatory legal, regulatory and administrative provisions in force in the Member States of contract performance, including the obligations referred to in Article 15(2). To this end, Member States may provide for a system of liability throughout the subcontracting chain so that the direct contractor of a subcontractor is liable in the event that the subcontractor fails to comply with one of those provisions or is insolvent. When a direct contractor is insolvent, such system should provide that the next solvent direct contractor up the

subcontracting chain, including the main contractor, is liable.

3b. Member States may provide for more stringent liability rules under national law.

Amendment 206

Proposal for a directive

Article 72 – paragraph 2 – introductory part

Text proposed by the Commission

2. A modification of a contract during its term shall be considered substantial within the meaning of paragraph 1, where it renders the contract substantially different from the one initially concluded.

In any case, without prejudice to paragraph 3 and 4, a modification shall be considered substantial where one of the following conditions is met:

Amendment

2. Without prejudice to *paragraphs* 3 and 4, a modification shall be considered substantial where one of the following conditions is met:

Amendment 207

Proposal for a directive

Article 72 – paragraph 2 – points -a and -a a (new)

Text proposed by the Commission

Amendment

(-a) it alters the nature of the contract;
(-aa) it entails replacement of the contractual partner;

Justification

The provisions concerning the modification of current contracts need to be supplemented (altering the nature of the contract is always a substantial modification) and clarified (the existing paragraph 3 has been incorporated into paragraph 2 in the interests of simplification, as a substantial modification is also at issue here).

Amendment 208

Proposal for a directive
Article 72 – paragraph 2 – point c

Text proposed by the Commission

(c) the modification extends the **scope** of the contract considerably to encompass supplies, services or works not initially covered.

Amendment

(c) the modification extends the **subject** of the contract considerably to encompass supplies, services or works not initially covered.

Amendment 209

Proposal for a directive
Article 72 – paragraph 3 – subparagraph 1

Text proposed by the Commission

3. The replacement of the contractual partner shall be considered a substantial modification within the meaning of paragraph 1.

deleted

Amendment

Justification

The paragraph should be deleted in accordance with the amendment tabled to Article 72(2) (new paragraph c b). Clarification of the original text.

Amendment 210

Proposal for a directive
Article 72 – paragraph 3 – subparagraph 2

Text proposed by the Commission

However, the first subparagraph shall not apply in the event of universal or partial succession into the position of the initial contractor, following corporate restructuring operations **or** insolvency, **of** another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Directive.

Amendment

Point (-aa) of paragraph 2 shall not apply in the event of universal or partial succession into the position of the initial contractor, following corporate restructuring operations, **transfer of capital or assets between undertakings or the taking-on of a contractual partner after his** insolvency, **by** another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract

and is not aimed at circumventing the application of this Directive ***or in the event of the take-over of the main contractors' signatory status by the contracting authority in accordance with Member State provisions in line with Article 71.***

Amendment 211
Proposal for a directive
Article 72 – paragraph 4

Text proposed by the Commission

4. Where the value of a modification can be expressed in monetary terms, the modification shall not be considered to be substantial within the meaning of paragraph 1, where its value does not exceed the thresholds set out in Article 4 ***and*** where it is below **5** % of the price of the initial contract, provided that the modification does not alter the overall nature of the contract. Where several successive modifications are made, the value shall be assessed on the basis of the cumulative value of the successive modifications.

Amendment

4. Where the value of a modification can be expressed in monetary terms, the modification shall not be considered to be substantial within the meaning of paragraph 1, where its value does not exceed the thresholds set out in Article 4 ***or*** where it is below **10** % of the price of the initial contract, provided that the modification does not alter the overall nature of the contract. Where several successive modifications are made, the value shall be assessed on the basis of the cumulative value of the successive modifications.

Amendment 212
Proposal for a directive
Article 72 – paragraph 5

Text proposed by the Commission

5. Contract modifications shall not be considered substantial within the meaning of paragraph 1 where they have been provided for in the procurement documents in clear, precise and unequivocal review clauses or options. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall not provide for modifications or options that would alter the overall nature

Amendment

5. Contract modifications shall not be considered substantial within the meaning of paragraph 1 where they have been provided for in the procurement documents in clear, precise and unequivocal review clauses or options ***or in the form of a price revision clause.*** Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall not provide for modifications or options that

of the contract.

would alter the overall nature of the contract.

Amendment 213

Proposal for a directive Article 72 – paragraph 6 a (new)

Text proposed by the Commission

Amendment

6a. For the purpose of the calculation of the price mentioned in paragraph 4 and point (c) of paragraph 6 of this Article, the updated price shall be the reference value when the contract includes an indexation clause.

Amendment 214

Proposal for a directive Article 72 – paragraph 7

Text proposed by the Commission

Amendment

7. Contracting authorities ***shall not have recourse to*** modifications of the contract ***in the following cases:***

7. Contracting authorities ***shall not invoke the provisions of this Article concerning*** modifications of the contract where the modification would aim at compensating risks of price increases that have been hedged by the contractor.

(a) where the modification would aim at remedying deficiencies in the performance of the contractor or the consequences, which can be remedied through the enforcement of contractual obligations;

(b) where the modification would aim at compensating risks of price increases that have been hedged by the contractor.

Justification

Concerning the deletion of point a): Problematic - no contracting authority can easily dispense with claims arising from deficiencies in the performance of the contractor in order to avoid a new procurement procedure.

Amendment 215

Proposal for a directive

Article 73 – paragraph 1 – introductory part

Text proposed by the Commission

Member States shall ensure that contracting authorities have the possibility, under the conditions determined by the applicable national contract law, to terminate a public contract during its term, where one of the following conditions is fulfilled:

Amendment

1. Member States shall ensure that contracting authorities have the possibility, under the conditions determined by the applicable national contract law, to terminate a public contract during its term, where one of the following conditions is fulfilled:

Amendment 216

Proposal for a directive

Article 73 – paragraph 1 – point a

Text proposed by the Commission

(a) the exceptions provided for in Article 11 cease to apply following a private participation in the legal person awarded the contract pursuant to Article 11(4);

Amendment

(a) the exceptions provided for in Article 11 cease to apply following a private participation in the legal person awarded the contract pursuant to Article 11(4), ***except for non-controlling or legally enforced forms of private participation;***

Amendment 217

Proposal for a directive

Article 73 - paragraph 2 (new)

Text proposed by the Commission

Amendment

2. Member States shall ensure that contracting authorities have the possibility, under the conditions determined by the applicable national contract law, to terminate a framework agreement during its term, where the economic operator has shown significant

or persistent deficiencies in the performance of any substantive requirement under the agreement.

Amendment 218

Proposal for a directive Article 75 – paragraph 1

Text proposed by the Commission

1. Contracting authorities intending to award a public contract for the services referred to in Article 74 shall make known their intention by means of a **contract notice**.

Amendment

1. Contracting authorities intending to award a public contract for the services referred to in Article 74 shall make known their intention by means **of a prior information notice, which shall be published continuously and contain the information set out in Annex VI part H. The prior information notice shall indicate that the contract will be awarded without further publication and invite interested economic operators to express their interest in writing.**

Justification

Key AM proposing a compromise on social and other services to avoid reinstating Part B Services. To be read in conjunction with the rise in threshold proposed.

Amendment 219

Proposal for a directive Article 75 – paragraph 2

Text proposed by the Commission

2. Contracting authorities that have awarded a public contract for the services referred to in Article 74 shall make known the results of the procurement procedure by means of a contract award notice.

Amendment

(Does not affect English version)

Amendment 220

Proposal for a directive Article 75 – paragraph 3 – subparagraph 1

Text proposed by the Commission

3. The **notices** referred to in **paragraphs 1 and 2** shall contain the information referred to in Annexes VI Part **H and I**, in accordance with the standard forms.

Amendment

3. The **notice** referred to in **paragraph 2** shall contain the information referred to in **Annex VI Part I**, in accordance with the standard forms.

Amendment 221

Proposal for a directive
Article 76 – paragraph 1

Text proposed by the Commission

1. Member States shall put in place appropriate procedures for the award of contracts subject to this Chapter, ensuring full compliance with the principles of transparency and equal treatment of economic operators and allowing contracting authorities to take into account the specificities of the services in question.

Amendment

1. Member States shall put in place appropriate **simplified** procedures **in accordance with Article 75(1)**, for the award of contracts subject to this Chapter, ensuring full compliance with the principles of transparency and equal treatment of economic operators and allowing contracting authorities to take into account the specificities of the services in question.

Amendment 222

Proposal for a directive
Article 76 – paragraph 2

Text proposed by the Commission

2. Member States shall ensure that contracting authorities **may** take into account the need to ensure quality, continuity, accessibility, availability and comprehensiveness of the services, the specific needs of different categories of users, the involvement and empowerment of users and innovation. Member States **may also provide** that the choice of the service provider **shall not be** made solely on the basis of the price for the provision of the service.

Amendment

2. Member States shall ensure that contracting authorities take into account the need to ensure **high** quality, continuity, accessibility, **affordability**, availability and comprehensiveness of the services, the specific needs of different categories of users, **including disadvantaged and vulnerable groups**, the involvement and empowerment of users and innovation. Member States **shall ensure** that the choice of the service provider **is** not made solely on the basis of the price for the provision of the service **but takes into account**

quality and sustainability criteria for social services.

Amendment 223

Proposal for a directive Article 83

Text proposed by the Commission

Article 83

Enforcement

In conformity with Council Directive 89/665/EEC, Member States shall ensure correct application of this Directive by effective, available and transparent mechanisms which complement the system in place for the review of decisions taken by contracting authorities.

Amendment

Article 83

Implementation and enforcement by competent authorities and structures

1. In order to effectively ensure correct and efficient implementation, Member States shall ensure that at least the tasks set out in this Article are performed by one or more authorities or structures. They shall indicate to the Commission all authorities or structures competent for those tasks.

1a. Member States shall ensure that the application of public procurement rules is monitored, including the implementation of projects co-financed by the Union with a view to detecting threats to the financial interests of the Union. Such monitoring shall be used to prevent, detect and adequately report possible instances of procurement fraud, corruption, conflict of interest and other serious irregularities.

Where monitoring authorities or structures identify specific violations or systemic problems, they shall ensure that those problems are referred to national auditing authorities, courts or tribunals or other appropriate authorities or structures, such as the ombudsman, national Parliaments or committees thereof.

1b. The results of the monitoring activities pursuant to paragraph 2 shall be made available to the public through appropriate means of information. In

particular, Member States shall publish, at least every two years, an overview of the most frequent sources of incorrect application or of legal uncertainty, including possible structural or recurring problems in the application of the rules, possible cases of fraud and other illegal behaviour.

Member States shall transmit to the Commission every two years a general overview of their national sustainable procurement policies, describing the relevant national action plans and initiatives and, where known, their practical implementation. They shall also indicate the success rate of SMEs in public procurement; where it is lower than 50 % in terms of values of contracts awarded to SMEs, Member States shall indicate whether any initiatives are in place to increase this success rate.

On the basis of the data received, the Commission shall regularly issue a report on the implementation and best practices of such policies in the internal market.

1c. Member States shall ensure that guidance on the interpretation and application of the Union public procurement law is available free of charge to assist contracting authorities and economic operators, in particular SMEs, in correctly applying the Union public procurement rules.

1d. Member States shall, without prejudice to the general procedures and working methods established by the Commission for its communications and contacts with Member States, designate a contact point for cooperation with the Commission as regards the application of Union law and the implementation of the budget from the Union on the basis of Article 17 TFEU and Article 317 TFEU.

1e. Contracting authorities shall, at least for the duration of the contract, keep copies of all concluded contracts with a

value equal to or greater than:

(a) 1 000 000 EUR in the case of public supply contracts or public service contracts;

(b) 10 000 000 EUR in the case of public works contracts.

Justification

Alternative proposals on governance.

Amendment 224

Proposal for a directive Article 84

Text proposed by the Commission

Amendment

Article 84

deleted

Public oversight

1. Member States shall appoint a single independent body responsible for the oversight and coordination of implementation activities (hereinafter 'the oversight body'). Member States shall inform the Commission of their designation.

All contracting authorities shall be subject to such oversight.

2. The competent authorities involved in the implementation activities shall be organised in such a manner that conflicts of interests are avoided. The system of public oversight shall be transparent. For this purpose, all guidance and opinion documents and an annual report illustrating the implementation and application of rules laid down in this Directive shall be published.

The annual report shall include the following:

(a) an indication of the success rate of small and medium-sized enterprises (SMEs) in public procurement; where the

percentage is lower than 50 % in terms of values of contracts awarded to SMEs, the report shall provide an analysis of the reasons therefore;

(b) a global overview of the implementation of sustainable procurement policies, including on procedures taking into account considerations linked to the protection of the environment, social inclusion including accessibility for persons with disabilities, or fostering innovation;

(c) information on the monitoring and follow-up of breaches to procurement rules affecting the budget of the Union in accordance with paragraphs 3 to 5 of the present article;

(d) centralized data about reported cases of fraud, corruption, conflict of interests and other serious irregularities in the field of public procurement, including those affecting projects cofinanced by the budget of the Union.

3. The oversight body shall be responsible for the following tasks:

(a) monitoring the application of public procurement rules and the related practice by contracting authorities and in particular by central purchasing bodies;

(b) providing legal advice to contracting authorities on the interpretation of public procurement rules and principles and on the application of public procurement rules in specific cases;

(c) issuing own-initiative opinions and guidance on questions of general interest pertaining to the interpretation and application of public procurement rules, on recurring questions and on systemic difficulties related to the application of public procurement rules, in the light of the provisions of this Directive and of the relevant case-law of the Court of Justice of the European Union;

(d) establishing and applying comprehensive, actionable 'red flag' indicator systems to prevent, detect and adequately report instances of procurement fraud, corruption, conflict of interest and other serious irregularities;

(e) drawing the attention of the national competent institutions, including auditing authorities, to specific violations detected and to systemic problems;

(f) examining complaints from citizens and businesses on the application of public procurement rules in specific cases and transmitting the analysis to the competent contracting authorities, which shall have the obligation to take it into account in their decisions or, where the analysis is not followed, to explain the reasons for disregarding it;

(g) monitoring the decisions taken by national courts and authorities following a ruling given by the Court of Justice of the European Union on the basis of Article 267 of the Treaty or findings of the European Court of Auditors establishing violations of Union public procurement rules related to projects cofinanced by the Union; the oversight body shall report to the European Anti-Fraud Office any infringement to Union procurement procedures where these were related to contracts directly or indirectly funded by the European Union.

The tasks referred to in point (e) shall be without prejudice to the exercise of rights of appeal under national law or under the system established on the basis of Directive 89/665/EEC.

Member States shall empower the oversight body to seize the jurisdiction competent according to national law for the review of contracting authorities' decisions where it has detected a violation in the course of its monitoring and legal advising activity.

4. Without prejudice to the general procedures and working methods established by the Commission for its communications and contacts with Member States, the oversight body shall act as a specific contact point for the Commission when it monitors the application of Union law and the implementation of the budget from the Union on the basis of Article 17 of the Treaty on the European Union and Article 317 of the Treaty on the Functioning of the European Union. It shall report to the Commission any violation of this Directive in procurement procedures for the award of contracts directly or indirectly funded by the Union.

The Commission may in particular refer to the oversight body the treatment of individual cases where a contract is not yet concluded or a review procedure can still be carried out. It may also entrust the oversight body with the monitoring activities necessary to ensure the implementation of the measures to which Member States are committed in order to remedy a violation of Union public procurement rules and principles identified by the Commission.

The Commission may require the oversight body to analyse alleged breaches to Union public procurement rules affecting projects co-financed by the budget of the Union. The Commission may entrust the oversight body to follow-up certain cases and to ensure that the appropriate consequences of breaches to Union public procurement rules affecting projects co-financed are taken by the competent national authorities which will be obliged to follow its instructions.

5. The investigation and enforcement activities carried out by the oversight body to ensure that contracting authorities' decisions comply with this Directive and the principles of the Treaty shall not replace or prejudge the institutional role

of the Commission as guardian of the Treaty. When the Commission decides to refer the treatment of an individual case pursuant to paragraph 4, it shall also retain the right to intervene in accordance with the powers conferred to it by the Treaty.

6. Contracting authorities shall transmit to the national oversight body the full text of all concluded contracts with a value equal to or greater than

(a) 1 000 000 EUR in the case of public supply contracts or public service contracts;

(b) 10 000 000 EUR in the case of public works contracts.

7. Without prejudice to the national law concerning access to information, and in accordance with national and EU legislation on data protection, the oversight body shall, upon written request, give unrestricted and full direct access, free of charge, to the concluded contracts referred to in paragraph 6. Access to certain parts of the contracts may be refused where their disclosure would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interests of economic operators, public or private, or might prejudice fair competition between them.

Access to the parts that may be released shall be given within a reasonable delay and no later than 45 days from the date of the request.

The applicants filing a request for access to a contract shall not need to show any direct or indirect interest related to that particular contract. The recipient of information should be allowed to make it public.

8. A summary of all the activities carried out by the oversight body in accordance with paragraphs 1 to 7 shall be included

in the annual report referred to in paragraph 2.

Justification

Proposed regulation will significantly raise administrative burden on the side of Member States. Moreover, it will influence internal organisation of administration in Member States. Decisions with regard of activities to be undertaken in order to ensure correct application of the directive and responsible institutions should be left to the discretion of Member States.

Amendment 225

**Proposal for a directive
Article 85 – paragraph 1 – introductory part**

Text proposed by the Commission

For ***every contract or framework agreement, and every time a dynamic purchasing system is established***, contracting authorities shall draw up a written report which shall include at least the following:

Amendment

For ***all procurement contracts with a value equal to or greater than the thresholds laid down in Article 4 of this Directive***, contracting authorities shall draw up a written report which shall include at least the following:

Amendment 226

**Proposal for a directive
Article 85 – paragraph 1 – points b, c and d**

Text proposed by the Commission

(b) the names of the ***successful*** candidates or tenderers and the reasons for their selection;

(c) the names of the candidates or tenderers rejected and the reasons for their rejection;

(d) the reasons for the rejection of tenders found to be abnormally low;

Amendment

(b) ***where applicable, the results of the qualitative selection and reduction of numbers pursuant to Articles 64 and 65, namely:***

(i) the names of the ***selected*** candidates or tenderers and the reasons for their selection;

(ii) the names of the candidates or tenderers rejected and the reasons for their rejection;

(d) the reasons for the rejection of tenders found to be abnormally low;

Justification

Alternative proposals on governance (reporting).

Amendment 227

Proposal for a directive

Article 85 – paragraph 1 – point e

Text proposed by the Commission

(e) the name of the successful tenderer and the reasons why its tender was selected and, where known, the share of the contract or framework agreement which the successful tenderer intends to subcontract to third parties;

Amendment

(e) the name of the successful tenderer and the reasons why its tender was selected and, where known, the share of the contract or framework agreement which the successful tenderer intends to subcontract to third parties ***and information on its subcontractors including their names, contact details and legal representatives;***

Amendment 228

Proposal for a directive

Article 85 – paragraph 1 – point e (new)

Text proposed by the Commission

(e) for competitive procedures with negotiations and competitive dialogues, the circumstances as laid down in Article 24 which justify the use of those procedures;

Amendment 229

Proposal for a directive

Article 85 – paragraph 1 – point g

Text proposed by the Commission

(g) where ***necessary***, the reasons why the contracting authority has decided not to award a contract or framework agreement or to establish a dynamic purchasing system

Amendment

(g) where ***applicable***, the reasons why the contracting authority has decided not to award a contract or framework agreement or to establish a dynamic purchasing system

Amendment 230

Proposal for a directive Article 85 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

To the extent that the contract award notice drawn up pursuant to Article 48 contains the information required under paragraph 1, contracting authorities may refer to that notice.

Justification

Alternative proposals on governance (reporting).

Amendment 231

Proposal for a directive Article 85 – paragraph 2

Text proposed by the Commission

Amendment

The contracting authorities shall document the progress of all procurement procedures, whether or not those are conducted by electronic means. To that end, they shall ***document*** all stages ***in*** the procurement procedure, ***including all*** communications with economic operators and internal deliberations, preparation of the tenders, dialogue or negotiation if any, selection and award of the contract.

The contracting authorities shall document the progress of all procurement procedures, whether or not those are conducted by electronic means. To that end, they shall ***ensure that they dispose of sufficient documentation to justify decisions taken at all stages of*** the procurement procedure, ***on*** communications with economic operators and internal deliberations, preparation of the tenders, dialogue or negotiation if any, selection and award of the contract.

Justification

Alternative proposals on governance (reporting).

Amendment 232

Proposal for a directive Article 85 – paragraph 3

Text proposed by the Commission

The report, or its main elements, shall be communicated to the Commission or to the ***national oversight body*** where they so request.

Amendment

The report, or its main elements, shall be communicated to the Commission or to the ***competent authorities or structures referred to in Article 83*** where they so request.

Justification

Alternative proposals on governance (reporting).

Amendment 233

**Proposal for a directive
Article 86 – title**

Text proposed by the Commission

National reporting ***and lists of contracting authorities***

Amendment

National reporting

Justification

Alternative proposals on governance (reporting).

Amendment 234

**Proposal for a directive
Article 86 – paragraph 1**

Text proposed by the Commission

1. ***The bodies established or appointed in accordance with Article 84*** shall forward to the Commission ***an implementation and*** statistical report on each year, based on a standard form, not later than 31 October of the following year.

Amendment

1. ***Member States*** shall forward to the Commission ***a*** statistical report on each year, based on a standard form, not later than 31 October of the following year.

Justification

Alternative proposals on governance (reporting).

Amendment 235

Proposal for a directive

Article 86 – paragraph 2 – points a, b, c and d

Text proposed by the Commission

(a) a ***complete and up-to-date*** list of all central government authorities, sub-central contracting authorities and bodies governed by public law, ***including sub-central authorities and associations of contracting authorities awarding*** public contracts or framework agreements, indicating for each authority the unique identification number where such number is provided for in national legislation; this list shall be grouped by type of authority;

(b) a ***complete and up-to-date*** list of all central purchasing bodies;

(c) for all contracts above the thresholds laid down in Article 4 of this Directive:

(i) the number and value of contracts awarded broken down for each type of authority by procedure and by works, supplies and services identified by division of the CPV nomenclature;

(ii) where the contracts have been concluded under the negotiated procedure without prior publication, the data referred to in point (i) shall also be broken down according to the circumstances referred to in Article 30 and shall specify the number and value of contracts awarded, by Member State and third country of the successful contractor;

(d) for all contracts which fall below the thresholds laid down in Article 4 of this Directive, but would be covered by this Directive if their value exceeded the

Amendment

(a) a list of all central government authorities, sub-central contracting authorities and bodies governed by public law, ***which have awarded*** public contracts or ***concluded*** framework agreements ***during the year concerned***, indicating for each authority the unique identification number where such number is provided for in national legislation; this list shall be grouped by type of authority;

(b) a list of all central purchasing bodies ***which have awarded public contracts or concluded framework agreements during the year concerned;***

(c) for all contracts above the thresholds laid down in Article 4 of this Directive, ***the number and value of contracts awarded broken down for each type of authority by procedure and by works, supplies and services.***

threshold, the number and value of contracts awarded broken down by each type of authority.

Justification

Alternative proposals on governance (reporting).

Amendment 236

Proposal for a directive Article 86 – paragraph 5

Text proposed by the Commission

5. The Commission shall establish the standard form for the annual **implementation and** statistical report referred to in paragraph 1. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 91.

Amendment

5. The Commission shall establish the standard form for the annual statistical report referred to in paragraph 1. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 91.

Justification

Alternative proposals on governance (reporting).

Amendment 237

Proposal for a directive Article 87 – title

Text proposed by the Commission

Assistance to contracting authorities **and businesses**

Amendment

Assistance to contracting authorities

(CA 63)Amendment 238 Proposal for a directive Article 87 – paragraph 1

Text proposed by the Commission

1. Member States shall make available technical support structures in order to provide legal and economic **advice**,

Amendment

1. Member States shall make available technical support structures in order to provide legal and economic **information**,

guidance and assistance to contracting authorities in preparing and carrying out procurement procedures. Member States shall also ensure that each contracting authority can obtain **competent** assistance and **advice** on individual questions.

guidance and assistance to contracting authorities in preparing and carrying out procurement procedures. Member States shall also ensure that each contracting authority can obtain **technical** assistance and **information** on individual questions, **in particular in relation to Articles 54, 55 and 71.**

Amendment 239
Proposal for a directive
Article 87 – paragraph 2

Text proposed by the Commission

Amendment

2. With a view to improving access to public procurement for economic operators, in particular SMEs, and in order to facilitate correct understanding of the provisions of this Directive, Member States shall ensure that appropriate assistance can be obtained, including by electronic means or using existing networks dedicated to business assistance.

deleted

Amendment 240
Proposal for a directive
Article 87 – paragraph 3

Text proposed by the Commission

Amendment

3. Specific administrative assistance shall be available to economic operators intending to participate in a procurement procedure in another Member State. Such assistance shall at least cover administrative requirements in the Member State concerned, as well as possible obligations related to electronic procurement.

deleted

Member States shall ensure that interested economic operators have easy access to appropriate information on the obligations relating to taxes,

environmental protection, and to social and labour law obligations, which are in force in the Member State, in the region or locality where the works are to be carried out or the services are to be provided and which will be applicable to the works carried out on site or to the services provided during the performance of the contract.

Amendment 241
Proposal for a directive
Article 87 – paragraph 4

Text proposed by the Commission

Amendment

4. For the purposes of paragraphs 1, 2 and 3, Member States may appoint a single body or several bodies or administrative structures. Member States shall ensure due coordination between those bodies and structures. **deleted**

Amendment 242

Proposal for a directive
Article 88 – paragraph 3

Text proposed by the Commission

Amendment

3. For the purposes of this Article, Member States shall designate one or more liaison points, the contact details of which shall be communicated to the other Member States, the oversight bodies and the Commission. Member States shall publish and regularly update the list of liaison points. The oversight body shall be in charge of the coordination of such liaison points. **deleted**

Justification

Alternative proposals on governance (administrative cooperation).

Amendment 243

Proposal for a directive Annex VI – part H

Text proposed by the Commission

Part H

INFORMATION TO BE INCLUDED IN **CONTRACT** NOTICES CONCERNING CONTRACTS FOR SOCIAL AND OTHER SPECIFIC SERVICES

(as referred to in Article 75(1))

1. Name, identification number (where provided for in national legislation), address including NUTS code, **telephone, fax number**, email and internet address of the contracting authority **and, where different, of the service from which additional information may be obtained.**
2. **Where appropriate, email or internet address at which the specifications and any supporting documents will be available.**
3. **Type of contracting authority and main activity exercised.**
4. **Where appropriate, indication whether the contracting authority is a central purchasing body or that any other form of joint procurement is involved.**
5. CPV Nomenclature reference No(s); **where the contract is divided into lots, this information shall be provided for each lot.**
6. NUTS code for the main location of works in case of works or NUTS code for the main place of delivery or performance in case of supplies and services
7. **Description of the services and where applicable, incidental works and supplies**

Amendment

Part H

INFORMATION TO BE INCLUDED IN **PRIOR INFORMATION** NOTICES CONCERNING CONTRACTS FOR SOCIAL AND OTHER SPECIFIC SERVICES

(as referred to in Article 75(1))

1. Name, identification number (where provided for in national legislation), address including NUTS code, email and internet address of the contracting authority.
2. **Brief description of the contract in question including the estimated total value of the contract and CPV Nomenclature reference No(s).**
3. **As far as already known:**
 - a) NUTS code for the main location of works in case of works or NUTS code for the main place of delivery or performance in case of supplies and services;
 - b) **time-frame for delivery or provision of goods, works or services and duration of**

to be procured

8. Estimated total value of contract(s); where the contract is divided into lots, this information shall be provided for each lot.

9. Conditions for participation, including
a) where appropriate, indication whether the contract is restricted to sheltered workshops, or whether its execution is restricted to the framework of protected job programmes,

b) where appropriate, indication whether the execution of the service is reserved by law, regulation or administrative provision to a particular profession.

10. Time limit(s) for contacting the contracting authority in view of participation.

11. Brief description of the main features of the award procedure to be applied.

12. Any other relevant information.

the contract;

c) conditions for participation, including:

i) where appropriate, indication whether the contract is restricted to sheltered workshops, or whether its execution is restricted to the framework of protected job programmes,

ii) where appropriate, indication whether the execution of the service is reserved by law, regulation or administrative provision to a particular profession;

d) brief description of the main features of the award procedure to be applied.

Amendment 244

Proposal for a directive Annex VIII – point 2 – introductory part

Text proposed by the Commission

(2) 'standard' means a technical specification approved by a recognised **standardising body** for repeated or continuous **application, compliance** with which is not compulsory and which falls into one of the following categories:

Amendment 245

Proposal for a directive Annex VIII – point 4

Amendment

(2) 'standard' means a technical specification **established by consensus and** approved by a recognised **standardisation organisation** for repeated or continuous **use**, with which **compliance** is not compulsory and which falls into one of the following categories:

Text proposed by the Commission

(4) 'Common technical specification' means a technical specification laid down in accordance with a procedure recognised by the Member States or in accordance with Articles 9 and 10 of Parliament and Council Regulation [XXX] on European standardisation [and amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/105/EC and 2009/23/EC of the European Parliament and the Council] which has been published in the Official Journal of the European Union;

Amendment

(4) 'Common technical specification' means a technical specification laid down in accordance with a procedure recognised by the Member States or, ***in the field of information and communication technologies, in*** accordance with Articles 9 and 10 of Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation¹;

¹ OJ L 316, 14.11.2012, p. 12.

Amendment 246

**Proposal for a directive
Annex XIII – point a**

Text proposed by the Commission

(a) Identification of the economic operator;

Amendment

(a) Identification of the economic operator, ***company registration number, name, address, bank;***

Amendment 247

**Proposal for a directive
Annex XIII – point a a (new)**

Text proposed by the Commission

Amendment

(aa) Description of the economic operator, in particular year of establishment, corporate form, owner(s) of the economic operator, board members, industry code, short description of the

main services sold by the economic operator;

Amendment 248

Proposal for a directive Annex XIII – point c a (new)

Text proposed by the Commission

Amendment

(ca) Certification that the economic operator has fulfilled its obligations in relation to the payment of taxes or social security contributions as referred to in Article 55(2);

Amendment 249

Proposal for a directive Article XIII – point c a (new)

Text proposed by the Commission

Amendment

(ca) A declaration on honour as referred to in Article 22;

Amendment 250

Proposal for a directive Annex XIII – point d a (new)

Text proposed by the Commission

Amendment

(da) Key economic indicators of the economic operator for the last three accounting years, or, in the case of economic operators which have been in business for less than three years, since the date of commencement of business: gross sales, EBIT and solvency ratio;

Amendment 251

**Proposal for a directive
Annex XIII – point d b (new)**

Text proposed by the Commission

Amendment

(db) Key organisational indicators of the economic operator, or in the case of the economic operators which have been in business for less than three years, since the date of commencement of business: average number of employees during the last three accounting years and number of employees by the end of the last accounting year;

Amendment 252

**Proposal for a directive
Annex XIII – point f**

Text proposed by the Commission

Amendment

(f) Indication of the period of validity of the Passport, which shall be not less than **6** months.

(f) Indication of the period of validity of the Passport, which shall be not less than **twelve** months.

**Amendment 253
Proposal for a directive
Annex 16**

Text proposed by the Commission

Amendment

CPV Code	Description
79611000-0 and from 85000000-9 to 85323000-9 (except 85321000-5 and 85322000-2)	Health and social services

CPV Code	Description
79611000-0 75200000-8; 75231200-6; 75231240-8 and from 85000000-9 to 85323000-9 (except 85321000-5 and 85322000-2) and 98133100-5 and 98200000-5	Health, social and related services

75121000-0, 75122000-7,	Administrative educational,
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75121000-0, 75122000-7,	Administrative educational,
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75124000-1; from 79995000-5 to 79995200-7; from 80100000-5 to 80660000-8 (except 80533000-9, 80533100-0, 80533200-1); from 92000000-1 to 92700000-8 (except 92230000-2, 92231000-9, 92232000-6) 75300000-9	healthcare and cultural services	75124000-1; from 79995000-5 to 79995200-7; from 80100000-5 to 80660000-8 (except 80533000-9, 80533100-0, 80533200-1); from 92000000-1 to 92700000-8 (except 92230000-2, 92231000-9, 92232000-6) 75300000-9	healthcare and cultural services
75310000-2, 75311000-9, 75312000-6, 75313000-3, 75313100-4, 75314000-0, 75320000-5, 75330000-8, 75340000-1 98000000-3	Compulsory social security services Benefit services	75310000-2, 75311000-9, 75312000-6, 75313000-3, 75313100-4, 75314000-0, 75320000-5, 75330000-8, 75340000-1 98000000-3 , 55521100-9	Compulsory social security services ¹ Benefit services
98120000-0	Other community, social and personal services Services furnished by trade unions	98120000-0	Other community, social and personal services Services furnished by trade unions
98131000-0	Religious services	98131000-0 From 79600000- 0 to 79635000-4 (except for 79611000-0, 79632000-3, 79633000-0), and from 98500000-8 to 98514000-9 From 80100000- 5 to 80660000-8 (except 80533000- 9, 80533100-0,	Religious services Personnel placement and supply services apart from employment contracts
			Education and vocational education services

80533200-1)

from 79100000-5
to 79140000-7,
including

*Legal services
to the extent that
they are not
excluded under
Article 10(c)*

¹ These services are not covered by this Directive where they are organised as non-economic services of general interest. Member States are free to organise the provision of compulsory social services or of other services as services of general interest or as non-economic services of general interest.

EXPLANATORY STATEMENT

In the view of the rapporteur, the modernisation of the public procurement directives should strike a balance between simplification of the rules on the one hand, and sound, effective procedures linked to innovative, sustainable award criteria on the other hand, while also ensuring greater participation by SMEs, and making e-procurement the general rule.

The aim should be to fully exploit the potential of public procurement within the Single Market in order to foster sustainable growth, employment and social inclusion. In the light of the fact that public procurement contracts constitute a significant share of the economy (around 19% of EU GDP), the successful revision and enforcement of public procurement rules would considerably help in re-launching investments in the real economy and overcoming the crisis of the European economy.

The rapporteur welcomes the Commission proposals and considers that they contain some interesting new principles and ideas. They need however to be improved to achieve the best result possible. A more detailed consideration of the rapporteur's proposals may be found in the working document of 23 February 2012 (PE 483.690) drawn up by the rapporteur upstream of this draft report.

▪ **Effective and socially sustainable public procurement**

The rapporteur considers that the Commission proposal does not go far enough, particularly on social aspects. He therefore wishes to ensure compliance with social standards at all stages of the public procurement procedure.

Accordingly the rapporteur goes into greater detail on the **technical specifications** which are set out in the tendering documents and define the features which the works, services or supplies must possess, so as to enable the contracting authority to achieve sustainability objectives if it so wishes. The technical specifications should therefore be permitted to include requirements concerning: performance (e.g. environmental performance); safety, particularly methods for evaluating the quality of products, packaging and instructions for use; and life cycle.

The rapporteur also reinforces the **grounds for exclusion** by requiring the exclusion from public procurement contracts of any economic operator which has breached its obligations under social, labour and environmental law as defined by national and European legislation and collective agreements which have been concluded in accordance with Union law. Similarly, the contracting authorities may not award the contract to the tenderer making the best bid if the economic operator in question is unable to provide up-to-date information on the payment of his social security contributions.

Finally, at the **award criteria** stage for public procurement contracts, the rapporteur considers that the notion of the 'lowest price' should finally be scrapped in favour of that of the 'most

economically advantageous tender' (MEAT). Given that price is also taken into account in the MEAT, this would allow contracting authorities to make the most appropriate choices in relation to their specific needs, including the consideration of strategic societal aspects, social criteria and environmental criteria and, in particular, fair trade.

However, it is worth mentioning that for reasons of efficiency and legal security, none of the award criteria should give total freedom of choice to the contracting authority: the award criteria selected for determining the most economically advantageous tender should always be linked to the subject-matter of the contract and should ensure the possibility of effective competition.

In order to ensure that public procurement contracts are implemented effectively, the Member States should also have the option of requiring contracting authorities to check the performance of the economic operator awarded the contract.

- **Healthy sub-contracting to ensure effective participation of SMEs**

The rapporteur supports sub-contracting where it permits the development of SMEs. However, there have been some alarming cases where the practice of 'cascade sub-contracting' has led to the exploitation of workers and thus to lower-quality public procurement contracts. It is in the interests of everyone, undertakings as well as contracting authorities, to ensure that the work carried out in the performance of public procurement contracts is of high quality and complies with labour law. Accordingly the rapporteur proposes introducing the principle of responsibility throughout the sub-contracting chain so that all stages in the process bear responsibility for respecting fundamental rights and complying with health and safety of workers and current labour laws.

Furthermore, the contracting authority must ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties, and the proposed subcontractors.

The provisions concerning abnormally low bids should also be tightened to avoid any possibility of sub-contracting that does not comply with labour law.

The rapporteur supports the Commission's proposal to make e-procurement the general rule. This will facilitate and encourage SME participation. However, he wishes to retain the current submission deadlines under Directive 2004/18. He considers that the effect of a minimum deadline is necessary to ensure that tenderers, particularly SMEs, are able to draw up an adequate tender.

The rapporteur also supports the creation of the e-passport, which will undoubtedly facilitate participation by SMEs.

- **Simplifying public procurement for contracting authorities**

The rapporteur draws particular attention to the contracting authorities which will be responsible for applying the provisions of the forthcoming directive on public procurement. Accordingly he is keen not to make their task any harder, and to enable them to complete public procurement contracts effectively and in the best interests of their local area.

The rapporteur therefore considers it essential for all the procedures laid down in the directive to be transposed in the Member States: each contracting authority should have at its disposal a toolbox to enable it to choose the procedure best suited to its needs. The rapporteur considers it desirable that greater use should be made in future of the negotiated procedure.

Moreover, the rapporteur considers that the Member States should provide contracting authorities with the technical and financial resources they need to adapt to e-procurement and to prepare their calls for tender.

The rapporteur also wishes to improve flexibility in the relations between public authorities proposed by the Commission. The Commission codifies current case law in quite a restrictive manner: consequently, local authorities will have their room for manoeuvre considerably reduced, at the expense of the overall efficiency of public procurement. The rapporteur therefore provides for exceptions to the principle of a total ban on private participation, while insisting on the need to pursue the general interest.

The rapporteur supports the Commission's proposal seeking to end the distinction between priority and non-priority services. He considers it appropriate to create a special scheme for social services, given their specific characteristics and in order to guarantee the strategic use of public procurement, but wishes to make the scheme less stringent by transforming the requirement for ex-ante publication into a prior information notice, while stressing the need to comply with the principles of transparency and equal treatment.

As regards the national governance authority, the rapporteur considers that it is important for each Member State to have authorities or structures responsible for the proper operation of public procurement. However, he wishes to avoid any additional administrative burden which might slow down the work of the contracting authorities.

21.9.2012

OPINION OF THE COMMITTEE ON INTERNATIONAL TRADE

for the Committee on the Internal Market and Consumer Protection

on the proposal for a European Parliament and Council on Public Procurement
(COM(2011)0896 – C7-0006/2012 – 2011/0438(COD))

Rapporteur: Gianluca Susta

SHORT JUSTIFICATION

The Commission has recently proposed to update the directives on public procurement (Directive 2004/18/EC) and on the procurement procedures for authorities operating in the water, energy, transport, and postal services sectors (Directive 2004/17/EC). Also presented were a proposal for a new directive aimed at regulating the field of concessions and, only subsequently, a proposal to regulate the access of third-country goods and services to the Union's internal public procurement market and procedures supporting negotiations on access of Union goods and services to third-country public procurement markets.

At international level, public procurement represents an important proportion of world trade: in developed countries; the procurement sector on average is worth 15–20 % of GDP. Despite its importance, the public procurement market remains one of the most closed (the Commission estimates that more than half the global public procurement market is still closed to foreign competition) and least regulated sectors in international trade.

At multilateral level, the key regulation is the international Government Procurement Agreement (GPA), which recently underwent a review completed in March 2012. This review was aimed at increasing the transparency and openness of international public procurement markets and simplifying procedures. In this regard, the rapporteur welcomes this review process and hopes it is quickly approved by the EU; at the same time, he notes that only 42 WTO Member States (of whom 27 are EU Member States) have so far adhered to this international agreement and he strongly hopes that many other countries will join, especially the more developed countries and emerging economies, in order to extend geographical coverage and thus obtain a system of shared and universally valid rules in this important international trade sector.

Specific provisions relating to public procurement are also present in another WTO agreement: the General Agreement on Trade in Services (GATS).

At bilateral level, the EU is also bound by obligations in the context of various bilateral Agreements already concluded (with Albania, the Former Yugoslav Republic of Macedonia, CARIFORUM, Chile, Croatia, Mexico, Montenegro, South Korea and Switzerland). The procurement sector is an important and often delicate aspect of current negotiations aimed at reaching possible new trade agreements with other international partners.

Within this international context, the rapporteur stresses the importance of the international dimension in the public procurement sector. Moreover, he points out the need for a gradual opening of public procurement markets on the basis of a system of shared rules, aiming for reciprocity, equity and respect of international environment, social and employment law. The European Union currently guarantees international operators a significant degree of openness to its public procurement market, which is often not reciprocated by other major international trading partners.

The rapporteur thus hopes for more incisive action by the EU, through legislative initiatives and coherent negotiating positions, in order to re-establish equitable conditions and introduce a genuine international level playing field.

In this context, he deplores the Commission's decision not to proceed with a joint standardisation of the 'external dimension' of public contracts: the decision not to repeat the provisions contained in Directive 2004/17/EC regarding tenders involving foreign goods and services, and the subsequent submission of a complementary but totally independent legislative initiative, including in terms of its legislative process – although favourably received as regards its proposed content – could create a dangerous legal vacuum, depriving European legislation of provisions aimed at regulating the access of goods, services and companies of third countries to the European procurement market.

For this reason, the rapporteur considers of utmost importance the reintroduction of specific rules aimed at systematically and extensively regulating the conditions which would allow the rejection of any tenders with a prevalence of goods and services not covered by international agreements: in this regard, the rapporteur intends to adapt the legislative mechanism proposed by the Commission in its recent regulation proposal.

It also appears important to make the legislation proposed by the Commission on so-called 'abnormally low tenders' even more restrictive by introducing the possibility of an automatic exclusion mechanism for tenders that are significantly lower than others, and by extending the minimum conditions for requesting additional information from economic operators.

Lastly, it was decided to introduce amendments to reflect more fully the international context in which the European directives operate.

AMENDMENTS

The Committee on International Trade calls on the Committee on International Trade, as the committee responsible, to incorporate the following amendments in its report:

Amendment 1

Proposal for a directive

Recital 2

Text proposed by the Commission

(2) Public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the current public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts have to be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises in public procurement and to enable procurers to make better use of public procurement in support of common societal goals. There is also a need to clarify basic notions and concepts to ensure better legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.

Amendment 2

Proposal for a directive

Recital 2 a (new)

Amendment

(2) Public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. **Public procurement is a vital tool in the redefinition of European industrial policy.** For that purpose, the current public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts have to be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises in public procurement and to enable procurers to make better use of public procurement in support of common societal goals. There is also a need to clarify basic notions and concepts to ensure better legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.

Text proposed by the Commission

Amendment

(2a) Internal Market and international markets are increasingly interlinked, therefore EU values, such as transparency, a principled stance against corruption, principle of reciprocity and the advancement of social and human rights should be appropriately promoted in procurement policies.

Amendment 3

Proposal for a directive Recital 8

Text proposed by the Commission

Amendment

(8) Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the Agreements reached in the Uruguay Round multilateral negotiations (1986 to 1994) approved in particular the World Trade Organisation Agreement on Government Procurement, hereinafter referred to as the ‘Agreement’. The aim of the Agreement is to establish a multilateral framework of balanced rights and obligations relating to public contracts with a view to achieving the liberalisation and expansion of world trade. For contracts covered by the Agreement, as well as by other relevant international agreements by which the Union is bound, contracting authorities fulfil the obligations under these agreements by applying this Directive to economic operators of third countries that are signatories to the agreements.

(8) Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the Agreements reached in the Uruguay Round multilateral negotiations (1986 to 1994) approved in particular the World Trade Organisation Agreement on Government Procurement, hereinafter referred to as the ‘Agreement’. The aim of the Agreement is to establish a multilateral framework of balanced rights and obligations relating to public contracts with a view to achieving the liberalisation and expansion of world trade. ***This Agreement has been subject to a review that ended in March 2012; the chief aims of the review of the Agreement were to increase the degree of openness of sector markets, expand its coverage, eliminate discriminatory measures and increase transparency in procedures.*** For contracts covered by the Agreement, as well as by other relevant international agreements by which the Union is bound, ***including commitments within the framework of***

bilateral trade Agreements, contracting authorities fulfil the obligations under these agreements by applying this Directive to economic operators of third countries that are signatories to the agreements. ***In this regard, international commitments made by the Union in relation to third countries as regards access to the public procurement market must be transposed to the EU legal system so as to ensure effective and uniform application.***

Amendment 4

Proposal for a directive Recital 8 a (new)

Text proposed by the Commission

Amendment

(8a) Within the World Trade Organisation and within the framework of its bilateral relations, the Union supports an ambitious international opening of the public procurement markets of the Union and of its trade partners, in a spirit of reciprocity and mutual benefit.

Amendment 5

Proposal for a directive Recital 8 a (new)

Text proposed by the Commission

Amendment

(8a) When the European Commission negotiates trade agreements with countries that are not members of the Agreement, it should include the criteria that are in addition to price in the chapter on public procurement. Contracting authorities should be able, with the Commission's agreement, to exclude economic operators from third countries which do not open up their public procurement markets to EU businesses. This would give the Commission some scope for manoeuvre in its negotiations

with third countries.

Amendment 6

Proposal for a directive

Recital 9

Text proposed by the Commission

(9) The Agreement applies to contracts above certain thresholds, set in the Agreement and expressed as special drawing rights. The thresholds laid down by this Directive should be aligned to ensure that they correspond to the euro equivalents of the thresholds of the Agreement. Provision should also be made for periodic reviews of the thresholds expressed in euros so as to adjust them, by way of a purely mathematical operation, to possible variations in the value of the euro in relation to the special drawing right.

Amendment

(9) The Agreement applies to contracts above certain thresholds, set in the Agreement and expressed as special drawing rights. The thresholds laid down by this Directive should be aligned to ensure that they correspond to the euro equivalents of the thresholds of the Agreement. Provision should also be made for periodic reviews of the thresholds expressed in euros so as to adjust them, by way of a purely mathematical operation, to possible variations in the value of the euro in relation to the special drawing right. ***It is also appropriate that this regular review of thresholds is also carried out on the basis of a preliminary assessment of the proper implementation of the principle of substantial reciprocal market openness between the European Union and the other signatories of the Agreement. Evaluation of substantial reciprocity applies equally to third countries which do not adhere to the Government Procurement Agreement but which have access to the European public procurement market.***

Amendment 7

Proposal for a directive

Recital 11

Text proposed by the Commission

(11) ***Other*** categories of services continue by their very nature to have a limited cross-border dimension, ***namely*** what are known as services to the person, such as certain

Amendment

(11) ***Certain*** categories of services continue by their very nature to have a limited cross-border dimension, ***for example*** what are known as services to the

social, health and educational services. These services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. A specific regime should therefore be established for public contracts for these services, with a higher threshold of EUR **500 000**. Services to the person with values below this threshold will typically not be of interest to providers from other Member States, unless there are concrete indications to the contrary, such as Union financing for transborder projects. Contracts for services to the person above this threshold should be subject to Union-wide transparency. Given the importance of the cultural context and the sensitivity of these services, Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate. The rules of this directive take account of that imperative, imposing only observance of basic principles of transparency and equal treatment and making sure that contracting authorities are able to apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee. Member States and/or public authorities remain free to provide these services themselves or to organise social services in a way that does not entail the conclusion of public contracts, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority, without any limits or quotas, provided such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination.

person, such as certain social, health and educational services. These services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. A specific regime should therefore be established for public contracts for these services, with a higher threshold of EUR **1 000 000**. Services to the person with values below this threshold will typically not be of interest to providers from other Member States, unless there are concrete indications to the contrary, such as Union financing for transborder projects. Contracts for services to the person above this threshold should be subject to Union-wide transparency. Given the importance of the cultural context and the sensitivity of these services, Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate. The rules of this directive take account of that imperative, imposing only observance of basic principles of transparency and equal treatment and making sure that contracting authorities are able to apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee. Member States and/or public authorities remain free to provide these services themselves or to organise social services in a way that does not entail the conclusion of public contracts, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority, without any limits or quotas, provided such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination.

Amendment 8

Proposal for a directive Recital 13

Text proposed by the Commission

(13) Being addressed to Member States, this directive does not apply to procurement carried out by international organisations on their own behalf and for their own account. There is, however, a need to clarify to what extent this directive should be applied to procurement governed by specific international rules.

Amendment

(13) Being addressed to Member States, this directive does not apply to procurement carried out by international organisations on their own behalf and for their own account. There is, however, a need to clarify to what extent this directive should be applied to procurement governed by specific international rules. ***The European Institutions should, in particular, take into account the changes effected by this Directive and adjust their own procurement rules accordingly to reflect these changes.***

Amendment 9

Proposal for a directive Recital 34

Text proposed by the Commission

(34) Public contracts should not be awarded to economic operators that have participated in a criminal organisation or have been found guilty of corruption, fraud to the detriment of the Union's financial interests or money laundering. Non-payment of taxes or social security contributions should also be sanctioned by mandatory exclusion at the level of the Union. Furthermore, contracting authorities should be given the possibility to exclude candidates or tenderers for ***violations of environmental or social obligations, including rules on accessibility for disabled persons or other*** forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights.

Amendment

(34) Public contracts should not be awarded to economic operators that have participated in a criminal organisation or have been found guilty of corruption, fraud to the detriment of the Union's financial interests or money laundering. Non-payment of taxes or social security contributions, ***violations of environmental, labour or social obligations, including in accordance with internationally recognised principles and including rules on working conditions, collective agreements and accessibility for disabled persons*** should also be sanctioned by mandatory exclusion at the level of the Union. Furthermore, contracting authorities should be given the possibility to exclude candidates or tenderers for forms of grave professional misconduct, such as violations

of competition rules or of intellectual property rights.

Justification

The equal treatment of workers and the compliance with national laws is included in the current directive; there is no reason for deletion.

Amendment 10

Proposal for a directive

Recital 37

Text proposed by the Commission

(37) Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment. These criteria should guarantee that tenders are assessed in conditions of effective competition, also where contracting authorities require high-quality works, supplies and services that are optimally suited to their needs, for instance where the chosen award criteria include factors linked to the production process. As a result, contracting authorities should be allowed to adopt *as award criteria either ‘the most economically advantageous tender’ or ‘the lowest cost’, taking into account that in the latter case they are free to set adequate quality standards by using technical specifications or contract performance conditions.*

Amendment 11

Proposal for a directive

Recital 38

Text proposed by the Commission

(38) *Where contracting authorities choose to award* a contract to the most economically advantageous tender, *they* must determine the award criteria on the basis of which they will assess tenders in

Amendment

(37) Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment. These criteria should guarantee that tenders are assessed in conditions of effective competition, also where contracting authorities require high-quality works, supplies and services that are optimally suited to their needs, for instance where the chosen award criteria include factors linked to the production process. As a result, contracting authorities should be allowed to adopt ‘the most economically advantageous tender’ *as the award criterion.*

Amendment

(38) *When* a contract *is to be awarded* to the most economically advantageous tender, *contracting authorities* must determine the award criteria on the basis of which they will assess tenders in order to

order to identify which one offers the best value for money. The determination of these criteria depends on the subject-matter of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the subject-matter of the contract, as defined in the technical specifications, and the value for money of each tender to be measured. Furthermore, the chosen award criteria should not confer an unrestricted freedom of choice on the contracting authority and they should ensure the possibility of effective competition and be accompanied by requirements that allow the information provided by the tenderers to be effectively verified.

Amendment 12

Proposal for a directive

Recital 41

Text proposed by the Commission

(41) ***Furthermore, in technical specifications and in award criteria, contracting authorities should be allowed to refer to a specific production process, a specific mode of provision of services, or a specific process for any other stage of the life cycle of a product or service, provided that they are linked to the subject-matter of the public contract.*** In order to better integrate social considerations in public procurement, procurers may also be allowed to include, in the award criterion of the most economically advantageous tender, characteristics related to the working conditions of the persons directly participating in the process of production or provision in question. Those characteristics may only concern the protection of health of the staff involved in the production process or the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the

identify which one offers the best value for money. The determination of these criteria depends on the subject-matter of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the subject-matter of the contract, as defined in the technical specifications, and the value for money of each tender to be measured. Furthermore, the chosen award criteria should not confer an unrestricted freedom of choice on the contracting authority and they should ensure the possibility of effective competition and be accompanied by requirements that allow the information provided by the tenderers to be effectively verified.

Amendment

(41) In order to better integrate social considerations in public procurement, procurers may also be allowed to include ***optionally***, in the award criterion of the most economically advantageous tender, characteristics related to the working conditions of the persons directly participating in the process of production or provision in question. Those characteristics may only concern the protection of health of the staff involved in the production process or the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract, including accessibility for persons with disabilities. Any award criteria which include those characteristics should in any event remain limited to characteristics that have immediate consequences on staff members in their working environment. They should be applied in accordance with Directive 96/71/EC of the European

contract, including accessibility for persons with disabilities. Any award criteria which include those characteristics should in any event remain limited to characteristics that have immediate consequences on staff members in their working environment. They should be applied in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services and in a way that does not discriminate directly or indirectly against economic operators from other Member States or from third countries parties to the Agreement or to Free Trade Agreements to which the Union is party. For service contracts and for contracts involving the design of works, contracting authorities should also be allowed to use as an award criterion the organisation, qualification and experience of the staff assigned to performing the contract in question, as this may affect the quality of contract performance and, as a result, the economic value of the tender.

Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services and in a way that does not discriminate directly or indirectly against economic operators from other Member States or from third countries parties to the Agreement or to Free Trade Agreements to which the Union is party. For service contracts and for contracts involving the design of works, contracting authorities should also be allowed to use as an award criterion the organisation, qualification and experience of the staff assigned to performing the contract in question, as this may affect the quality of contract performance and, as a result, the economic value of the tender.

Amendment 13

Proposal for a directive

Recital 42

Text proposed by the Commission

(42) Tenders that appear abnormally low in relation to the works, supplies or services might be based on technically, economically or legally unsound assumptions or practices. In order to prevent possible disadvantages during contract performance, contracting authorities should be obliged to ask for an explanation of the price charged where a tender significantly undercuts the prices demanded by other tenderers. Where the tenderer cannot provide a sufficient explanation, the contracting authority

Amendment

(42) Tenders that appear abnormally low in relation to the works, supplies or services might be based on technically, economically or legally unsound assumptions or practices. In order to prevent possible disadvantages during contract performance, contracting authorities ***should be able to exclude tenders that are far lower than the prices charged by other tenderers and should*** be obliged to ask for an explanation of the price charged where a tender significantly undercuts the prices demanded by other

should be entitled to reject the tender. Rejection should be mandatory in cases where the contracting authority has established that the abnormally low price charged results from non-compliance with mandatory Union legislation in the fields of social, labour or environmental law or international labour law provisions.

Amendment 14

Proposal for a directive Recital 48 a (new)

Text proposed by the Commission

tenderers. Where the tenderer cannot provide a sufficient explanation, the contracting authority should be entitled to reject the tender. Rejection should be mandatory in cases where the contracting authority has established that the abnormally low price charged results from non-compliance with mandatory Union legislation in the fields of social, labour or environmental law or international labour law provisions.

Amendment

(48a) Contracting authorities should respect the delay of payment as established in Directive 2011/7/EU.

Amendment 15

Proposal for a directive Recital 55

Text proposed by the Commission

(55) It is of particular importance that the Commission carries out appropriate consultations during its preparatory work, including at expert level. When preparing and drawing up delegated acts, the Commission should ensure simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and the Council.

Amendment

(55) It is of particular importance that the Commission carries out appropriate consultations during its preparatory work, including at expert level. When preparing and drawing up delegated acts, the Commission should ensure simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and the Council. ***The Commission should provide full information and documentation on its meetings with national experts within the framework of the preparation and implementation of delegated acts. In this respect, the Commission should ensure that the European Parliament is duly involved, drawing on best practices from previous experience in other policy areas***

in order to create the best possible conditions for future scrutiny of delegated acts by the European Parliament.

Justification

The directive foresees the use of delegated acts — among other things — to adapt the methodology for the calculation of the threshold levels to any change provided for by the Government Procurement Agreement (Article 6.5 classic, Article 12(4) utilities directive) and to change the list of international social and environmental law provisions in ANNEX XI (Article 54(2) classic directive, Article 70 utilities directive). As these are issues with a clear international trade dimension, the rapporteur feels that the same institutional procedures should apply as with ‘normal’ trade legislation. In line with OMNIBUS I and OMNIBUS II (alignment package in the Committee on International Trade (INTA)), the rapporteur proposes emphasising the need for the European Parliament to be duly involved in the preparation and implementation of delegated acts (Recital 55). This will facilitate the scrutiny of delegated acts and will ensure an efficient exercise of the delegation of power by avoiding objections from the European Parliament. The rapporteur deems it appropriate to limit in time (Article 89(2)) the conferral of powers on the Commission. Such a limitation brings about more parliamentary control, obliging the Commission to draw up a report in respect of the delegation of power no later than nine months before the end of the established period. On the other hand, tacit extension of the delegation for a period of identical duration prevents overburdening the legislators and facilitates the implementation of the common commercial policy. Considering the dynamics of parliamentary work, internal procedures and deadlines, it is important to assure that the legislator is given enough time to duly scrutinize a legislative act (Article 89(5)). All changes reflect changes brought about by the two Trade Omnibuses.

Amendment 16

Proposal for a directive Article 4 – paragraph 1 – point d

Text proposed by the Commission

(d) EUR **500 000** for public contracts for social and other specific services listed in Annex XVI.

Amendment

(d) EUR **1 000 000** for public contracts for social and other specific services listed in Annex XVI.

Amendment 17

Proposal for a directive Article 6 – paragraph 1

Text proposed by the Commission

1. Every two years from 30 June 2014, the

Amendment

1. Every two years from 30 June 2014, the

Commission shall verify that the thresholds set out in points (a), (b) and (c) of Article 4 correspond to the thresholds established in the Government Procurement Agreement and shall, where necessary, revise them. In accordance with the calculation method set out in the Government Procurement Agreement, the Commission shall calculate the value of these thresholds on the basis of the average daily value of the euro in terms of the special drawing rights (SDRs), over a period of 24 months terminating on the last day of August preceding the revision with effect from 1 January. The value of the thresholds thus revised shall, where necessary, be rounded down to the nearest thousand euros so as to ensure that the thresholds in force provided for by the Agreement, expressed in SDRs, are observed.

Amendment 18

Proposal for a directive Article 9 – paragraph 1 – point c

Text proposed by the Commission

(c) a particular procedure of an international organisation;

Amendment 19

Proposal for a directive Article 9 – paragraph 2 a (new)

Text proposed by the Commission

Commission shall verify that the thresholds set out in points (a), (b) and (c) of Article 4 correspond to the thresholds established in the Government Procurement Agreement and shall, where necessary, revise them. In accordance with the calculation method set out in the Government Procurement Agreement, the Commission shall calculate the value of these thresholds on the basis of the average daily value of the euro in terms of the special drawing rights (SDRs), over a period of 24 months terminating on the last day of August preceding the revision with effect from 1 January. The value of the thresholds thus revised shall, where necessary, be rounded down to the nearest thousand euros so as to ensure that the thresholds in force provided for by the Agreement, expressed in SDRs, are observed. ***The Commission may also take into account the changes to the thresholds made by the other Contracting Parties to the Agreement.***

Amendment

(c) a particular procedure of an international organisation, ***which has its affiliation in the Member State;***

Amendment

(2a) In any case, access to parts of the EU's procurement markets for third countries should be based on principle of reciprocity and proportionality.

Amendment 20

Proposal for a directive

Article 11 – paragraph 4 – point c

Text proposed by the Commission

(c) the participating contracting authorities do not perform on the open market more than 10 % in terms of turnover of the activities which are relevant in the context of the agreement;

Amendment

deleted

Amendment 21

Proposal for a directive

Article 23 – paragraph 1

Text proposed by the Commission

1. As far as covered by Annexes I, II, IV and V and the General Notes to the European Union's Appendix 1 to the Government Procurement Agreement and by the other international agreements by which the Union is bound, as listed in Annex V to this Directive, contracting authorities shall accord to the works, supplies, services and economic operators of the signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the Union. By applying this Directive to economic operators of the signatories to those agreements, contracting authorities shall comply with those agreements.

Amendment

1. As far as covered by Annexes I, II, IV and V and the General Notes to the European Union's Appendix 1 to the Government Procurement Agreement and by the other international agreements by which the Union is bound — ***including commitments within the framework of bilateral trade agreements*** — as listed in Annex V to this Directive, contracting authorities shall accord to the works, supplies, services and economic operators of the signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the Union. By applying this Directive to economic operators of the signatories to those agreements, contracting authorities shall comply with those agreements.

Amendment 22

Proposal for a directive Article 30 – paragraph 2 – letter b

Text proposed by the Commission

(b) where the aim of the procurement is the creation or obtention of a work of art;

Amendment

(b) where the aim of the procurement is the creation, **renovation, conservation,** or obtention of a work of art — **or of movable or immovable property, subject to artistic, historic and architectural constraints;**

Amendment 23

Proposal for a directive Article 39 – paragraph 1 – subparagraph 2

Text proposed by the Commission

For this purpose, contracting authorities may seek or accept advice from administrative support structures or from third parties or market participants, provided that such advice does not have the effect of precluding competition and does not result in a violation of the principles of non-discrimination and transparency.

Amendment

For this purpose, contracting authorities may seek or accept advice from administrative support structures or from **independent** third parties or market participants, provided that such advice does not have the effect of precluding competition and does not result in a violation of the principles of non-discrimination and transparency.

Justification

Contracting authorities rather “consult” market participants, mainly to get information about techniques and innovations. It has to be highlighted that market participants, that is, potential candidates in a tender should not influence contracting authorities.

Amendment 24

Proposal for a directive Article 44 – paragraph 1 – subparagraph 1

Text proposed by the Commission

Public contracts may be subdivided into **homogenous or heterogeneous** lots. For contracts with a value equal to or greater **than the thresholds provided for in Article 4 but not less** than EUR 500 000, determined in accordance with Article 5,

Amendment

With a view to maximizing competition and access of SMEs to public procurement, public contracts may be subdivided into lots. For contracts with a value equal to or greater than EUR 500 000, determined in accordance with Article

where the contracting authority does not deem it appropriate to split into lots, it shall provide in the contract notice or in the invitation to confirm interest a specific explanation of its reasons.

5, where the contracting authority does not deem it appropriate to split into lots, it shall provide in the contract notice or in the invitation to confirm interest a specific explanation of its reasons.

Justification

Authorities benefit from a wider competition between tenderers and a better access to SMEs as this increases the number of possible offers. For the sake of simplification there is also no need to indicate that the Article referees to contracts with a value equal to or grater than the thresholds indicated in Article 4, as it is obvious.

Amendment 25

**Proposal for a directive
Article 44 – paragraph 1 – subparagraph 2**

Text proposed by the Commission

Amendment

Contracting authorities shall indicate, in the contract notice ***or*** in the invitation to confirm interest, ***whether tenders are limited to one or more lots only.***

Where the contracting authority limits the possibility to tender to one or more lots it shall indicate it, in the contract notice, in the invitation to confirm interest or ***in the procurement documents.***

Justification

It seems to be sufficient to oblige contracting authorities to inform, in the contract notice or in the invitation to confirm interest, about its decision not to split contract into lots. Contracting authorities should not be required to provide specific explanations of its reasons. It is not clear what would be the added value of such requirement. The wording of the Article was adjusted for clarification.

Amendment 26

**Proposal for a directive
Article 44 – paragraph 3**

Text proposed by the Commission

Amendment

3. Where more than one lot may be awarded to the same tenderer, contracting authorities may provide that they will either award a contract per lot or one or more contracts covering several or all lots. Contracting authorities shall specify in the procurement documents whether they

deleted

reserve the right to make such a choice and, if so, which lots may be grouped together under one contract. Contracting authorities shall first determine the tenders fulfilling best the award criteria set out pursuant to Article 66 for each individual lot. They may award a contract for more than one lot to a tenderer that is not ranked first in respect of all individual lots covered by this contract, provided that the award criteria set out pursuant to Article 66 are better fulfilled with regard to all the lots covered by that contract. Contracting authorities shall specify the methods they intend to use for such comparison in the procurement documents. Such methods shall be transparent, objective and non-discriminatory.

Justification

This paragraph could lead to contrary of what is the aim of the proposal, namely to enable better access of SMEs to public contracts, as it may lead to aggregation of procurement, thereby excluding SMEs.

Amendment 27

**Proposal for a directive
Article 54 – paragraph 2**

Text proposed by the Commission

2. Contracting authorities **may decide** not **to** award a contract to the tenderer submitting the best tender where they have established that the tender does not comply, at least in an equivalent manner, with obligations established by Union legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XI.

Amendment

2. Contracting authorities **shall** not award a contract to the tenderer submitting the best tender where they have established that the tender does not comply, at least in an equivalent manner, with obligations established by Union legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XI.

Amendment 28

**Proposal for a directive
Article 55 – paragraph 2 a (new)**

Text proposed by the Commission

Amendment

(2a) Any economic operator shall be excluded from participation in a contract where the contracting authority is aware of any violation of obligations established by Union legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XI. Compliance with Union legislation or with international law also includes compliance in an equivalent manner.

Amendment 29

Proposal for a directive

Article 55 – paragraph 3 – subparagraph 1 – point a

Text proposed by the Commission

Amendment

(a) where it is aware of any violation of obligations established by Union legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XI. Compliance with Union legislation or with international provisions also includes compliance in an equivalent manner.

deleted

Amendment 30

Proposal for a directive

Article 66 – paragraph 1 – subparagraph 1 – introductory part

Text proposed by the Commission

Amendment

Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the criteria on which contracting authorities shall base the award of public contracts shall be ***one of the following***:

Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the criteria on which contracting authorities shall base the award of public contracts shall be ***the most economically advantageous tender***.

Amendment 31

Proposal for a directive

Article 66 – paragraph 1 – subparagraph 1 – point a

Text proposed by the Commission

Amendment

(a) the most economically advantageous tender; **deleted**

Amendment 32

Proposal for a directive

Article 66 – paragraph 1 – subparagraph 1 – point b

Text proposed by the Commission

Amendment

(b) the lowest cost. **deleted**

Amendment 33

Proposal for a directive

Article 66 – paragraph 1 – subparagraph 2

Text proposed by the Commission

Amendment

Costs may be assessed, on the choice of the contracting authority, on the basis of the price only or using a cost-effectiveness approach, such as a life-cycle costing approach, under the conditions set out in Article 67. **deleted**

Amendment 34

Proposal for a directive

Article 66 – paragraph 2 – introductory part

Text proposed by the Commission

Amendment

2. The most economically advantageous tender ***referred to in point (a) of paragraph 1*** from the point of view of the contracting authority shall be identified on the basis of criteria linked to the subject-matter of the public contract in question.

2. The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of criteria linked to the subject-matter of the public contract in question. Those criteria shall include, in addition to

Those criteria shall include, in addition to the price or costs *referred to in point (b) of paragraph 1*, other criteria linked to the subject-matter of the public contract in question, such as:

the price or costs, *which the contracting authority shall assess, as it prefers, either on the basis of the price alone or by using a cost-effectiveness approach, such as a life-cycle costing approach under the conditions set out in Article 67*, other criteria linked to the subject-matter of the public contract in question, such as:

Amendment 35

Proposal for a directive Article 66 – paragraph 3

Text proposed by the Commission

Amendment

3. Member States may provide that the award of certain types of contracts shall be based on the most economically advantageous tender as referred to in point (a) of paragraph 1 and in paragraph 2.

deleted

Amendment 36

Proposal for a directive Article 66 – paragraph 5 – subparagraph 1

Text proposed by the Commission

Amendment

In the case referred to in point (a) of paragraph 1 the contracting authority shall specify, in the contract notice, in the invitation to confirm interest, in the procurement documents or, in the case of a competitive dialogue, in the descriptive document, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

The contracting authority shall specify, in the contract notice, in the invitation to confirm interest, in the procurement documents or, in the case of a competitive dialogue, in the descriptive document, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

Amendment 37

Proposal for a directive Article 69

Abnormally low tenders

1. Contracting authorities shall require economic operators to explain the price or costs charged, **where all of the following conditions are fulfilled:**

(a) the price or cost charged is more than **50 %** lower than the average price or costs of the remaining tenders

(b) the price or cost charged is more than 20 % lower than the price or costs of the second lowest tender;

(c) **at least five tenders have been submitted.**

2. Where tenders appear to be abnormally low for other reasons, contracting authorities may also request such explanations.

3. The explanations referred to in paragraphs 1 and 2 may in particular relate to:

(a) the economics of the construction method, the manufacturing process or the services provided;

(b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the execution of the work or for the supply of the goods or services;

(c) the originality of the work, supplies **or** services proposed by the tenderer;

(d) compliance, at least in an equivalent manner, with obligations established by Union legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XI or, where not applicable, with other provisions ensuring an equivalent level of protection;

Abnormally low tenders

1. **Contracting authorities may exclude tenders where the price or the costs applied is more than 50% lower than the base tender price**

2. Contracting authorities shall require economic operators to explain the price or costs **charged if at least three tenders have been submitted and one of the following conditions is fulfilled:**

(a) the price or cost charged is more than **30 %** lower than the average price or costs of the remaining tenders

(b) the price or cost charged is more than 20 % lower than the price or costs of the second lowest tender

(c) **the price or cost indicated in a tender is more than 40% lower than the price or cost estimated by a contracting authority including taxes**

3. **Anyway**, where tenders appear to be abnormally low for other reasons, contracting authorities shall also request such explanations.

4. **The explanations referred to in paragraph 2 and 3 may in particular relate to:**

(a) the economics of the construction method, the manufacturing process or the services provided,

(b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the execution of the work or for the supply of the goods **or services**

(c) the originality of the work, supplies **and** services proposed by the tenderer

(e) the possibility of the tenderer obtaining State aid.

4. The contracting authority shall verify the information provided by consulting the tenderer. It may only reject the tender where the evidence does not justify the low level of price or costs charged, taking into account the elements referred to in paragraph 3.

Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with obligations established by Union legislation in the field of social and labour law or environmental law or by the international social and environmental law provisions listed in Annex XI.

5. Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was compatible with the internal market within the meaning of Article 107 of the Treaty. Where the contracting authority rejects a tender in those circumstances, it shall inform the Commission thereof.

6. Upon request, Member States shall make available to other Member States, in accordance with Article 88, any information relating to the evidence and documents produced in relation to details listed in paragraph 3.

(d) compliance, at least in an equivalent manner with obligations established by the Union legislation in the field of social and labour and environmental law or the international social and environmental law provisions listed in Annex XI or, where not applicable, with other provisions ensuring an equivalent level of protection

(e) the possibility of the tenderer obtaining state aid *both for the financing of the tender itself and for the financing of services, supplies and works relating to the tender*

(ebis) the use of subcontractors that do not comply with social, labour and environmental obligations or rules regarding state aid as explained in d) and e)

5. The contracting authority shall verify the information provided by consulting the tenderer. It shall reject the tender where the evidence does not justify the low level of price or costs charged, taking into account in particular the elements referred to in paragraph 3

Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with obligations established by Union legislation in the field of social and labour law or environmental law or by the international social and environmental law provisions listed in Annex XI.

6. Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid,

the tender may be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was compatible with the internal market within the meaning of Article 107 of the Treaty. Where the contracting authority rejects a tender in those circumstances, it shall inform the Commission thereof.

7. Upon request, Member States shall make available to other Member States, in accordance with Article 88, any information relating to the evidence and documents produced in relation to details listed in paragraph 3.

Amendment 38

Proposal for a directive Article 69 a (new)

Text proposed by the Commission

Amendment

Article 69a

The current Directive shall be in accordance with Regulation on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries (COM/2012/0124 - 2012/0060 (COD)) and shall be in accordance with the conditions laid down in Articles 58 and 59 of Directive 2004/17/EC, whereby tenders covering goods originating in third countries with which the European Union has not concluded, whether multilaterally or bilaterally, an agreement ensuring comparable and effective access for European Union undertakings to the markets of those third countries may be rejected.

Amendment 39

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Proposal for a directive
Article 71 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. The subcontractor, irrespective of its country of origin, is required to comply with labour, social and environmental standards and shall not benefit from any State aid that might result in the price of the tender price being so low that it is detrimental to fair competition.

Amendment 40

Proposal for a directive
Article 83 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

1a. Member States shall ensure that the application of public procurement rules is monitored including the implementation of projects co-financed by the Union with a view to detecting threats to the financial interests of the Union. This monitoring shall be used to prevent, detect and adequately report possible instances of procurement fraud, corruption, conflict of interest and other serious irregularities. Where monitoring authorities or structures identify specific violations or systemic problems, they shall be empowered to refer those problems to national auditing authorities, courts or tribunals or other appropriate authorities or structures, such as the ombudsman, national Parliaments or committees thereof.

Amendment 41

Proposal for a directive Article 89 – paragraph 2

Text proposed by the Commission

2. The delegation of power referred to in Articles 6, 13, 19, 20, 23, 54, 59, 67 and 86 shall be conferred on the Commission for **an indeterminate** period of **time from the** [date of entry into force of the **present** Directive].

Amendment

2. The delegation of power referred to in Articles 6, 13, 19, 20, 23, 54, 59, 67 and 86 shall be conferred on the Commission for a period of **five years from ...***[date of entry into force of the Directive]. **The Commission shall draw up a report in respect of the delegation of power not later than nine months before the end of the five-year period. The delegation shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension not later than three months before the end of each period.**

Amendment 42

Proposal for a directive Article 89 – paragraph 5

Text proposed by the Commission

5. A delegated act adopted pursuant to this Article shall enter into force only where no objection has been expressed either by the European Parliament or by the Council within a period of two months of notification of the act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by **two** months at the initiative of the European Parliament or the Council.

Amendment

5. A delegated act adopted pursuant to this Article shall enter into force only where no objection has been expressed either by the European Parliament or by the Council within a period of two months of notification of the act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by **four** months at the initiative of the European Parliament or the Council.

Justification

The directive foresees the use of delegated acts - among other things - to adapt the methodology for the calculation of the threshold levels to any change provided for by the Government Procurement Agreement (Article 6(5) classic, Article 12(4) utilities directive)

and to change the list of international social and environmental law provisions in ANNEX XI (Article 54(2) classic directive, Article 70 utilities directive). As these are issues with a clear international trade dimension, the rapporteur feels that the same institutional procedures should apply as with 'normal' trade legislation. In line with OMNIBUS I and OMNIBUS II (alignment package in the Committee on International Trade (INTA)), the rapporteur proposes emphasizing the need for the European Parliament to be duly involved in the preparation and implementation of delegated acts (Recital 55). This will facilitate the scrutiny of delegated acts and will ensure an efficient exercise of the delegation of power by avoiding objections from the European Parliament. The rapporteur deems it appropriate to limit in time (Article 89(2)) the conferral of powers on the Commission. Such a limitation brings about more parliamentary control, obliging the Commission to draw up a report in respect of the delegation of power no later than nine months before the end of the established period. On the other hand, tacit extension of the delegation for a period of identical duration prevents overburdening the legislators and facilitates the implementation of the common commercial policy. Considering the dynamics of parliamentary work, internal procedures and deadlines, it is important to assure that the legislator is given enough time to duly scrutinize a legislative act (Article 89(5)). All changes reflect changes brought about by the two Trade Omnibuses.

Amendment 43

Proposal for a directive ANNEX XI

Text proposed by the Commission

Amendment

- Convention No 94 on employment clauses (public contracts).

PROCEDURE

Title	Public procurement
References	COM(2011)0896 – C7-0006/2012 – 2011/0438(COD)
Committee responsible Date announced in plenary	IMCO 17.1.2012
Opinion by Date announced in plenary	INTA 17.1.2012
Rapporteur Date appointed	Gianluca Susta 25.1.2012
Discussed in committee	25.4.2012 11.7.2012
Date adopted	18.9.2012
Result of final vote	+: 22 –: 5 0: 2
Members present for the final vote	William (The Earl of) Dartmouth, Laima Liucija Andrikienė, Nora Berra, David Campbell Bannerman, María Auxiliadora Correa Zamora, Christofer Fjellner, Metin Kazak, Franziska Keller, Bernd Lange, David Martin, Vital Moreira, Paul Murphy, Cristiana Muscardini, Franck Proust, Godelieve Quisthoudt-Rowohl, Niccolò Rinaldi, Helmut Scholz, Peter Šťastný, Robert Sturdy, Gianluca Susta, Henri Weber, Jan Zahradil, Paweł Zalewski
Substitute(s) present for the final vote	Amelia Andersdotter, George Sabin Cutaş, Małgorzata Handzlik, Syed Kamall, Ioannis Kasoulides, Maria Eleni Koppa, Marietje Schaake, Jarosław Leszek Wałęsa, Pablo Zalba Bidegain
Substitute(s) under Rule 187(2) present for the final vote	Emilio Menéndez del Valle, Raimon Obiols

26.9.2012

OPINION OF THE COMMITTEE ON EMPLOYMENT AND SOCIAL AFFAIRS

for the Committee on the Internal Market and Consumer Protection

on the proposal for a directive of the European Parliament and of the Council on Public procurement
(COM(2011)0896 – C7-0006/2012 – 2011/0438(COD))

Rapporteur: Birgit Sippel

SHORT JUSTIFICATION

The Commission proposal for a directive on public procurement plays a key role in the ‘Europe 2020’ strategy for smart, sustainable, and inclusive growth (COM(2010)2020). Public procurement is to be used increasingly to promote a high employment level as well as helping to achieve other goals, especially in the environment and social policy sphere.

By means of the proposal the Commission is seeking on the one hand to ‘Increase the efficiency of public spending to ensure the best possible ... outcomes in terms of value for money’ and, secondly, to enable public procurement to be put to ‘better use ... in support of common societal goals such as protection of the environment, employment and social inclusion and ensuring the best possible conditions for the provision of high[-]quality social services’. This approach is to be welcomed. The Commission proposals do not, however, go far enough and are much too vague, especially where social sustainability is concerned.

Public authorities in the EU spend about 18% of GDP on supply, works, and service contracts; that being the case, reform of the public procurement rules could serve as a powerful lever to bring greater sustainability to society. Given that the money involved is public money, it should not be spent on short-term goals, but should, on the contrary, be viewed as a long-term investment in society; to that extent, the onus on the authorities is all the greater.

If it is to be pursued to useful effect, the above aim requires a broad approach. The following points are particularly important:

- The ‘lowest cost’ criterion must be done away with altogether. The ‘most economically advantageous tender’ is a sufficiently flexible concept to allow for a tender’s price. To make it clear what is meant by ‘most economically advantageous tender’, the name should be changed to ‘most economically advantageous and sustainable tender’ (MEAST).

- Applicable labour and social standards should be mentioned not just in the recitals, but also in the articles. All provisions applicable at the workplace, whether laid down by international conventions or European regulations or by national legislation, arbitration awards, or collective agreements, must be brought to bear – and that includes in cross-border situations.
- In addition, contracting authorities must be given the option of incorporating other types of social criteria in the technical specifications and/or award criteria; among the examples are employment opportunities for disadvantaged groups, access to on-site vocational training, and ethical trade. Even at the beginning of a procedure it has to be possible to assess whether a tenderer can fulfil those criteria. External social costs linked to the subject matter of the contract should be included in this context.
- When tenders are abnormally low, the criteria must be tightened up. If it were either 25% lower than the average for the tenders submitted or 10% lower than the next lowest tender, a tender could quite legitimately be considered so low that certain points would need explaining.
- The provisions on subcontracting in the Commission proposal do not go far enough. A tenderer must be required not only to refer in its tender to the matter of subcontracting, but also to name its subcontractors and enable them to be identified by listing their contact details and legal representatives. Furthermore, it has to be possible for the main contractor and all of the subcontractors involved to be made liable in the event of failure to comply with social or labour law, provisions on health and safety at work, or working conditions.
- The new chapter on social services is intended to provide a better guarantee of quality in personal services. Given quality criteria accordingly have to be binding. In addition, public contracts must not, under any circumstances, be awarded solely on the basis of the lowest price. To complete the chapter, provisions need to be laid down on exclusion criteria, subcontracting, and compliance with labour and social standards applicable at the workplace.
- To enable the directive to be implemented properly, Title IV (‘Governance’) needs to be expanded. When, for example, contractors have been found to be seriously and persistently at fault in the performance of their contracts, their names should be entered in a register, which must be accessible to contracting authorities; and the fact of appearing in the register must constitute a ground for exclusion. The application of the public procurement rules, and especially of labour and social standards at the workplace, should be monitored by the public oversight bodies.

AMENDMENTS

The Committee on Employment and Social Affairs calls on the Committee on the Internal Market and Consumer Protection, as the committee responsible, to incorporate the following amendments in its report:

Amendment 1

Proposal for a directive

Recital 1

Text proposed by the Commission

(1) The award of public contracts by or on behalf of Member States authorities has to comply with the principles of the ***Treaty on the Functioning*** of the European Union, and in particular the free movement of goods, freedom of establishment and the freedom to provide services as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that these principles are given practical effect and public procurement is opened up to competition.

Amendment

(1) The award of public contracts by or on behalf of Member States authorities has to comply with the principles of the ***Treaties*** of the European Union, and in particular the free movement of goods, freedom of establishment and the freedom to provide services as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency ***and with the distribution of competencies as enshrined in Article 14 (1) TFEU and the Protocol No 26. The European regulation of public procurement should respect the wide discretion of public authorities in carrying out their public service tasks.*** However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that these principles are given practical effect and public procurement is opened up to competition.

Amendment 2

Proposal for a directive

Recital 2

Text proposed by the Commission

(2) Public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the current public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council of

Amendment

(2) Public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the current public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council of

31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts have to be revised and modernised in order to **increase** the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises in public procurement and to enable procurers to make better use of public procurement in support of common societal goals. There is also a need to clarify basic notions and concepts to ensure better legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.

31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts have to be revised and modernised in order to to **enable procurers to make better use of public procurement in support of sustainable development compliance with social and labour rights, social inclusion, innovation where relevant, and other common societal goals, thereby increasing** the efficiency of public spending, **ensuring best value for money**, facilitating in particular the participation of small and medium-sized enterprises in public procurement and to enable procurers to make better use of public procurement in support of common societal goals, **leading to creation of new sustainable jobs**. There is also a need to **simplify Union rules on public procurement, in particular as regards the method used to achieve the sustainability objectives which should be part and parcel of public procurement policy and to clarify basic notions and concepts to ensure better legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union. This Directive only provides legislation on how to buy.**

Amendment 3 Proposal for a directive Recital 5

Text proposed by the Commission

(5) Under Article 11 of the Treaty on the Functioning of the European Union, environmental protection requirements must be integrated into the definition and

Amendment

(5) Under **Articles 9, 10 and** 11 of the Treaty on the Functioning of the European Union, environmental protection requirements **and social considerations**

implementation of the Union policies and activities, in particular with a view to promoting sustainable development. This Directive clarifies how the contracting authorities may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring **that they can obtain** the best value for money for their contracts.

must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development. This Directive clarifies how the contracting authorities may contribute to the protection of the environment and the promotion of sustainable development **and how they can use their discretionary power to select technical specifications and award criteria with the aim of achieving sustainable public procurement**, whilst ensuring the **link to the subject matter of the contract and obtaining the best value for money for their contracts. Under Article 9 of the Treaty on the Functioning of the European Union, requirements linked to the guarantee of adequate social protection and the fight against social exclusion in defining and implementing its policies and activities should be taken into account when defining and implementing Union policies and activities, especially to promote a high level of employment. This directive also specifies how contracting authorities can help promote social criteria and improve employees' rights whilst ensuring that they can obtain the best social value for money for their contracts by encouraging sustainable public procurement, the respect of social criteria in all stages of the procurement procedure and the respect of obligations established by Union and/or national legislation and/or collective agreements in the field of social and employment protection provisions and working conditions or environmental law or of the international social and environmental law provisions listed in Annex XI, which are in force in the Member State, in the region or locality where the works are to be carried out or the services are to be provided.**

Justification

The reference to the horizontal social clause, which is a novelty of the Lisbon Treaty, is

essential for sustainable procurement and for the inclusion of horizontal social criteria throughout the procurement procedure.

Amendment 4

Proposal for a directive

Recital 5 a (new)

Text proposed by the Commission

Amendment

(5a) This Directive should not prevent Member States from complying with ILO Convention 94 on Labour Clauses in public contracts and encourages the inclusion of labour clauses in public procurement.

Justification

ILO Convention 94 provides that public contracts shall include labour clauses ensuring equal treatment with local workers. Member States having ratified this Convention should not be hindered to respect its provisions. This clarification is particularly important in the context of the judgement of the Court in case C-346/06 (Rüffert).

Amendment 5

Proposal for a directive

Recital 11

Text proposed by the Commission

Amendment

(11) Other categories of services continue by their very nature to have a limited cross-border dimension, namely what are known as services to the person, such as certain social, health and educational services. These services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. A specific regime should **therefore** be established **for public contracts for these services**, with a higher threshold of EUR 500 000. Services to the person with values below this threshold will typically not be of interest to providers from other Member States, unless there are concrete indications to the contrary, such

(11) Other categories of services continue by their very nature to have a limited cross-border dimension, namely what are known as services to the person, such as certain social, health and educational services. These services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. **By their very nature they are in general difficult to reconcile with internal market rules applying to public procurement. Therefore, public authorities should prefer other ways of providing these services and must ensure high quality for the social services provided if they decide nevertheless to**

as Union financing for transborder projects. Contracts for services to the person above this threshold should be subject to Union-wide transparency. Given the importance of the cultural context *and* the sensitivity of these services, Member States *should be given* wide discretion to organise the choice of the service providers in the way they consider most appropriate. The rules of this directive take account of that imperative, imposing only observance of basic principles of transparency and equal treatment and making sure that contracting authorities *are able to apply* specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee. Member States and/or public authorities remain free to provide these services themselves or to organise social services in *a* way that does not entail the conclusion of public contracts, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority, without any limits or quotas, provided such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination.

apply public procurement procedures. For a better quality of these services in contracts, a specific regime should be established with a higher threshold of EUR 500 000. Services to the person with values below this threshold will typically not be of interest to providers from other Member States, unless there are concrete indications to the contrary, such as Union financing for transborder projects. Contracts for services to the person above this threshold should be subject to Union-wide transparency. Given the importance of the cultural context and the sensitivity of these services, *the subsidiarity principle, Protocol 26 on Services of general interest, Article 14 of the Treaty on the Functioning of the European Union and Article 36 of the Charter of Fundamental Rights*, Member States *have* wide discretion to organise the choice of the service providers in the way they consider most appropriate, *as closely as possible to the needs of the users, and taking into account the differences in the needs and preferences of users that may result from different geographical, social or cultural situations, and to ensure universal access, continuity and availability of the services in all territories of the Union.* The rules of this directive take account of that imperative, imposing only observance of basic principles of transparency and equal treatment and making sure that contracting authorities are able to apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee, *which are designed to ensure a high level of quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of different categories of users, including disadvantaged and vulnerable groups, users' satisfaction, social inclusion, the involvement and empowerment of users*

and, where relevant, innovation. Criteria relating to social and employment conditions, health and safety at the workplace, social security and working conditions should particularly be taken into account. Member States and/or public authorities remain free to provide these services themselves *including vertical "in-house" provision or horizontal inter-municipal (public-public) cooperation*, or to organise social services in *any other* way that does not entail the conclusion of public contracts, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority, without any limits or quotas, provided such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination. *According to case law of the Court, in particular the judgement in case C-70/95 (Sodemare), contracting authorities may be allowed to reserve contracts to non-profit organisation, if such a restriction is provided for by national law and compatible with European law, if it is necessary and proportionate to attain certain societal goals of the national welfare system.*

Justification

The respect of basic principles ensuring the high quality of social services should be binding. The wide discretion of Member States or public authorities in providing public services must be underlined. It must be clear that other ways of providing those services, which do not imply public procurement procedures (i.e. in-house provision or horizontal inter-municipal cooperation, or specific national systems like the 'sozialrechtliches Dreiecksverhältnis' in Germany), do also exist and they are conform with EU-law. The reference to the judgement of the Court in case C-70/95 (Sodemare) is essential for the reservation of contracts to non-profit organisations.

Amendment 6

Proposal for a directive Recital 19

Text proposed by the Commission

(19) Electronic means of information and communication can greatly simplify the publication of contracts and increase the efficiency and transparency of procurement processes. They should become the standard means of communication and information exchange in procurement procedures. The use of electronic means also leads to time savings. As a result, provision should be made for reducing the minimum periods where electronic means are used, subject, however, to the condition that they are compatible with the specific mode of transmission envisaged at Union level. Moreover, electronic means of information and communication including adequate functionalities can enable contracting authorities to prevent, detect and correct errors that occur during procurement procedures.

Amendment

(19) Electronic means of information and communication can greatly simplify the publication of contracts, ***reduce administrative burdens such as transaction costs particularly for SMEs***, and increase the efficiency and transparency of procurement processes. They should become the standard means of communication and information exchange in procurement procedures. The use of electronic means also leads to time savings. As a result, provision should be made for reducing the minimum periods where electronic means are used, subject, however, to the condition that they are compatible with the specific mode of transmission envisaged at Union level. Moreover, electronic means of information and communication including adequate functionalities can enable contracting authorities to prevent, detect and correct errors that occur during procurement procedures.

Amendment 7

**Proposal for a directive
Recital 25 a (new)**

Text proposed by the Commission

Amendment

(25a) Member States should be encouraged to use a service voucher system, which is a new effective tool to arrange public services.

A 'service voucher system' is a system where a contracting authority gives a service voucher to a customer who can then acquire a service from a service provider which is included by the contracting authority to the service voucher system. The contracting authority pays the sum corresponding to the value of the service voucher to the service

provider.

It is beneficial to SMEs because it is very easy to get to participate in a service voucher system. A service voucher system gives a freedom of choice to the citizen who may select the service provider from several alternatives. A service voucher system is beneficial to the authority as well, as it is much easier to establish a service voucher system compared to a classic public procurement.

The service voucher system does not fall under the European regime for public procurement or under this Directive.

Amendment 8

Proposal for a directive Recital 27

Text proposed by the Commission

(27) The technical specifications drawn up by public purchasers need to allow public procurement to be opened up to competition. To that end, it must be possible to submit tenders that reflect the diversity of technical solutions so as to obtain a sufficient level of competition. Consequently, technical specifications should be drafted in *such a way* to avoid artificially narrowing down competition through requirements that favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator. Drawing up the technical specifications in terms of functional and performance requirements generally allows this objective to be achieved in the best way possible and favours innovation. Where reference is made to a European standard or, in the absence thereof, to a national standard, tenders based on equivalent arrangements must be considered by contracting authorities. To

Amendment

(27) The technical specifications drawn up by public purchasers need to allow public procurement to be opened up to competition. To that end, it must be possible to submit tenders that reflect the diversity of technical solutions so as to obtain a sufficient level of competition. Consequently, technical specifications should be drafted *and applied in conformity with the principles of transparency and non-discrimination*, to avoid artificially narrowing down competition through requirements that favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator. Drawing up the technical specifications in terms of functional and performance requirements generally allows this objective to be achieved in the best way possible and favours innovation. Where reference is made to a European standard or, in the absence thereof, to a national

demonstrate equivalence, tenderers can be required to provide third-party verified evidence; however, other appropriate means of proof such as a technical dossier of the manufacturer should also be allowed where the economic operator concerned has no access to such certificates or test reports, or no possibility of obtaining them within the relevant time limits.

standard, tenders based on equivalent arrangements must be considered by contracting authorities. To demonstrate equivalence, tenderers can be required to provide third-party verified evidence; however, other appropriate means of proof such as a technical dossier of the manufacturer should also be allowed where the economic operator concerned has no access to such certificates or test reports, or no possibility of obtaining them within the relevant time limits.

Amendment 9

Proposal for a directive Recital 28

Text proposed by the Commission

(28) Contracting authorities that wish to purchase works, supplies or services with specific environmental, social or other characteristics should be able to refer to particular labels, such as the European Eco-label, (multi-)national eco-labels or any other label provided that the requirements for the label are linked to the subject-matter of the contract, such as the description of the product and its presentation, including packaging requirements. It is furthermore essential that these requirements are drawn up and adopted on the basis of objectively verifiable criteria, using a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations, can participate, and that the label is accessible and available to all interested parties.

Amendment

(28) Contracting authorities that wish to purchase works, supplies or services with specific environmental, social or other characteristics should be able to refer to particular labels, such as the European Eco-label, (multi-)national eco-labels or any other label provided that the requirements for the label are linked to the subject-matter of the contract, such as the description of the product and its presentation, including packaging requirements. It is furthermore essential that these requirements are drawn up and adopted on the basis of objectively verifiable criteria, using a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors, **social organisations** and environmental organisations, can participate, and that the label is accessible and available to all interested parties.

Amendment 10

Proposal for a directive Recital 29 a (new)

Text proposed by the Commission

Amendment

(29a) The importance of training the staff of contracting authorities and individual operators should be underlined, on the one hand, and skills and training requirements should be included in contracting specifications as a long term strategy, on the other; it should be stressed, however, that these latter actions must be directly linked to the subject matter of the contract, be proportionate and economically advantageous.

Amendment 11

Proposal for a directive Recital 32 a (new)

Text proposed by the Commission

Amendment

(32a) Job creation depends heavily on small and medium sized enterprises. SMEs have been able to offer new, sustainable jobs even in the times of economic crisis. As public authorities use around 18 % of GDP on public procurement, this legislative regime has significant impact on SMEs' ability to continue creating new jobs. Thus, public contracts should be made as accessible as possible for SMEs, both above and below the thresholds, which are defined in this Directive. In addition to the specific tools, which are tailored to enhance the involvement of SMEs in the public procurement market, Member States and contracting authorities should be strongly encouraged to create SME-friendly public procurement strategies. The Commission has published a staff working document "European code of best practices facilitating access by SMEs to public procurement contracts" (SEC (2008)COM 2193), which aims at helping member states create national strategies,

programs and action plans in order to improve SMEs participation in these markets. Efficient public procurement policy has to be coherent. National, regional and local authorities have to rigorously apply the rules set in the Directive and on the other hand, implementing general policies designated to enhance SMEs access to public procurement markets will remain extremely important especially from the perspective of job creation;

Amendment 12

Proposal for a directive Recital 34

Text proposed by the Commission

(34) Public contracts should not be awarded to economic operators that have participated in a criminal organisation or have been found guilty of corruption, fraud to the detriment of the Union's financial interests or money laundering. Non-payment of taxes or social security contributions should also be sanctioned by mandatory exclusion at the level of the Union. Furthermore, contracting authorities should be given the possibility to exclude candidates or tenderers for violations of environmental or social obligations, including rules on accessibility for disabled persons or other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights.

Amendment

(34) Public contracts should not be awarded to economic operators that have participated in a criminal organisation or have been found guilty of corruption, fraud to the detriment of the Union's financial interests or money laundering. Non-payment of taxes or social security contributions should also be sanctioned by mandatory exclusion at the level of the Union. Furthermore, contracting authorities should be given the possibility to exclude candidates or tenderers for violations of environmental, **labour** or social obligations, including rules on **working conditions, collective agreements and accessibility** for disabled persons, **health and safety at work** or other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights.

Amendment 13

Proposal for a directive Recital 37

Text proposed by the Commission

(37) Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination **and** equal treatment. These criteria should guarantee that tenders are assessed in conditions of effective competition, also where contracting authorities require high-quality works, supplies and services that are optimally suited to their needs, for instance where the chosen award criteria include factors linked to the production process. ***As a result, contracting authorities should be allowed to adopt as award criteria either 'the most economically advantageous tender' or 'the lowest cost', taking into account that in the latter case they are free to set adequate quality standards by using technical specifications or contract performance conditions.***

Amendment

(37) Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination, equal treatment, ***cost-quality-effectiveness and the conscientious application of social standards***. These criteria should guarantee that tenders are assessed in conditions of effective competition, also where contracting authorities require high-quality works, supplies and services that are optimally suited to their needs, for instance where the chosen award criteria include factors linked to the production process. ***Accordingly, contracting authorities should adopt as award criteria 'the most economically advantageous tender' in order to assess the contracting authority's sustainability concerns, added to that of basic respect for national, European and international social standards, Contracting authorities are also free to set adequate sustainability and quality standards by using technical specifications or contract performance conditions.***

Amendment 14

**Proposal for a directive
Recital 38**

Text proposed by the Commission

(38) Where contracting authorities choose to award a contract to the most economically advantageous tender, they must determine the award criteria on the basis of which they will assess tenders in order to identify which one offers the best value for money. The determination of these criteria depends on the subject-matter of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the subject-matter of the contract, as defined in

Amendment

(38) Where contracting authorities choose to award a contract to the most economically advantageous tender, they must determine the award criteria on the basis of which they will assess tenders in order to identify which one offers the best value for money, ***economic and social sustainability***. The determination of these criteria depends on the subject-matter of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the subject-

the technical specifications, and the value for money of each tender to be measured. Furthermore, the chosen award criteria should not confer an unrestricted freedom of choice on the contracting authority and they should ensure the possibility of effective competition and be accompanied by requirements that allow the information provided by the tenderers to be effectively verified.

matter of the contract, as defined in the technical specifications, and the value for money of each tender to be measured. Furthermore, the chosen award criteria should not confer an unrestricted freedom of choice on the contracting authority and they should ensure the possibility of effective competition and be accompanied by requirements that allow the information provided by the tenderers to be effectively verified.

Amendment 15

Proposal for a directive Recital 41

Text proposed by the Commission

(41) Furthermore, in technical specifications and in award criteria, contracting authorities should be allowed to refer to a specific production process, a specific mode of provision of services, or a specific process for any other stage of the life cycle of a product or service, provided that they are linked to the subject-matter of the public contract. ***In*** order to better integrate social considerations in public procurement, procurers may also be allowed to include, ***in the award criterion of the most economically advantageous tender***, characteristics related to the working conditions of the persons directly participating in the process of production or provision in question. Those characteristics may ***only*** concern the protection of health of the staff involved in the production process or the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract, including accessibility for persons with disabilities. Any award criteria which include those characteristics should in any event remain limited to characteristics that have immediate consequences on staff

Amendment

(41) Furthermore, in technical specifications and in award criteria, contracting authorities should be allowed to refer to a specific production process, ***including for example social and environmental aspects***, a specific mode of provision of services, or a specific process for any other stage of the life cycle of a product or service, provided that they are linked to the subject-matter of the public contract. ***The link to the subject matter rule shall be interpreted broadly.*** ***Accordingly, in*** order to better integrate social considerations in public procurement, procurers may also be allowed to include, ***in the technical specifications and award criteria***, characteristics related to the working conditions of the persons directly participating in the process of production or provision in question. Those characteristics may ***for example*** concern the protection of health of the staff involved in the production process, ***gender balance, access to on-site vocational training, users' involvement and consultation, human rights, ethical trade*** or the favouring of social integration of

members in their working environment. They should be applied *in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services and* in a way that does not discriminate directly or indirectly against economic operators from other Member States or from third countries parties to the Agreement or to Free Trade Agreements to which the Union is party. For service contracts and for contracts involving the design of works, contracting authorities should also be allowed to use as *an award criterion* the organisation, qualification and experience of the staff assigned to performing the contract in question, as this may affect the quality of contract performance and, as a result, the economic value of the tender.

disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract, including accessibility for persons with disabilities. Any award criteria which include those characteristics should in any event remain limited to characteristics that have immediate consequences on staff members in their working environment. They should be applied in a way that does not discriminate directly or indirectly against economic operators from other Member States or from third countries parties to the Agreement or to Free Trade Agreements to which the Union is party. For service contracts and for contracts involving the design of works, contracting authorities should also be allowed to use as *technical specifications or award criteria* the organisation, qualification and experience of the staff assigned to performing the contract in question, as this may affect the quality of contract performance and, as a result, the economic value of the tender.

Amendment 16

Proposal for a directive Recital 43

Text proposed by the Commission

(43) Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory, are linked to the subject-matter of the contract and are indicated in the contract notice, the prior information notice used as a means of calling for competition or the procurement documents. They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment, protection of the environment or animal welfare. For

Amendment

(43) Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory, are *directly* linked to the subject-matter of the contract and are indicated in the contract notice, the prior information notice used as a means of calling for competition or the procurement documents. They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment, protection of the environment or animal welfare. For

instance, mention may be made, amongst other things, of the requirements - applicable during performance of the contract - to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with fundamental International Labour Organisation (ILO) Conventions, even where such Conventions have not been implemented in national law, and to recruit more disadvantaged persons than are required under national legislation.

instance, mention may be made, amongst other things, of the requirements - applicable during performance of the contract - to recruit long-term job-seekers, ***unemployed young persons, persons with disabilities, women*** or to implement training measures for the unemployed or young persons, to comply in substance with fundamental International Labour Organisation (ILO) Conventions, ***while respecting the principle of subsidiarity***, even where such Conventions have not been implemented in national law, and to recruit more disadvantaged persons than are required under national legislation. .

Amendment 17

Proposal for a directive Recital 44 a (new)

Text proposed by the Commission

Amendment

(44a) The provisions of the Directive should respect Member States' different labour market models, including those where collective agreements apply.

Amendment 18

Proposal for a directive Recital 44 b (new)

Text proposed by the Commission

Amendment

(44b) Member States should be able to use contract clauses that contain provisions on compliance with collective agreements, insofar as this is mentioned in the contracting authority's contract notice or in the tender specifications, so as to comply with the principle of transparency.

Amendment 19

Proposal for a directive
Recital 47

Text proposed by the Commission

(47) In line with the principles of equal treatment and transparency, the successful tenderer should not be replaced by another economic operator without reopening the contract to competition. However, the successful tenderer performing the contract may undergo certain structural changes during the performance of the contract, such as purely internal reorganisations, mergers and acquisitions or insolvency. Such structural changes should not automatically require new procurement procedures for all public contracts performed by that undertaking.

Amendment

(47) In line with the principles of equal treatment, **objectivity** and transparency, the successful tenderer should not be replaced by another economic operator without reopening the contract to competition. However, the successful tenderer performing the contract may undergo certain structural changes during the performance of the contract, such as purely internal reorganisations, mergers and acquisitions or insolvency. Such structural changes should not automatically require new procurement procedures for all public contracts performed by that undertaking.

Amendment 20

Proposal for a directive
Article 1 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. This Directive is without prejudice to the right of public authorities at all levels to decide whether, how and to what extent they want to perform public functions themselves. Public authorities may perform public interest tasks using their own resources, without being obliged to call on outside economic operators. They may do so in cooperation with other public authorities.

Justification

It is important to clarify that it remains up to the Member States to decide whether and to what extent they want to perform public functions themselves and how they want to do this. This freedom is incorporated in the Lisbon Treaty in Article 4 (2) of the TEU which acknowledges the right to regional and local self-government. Protocol 26 on SGI and Article 14 TFEU reinforce national and local responsibilities in providing, commissioning and organising services of general economic interest.

Amendment 21

Proposal for a directive

Article 2 – point 22

Text proposed by the Commission

22. ‘life cycle’ means all consecutive and/or interlinked stages, including production, transport, use and maintenance, throughout the existence of a product or a works or the provision of a service, from raw material acquisition or generation of resources to disposal, clearance and finalisation;

Amendment

22. ‘life cycle’ means all consecutive and/or interlinked stages, including production, transport, **installation**, use and maintenance, throughout the existence of a product or a works or the provision of a service, from raw material acquisition or generation of resources to disposal, clearance and finalisation;

Amendment 22

Proposal for a directive

Article 10 – paragraph 1 – point c

Text proposed by the Commission

(c) arbitration and conciliation services;

Amendment

(c) arbitration and conciliation services, **including dispute adjudication services**;

Amendment 23

Proposal for a directive

Article 11

Text proposed by the Commission

1. A contract awarded by a contracting authority to another legal person shall fall outside the scope of this Directive where the following cumulative conditions are fulfilled:

(a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;

(b) at least **90 %** of the activities of that legal person are carried out for the controlling contracting authority or for

Amendment

1. A contract awarded by a contracting authority to another legal person shall fall outside the scope of this Directive where the following cumulative conditions are fulfilled:

(a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments.

b) at least **80 %** of the activities of that legal person are carried out for the controlling contracting authority or for

other legal persons controlled by that contracting authority;

(c) there is no private participation in the controlled legal person.

A contracting authority shall be deemed to exercise over a legal person a control similar to that which it exercises over its own departments within the meaning of point (a) of the first subparagraph where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person.

2. Paragraph 1 also applies where a controlled entity which is a contracting authority awards a contract to its controlling entity, or to another legal person controlled by the same contracting authority, provided that there is no private participation in the legal person being awarded the public contract.

3. A contracting authority, which does not exercise over a legal person control within the meaning of paragraph 1, may nevertheless award a public contract **without applying** this Directive to a legal person which it controls jointly with other contracting authorities, where the following conditions are fulfilled:

(a) the contracting authorities exercise jointly over the legal person a control which is similar to that which they exercise over their own departments;

(b) at least **90 %** of the activities of that legal person are carried out for the controlling contracting **authorities** or other legal persons controlled by **the same**

other legal persons controlled by that contracting authority;

(c) there is no private participation in the controlled legal person, **with the exception of legally enforced forms of private participation.**

A contracting authority shall be deemed to exercise over a legal person a control similar to that which it exercises over its own departments within the meaning of point (a) of the first subparagraph where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person.

2. Paragraph 1 also applies where a controlled entity which is a contracting authority awards a contract to its controlling entity **or entities**, or to another legal person controlled by the same contracting authority, provided that there is no private participation in the legal person being awarded the public contract, **with the exception of legally enforced forms of private participation.**

3. A contracting authority, which does not exercise over a legal person control within the meaning of paragraph 1, may nevertheless award a public contract **outside the scope of** this Directive to a legal person which it controls jointly with other contracting authorities, **and the legal person over which the contracting authority or authorities exercise control may acquire goods and services from those public owners without applying this directive**, where the following conditions are fulfilled:

(a) the contracting authorities exercise jointly over the legal person a control which is similar to that which they exercise over their own departments;

(b) at least **80 %** of the activities of that legal person are carried out for the controlling contracting **authority** or for other legal persons controlled by **that**

contracting *authorities*;

(c) there is no private participation in the controlled legal person.

For the purposes of point (a), contracting authorities shall be deemed to jointly control a legal person where the following cumulative conditions are fulfilled:

(a) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities;

(b) those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person;

(c) the controlled legal person does not pursue any interests which are distinct from that of the public authorities affiliated to it;

(d) the controlled legal person does not draw any gains other than the reimbursement of actual costs from the public contracts with the contracting authorities.

4. An agreement concluded between two or more contracting authorities shall not be deemed to be a public contract within the meaning of Article 2(6) of this Directive where the following cumulative conditions are fulfilled:

(a) the ***agreement establishes a genuine cooperation between the participating contracting authorities aimed at carrying out jointly their public service tasks and involving mutual rights and obligations of the parties;***

(b) the agreement is governed only by considerations relating to the public

contracting *authority*;

(c) there is no private participation in the controlled legal person, ***with the exception of legally enforced forms of private participation.***

For the purposes of point (a), contracting authorities shall be deemed to jointly control a legal person where the following cumulative conditions are fulfilled:

(a) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities, ***while one representative may represent one or many participating contracting authorities;***

(b) those contracting authorities are able to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person;

(d) the controlled legal person does not draw any gains other than the reimbursement of actual costs from the public contracts with the contracting authorities.

4. An agreement concluded between two or more contracting authorities shall not be deemed to be a public contract within the meaning of Article 2(6) of this Directive ***and thus fall outside the scope of this Directive*** where the following cumulative conditions are fulfilled:

(a) the ***purpose of the partnership is the provision of a public-service task conferred on all participating public authorities;***

(b) the agreement is governed only by considerations relating to the public

interest;

(c) the participating contracting authorities do not perform on the open market more than **10 %** in terms of turnover of the activities which are relevant in the context of the agreement;

(d) the agreement does not involve financial transfers between the participating contracting authorities, other than those corresponding to the reimbursement of actual costs of the works, services or supplies;

(e) there is no private participation in any of the contracting authorities involved.

5. The absence of private participation referred to in paragraphs 1 to 4 shall be verified at the time of the award of the contract or of the conclusion of the agreement.

The exclusions provided for in paragraphs 1 to 4 shall cease to apply from the moment any private participation takes place, with the effect that ongoing contracts need to be opened to competition through regular procurement procedures.

interest;

(c) the participating contracting authorities do not perform on the open market more than **20 %** in terms of turnover of the activities which are relevant in the context of the agreement;

(d) the agreement does not involve financial transfers between the participating contracting authorities, other than those corresponding to the reimbursement of actual costs of the works, services or supplies;

(e) ***the task is carried out solely by the public authorities concerned and*** there is no ***active*** private participation in any of the contracting authorities involved ***with the exception of forms of legally enforced private participation.***

5. The absence of ***active*** private participation referred to in paragraphs 1 to 4 shall be verified at the time of the award of the contract or of the conclusion of the agreement.

The exclusions provided for in paragraphs 1 to 4 shall cease to apply from the moment any private participation takes place, ***with the exception of forms of legally enforced private participation,*** with the effect that ongoing contracts need to be opened to competition through regular procurement procedures.

Amendment 24

Proposal for a directive Article 15

Text proposed by the Commission

Principles of procurement

Amendment

Purpose and principles of procurement

-1. The purpose of this Directive is to safeguard the efficient use of public funds, to promote high-quality procurement, to strengthen competition

and the functioning of the public procurement markets and to safeguard equal opportunities for companies and other providers in offering supply, service and public works contracts under competitive bidding for public procurement. Public procurement is to be used to achieve a smart, sustainable and inclusive growth and to support common societal goals and to provide goods and services of high quality. It is the right of public authorities to decide how they want to provide commissioning and organise their services.

1. Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate way. The design of the procurement shall not be made with the objective of excluding it from the scope of this Directive or of artificially narrowing competition.

1. Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate way. ***The details of public contracts shall be made public.*** The design of the procurement shall not be made with the objective of excluding it from the scope of this Directive or of artificially narrowing competition.

1a. Economic operators shall comply with obligations established by Union and/or national legislation and/or collective agreements in the field of social and employment protection provisions and working conditions or environmental law or of the international social and environmental law provisions listed in Annex XI, which are in force in the Member State, in the region or locality where the works are to be carried out or the services are to be provided. This Directive does not prevent Member States from complying with ILO Convention 94 on Labour Clauses in public contracts. Contracting authorities shall verify that the contractors are of good reputation not having gravely broken against national or international environmental, social, labour or other relevant laws.

1b. Contracting authorities shall aim for best value in procurement policy. This is achieved through the awarding of the

public contract to the most economically advantageous and sustainable tender.

Amendment 25

Proposal for a directive Article 17 – paragraph 1

Text proposed by the Commission

1. Member States may reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled and disadvantaged workers or provide for such contracts to be performed in the context of sheltered employment programmes, provided that more than 30% of the employees of those workshops, economic operators or programmes are disabled *or* disadvantaged **workers**.

Amendment

1. Member States may reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled and disadvantaged workers or provide for such contracts to be performed in the context of sheltered employment programmes, provided that more than 30% of the employees of those workshops, economic operators or programmes are disabled **and/or** disadvantaged **persons**. ***'Disadvantaged persons' includes amongst others: the unemployed, people experiencing particular difficulty in achieving integration, people at risk of exclusion, members of vulnerable groups and members of disadvantaged minorities. The call for competition may make reference to this provision.***

Justification

The term 'disadvantaged persons' needs to be specified as it is much wider than 'handicapped persons' referred to in the current Directives. This definition creates more legal clarity.

Amendment 26

Proposal for a directive Article 29 – paragraph 3 – subparagraph 3

Text proposed by the Commission

Only those economic operators invited by the contracting authority following its assessment of the requested information

Amendment

Only those economic operators invited by the contracting authority following its assessment of the requested information

may submit research and innovation projects aimed at meeting the needs identified by the contracting authority that cannot be met by existing solutions. The contract shall be awarded on the sole basis of the award criterion of the most economically advantageous tender in accordance with Article 66(1)(a).

may submit research and innovation projects aimed at meeting the needs identified by the contracting authority that cannot be met by existing solutions. The contract shall be awarded on the sole basis of the award criterion of the most economically advantageous tender in accordance with Article 66(1)(a) **and Article 66(2)**.

Amendment 27

Proposal for a directive Article 40 – paragraph 2 – subparagraph 2 a (new)

Text proposed by the Commission

Amendment

The requirements shall be limited to the subject matter of the contract and the contracting authority must be able to follow up and control that the requirements are fulfilled;

Amendment 28

Proposal for a directive Article 40 – paragraph 3 – introductory part

Text proposed by the Commission

Amendment

Without prejudice to mandatory national technical rules, to the extent that they are compatible with Union law, the technical specifications shall be formulated in ***one of*** the following ***ways***:

Without prejudice to mandatory national technical rules, to the extent that they are compatible with Union law, the technical specifications shall be formulated in the following ***order of priority***:

Amendment 29

Proposal for a directive Article 40 – paragraph 3 – point -1 (new)

Text proposed by the Commission

Amendment

(-1) by reference to technical specifications and, in order of priority, to

national standards transposing European standards, European technical approvals, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or - when those do not exist - national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies; each reference shall be accompanied by the words 'or equivalent';

Amendment 30

Proposal for a directive Article 40 – paragraph 3 – point b

Text proposed by the Commission

Amendment

(b) by reference to technical specifications and, in order of preference, to national standards transposing European standards, European technical approvals, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or - when those do not exist - national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies; each reference shall be accompanied by the words 'or equivalent';

deleted

Amendment 31

Proposal for a directive Article 40 – paragraph 3 – point c

Text proposed by the Commission

Amendment

(c) in terms of performance or functional

(c) in terms of performance or functional

requirements as referred to in point (a), with reference to the technical specifications referred to in point (b) as a means of presuming conformity with such performance or functional requirements;

requirements as referred to in point (a), with reference to the technical specifications referred to in point (-I) as a means of presuming conformity with such performance or functional requirements;

Amendment 32

Proposal for a directive

Article 40 – paragraph 3 – point d

Text proposed by the Commission

(d) by reference to the technical specifications referred to in point (b) for certain characteristics, and by reference to the performance or functional requirements referred to in point (a) for other characteristics.

Amendment

(d) by reference to the technical specifications referred to in point (-I) for certain characteristics, and by reference to the performance or functional requirements referred to in point (a) for other characteristics.

Amendment 33

Proposal for a directive

Article 41

Text proposed by the Commission

Where contracting authorities lay down environmental, social or other characteristics of a works, service or supply in terms of performance or functional requirements as referred to in point (a) of Article 40(3) they may require that these works, services or supplies bear a specific label, provided that all of the following conditions are fulfilled:

(a) the requirements for the label only concern characteristics which are linked to the subject-matter of the contract and are appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract;

(b) the requirements for the label are drawn

Amendment

Where contracting authorities lay down environmental, social or other characteristics of a works, service or supply in terms of performance or functional requirements as referred to in point (a) of Article 40(3) they may require that these works, services or supplies bear labels, provided that all of the following conditions are fulfilled:

(a) the requirements for the label only concern characteristics which are linked to the subject-matter of the contract **or the production of the subject-matter of the contract** and are appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract;

(b) the requirements for the label are drawn

up on the basis of scientific information or based on other objectively verifiable and non-discriminatory criteria;

(c) the labels are established in an open and transparent procedure in which all stakeholders, including government bodies, consumers, manufacturers, distributors *and* environmental organisations, may participate,

(d) the labels are accessible to all interested parties;

(e) the *criteria* of the label are *set* by a third party which is independent from the economic operator applying for the label.

Contracting authorities requiring a *specific* label shall accept all equivalent labels that fulfil the requirements of the label indicated by the contracting authorities. For products that do not bear the label, contracting authorities *shall* also accept a technical dossier of the manufacturer or other appropriate means of proof.

up on the basis of scientific information or based on other objectively verifiable and non-discriminatory criteria;

(c) the labels are established in an open and transparent procedure in which all stakeholders, including government bodies, consumers, manufacturers, distributors, *social partners*, environmental *and social* organisations may participate,

(d) the labels are accessible to all interested parties;

(e) the *attribution and verification* of the label are *undertaken* by a third party which is independent from the economic operator applying for the label.

Contracting authorities requiring a label shall accept all equivalent labels that fulfil the requirements of the label indicated by the contracting authorities. For products that do not bear the label, contracting authorities *may* also accept a technical dossier of the manufacturer or other appropriate means of proof *of equivalence*. *The burden for providing proof of equivalence with a specific label should be placed on the tenderer claiming equivalence.*

Amendment 34

Proposal for a directive Article 54 – paragraph 2

Text proposed by the Commission

2. Contracting authorities *may* decide not to award a contract to the tenderer submitting the best tender where they have established that the tender does not comply, at least in an equivalent manner, with obligations established by Union legislation in the field of social and *labour law* or environmental law or of the international social and environmental law provisions listed in Annex XI.

Amendment

2. Contracting authorities *shall* decide not to award a contract to the tenderer submitting the best tender where they have established that the tender does not comply, at least in an equivalent manner, with obligations established by Union *or national legislation and/or collective agreements* in the field of social and *employment protection provisions and working conditions* or environmental law

or of the international social and environmental law provisions listed in Annex XI, ***which are in force in the Member State, in the region or locality where the work, service or supply is performed, including in the subcontracting chain and provided they are linked to the subject matter of the contract.***

Amendment 35

Proposal for a directive

Article 55 – paragraph 1 – subparagraph 1 – point e a (new)

Text proposed by the Commission

Amendment

(ea) human trafficking, use of child labour or other crimes against human rights.

Amendment 36

Proposal for a directive

Article 55 – paragraph 2

Text proposed by the Commission

Amendment

2. Any economic operator shall be excluded from participation in a contract where the contracting authority is aware of a decision having the force of res judicata establishing that it has not fulfilled the obligations relating to the payment of taxes ***or*** social security contributions in accordance with the legal provisions of the country in which it is established or with those of the Member State of the contracting authority.

2. Any economic operator shall be excluded from participation in a contract where the contracting authority is aware of a decision having the force of res judicata establishing that it has not fulfilled the obligations relating to the payment of taxes, ***remuneration***, social security contributions ***or other fundamental obligations in the field of social and employment protection provisions and working conditions***, in accordance with the legal provisions of the country in which it is established or with those of the Member State of the contracting authority.

Amendment 37

Proposal for a directive

Article 55 – paragraph 3 – subparagraph 1 – point a

Text proposed by the Commission

(a) where it is aware of any violation of obligations established by Union legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XI. Compliance with Union legislation or with international provisions also includes compliance in an equivalent manner.

Amendment

(a) where it is aware of any **other** violation of obligations established by Union legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XI. Compliance with Union legislation or with international provisions also includes compliance in an equivalent manner.

Amendment 38

Proposal for a directive

Article 55 – paragraph 3 – subparagraph 1 – point c

Text proposed by the Commission

(c) where the contracting authority can demonstrate by any means that the economic operator is guilty of other grave professional misconduct;

Amendment

(c) where the contracting authority can demonstrate by any means that the economic operator is guilty of other grave professional misconduct, ***gravely acting against the national social, environmental or labour laws of its home country or the country of the contracting authority or gravely neglecting workers' health and safety;***

Amendment 39

Proposal for a directive

Article 55 – paragraph 4 – subparagraph 1

Text proposed by the Commission

Any candidate or tenderer that is in one of the situations referred to in ***paragraphs 1, 2 and 3*** ***may provide*** the contracting authority with evidence demonstrating its reliability despite the existence of the relevant ground for exclusion.

Amendment

If a candidate or tenderer that is in one of the situations referred to in ***paragraph 1, 2 and 3*** ***provides*** the contracting authority with evidence demonstrating its reliability ***or, as appropriate, the reliance of its subcontractors,*** despite the existence of the relevant ground for exclusion ***the contracting authority may reconsider the***

exclusion of the tender.

Justification

It is important to reverse the functioning of this Article. The operator should not make a "self-cleaning", but it should be up to the contracting authority to take a decision against the exclusion if evidence is provided.

Amendment 40

Proposal for a directive

Article 60 – paragraph 3 a (new)

Text proposed by the Commission

Amendment

3a. Evidence that the tenderers or candidates have taken account, when drawing up their tender, of the obligations relating to taxes, environmental protection, social and employment protection provisions and working conditions which are in force in the Member State, in the region or locality where the works are to be carried out or the services are to be provided.

Amendment 41

Proposal for a directive

Article 66

Text proposed by the Commission

Amendment

Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the ***criteria*** on which contracting authorities shall base the award of public contracts shall be ***one of the following***:

- (a) the most economically advantageous tender;***
- (b) the lowest cost.***

Costs ***may*** be assessed, ***on the choice of the contracting authority, on the basis of***

Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the ***criterion*** on which contracting authorities shall base the award of public contracts shall be ***the most economically advantageous and sustainable tender.***

Costs ***shall*** be assessed using a cost-effectiveness approach, such as a life-cycle

the price only or using a cost-effectiveness approach, such as a life-cycle costing approach, under the conditions set out in Article 67.

2. The most economically advantageous tender *referred to in point (a) of paragraph 1 from the point of view of the contracting authority* shall be identified on the basis of criteria linked to the subject-matter of the public contract in question. Those criteria shall include, in addition to the price or costs *referred to in point (b) of paragraph 1, other criteria linked to the subject-matter of the public contract in question*, such as:

- (a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, environmental characteristics and innovative character;
- (b) for service contracts and contracts involving the design of works, the organisation, qualification and experience of the staff assigned to performing the contract in question may be taken into consideration, with the consequence that, following the award of the contract, such staff may only be replaced with the consent of the contracting authority, which must verify that replacements ensure equivalent organisation and *quality*;
- (c) after-sales service and technical assistance, delivery date and delivery period or period of completion;
- (d) the specific process of production or provision of the requested works, supplies or services or of any other stage of its life cycle as referred to in *point (22)* of Article 2, to the extent that those criteria are specified in accordance with paragraph 4 and they concern factors directly involved

costing approach, under the conditions set out in Article 67.

2. The most economically advantageous *and sustainable* tender shall be identified on the basis of criteria linked to the subject-matter of the public contract in question. Those criteria shall include, in addition to the price or costs, *including life-cycle costs as referred to in Article 67, other criteria linked to the subject-matter of the public contract in question*, such as:

- (a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, environmental *and social* characteristics and innovative character;
- (b) for service contracts and contracts involving the design of works, the organisation, qualification and experience of the staff assigned to performing the contract in question *as well as the qualification and professional conduct of any subcontractor* may be taken into consideration, with the consequence that, following the award of the contract, such staff may only be replaced with the consent of the contracting authority, which must verify that replacements ensure equivalent organisation, *qualification and experience*;
- (c) after-sales service and technical assistance, delivery date and delivery period or period of completion;
- (d) the specific process of production or provision of the requested works, supplies or services or of any other stage of its life cycle as referred to in *point 22* of Article 2, to the extent that those criteria are specified in accordance with paragraph 4 and they concern factors directly involved in these

in these processes and characterise the specific process of production or provision of the requested works, supplies or services.

3. Member States may provide that the award of certain types of contracts shall be based on the most economically advantageous tender as referred to in point (a) of paragraph 1 and in paragraph 2.

4. Award criteria shall **not confer an unrestricted freedom of choice on the contracting authority**. They shall ensure the possibility of effective competition and shall be accompanied by requirements that allow the information provided by the tenderers to be effectively verified. Contracting authorities shall verify effectively, on the basis of the information and proof provided by the tenderers, whether the tenders meet the award criteria.

5. In the case referred to in point (a) of paragraph 1 the contracting authority shall specify, in the contract notice, in the invitation to confirm interest, in the procurement documents or, in the case of a competitive dialogue, in the descriptive document, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

Those weightings may be expressed by providing for a range with an appropriate maximum spread.

Where weighting is not possible for objective reasons, the contracting authority shall indicate the criteria in decreasing order of importance.

processes and characterise the specific process of production or provision of the requested works, supplies or services.

4. Award criteria shall **be linked to the subject matter, they** shall ensure the possibility of effective **and fair** competition and shall be accompanied by requirements that allow the information provided by the tenderers to be effectively verified. Contracting authorities shall verify effectively, on the basis of the information and proof provided by the tenderers, whether the tenders meet the award criteria.

5. The contracting authority shall specify, in the contract notice, in the invitation to confirm interest, in the procurement documents or, in the case of a competitive dialogue, in the descriptive document, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous **and sustainable** tender.

Those weightings may be expressed by providing for a range with an appropriate maximum spread.

Where weighting is not possible for objective reasons, the contracting authority shall indicate the criteria in decreasing order of importance.

Amendment 42

Proposal for a directive Article 67

Text proposed by the Commission

1. Life-cycle costing shall to the extent relevant cover the following costs over the life cycle of a product, service or works as defined in point (22) of Article 2:

- (a) internal costs, including costs relating to acquisition, such as production costs, use, such as energy consumption, maintenance costs, and end of life, such as collection and recycling costs and
- (b) external environmental costs directly linked to the life cycle, provided their monetary value can be determined and verified, which may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.

2. Where contracting authorities assess the costs using a life-cycle costing approach, they shall indicate in the procurement documents the methodology used for the calculation of the life-cycle costs. The methodology used must fulfil all of the following conditions:

- (a) it has been drawn up on the basis of scientific information or is based on other objectively verifiable and non-discriminatory criteria;
- (b) it has been established for repeated or continuous application;**
- (c) it is accessible to all interested parties. Contracting authorities shall allow economic operators, including economic operators from third countries, to apply a different methodology for establishing the life-cycle costs of their offer, provided that they prove that this methodology complies with the requirements set out in points a, b and c and is equivalent to the methodology

Amendment

1. Life-cycle costing shall to the extent relevant cover the following costs over the life cycle of a product, service or works as defined in point (22) of Article 2:

- (a) internal costs, including costs relating to acquisition, such as production costs, use, such as energy consumption, maintenance costs, and end of life, such as collection and recycling costs and
- (b) external **costs including social and/or** environmental costs directly linked to the life cycle, provided their monetary value can be determined and verified, which may include **the impacts of production on the surrounding environment and adjacent communities or** the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.

2. Where contracting authorities assess the costs using a life-cycle costing approach, they shall indicate in the procurement documents the methodology used for the calculation of the life-cycle costs **and provide the method for the calculation of life-cycle costs to any tenderer.** The methodology used must fulfil all of the following conditions **and should, if possible, be simplified in order to be accessible for SMEs:**

- (a) it has been drawn up on scientific information or other objectively verifiable and non-discriminatory criteria;
- (c) it is accessible to all interested parties. Contracting authorities shall allow economic operators, including economic operators from third countries, to apply a different methodology for establishing the life-cycle costs of their offer, provided that they prove that this methodology complies with the requirements set out in points a, b and c and is equivalent to the methodology

indicated by the contracting authority.

3. **Whenever a** common methodology for the calculation of life-cycle costs is adopted as part of a legislative act of the Union, **including by delegated acts** pursuant to sector specific legislation, **it** shall be **applied where life-cycle costing is** included in the award criteria referred to in Article 66(1).

A list of such legislative and delegated acts is set out in Annex XV. The Commission shall be empowered to adopt delegated acts in accordance with Article 89 concerning the update of this list, when on the basis of the adoption of new legislation, repeal or modification of such legislation, such amendments prove necessary.

Amendment 43

Proposal for a directive Article 69 – paragraph 3, 4

Text proposed by the Commission

3. The explanations referred to in paragraphs 1 and 2 **may** in particular relate to:

(d) compliance, **at least in an equivalent manner**, with obligations established by Union legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XI or, where not applicable, with other provisions ensuring an equivalent level of protection;

(e) the possibility of the tenderer obtaining state aid.

4. The contracting authority shall verify the

indicated by the contracting authority.

Contracting authorities may ask for a third party certified document as proof for the fulfilment of the equivalence.

3. **Any** common methodology for the calculation of life-cycle costs adopted as part of a legislative act of the Union, pursuant to sector specific legislation, **or as part of a European technical specification** shall be **deemed to meet the criteria as set out in paragraph 2 and may be** included in the award criteria referred to in Article 66(1).

A list of such legislative and delegated acts is set out in Annex XV. The Commission shall be empowered to adopt delegated acts in accordance with Article 89 concerning the update of this list, when on the basis of the adoption of new legislation, repeal or modification of such legislation, such amendments prove necessary.

Amendment

3. The explanations referred to in paragraphs 1 and 2 **shall** in particular relate to:

(d) compliance with obligations established by Union **or national legislation and/or collective agreements** in the field of social and **employment protection provisions and working conditions** or environmental law or of the international social and environmental law provisions listed in Annex XI or, where not applicable, with other provisions ensuring an equivalent level of protection;

(e) the possibility of the tenderer obtaining state aid.

4. The contracting authority shall verify the

information provided by consulting the tenderer. It *may only* reject the tender where the evidence does not justify the low level of price or costs charged, taking into account the elements referred to in paragraph 3.

Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with *obligations established by Union legislation in the field of social and labour law or environmental law or by the international social and environmental law provisions listed in Annex XI*.

Amendment 44

Proposal for a directive Article 70

Text proposed by the Commission

Article 70

Conditions for performance of contracts

Contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are indicated in the call for competition or in the specifications. Those conditions may, in particular, concern social and environmental considerations. They may also include the requirement that economic operators foresee compensations for risks of price increases that are the result of price fluctuations (hedging) and that could substantially impact the performance of a contract.

information provided by consulting the tenderer. It *shall* reject the tender where the evidence does not justify the low level of price or costs charged, taking into account the elements referred to in paragraph 3, *or when the received justification is not sufficient*.

Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with *provisions set out in paragraph 3 (d)*.

Amendment

Article 70

Conditions for performance of contracts

Contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are indicated in the call for competition or in the specifications. Those conditions may, in particular, concern social and environmental considerations *and shall include obligations established by Union and/or national legislation and/or collective agreements in the field of social and employment protection provisions and working conditions or environmental law or of the international social and environmental law provisions listed in Annex XI which are in force in the Member State, in the region or locality where the works are to be carried out or the services are to be provided*.

They may also include the requirement that economic operators foresee compensations for risks of price increases that are the

result of price fluctuations, **using different hedging strategies including price adoption formulas**, and that could substantially impact the performance of a contract.

Justification

Obligations regarding social and employment protection and working conditions have to be clearly set out in the contract performance clauses in order to ensure that they are respected.

Amendment 45

**Proposal for a directive
Article 71 – paragraph 1**

Text proposed by the Commission

1. In the procurement documents, the contracting authority **may** ask or may be required by a Member State to ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors.

Amendment

1. In the procurement documents, the contracting authority **shall** ask or be required by a Member State to ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors, **providing information regarding the subcontractor including names, contact details and legal representatives**.

1a. In the procurement documents, the contracting authority shall stipulate that the conditions and requirements which apply to the tenderer also apply to any third parties who perform part of the contract as subcontractors.

1b. Any changes in the subcontracting chain shall be proposed by the economic operator and agreed by the contracting authority. In case the proposed change regards also the involvement of a new subcontractor, the main contractor shall indicate his or her name, contact details and legal representatives.

1c. The proposed change shall be rejected if it doesn't guarantee the respect of point 1a.

7. The contracting authority in its contract with the main contractor, and the

main contractor and any intermediate subcontractor in their contracts with their subcontractors, shall stipulate that in the event that they have reason to believe that their immediate subcontractor is violating the rules referred to in the second subparagraph, the immediate subcontractor shall take immediate action to remedy the situation, and that, failing this, the contract concerned shall be terminated.

8. If the termination of the contract and the replacement of the concerned subcontractor takes the form of a transfer of undertaking, as defined in Directive 2001/23/EC, the provisions of that Directive shall apply.

Amendment 46

Proposal for a directive Article 72 – paragraph 3 – subparagraph 2

Text proposed by the Commission

However, the first subparagraph shall not apply in the event of universal or partial succession into the position of the initial contractor, following corporate restructuring operations or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Directive.

Amendment

However, the first subparagraph shall not apply in the event of universal or partial succession into the position of the initial contractor, following corporate restructuring operations or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Directive. ***Neither shall the first subparagraph apply in the event of restructuring of the contracting authority, as the contracting authority has the right to transfer the agreement to a third party, who will be responsible for the duties of the contracting authority.***

Amendment 47

Proposal for a directive
Article 73 – paragraph 1 – introductory part

Text proposed by the Commission

Member States shall ensure that contracting authorities **have** the possibility, under the conditions determined by the applicable national contract law, to terminate a public contract during its term, **where** one of the following conditions is fulfilled:

Amendment

Member States shall ensure that ***the national contract law is followed when terminating a public procurement contract. Member States may, when giving*** contracting authorities the possibility under the conditions determined by the applicable national contract law to terminate a public contract during its term, ***require that*** one of the following conditions is fulfilled:

Amendment 48

Proposal for a directive
Article 73 a (new) within title III – chapter 1

Text proposed by the Commission

Amendment

Member States have wide discretion to organize the choice of service providers in the way they consider most appropriate and are free to provide social services and other specific services themselves or to organize their provision in any other way that does not entail the conclusion of public contracts. This directive shall not apply to specific national procedures, e.g. procedures that are based on the user's free choice of service providers, i.e. voucher system, free choice model, triangular relationship, or to the principle that all providers of social or other specific services which are able to comply with the conditions previously laid down by law should, irrespective of their legal form, be permitted to provide those services, provided that the general principles of equal treatment, transparency and non-discrimination are respected.

Amendment 49

Proposal for a directive
Article 76 – paragraph 1

Text proposed by the Commission

1. Member States shall put in place appropriate procedures for the award of contracts subject to this Chapter, ensuring full compliance with the principles of transparency and equal treatment of economic operators and allowing contracting authorities to take into account the specificities of the services in question.

Amendment

1. Member States shall put in place appropriate procedures for the award of contracts subject to this Chapter, ensuring full compliance with the principles of transparency, ***non-discrimination*** and equal treatment of economic operators and allowing contracting authorities to take into account the specificities of the services in question.

Amendment 50

Proposal for a directive
Article 76 – paragraph 2

Text proposed by the Commission

2. Member States shall ensure that contracting authorities ***may*** take into account the need to ensure quality, continuity, accessibility, availability and comprehensiveness of the services, the specific needs of different categories of users, the involvement and empowerment of users and innovation. Member States ***may also*** provide that the choice of the service provider ***shall not be*** made solely on the basis of the price for the provision of the service.

Amendment

2. Member States shall ensure that contracting authorities take into account the need to ensure ***a high level of*** quality, continuity, accessibility, ***affordability***, availability and comprehensiveness of the services, the specific needs of different categories of users, ***including disadvantaged and vulnerable groups, users' satisfaction, social inclusion***, the involvement and empowerment of users and, ***where relevant***, innovation. Member States ***shall*** provide that the choice of the service provider ***is*** not made solely on the basis of the price for the provision of the service. ***When drawing up quality criteria, contracting authorities may refer to the criteria set out in the voluntary European Quality Framework for Social Services.***

2a. Contracting authorities may choose to limit the participation in a tender procedure for the provision of social and health services to non profit organisations, provided that a national law that is compatible with European law

provides for restricted access to certain services for the benefit on non profit organisations, in line with the ECJ's jurisprudence. The call for competition shall make reference to this provision. The basic principles of transparency and equal treatment should be respected.

Amendment 51

Proposal for a directive Article 84 – paragraph 8 a (new)

Text proposed by the Commission

Amendment

8a. The annual report should also include an annual comparison between the prices submitted and the actual cost of contracts that have already been performed and the potential influence over the number of staff employed by suppliers.

Amendment 52

Proposal for a directive Article 85 – subparagraph 1 – point (e)

Text proposed by the Commission

Amendment

(e) the name of the successful tenderer and the reasons why its tender was selected and, where known, the share of the contract or framework agreement which the successful tenderer intends to subcontract to third parties;

(e) the name of the successful tenderer and the reasons why its tender was selected and, where known, the share of the contract or framework agreement which the successful tenderer intends to subcontract to third parties ***and information on their subcontractors including their names, contact details and legal representatives;***

Amendment 53

Proposal for a directive Article 87 – paragraph 3 – subparagraph 2

Text proposed by the Commission

Member States shall ensure that interested economic operators have easy access to appropriate information on the obligations relating to taxes, environmental protection, and to social and ***labour law obligations***, which are in force in the Member State, in the region or locality where the works are to be carried out or the services are to be provided and which will be applicable to the works carried out on site or to the services provided during the performance of the contract.

Amendment

Member States shall ensure that interested economic operators have easy access to appropriate information on the obligations relating to taxes, environmental protection, and to social and ***employment protection provisions and working conditions***, which are in force in the Member State, the region or locality where the works are to be carried out or the services are to be provided and which will be applicable to the works carried out on site or to the services provided during the performance of the contract. ***Member States shall ensure that contracting authorities state where the information can be found in the contract documents.***

Amendment 54

**Proposal for a directive
Annex VIII – point 2 – introductory part**

Text proposed by the Commission

'standard' means a technical specification approved by a recognised ***standardising body*** for repeated or continuous ***application, compliance*** with which is not compulsory and which falls into one of the following categories:

Amendment

'standard' means a technical specification ***established by consensus and*** approved by a recognised ***standardisation organisation*** for repeated or continuous ***use***, with which ***compliance*** is not compulsory, and which falls into one of the following categories:

Amendment 55

**Proposal for a directive
Annex XVI – point 6**

Text proposed by the Commission

- ***Services furnished by trade unions***

Amendment

deleted
- ***Emergency medical services***
- ***School and student transport***

PROCEDURE

Title	Public procurement
References	COM(2011)0896 – C7-0006/2012 – 2011/0438(COD)
Committee responsible Date announced in plenary	IMCO 17.1.2012
Opinion by Date announced in plenary	EMPL 17.1.2012
Rapporteur Date appointed	Birgit Sippel 16.2.2012
Discussed in committee	31.5.2012 10.7.2012 17.9.2012
Date adopted	18.9.2012
Result of final vote	+: 30 -: 1 0: 11
Members present for the final vote	Edit Bauer, Heinz K. Becker, Phil Bennion, Vilija Blinkevičiūtė, Philippe Boulland, David Casa, Alejandro Cercas, Ole Christensen, Derek Roland Clark, Marije Cornelissen, Emer Costello, Andrea Cozzolino, Frédéric Daerden, Karima Delli, Sari Essayah, Richard Falbr, Thomas Händel, Nadja Hirsch, Stephen Hughes, Danuta Jazłowiecka, Martin Kastler, Ádám Kósa, Veronica Lope Fontagné, Olle Ludvigsson, Thomas Mann, Elisabeth Morin-Chartier, Csaba Óry, Siiri Oviir, Rovana Plumb, Konstantinos Poupakis, Sylvana Rapti, Licia Ronzulli, Elisabeth Schroedter, Nicole Sinclair, Joanna Katarzyna Skrzydlewska, Jutta Steinruck
Substitute(s) present for the final vote	Georges Bach, Sergio Gutiérrez Prieto, Filiz Hakaeva Hyusmenova, Jelko Kacin, Svetoslav Hristov Malinov, Ramona Nicole Mănescu, Emilie Turunen

2.8.2012

OPINION OF THE COMMITTEE ON THE ENVIRONMENT, PUBLIC HEALTH AND FOOD SAFETY

for the Committee on the Internal Market and Consumer Protection

on the proposal for a directive of the European Parliament and of the Council on public procurement
(COM(2011)0896 – C7-0006/2012 – 2011/0438(COD))

Rapporteur: Åsa Westlund

SHORT JUSTIFICATION

Public Procurement is an important factor in our common society; economically, socially and environmentally. Public authorities in Europe spend around 18 percent of GDP on goods and services through procurement. Public Procurement can, and should, be used as an instrument for implementing the objectives of the European Union.

Public procurement is an important tool for contracting authorities to make the best use of taxpayers' money. That includes using public procurement to create sustainable development including enhance positive development in the areas of environment, climate, anti-discrimination, animal welfare and youth employment for example. Since sustainable development is an objective in the Lisbon treaty it is important to enable and encourage all public authorities to use public procurement as a tool to reach this goal.

The Committee for Environment, Public Health and Food Safety will give this opinion to the Committee for Internal Market and Consumer Protection. The opinion will focus on issues regarding sustainable public procurement, in the areas of environmental, economic, and social matters.

The Rapporteur welcomes the Commission's proposal for a new directive on public procurement. The proposal focuses on increasing the efficiency of public spending, implies simplification and flexibility of existing rules and stresses the importance of environmental considerations. Further suggestions focus on making public procurement more useful in supporting common societal goals.

The Rapporteur wants to put extra focus on the following important issues:

- There should not be any ambiguity that contracting authorities are allowed to set demands that are stricter or go further than current EU-legislation in specific areas.
- Innovative solutions should be promoted in public procurement. Public purchasers should be encouraged to buy innovative products and services in order to achieve the goals of sustainable development. New innovative solutions and ideas are necessary in the area of environment and public procurement should be used as a tool to meet such needs.
- The criteria of life cycle considerations should be upgraded. The social and environmental effects of the entire production process must be taken into consideration. Therefore contracting authorities should have further possibilities to impose demands on the production process and not only on the specific product. This will lead to a more sustainable procurement.
- Based on public health considerations, the application of collective agreements and international conventions on employment should not be an option but a requirement on assigned contractors. To safeguard workers' health and their work environment it should be possible to exclude and penalize tenderers who do not follow social and labour legislation. Countries that have ratified ILO Convention 94 should not be hindered in implementing the convention.
- The use of standards should be preferred over of the use of labels. Standards are useful as they are well understood by tenderers in the relevant area and will help avoid making contracting authorities re-invent the wheel. By stressing the use of standards the Directive facilitates for contracting authorities to set environmental and social demands.
- The Directive must not reduce the possibility for municipalities to cooperate in order to provide some services of general interest, as for example waste and water treatment.
- The Directive should increase the possibility to impose demands on the entire contractors chain, i.e. also on sub-contractors. Not only the main contractor/tenderer must follow the rules and regulations set out by the contracting authority but also sub-contractors should be required to do so. There is need for a control system which covers all parts of the contractors' chain.

The Rapporteur is committed to preserve self-determination and autonomy of municipalities, regions and other local contracting authorities. The regulation must be clear in order to avoid interpretation disputes. Simplification of the Directive will also encourage and enable contracting authorities to incorporate clear sustainability objectives into their public procurement policies.

AMENDMENTS

The Committee on the Environment, Public Health and Food Safety calls on the Committee on the Internal Market and Consumer Protection, as the committee responsible, to incorporate the following amendments in its report:

Amendment 1

Proposal for a directive

Recital 2

Text proposed by the Commission

(2) Public procurement plays a key role in the Europe 2020 strategy ***as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds.*** For that purpose, the current public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts have to be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises in public procurement and to enable procurers to make better use of public procurement in support of common societal goals. There is also a need to clarify basic notions and concepts to ensure better legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.

Amendment

(2) Public procurement, ***as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds,*** plays a key role in the Europe 2020 strategy ***and in fulfilling the objective of sustainable development stated in the Treaty of Lisbon.*** For that purpose, the current public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts have to be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises in public procurement and to enable procurers to make better use of public procurement in support of common societal goals. There is also a need to clarify basic notions and concepts to ensure better legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.

Justification

Text relating to the Treaty of Lisbon is needed to underline the importance of sustainable development.

Amendment 2

Proposal for a directive Recital 2

Text proposed by the Commission

(2) Public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the current public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts have to be revised and modernised in order to **increase** the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises in public procurement and **to enable** procurers to make better use of public procurement in support of common societal goals. There is also a need to clarify basic notions and concepts to ensure better legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.

Amendment

(2) Public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the current public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts have to be revised and modernised in order to **enable procurers to make better use of public procurement in support of sustainable development and other common societal goals, thereby increasing** the efficiency of public spending, **ensuring best value for money, and** facilitating in particular the participation of small and medium-sized enterprises in public procurement and **encouraging local procurement as well as enabling** procurers to make better use of public procurement in support of common societal goals. **Contracting authorities are encouraged to set demands that are stricter or go further than current EU-legislation in specific areas, in order to reach these common objectives.** There is also a need to **simplify the Directives and to** clarify basic notions and concepts to ensure better legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice

of the European Union. ***This Directive provides legislation on how to buy, what to buy is up to the contracting authorities. Contracting authorities are encouraged to set demands that are stricter or go further than current EU legislation in specific areas, in order to reach the common objectives.***

Justification

There should not be any ambiguity about that contracting authorities are allowed to set demands that are stricter or go further than current EU-legislation in specific areas. An early declaration of the directive's role in achieving climate, environmental and social cohesion will account for articles relating to these issues later.

Amendment 3

Proposal for a directive Recital 3

Text proposed by the Commission

(3) The increasingly diverse forms of public action have made it necessary to define more clearly the notion of procurement itself. The Union rules on public procurement are not intended to cover all forms of disbursement of public money, but only those aimed at the acquisition of works, supplies or services for consideration. The notion of acquisition should be understood broadly in the sense of obtaining the benefits of the works, supplies or services in question, not necessarily requiring a transfer of ownership to the contracting authorities. Furthermore, the mere financing of an activity, which is frequently linked to the obligation to reimburse the amounts received where they are not used for the purposes intended, does not ***usually*** fall under the public procurement rules.

Amendment

(3) The increasingly diverse forms of public action have made it necessary to define more clearly the notion of procurement itself. The Union rules on public procurement are not intended to cover all forms of disbursement of public money, but only those aimed at the acquisition of works, supplies or services for consideration. The notion of acquisition should be understood broadly in the sense of obtaining the benefits of the works, supplies or services in question, not necessarily requiring a transfer of ownership to the contracting authorities. Furthermore, the mere financing of an activity, which is frequently linked to the obligation to reimburse the amounts received where they are not used for the purposes intended, does not fall under the public procurement rules. ***Contracts awarded to controlled entities or cooperation for the joint execution of the public service tasks of the participating contracting authorities are not subject of***

the public procurement rules if the conditions set out in this Directive are fulfilled.

Amendment 4

Proposal for a directive Recital 4 a (new)

Text proposed by the Commission

Amendment

(4a) Under Article 9 of the Treaty on the Functioning of the European Union, the Union must, in defining and implementing its policies and activities, take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health. This Directive contributes to attaining these objectives by encouraging socially sustainable public procurement, ensuring that social criteria are employed at all stages of the procurement procedure, and reinforcing all existing obligations at Union, national and international level relating to working conditions, social protection and public health.

Justification

Recital 5 already refers to Article 11 TFEU, which ensures environmental protection requirements are integrated into all Union policies. This new Recital seeks to do the same with Article 9 TFEU, which ensures social and health goals are taken into account in all Union policies.

Amendment 5

Proposal for a directive Recital 4 b (new)

Text proposed by the Commission

Amendment

(4b) A key principle of the 2008-2013

Health Strategy is 'Health in All Policies' (HIAP), or the integration of health concerns into all policies at Union, national and regional level, an approach endorsed by Member States in the 2007 Declaration on 'Health in All Policies' (HIAP). This Directive contributes to the HIAP approach by ensuring that procurement rules can help contracting authorities to achieve public health objectives, and that criteria relating to public health and to health and safety in the workplace may be employed at all stages of the procurement procedure.

Amendment 6

Proposal for a directive Recital 5

Text proposed by the Commission

(5) Under *Article 11* of the Treaty on the Functioning of the European Union, environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development. This Directive clarifies how the contracting authorities may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring ***that they can obtain*** the best value for money for their contracts.

Amendment

(5) Under *Articles 9, 10 and 11* of the Treaty on the Functioning of the European Union, environmental protection requirements ***and social considerations*** must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development. This Directive clarifies how the contracting authorities may contribute to the protection of the environment and the promotion of sustainable development ***and how they can use their discretionary power to select technical specifications and award criteria with the aim of achieving sustainable public procurement***, whilst ensuring the ***link to the subject matter of the contract and obtaining the*** best value for money for their contracts.

Amendment 7

Proposal for a directive Recital 5 a (new)

PE483.468v03-00

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Text proposed by the Commission

Amendment

(5a) Public procurement accounts for approximately 19% of global GDP, or almost 40 times the amount provided by EU Member States as Official Development Assistance (ODA). As such it has huge potential to be a tool for living up to the EU's obligations towards Policy Coherence for development as enshrined in Article 208 TFEU and for implementing sustainable government policies both in the Union and in developing countries.

Amendment 8

Proposal for a directive Recital 5 b (new)

Text proposed by the Commission

Amendment

(5b) Contracting authorities have broad discretion to choose the technical specifications that define the supplies, services, or works they seek to procure. Further, they have broad discretion to use both technical specifications and award criteria to achieve a contracting authority's objectives, including specifications and criteria designed to achieve more sustainable public procurement. Technical specifications and award criteria, including those relating to sustainability objectives, must be linked to the subject matter of the procurement contract. Provided that the link to the subject matter rule is satisfied, this Directive is not intended to further constrain the types of concerns that a contracting authority can address through technical specifications or award criteria.

Amendment 9

**Proposal for a directive
Recital 5 c (new)**

Text proposed by the Commission

Amendment

(5c) Technical specifications, award criteria, and conditions for contract performance are distinguished by the role they play in the procurement process, and not by the content of the specifications or criteria. Through technical specifications, the contracting authority defines absolute requirements for the procurement; ability to meet the technical specifications is a prerequisite for being considered a candidate for the contract and only products or services meeting the specifications can be considered. In contrast, award criteria enable the contracting authority to compare the relative advantages of different combinations of criteria. The award criteria are weighted and each tender is scored on the extent of its satisfaction of each criterion, but ability to satisfy all the award criteria is not a prerequisite. Finally, contract performance clauses may be included in the contract to indicate how the contract must be performed. A contracting authority has broad discretion to incorporate its sustainability objectives into any stage of the procurement process – through technical specifications, award criteria, and contract performance conditions.

Amendment 10

**Proposal for a directive
Recital 17**

Text proposed by the Commission

Amendment

(17) Research and innovation, including eco-innovation and social innovation, are among the main drivers of future growth and have been put at the centre of the

(17) Research and innovation, including eco-innovation and social innovation, are among the main drivers of future growth and have been put at the centre of the

Europe 2020 strategy for smart, sustainable and inclusive growth. Public authorities should make the best strategic use of public procurement to spur innovation. Buying innovative goods and services plays a key role in improving the efficiency and quality of public services while addressing major societal challenges. It contributes to achieving best value for public money as well as wider economic, environmental and societal benefits in terms of generating new ideas, translating them into innovative products and services and thus promoting sustainable economic growth. This directive should contribute to facilitating public procurement of innovation and help Member States in achieving the Innovation Union targets. A specific procurement procedure should therefore be provided for which allows contracting authorities to establish a long-term innovation partnership for the development and subsequent purchase of a new, innovative product, service or works provided it can be delivered to agreed performance levels and costs. The partnership should be structured in such a way that it can provide the necessary ‘market-pull’, incentivising the development of an innovative solution without foreclosing the market.

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Amendment 11

Proposal for a directive Recital 28

Text proposed by the Commission

(28) Contracting authorities that wish to purchase works, supplies or services with specific environmental, social or other characteristics should be able to refer to particular labels, such as the European Eco-label, (multi-)national eco-labels or any other label provided that the requirements for the label are linked to the subject-matter of the contract, such as the description of the product and its presentation, including packaging requirements. It is furthermore essential that these requirements are drawn up and adopted on the basis of objectively verifiable criteria, using a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations, can participate, and that the label is accessible and available to all interested parties.

Amendment

(28) Contracting authorities that wish to purchase works, supplies or services with specific environmental, **energy efficiency**, social, **animal welfare** or other characteristics should be able to refer to particular labels, such as the European Eco-label, (multi-)national eco-labels or any other label provided that the requirements for the label are linked to the subject-matter of the contract, such as the description of the product and its presentation, including packaging requirements. It is furthermore essential that these requirements are drawn up and adopted on the basis of objectively verifiable criteria, using a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations, can participate, and that the label is accessible and available to all interested parties.

Justification

Energy efficiency and energy savings reference is essential taking into account the Eco design directive and its provisions for products.

Amendment 12

Proposal for a directive
Recital 34

Text proposed by the Commission

(34) Public contracts should not be awarded to economic operators that have participated in a criminal organisation or have been found guilty of corruption, fraud to the detriment of the Union's financial interests or money laundering. Non-payment of taxes or social security contributions should also be sanctioned by mandatory exclusion at the level of the

Amendment

(34) Public contracts should not be awarded to economic operators that have participated in a criminal organisation or have been found guilty of corruption, fraud to the detriment of the Union's financial interests or money laundering. Non-payment of taxes or social security contributions should also be sanctioned by mandatory exclusion at the level of the

Union. Furthermore, contracting authorities should be given the possibility to exclude candidates or tenderers for violations of environmental or **social** obligations, including rules on accessibility for disabled persons or other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights.

Union. Furthermore, contracting authorities should be given the possibility to exclude candidates or tenderers for violations of environmental, **social** or **animal welfare** obligations, including rules on accessibility for disabled persons or other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights.

Amendment

Proposal for a directive

Recital 37

Text proposed by the Commission

(37) Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment. These criteria should guarantee that tenders are assessed in conditions of effective competition, also where contracting authorities require high-quality works, supplies and services that are optimally suited to their needs, for instance where the chosen award criteria include factors linked to the production process. As a result, contracting authorities should **be allowed to** adopt as award criteria **either** ‘the most economically advantageous tender’ **or** ‘**the lowest cost**’, **taking into account that in the latter case they are free to set adequate quality standards by using technical specifications or contract performance conditions.**

Amendment

(37) Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment. These criteria should guarantee that tenders are assessed in conditions of effective competition, also where contracting authorities require high-quality works, supplies and services that are optimally suited to their needs, for instance where the chosen award criteria include factors linked to the production process. As a result, contracting authorities should adopt as award criteria ‘the most economically advantageous tender’.

Amendment 14

Proposal for a directive

Recital 38

Text proposed by the Commission

(38) **Where contracting** authorities **choose**

Amendment

(38) **Contracting** authorities must

to award a contract to the most economically advantageous tender, they must determine the award criteria on the basis of which they will assess tenders in order to identify which one offers the best value for money. The determination of these criteria depends on the subject-matter of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the subject-matter of the contract, as defined in the technical specifications, and the value for money of each tender to be measured. Furthermore, the chosen award criteria should not confer an unrestricted freedom of choice on the contracting authority and they should ensure the possibility of effective competition and be accompanied by requirements that allow the information provided by the tenderers to be effectively verified.

determine award criteria on the basis of which they will assess tenders in order to identify which one offers the best value for money. *To identify the tender representing best value, contracting authorities should use objective criteria that are linked to the subject matter of the contract. The chosen award criteria should not confer an unrestricted freedom of choice on the contracting authority, however. Rather, the award procedure should guarantee effective competition through strict compliance with the principles of transparency, non-discrimination and equal treatment. These principles require, among other things, that the information provided by the tenderers be effectively and transparently verified.*

Amendment 15

Proposal for a directive Recital 39

Text proposed by the Commission

(39) It is of utmost importance to fully exploit the potential of public procurement to achieve the objectives of the Europe 2020 Strategy for sustainable growth. In view of the important differences between individual sectors and markets, it would however not be appropriate to set general mandatory requirements for environmental, social and innovation procurement. The Union legislature has already set mandatory procurement requirements for obtaining specific goals in the sectors of road transport vehicles (Directive 2009/33/EC of the European Parliament and the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles) and office

Amendment

(39) It is of utmost importance to fully exploit the potential of public procurement to achieve the objectives of the Europe 2020 Strategy for sustainable growth. In view of the important differences between individual sectors and markets, it would however not be appropriate to set general mandatory requirements for environmental, social and innovation procurement. The Union legislature has already set mandatory procurement requirements for obtaining specific goals in the sectors of road transport vehicles (Directive 2009/33/EC of the European Parliament and the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles) and office

equipment (Regulation (EC) No 106/2008 of the European Parliament and the Council of 15 January 2008 on a Community energy-efficiency labelling programme for office equipment). In addition, the definition of common methodologies for life cycle costing *has* significantly *advanced*. It therefore appears appropriate to continue *on that path, leaving it* to sector-specific legislation to set mandatory objectives and targets in *function* of the particular policies and conditions prevailing in the relevant sector *and to promote the development and use of European approaches to life-cycle costing as a further underpinning for* the use of public procurement in support of sustainable growth.

equipment (Regulation (EC) No 106/2008 of the European Parliament and the Council of 15 January 2008 on a Community energy-efficiency labelling programme for office equipment). In addition, the definition of common methodologies for life cycle costing *continues to advance* significantly, *and sector-specific applications of life-cycle costing continue to be developed, tested, and refined*. It therefore appears appropriate to continue to *use* sector-specific legislation to set mandatory objectives and targets in *the context* of the particular policies and conditions prevailing in the relevant sector to further the use of public procurement in support of sustainable growth. *These efforts should incorporate sector-appropriate applications of sound methodologies for life cycle costing. In accordance with other provisions of this Directive, mandatory procurement criteria adopted through sector-specific legislation may also include technical specifications and award criteria that incorporate sustainability considerations relating to generalised social and environmental benefits or harms, even where these have not been or cannot be monetised, provided that they are linked with the subject matter of the contract and strictly adhere to the principles of transparency, non-discrimination, and equal protection.*

Amendment 16

Proposal for a directive Recital 41

Text proposed by the Commission

(41) Furthermore, in technical specifications and in award criteria, contracting authorities should be allowed to refer to a specific production process, a specific mode of provision of services, or a

Amendment

(41) Furthermore, in technical specifications and in award criteria, contracting authorities should be allowed to refer to a specific production process, a specific mode of provision of services, or a

specific process for any other stage of the life cycle of a product or service, provided that they are linked to the subject-matter of the public contract. In order to better integrate social considerations in public procurement, procurers may also be allowed to include, in the award criterion of the most economically advantageous tender, characteristics related to the working conditions of the persons directly participating in the process of production or provision in question. Those characteristics may only concern the ***protection of health*** of the staff involved in the production process or the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract, including accessibility for persons with disabilities. Any award criteria which include those characteristics should in any event remain limited to characteristics that have immediate consequences on staff members ***in their working environment***. They should be applied in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services and in a way that does not discriminate directly or indirectly against economic operators from other Member States or from third countries parties to the Agreement or to Free Trade Agreements to which the Union is party. For service contracts and for contracts involving the design of works, contracting authorities should also be allowed to use as an award criterion the organisation, qualification and experience of the staff assigned to performing the contract in question, as this may affect the quality of contract performance and, as a result, the economic value of the tender.

specific process for any other stage of the life cycle of a product or service, provided that they are linked to the subject-matter of the public contract. In order to better integrate social considerations in public procurement, procurers may also be allowed to include, in the award criterion of the most economically advantageous tender, characteristics related to the working conditions of the persons directly participating in the process of production or provision in question. Those characteristics may concern the ***working conditions*** of the staff involved in the production process or the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract, including accessibility for persons with disabilities. Any award criteria which include those characteristics should in any event remain limited to characteristics that have immediate consequences on ***the working conditions of*** staff members. They should be applied in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services and in a way that does not discriminate directly or indirectly against economic operators from other Member States or from third countries parties to the Agreement or to Free Trade Agreements to which the Union is party. For service contracts and for contracts involving the design of works, contracting authorities should also be allowed to use as an award criterion the organisation, qualification and experience of the staff assigned to performing the contract in question, as this may affect the quality of contract performance and, as a result, the economic value of the tender.

Amendment 17

Proposal for a directive Recital 43

Text proposed by the Commission

(43) Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory, are linked to the subject-matter of the contract and are indicated in the contract notice, the prior information notice used as a means of calling for competition or the procurement documents. They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment, protection of the environment or animal welfare. For instance, mention may be made, amongst other things, of the requirements — applicable during performance of the contract — to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with fundamental International Labour Organisation (ILO) Conventions, even where such Conventions have not been implemented in national law, and to recruit more disadvantaged persons than are required under national legislation.

Amendment

(43) Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory, are linked to the subject-matter of the contract and are indicated in the contract notice, the prior information notice used as a means of calling for competition or the procurement documents. They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment, protection of the environment, ***protection of public health*** or animal welfare. For instance, mention may be made, amongst other things, of the requirements – applicable during performance of the contract – to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with fundamental International Labour Organisation (ILO) Conventions, ***in particular ILO Convention 94***, even where such Conventions have not been implemented in national law, and to recruit more disadvantaged persons than are required under national legislation.

Justification

This amendment stresses the importance of ILO Convention 94 on Labour Clauses (Public Contracts) which specifically regulates public procurement. The EU must commit itself to ILO standards.

Amendment 18

Proposal for a directive

Article 1 – paragraph 2 – subparagraph 1

Text proposed by the Commission

2. Procurement within the meaning of this Directive is the purchase ***or other forms of acquisition*** of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, ***whether or not the works, supplies or services are intended for a public purpose.***

Amendment

2. Procurement within the meaning of this Directive is the purchase of works, supplies or services ***via public contracts*** by one or more contracting authorities from economic operators chosen by those contracting authorities.

Justification

This change is necessary to allow for municipalities to cooperate in an effective way in order to provide certain services of general interest, as for example in waste and water treatment.

Amendment 19

Proposal for a directive

Article 1 – paragraph 2 – subparagraph 2

Text proposed by the Commission

An entirety of works, supplies and/or services, even if purchased through different contracts, constitutes a single procurement within the meaning of this Directive, if the contracts are part of one single project.

Amendment

deleted

Justification

This change is necessary to allow for municipalities to cooperate in an effective way in order to provide certain services of general interest, as for example waste and water treatment.

Amendment 20

Proposal for a directive Article 1 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. A contract awarded by a contracting authority to another legal person shall fall outside the scope of this Directive where the following cumulative conditions are fulfilled:

a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments.

b) the essential part of the activities of that legal person are carried out for the controlling contracting authority or for other legal persons controlled by that contracting authority;

c) there is no active private participation in the controlled legal person.

(Text from Article 11, para 1 of Commission proposal - with modifications)

Justification

This change is necessary to allow for municipalities to cooperate in an effective way in order to provide certain services of general interest, as for example waste and water treatment. This is a matter of scope and, therefore, Article 11 of the Commission proposal is moved to Article 1 with amendments.

Amendment 21

Proposal for a directive Article 1 – paragraph 2 b (new)

Text proposed by the Commission

Amendment

2b. Paragraph 2 a (new) also applies where a controlled entity or entities which are a contracting authority award a contract to its controlling entity, or to another legal person controlled by the same contracting authority, provided that

there is no private participation in the legal person being awarded the public contract.

(Text from Article 11, para 2 of Commission proposal - with modifications)

Justification

cf. to amendment to Article 1, para 2 a (new).

Amendment 22

Proposal for a directive

Article 1 – paragraph 2 c (new)

Text proposed by the Commission

Amendment

2c. A contracting authority, which does not exercise over a legal person control within the meaning of paragraph 3, may nevertheless award a public contract outside the scope of this Directive to a legal person which it controls jointly with other contracting authorities, where the following conditions are fulfilled:

a) the contracting authorities exercise jointly over the legal person a control which is similar to that which they exercise over their own departments;

b) the essential part of the activities of that legal person are carried out for the controlling contracting authorities or other legal persons controlled by the same contracting authorities;

c) there is no active private participation in the controlled legal person.

(Text from Article 11, para 3 of Commission proposal - with modifications)

Justification

cf. to amendment to Article 1, para 2 a (new).

Amendment 23

Proposal for a directive Article 1 – paragraph 2 d (new)

Text proposed by the Commission

Amendment

2d. An agreement concluded between two or more contracting authorities shall not be deemed to be a public contract within the meaning of Article 2(7) of this Directive, and thus fall out of the scope of the Directive, where the following cumulative conditions are fulfilled:

a) the purpose of the partnership is the provision of a public-service task conferred on all the public authorities;

b) the task is carried out solely by the public authorities concerned i.e. without the involvement of active private capital.

(Text from Article 11, para 4 of Commission proposal - with modifications)

Justification

cf. to amendment to Article 1, para 2 a (new)

Amendment 24

Proposal for a directive Article 1 – paragraph 2 e (new)

Text proposed by the Commission

Amendment

2e. However transferring tasks between public sector organisations is a matter for the Member States' internal administrative organisation and is not subject to procurement rules.

Amendment 25

Proposal for a directive Article 2 - point 22 a (new)

Text proposed by the Commission

Amendment

22a. 'socially sustainable production process' means the production process in which the provision of works, services and supplies, respects health and safety, social and labour law, rules and standards, in particular with regard to the principle of equal treatment at the workplace as defined by Union and national legislation and collective agreements, which apply where the provision of works, services and supplies takes place;

Amendment 26

Proposal for a directive Article 11

Text proposed by the Commission

Amendment

Article 11

deleted

Relations between public authorities

1. A contract awarded by a contracting authority to another legal person shall fall outside the scope of this Directive where the following cumulative conditions are fulfilled:

(a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments.

(b) at least 90 % of the activities of that legal person are carried out for the controlling contracting authority or for other legal persons controlled by that contracting authority;

(c) there is no private participation in the controlled legal person.

A contracting authority shall be deemed to exercise over a legal person a control similar to that which it exercises over its own departments within the meaning of point (a) of the first subparagraph where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person.

2. Paragraph 1 also applies where a controlled entity which is a contracting authority awards a contract to its controlling entity, or to another legal person controlled by the same contracting authority, provided that there is no private participation in the legal person being awarded the public contract.

3. A contracting authority, which does not exercise over a legal person control within the meaning of paragraph 1, may nevertheless award a public contract without applying this Directive to a legal person which it controls jointly with other contracting authorities, where the following conditions are fulfilled:

(a) the contracting authorities exercise jointly over the legal person a control which is similar to that which they exercise over their own departments;

(b) at least 90 % of the activities of that legal person are carried out for the controlling contracting authorities or other legal persons controlled by the same contracting authorities;

(c) there is no private participation in the controlled legal person.

For the purposes of point (a), contracting authorities shall be deemed to jointly control a legal person where the following cumulative conditions are fulfilled:

(a) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities;

(b) those contracting authorities are able

to jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person;

(c) the controlled legal person does not pursue any interests which are distinct from that of the public authorities affiliated to it;

(d) the controlled legal person does not draw any gains other than the reimbursement of actual costs from the public contracts with the contracting authorities.

4. An agreement concluded between two or more contracting authorities shall not be deemed to be a public contract within the meaning of Article 2(6) of this Directive where the following cumulative conditions are fulfilled:

(a) the agreement establishes a genuine cooperation between the participating contracting authorities aimed at carrying out jointly their public service tasks and involving mutual rights and obligations of the parties;

(b) the agreement is governed only by considerations relating to the public interest;

(c) the participating contracting authorities do not perform on the open market more than 10 % in terms of turnover of the activities which are relevant in the context of the agreement;

(d) the agreement does not involve financial transfers between the participating contracting authorities, other than those corresponding to the reimbursement of actual costs of the works, services or supplies;

(e) there is no private participation in any of the contracting authorities involved.

5. The absence of private participation referred to in paragraphs 1 to 4 shall be verified at the time of the award of the contract or of the conclusion of the

agreement.

The exclusions provided for in paragraphs 1 to 4 shall cease to apply from the moment any private participation takes place, with the effect that ongoing contracts need to be opened to competition through regular procurement procedures.

(Text from Article 11 partly moved to Article 1 - see amendments on Article 1, para 2a-d (new))

Justification

The content of Article 11 of the Commission proposal is important for the scope of the Directive and is thus moved, with modifications, to Article 1. Correspondingly, Article 11 of the Commission proposal is deleted.

Amendment 27

**Proposal for a directive
Article 11 a (new)**

Text proposed by the Commission

Amendment

Article 11 a

Service contracts awarded on the basis of exclusive right.

This Directive shall not apply to public service contracts awarded by a contracting authority to another contracting authority or to an association of contracting authorities on the basis of an exclusive right which they enjoy pursuant to a published law, regulation or administrative provision which is compatible with the treaty.

Justification

Reintroducing Article 18 from the current Directive 2004/18/EC. This Article is important for operations of general interest, for example gaming (state-authorized lotteries) and waste disposal. The Article makes it possible for authorities to reserve some operations for specific in-house companies. The European Court has applied this provision in C-360/96.

Amendment 28

Proposal for a directive

Article 24 – paragraph 1 – subparagraph 4 – introductory part

Text proposed by the Commission

They may also provide that contracting authorities may *use* a competitive procedure with negotiation or a competitive dialogue in any of the following cases:

Amendment

Member States shall provide that contracting authorities may *apply* a competitive procedure with negotiation or a competitive dialogue *as regulated in this Directive* in any of the following cases:

Justification

In certain cases a competitive procedure with negotiation represents the only feasible way of awarding complex contracts. Contracting authorities should therefore be able to opt for this type of procedure in such cases.

Amendment 29

Proposal for a directive

Article 24 – paragraph 1 – subparagraph 5

Text proposed by the Commission

Member States may decide not to transpose into their national law the competitive procedure with negotiation, the competitive dialogue and the innovation partnership procedures.

deleted

Amendment

Justification

In certain cases a competitive procedure with negotiation represents the only feasible way of awarding complex contracts. Contracting authorities should therefore be able to opt for this type of procedure in such cases.

Amendment 30

Proposal for a directive

Article 34 a (new)

Text proposed by the Commission

Amendment

Article 34 a

Central website for electronic tendering

In the interests of transparency, public authorities may publish information about the works which have been carried out, etc., on a central, European website established for the purpose, specifying amounts, quantities and the like, so that other public authorities can compare what has been paid for comparable works, etc., and base their invitations to tender on this information, which could cut costs and show up major discrepancies in the prices of contracts.

Amendment 31

Proposal for a directive

Article 40 – paragraph 1 – subparagraph 1

Text proposed by the Commission

1. The technical specifications as defined in point 1 of Annex VIII shall be set out in the procurement documents. They shall define the characteristics required of a works, service or supply.

Amendment

1. The technical specifications as defined in point 1 of Annex VIII shall be set out in the procurement documents. They shall define the characteristics required of a works, service or supply ***in order to achieve the use, sustainability and animal welfare objectives of the contracting authority.***

Amendment 32

Proposal for a directive

Article 41 – title

Text proposed by the Commission

Labels

Amendment

Labels and certificates of a third party verified standard

Justification

The use of labels should be deleted in favour of the use of standards. Standards are useful as they are well understood by tenderers in the relevant area and also to avoid contracting authorities needing to re-invent the wheel. By stressing the use of standards the Directive

facilitates for contracting authorities to set environmental and social demands.

Amendment 33

Proposal for a directive

Article 41 – paragraph 1 – subparagraph 1 – introductory part

Text proposed by the Commission

1. Where contracting authorities lay down environmental, social or other characteristics of a works, service or supply in terms of performance or functional requirements as referred to in point (a) of Article 40(3) they may require that these works, services or supplies bear a specific label, provided that all of the following conditions are fulfilled:

Amendment

1. Where contracting authorities lay down environmental, social or other characteristics of a works, service or supply in terms of performance or functional requirements as referred to in point (a) of Article 40(3) they may require that these works, services or supplies bear a specific label ***and/or a certificate of a third party verified standard***, provided that all of the following conditions are fulfilled:

Amendment 34

Proposal for a directive

Article 41 – paragraph 1 – subparagraph 1 – point a

Text proposed by the Commission

(a) the requirements for the label ***only*** concern characteristics which are linked to the subject-matter of the contract and are appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract;

Amendment

(a) the requirements for the label ***and/or the certificate of a third party verified standard*** concern characteristics which are linked to the subject-matter of the contract and are appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract;

Amendment 35

Proposal for a directive

Article 41 – paragraph 1 – subparagraph 1 – point b

Text proposed by the Commission

(b) the requirements for the label are drawn up on the basis of scientific information or based on other objectively verifiable and

Amendment

(b) the requirements for the label ***and/or the certificate of a third party verified standard*** are drawn up on the basis of

non-discriminatory criteria;

scientific information or based on other objectively verifiable and non-discriminatory criteria **and data**;

Amendment 36

Proposal for a directive

Article 41 – paragraph 1 – subparagraph 1 – point b a (new)

Text proposed by the Commission

Amendment

(ba) the rules governing selection are reasonably proportionate to the nature of the contract;

Amendment 37

Proposal for a directive

Article 41 – paragraph 1 – subparagraph 1 – point c

Text proposed by the Commission

Amendment

(c) the labels are established in an open and transparent procedure in which all stakeholders, including government bodies, consumers, manufacturers, distributors and environmental organisations, may participate,

(c) the labels ***and/or certificates of a third party verified standard*** are established in an open and transparent procedure in which all stakeholders, including government bodies, consumers, manufacturers, distributors and environmental organisations, may participate;

Amendment 38

Proposal for a directive

Article 41 – paragraph 1 – subparagraph 1 – point d

Text proposed by the Commission

Amendment

(d) the labels are accessible to all interested parties;

(d) the labels ***and/or certificates of a third party verified standard*** are accessible to all interested parties;

Amendment 39

Proposal for a directive

Article 41 – paragraph 1 – subparagraph 1 – point e

Text proposed by the Commission

(e) the criteria of the label are set by a third party which is independent from the economic operator applying for the label.

Amendment

(e) the criteria of the label **and/or certificate of a third party verified standard** are set by a third party which is independent from the economic operator applying for the label. **The third party may be a specific national or governmental body or organisation.**

Amendment 40

Proposal for a directive

Article 41 – paragraph 2

Text proposed by the Commission

2. Where a **label fulfils the conditions provided in points (b), (c), (d) and (e) of paragraph 1 but also** sets out requirements not linked to the subject-matter of the contract, contracting authorities may define the technical specification by reference to **those** of the detailed specifications of that **label**, or, where necessary, parts thereof, that are linked to the subject-matter of the contract and are appropriate to define characteristics of this subject-matter.

Amendment

2. Where a **third party verified standard does not meet the definition in point 6 of Annex VIII because its criteria** sets out requirements not linked to the subject-matter of the contract, contracting authorities may define the technical specification by reference to of the detailed specifications of that, **standard** or, where necessary, parts thereof, that are linked to the subject-matter of the contract and are appropriate to define characteristics of this subject-matter.

Justification

This amendment aims to highlight the use of third party standards in public procurement. By using third party verified standards contracting authorities and tenderers have a clear, eligible and useful tool. The fact that a product or service meets a third party verified standard serves as evidence that the contracting authority's criteria are met.

Amendment 41

Proposal for a directive

Article 41 – paragraph 2 – subparagraph 1 a (new)

Text proposed by the Commission

Amendment

The contracting authority may state in its technical specifications that works, supplies or services that comply with such a standard shall be deemed to satisfy the technical specifications. Contracting authorities shall also accept all equivalent standards that fulfil the specifications indicated by the contracting authorities. For works, supplies or services that have not been verified by a third party to comply with such a standard, contracting authorities shall also accept a technical dossier of the manufacturer or other appropriate means of proof such as certificates and declarations.

Justification

The use of labels should be deleted in favour of the use of standards. Standards are useful as they are well understood by tenderers in the relevant area and also to avoid contracting authorities needing to re-invent the wheel. By stressing the use of standards the Directive facilitates for contracting authorities to set environmental and social demands.

Amendment 42

Proposal for a directive

Article 55 – paragraph 4 – subparagraph 1

Text proposed by the Commission

Amendment

4. **Any** candidate or tenderer that is in one of the situations referred to in paragraphs 1, 2 and 3 **may provide** the contracting authority with evidence demonstrating its reliability despite the existence of the relevant ground for exclusion.

4. **If any** candidate or tenderer that is in one of the situations referred to in paragraphs 1, 2 and 3 **provides** the contracting authority with evidence demonstrating its reliability despite the existence of the relevant ground for exclusion, **the contracting authority may reconsider the exclusion of the tender.**

Justification

In order to ensure clearly and unambiguously that Union, national and regional law and other binding provisions must be upheld by any tenderer, and that contracting authorities have a clear right to exclude tenderers who are in breach of them.

Amendment 43

Proposal for a directive

Article 56 – paragraph 1 – point (c a) (new)

Text proposed by the Commission

Amendment

(ca) respect of standards in the field of health and safety, social and labour and environmental law defined by EU and national legislation as well by collective agreements.

Justification

The use of labels should be deleted in favour of the use of standards. Standards are useful as they are well understood by tenderers in the relevant area and also to avoid contracting authorities needing to re-invent the wheel. By stressing the use of standards the Directive facilitates for contracting authorities to set environmental and social demands.

Amendment 44

Proposal for a directive

Article 56 – paragraph 4 – subparagraph 1

Text proposed by the Commission

Amendment

4. With regard to technical and professional ability, contracting authorities may require that economic operators possess the necessary human and technical resources and experience to ***perform*** the contract to an appropriate quality standard. Contracting authorities may conclude that economic operators will not ***perform*** the ***contract to an appropriate quality standard*** where the contracting authority established that they have conflicting interests which may negatively affect the performance of the contract.

4. With regard to technical and professional ability, contracting authorities may require that economic operators possess ***or have made provisions to access or acquire*** the necessary human and technical resources and experience to ***ensure the performance of the*** contract to an appropriate quality standard ***and, where so requested by the contracting authority, in accordance with any contract performance clause specified in accordance with Article 70.*** Contracting authorities may conclude that economic operators will not ***ensure*** the ***required***

performance where the contracting authority established that they have conflicting interests which may negatively affect the performance of the contract.

Justification

The use of labels should be deleted in favour of the use of standards. Standards are useful as they are well understood by tenderers in the relevant area and also to avoid contracting authorities needing to re-invent the wheel. By stressing the use of standards the Directive facilitates for contracting authorities to set environmental and social demands.

Amendment 45

Proposal for a directive

Article 56 – paragraph 5 – subparagraph 1 a (new)

Text proposed by the Commission

Amendment

Provisions set in paragraphs 1, 2, 3, 4 and 5 apply to subcontracting procedures and subcontracting operators.

Justification

The aim is to give contracting authorities better possibilities to take subcontracting into account.

Amendment 46

Proposal for a directive

Article 57 – paragraph 3 – subparagraph 2 a (new)

Text proposed by the Commission

Amendment

National authorities shall create secure online certificate repositories where enterprises can submit all relevant documentation once every two years. That documentation shall be accessible to all contracting authorities at all levels, through the provision of a personal identification number.

Amendment 47

Proposal for a directive
Article 60 – paragraph 2 – subparagraph 1

Text proposed by the Commission

2. Proof of the economic operator's economic and financial standing may, as a general rule, be provided by one or more of the references listed in Annex XIV, **part 1**.

Amendment

2. Proof of the economic operator's economic and financial standing **as well as compliance with rules and standards in the field of health and safety, social and labour law defined by Union and national legislation and by collective agreements which apply in the place where the work, service or supply is performed**, may, as a general rule, be provided by one or more of the references listed in Annex XIV.

Amendment 48

Proposal for a directive
Article 61 – title

Text proposed by the Commission

Quality assurance standards and environmental management standards

Amendment

Quality assurance standards, and environmental **and animal welfare** management standards

Amendment 49

Proposal for a directive
Article 61 – paragraph 3

Text proposed by the Commission

3. Upon request, Member States shall make available to other Member States, in accordance with Article 88, any information relating to the documents produced as evidence of compliance with quality and environmental standards referred to in paragraphs 1 and 2 of this Article.

Amendment

3. Upon request, Member States shall make available to other Member States, in accordance with Article 88, any information relating to the documents produced as evidence of compliance with quality and environmental **and animal welfare** standards referred to in paragraphs 1 and 2 of this Article.

Amendment 50

Proposal for a directive
Article 66 – paragraph 1

Text proposed by the Commission

1. Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the criteria on which contracting authorities shall base the award of public contracts shall be ***one of the following***:

(a) the most economically advantageous tender;

(b) the lowest cost.

Costs may be assessed, on the choice of the contracting authority, on the basis of the price only or using a cost-effectiveness approach, such as a life-cycle costing approach, under the conditions set out in Article 67.

Amendment 51

Proposal for a directive
Article 66 – paragraph 2

Text proposed by the Commission

2. The most economically advantageous tender referred to in point (a) of paragraph 1 from the point of view of the contracting authority shall be identified on the basis of criteria linked to the subject-matter of the public contract in question. Those criteria shall include, in addition to the price or costs referred to in point (b) of paragraph 1, other criteria linked to the subject-matter of the public contract in question, ***such as***:

(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, environmental characteristics and innovative character;

Amendment

1. Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the criteria on which contracting authorities shall base the award of public contracts shall be ***the most economically advantageous tender.***

Amendment

2. The most economically advantageous tender referred to in point (a) of paragraph 1 from the point of view of the contracting authority shall be identified on the basis of criteria linked to the subject-matter of the public contract in question. Those criteria shall include, in addition to the price or costs referred to in point (b) of paragraph 1, other criteria linked to the subject-matter of the public contract in question.

(b) for service contracts and contracts involving the design of works, the organisation, qualification and experience of the staff assigned to performing the contract in question may be taken into consideration, with the consequence that, following the award of the contract, such staff may only be replaced with the consent of the contracting authority, which must verify that replacements ensure equivalent organisation and quality;

(c) after-sales service and technical assistance, delivery date and delivery period or period of completion;

(d) the specific process of production or provision of the requested works, supplies or services or of any other stage of its life cycle as referred to in point (22) of Article 2, to the extent that those criteria are specified in accordance with paragraph 4 and they concern factors directly involved in these processes and characterise the specific process of production or provision of the requested works, supplies or services.

Amendment 52

Proposal for a directive

Article 66 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. The criteria referred to in paragraph 2 may include:

(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users;

(b) innovative characteristics including best available techniques;

(c) environmental and sustainability criteria including life-cycle costing as

defined in Article 67 and Green Public Procurement criteria;

(d) socially sustainable production process criteria, which may also involve the employment of disadvantaged individuals or members of vulnerable groups;

(e) for service contracts and contracts involving the design of works, the organisation, qualification and experience of the staff assigned to performing the contract in question as well as the capacities, abilities and professional conduct of any subcontractor may be taken into consideration, with the consequence that, following the award of the contract, such staff may only be replaced and further subcontracting will only be permitted with the consent of the contracting authority, which must verify that replacements or further subcontracting ensure equivalent organisation and quality;

(f) after-sales service and technical assistance, delivery date and delivery period or period of completion;

(g) the specific process of production or provision of the requested works, supplies or services or of any other stage of its life cycle as referred to in point (22) of Article 2, to the extent that those criteria are specified in accordance with paragraph 4 and they concern factors directly involved in these processes and characterise the specific process of production or provision of the requested works, supplies or services.

Amendment 53

**Proposal for a directive
Article 66 – paragraph 3**

Text proposed by the Commission

Amendment

3. Member States may provide that the award of certain types of contracts shall be based on the most economically advantageous tender as referred to in point (a) of paragraph 1 and in paragraph 2.

deleted

Amendment 54

Proposal for a directive

Article 66 – paragraph 5 – subparagraph 1

Text proposed by the Commission

Amendment

5. In the case referred to in point (a) of paragraph 1 the contracting authority shall specify, in the contract notice, in the invitation to confirm interest, in the procurement documents or, in the case of a competitive dialogue, in the descriptive document, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

5. The contracting authority shall specify, in the contract notice, in the invitation to confirm interest, in the procurement documents or, in the case of a competitive dialogue, in the descriptive document, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

Amendment 55

Proposal for a directive

Article 67 – paragraph 2 – subparagraph 1 – point a

Text proposed by the Commission

Amendment

(a) it has been drawn up on **the basis of** scientific information or is based on other objectively verifiable and non-discriminatory criteria;

(a) it has been drawn up **in close consultation with stakeholders, is based** on scientific information or is based on other objectively verifiable and non-discriminatory criteria;

Amendment 56

Proposal for a directive

Article 67 – paragraph 2 – subparagraph 1 – point b

Text proposed by the Commission

Amendment

(b) it has been established for repeated or continuous application;

(b) it has been **tested and verified with suppliers and** established for repeated or continuous application;

Amendment 57

Proposal for a directive

Article 67 – paragraph 2 – subparagraph 1 – point c a (new)

Text proposed by the Commission

Amendment

(ca) it is formulated so as to ensure that market surveillance authorities can verify the conformity of the product with the declared life-cycle costs.

Amendment 58

Proposal for a directive

Article 67 – paragraph 3 – subparagraph 1

Text proposed by the Commission

Amendment

3. Whenever a common methodology for the calculation of life-cycle costs is adopted as part of a legislative act of the Union, including by delegated acts pursuant to sector specific legislation, **it** shall be applied where life-cycle costing is included in the award criteria referred to in Article 66(1).

3. Whenever a common methodology for the calculation of life-cycle costs is adopted as part of a legislative act of the Union, including by delegated acts pursuant to sector specific legislation, **such legislative acts shall be adopted in close consultation with stakeholders. Such common methodologies shall be** applied where life-cycle costing is included in the award criteria referred to in Article 66(1).

Amendment 59

Proposal for a directive

Article 69 – paragraph 4 – subparagraph 2

Text proposed by the Commission

Amendment

Contracting authorities shall reject the

Contracting authorities shall reject the

tender, where they have established that the tender is abnormally low because it does not comply with obligations established by Union legislation in the field of social and labour law *or* environmental law or by the international social and environmental law provisions listed in Annex XI.

tender, where they have established that the tender is abnormally low because it does not comply with obligations established by Union legislation *or national laws, regulations and other binding provisions* in the field of social and labour law, environmental law or *public health law or* by the international social and environmental law provisions listed in Annex XI.

Justification

Contracting authorities should have the right to refuse giving a contract to a tender that does not comply with laws and regulations. The reference to regulations in this article should not be limited to Union legislation in specific regulatory fields. The article should be extended to include national legislation and systems for regulating the labour market.

Amendment 60

Proposal for a directive Article 70 – subparagraph 1 a (new)

Text proposed by the Commission

Amendment

A contracting authority may state in the contract documents, or be obliged by a Member State so to state, the body or bodies from which a candidate or tenderer may obtain the appropriate information on the obligations relating to taxes, to environmental protection, to the employment protection provisions and to the working conditions which are normally applied in the place where the works are to be carried out or services are to be provided and which shall be applicable to the works carried out on site or to the services provided during the performance of the contract.

Justification

This amendment reintroduces, with some minor changes, Article 27, paragraph 1, from the present Directive 2004/18/EC. from the present directive on public procurement (EC 2004/18). This Article should not be deleted because of its importance in supporting tenderers from other countries to participate in procurement and to endorse cross-border trade.

Amendment 61

Proposal for a directive Article 70 – subparagraph 1 b (new)

Text proposed by the Commission

Amendment

A contracting authority which supplies the information referred to in paragraph 1 shall request the tenderers or candidates in the contract award procedure to indicate that they have taken account, when drawing up their tender, of the obligations relating to environment and employment protection provisions and the working conditions which are normally applied in the place where the works are to be carried out or the service is to be provided.

Justification

This amendment reintroduces, with some minor changes, Article 27, paragraph 2, from the present Directive 2004/18/EC. This Article should not be deleted because of its importance in supporting tenderers from other countries to participate in procurement and to endorse cross-border trade.

Amendment 62

Proposal for a directive Article 71 – paragraph 3

Text proposed by the Commission

Amendment

3. Paragraphs 1 and 2 shall be without prejudice to the question of the principal economic operator's liability.

3. Paragraphs 1 and 2 shall be without prejudice to the question of the principal economic operator's liability. ***A system of joint and several liability shall stipulate that the whole subcontracting chain is jointly held liable as regards respect of fundamental rights, environmental, health and safety, social and labour rules (as defined in Articles 2, 22 a (new), 40, 54, 55 and 56).***

Justification

The aim is to give contracting authorities better possibilities to take subcontracting into account.

Amendment 63

Proposal for a directive Article 84 – paragraph 1 – subparagraph 1

Text proposed by the Commission

1. Member States shall appoint a single independent body responsible for the oversight and coordination of implementation activities (hereinafter 'the oversight body'). Member States shall inform the Commission of their designation.

Amendment

1. Member States shall appoint a single independent body responsible for the oversight and coordination of implementation activities (hereinafter 'the oversight body') ***in cases in which no such independent body yet exists***. Member States shall inform the Commission of their designation.

Amendment 64

Proposal for a directive Annex VIII – point 5 a (new)

Text proposed by the Commission

Amendment

(5a) “Third party verified standard” means a specification established in relation to environmental, social or other characteristics of a works, service or supply (including life cycle and social sustainable production process characteristics) that is accessible to all interested parties and requires compliance to be verified by a third party which is independent from the tenders and where the criteria for the specification:

(a) only concern characteristics which are linked to the subject-matter of the contract;

(b) are drawn up on the basis of scientific information or based on other objectively verifiable and non-discriminatory criteria;

(c) are established in an open and transparent procedure in which all stakeholders, including government bodies, trade unions, consumers, manufacturers, distributors and environmental organisations, may participate;

(d) are set by a third party which is independent from any economic operator applying for the verification of compliance.

Justification

Modification due to changes regarding standards.

Amendment 65

**Proposal for a directive
Annex XI – indent 1 a (new)**

Text proposed by the Commission

Amendment

**- Convention 94 on Labour Clauses
(Public Contracts)**

Justification

Ensuring minimum standards of health, safety and welfare for workers employed by contractors.

Amendment 66

**Proposal for a directive
Annex XVI – row 2 – column 2**

Text proposed by the Commission

Amendment

Health and social services

Health and social services, ***including ambulance services***

PROCEDURE

Title	Public procurement
References	COM(2011)0896 – C7-0006/2012 – 2011/0438(COD)
Committee responsible Date announced in plenary	IMCO 17.1.2012
Opinion by Date announced in plenary	ENVI 17.1.2012
Rapporteur Date appointed	Åsa Westlund 7.2.2012
Discussed in committee	29.5.2012
Date adopted	10.7.2012
Result of final vote	+: 54 –: 4 0: 3
Members present for the final vote	Elena Oana Antonescu, Kriton Arsenis, Sophie Auconie, Pilar Ayuso, Sandrine Bélier, Sergio Berlato, Martin Callanan, Yves Cochet, Tadeusz Cymański, Chris Davies, Esther de Lange, Anne Delvaux, Bas Eickhout, Jill Evans, Karl-Heinz Florenz, Elisabetta Gardini, Gerben-Jan Gerbrandy, Matthias Groote, Françoise Grossetête, Cristina Gutiérrez-Cortines, Satu Hassi, Jolanta Emilia Hibner, Dan Jørgensen, Christa Kläß, Eija-Riitta Korhola, Holger Kraemer, Jo Leinen, Corinne Lepage, Zofija Mazej Kukovič, Linda McAvan, Radvilė Morkūnaitė-Mikulėnienė, Miroslav Ouzký, Vladko Todorov Panayotov, Gilles Pargneaux, Andres Perello Rodriguez, Mario Pirillo, Pavel Poc, Frédérique Ries, Oreste Rossi, Dagmar Roth-Behrendt, Kārlis Šadurskis, Horst Schnellhardt, Richard Seeber, Theodoros Skylakakis, Bogusław Sonik, Claudiu Ciprian Tănăsescu, Anja Weisgerber, Åsa Westlund, Glenis Willmott, Sabine Wils, Marina Yannakoudakis
Substitute(s) present for the final vote	Margrete Auken, Erik Bánki, Christofer Fjellner, Gaston Franco, Julie Girling, Toine Manders, Miroslav Mikolášik, Vittorio Prodi, Alda Sousa, Marita Ulvskog

1.10.2012

OPINION OF THE COMMITTEE ON INDUSTRY, RESEARCH AND ENERGY

for the Committee on the Internal Market and Consumer Protection

on the proposal for a directive of the European Parliament and of the Council on public procurement
(COM(2011)0896 – C7-0006/2012 – 2011/0438(COD))

Rapporteur: András Gyürk

SHORT JUSTIFICATION

The Public Procurement plays a key role in achieving the goals of the Europe 2020 Strategy for smart, sustainable and inclusive growth. The EC proposal for a new Directive on Public Procurement should lead to the modernisation of the European legislation in this field. It offers an opportunity to simplify current procedures, enhance their transparency and take due account of the importance of energy efficiency-related aspects when purchasing products and services.

The amendments proposed by the Draftsman encourage the extensive use of electronic means of information and communication throughout the different stages of public procurement – from tendering to monitoring of the contract execution. The recourse to IT should lead to both cost-cutting and increased participation by small and medium enterprises (SMEs). To avoid the reverse effect due to insufficient IT knowledge, Member States are prompted to provide opportunities for the necessary trainings in order to acquire the skills needed to conclude the electronic public procurement procedure.

The Draftsman proposes to enhance the monitoring of the contract execution phase and to establish an opportunity to introduce future sanctions against the contractor in case of a serious breach of contract. The performance monitoring and the opportunity to introduce sanctions may significantly improve the procurement culture and ensure the most efficient use of public finances.

As the financial burden of public procurement procedures has been identified as a serious impediment for the access to public tenders by SMEs, the Draftsman proposes that the Commission makes a Union-wide inventory of all the fees related to public procurement, as a clear identification of such fees would allow for the review of those which are unreasonably cumbersome. Moreover, in order to allow for an extensive access to public tenders, Member States are prompted to set up objective, efficient and low-cost redress procedures. Taking this

into account, the Draftsman believes in using the existing competent authorities responsible for public contracting rather than setting up new oversight bodies.

Last but not least, special emphasis is placed on green procurement and the need to incorporate it in the assessment criteria for products and services purchased via public tender. Thus, the selection criteria should incorporate cost-effectiveness based on a whole life-cycle analysis which duly considers the energy-efficiency performance of given products or services through their life-cycle.

AMENDMENTS

The Committee on Industry, Research and Energy calls on the Committee on the Internal Market and Consumer Protection, as the committee responsible, to incorporate the following amendments in its report:

Amendment 1

Proposal for a directive

Recital 1

Text proposed by the Commission

(1) The award of public contracts by or on behalf of Member States authorities has to comply with the principles of the Treaty on the Functioning of the European Union, and in particular the free movement of goods, freedom of establishment and the freedom to provide services as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality *and* transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that these principles are given practical effect and public procurement is opened up to competition.

Amendment

(1) The award of public contracts by or on behalf of Member States authorities has to comply with the principles of the Treaty on the Functioning of the European Union, and in particular the free movement of goods, freedom of establishment and the freedom to provide services as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality, *openness*, transparency *and publicity*. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that these principles are given practical effect and public procurement is opened up to competition, *always ensuring that public funds are used effectively. This will require a high degree of flexibility for Member states in order to promote effective and suitable solutions.*

Amendment 2

Proposal for a directive Recital 2

Text proposed by the Commission

(2) Public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the current public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts have to be revised and modernised in order to **increase** the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises in public procurement **and to enable procurers to make better use of public procurement in support of common societal goals**. There is also a need to clarify basic notions and concepts to ensure better legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.

Amendment

(2) Public procurement plays a key role in the Europe 2020 strategy¹⁶ as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the current public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors¹⁷ and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts have to be revised and modernised in order to **enable public procurers to make better use of public procurement in support of sustainable development and other common societal goals, thereby increasing** the efficiency of public spending **by ensuring the best possible outcome in cost-benefit ratio terms, by reducing costs for both public authorities and enterprises alike and by** facilitating in particular the participation of small and medium-sized enterprises in public procurement and to enable procurers to make better use of public procurement in support of common societal goals. There is also a need to **simplify the EU rules, particularly with regard to how sustainability objectives can be incorporated into public procurement, and to** clarify basic notions and concepts to ensure better legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice

of the European Union.

Amendment 3

Proposal for a directive

Recital 5

Text proposed by the Commission

(5) Under **Article** 11 of the Treaty on the Functioning of the European Union, environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development. This Directive clarifies how the contracting authorities **may** contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring **that they can obtain the** best value for money **for their contracts**.

Amendment

(5) Under **Articles 9, 10 and** 11 of the Treaty on the Functioning of the European Union, environmental protection requirements **and the concepts of the socially-sustainable production process** must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development **and ensuring, throughout the supply chain, compliance with rules on public health and safety, social standards and national and Union labour laws**.

This directive clarifies how the contracting authorities contribute to the protection of the environment and the promotion of sustainable development, **and in regard to technical specifications and award criteria use the powers of discretion at their disposal to select the ones that are the most likely to achieve socially sustainable public procurement thereby ensuring contracts still obtain** best value for money **for their purpose**.

Amendment 4

Proposal for a directive

Recital 5 a (new)

Text proposed by the Commission

Amendment

(5a) Contracting authorities have broad discretion to choose the technical specifications that define the supplies, services, or works they seek to procure.

Further, they have broad discretion to use both technical specifications and award criteria to achieve a contracting authority's objectives, including specifications and criteria designed to achieve more sustainable public procurement. Technical specifications and award criteria, including those relating to sustainability objectives, must be linked to the subject matter of the procurement contract. Provided that the link to the subject matter rule is satisfied, this Directive is not intended to further constrain the types of concerns that a contracting authority can address through technical specifications or award criteria.

Justification

Contracting authorities should be allowed broad discretion to choose technical specifications and award criteria in relation to the supplies, services, or works they seek to procure. To that end, technical specifications and award criteria can be designed to reflect the contracting authority's sustainability objectives, as well as its functional procurement objectives. The scope and type of sustainability objectives that can be reflected in technical specifications and award criteria should be constrained by the link to the subject matter test.

Amendment 5

Proposal for a directive

Recital 7 a (new)

Text proposed by the Commission

Amendment

(7a) In view of the need to promote participation in cross-border public procurement procedures by economic operators in the Union, it is necessary for Member States to transpose and apply the provisions of the Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market¹ properly and punctually.

¹ OJ L 376, 27.12.2006, p. 36.

Amendment 6

Proposal for a directive Recital 8

Text proposed by the Commission

(8) Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the Agreements reached in the Uruguay Round multilateral negotiations (1986 to 1994), approved in particular the World Trade Organisation Agreement on Government Procurement, hereinafter referred to as the "Agreement". ***The aim of the Agreement is to establish a*** multilateral framework of balanced rights and obligations relating to public contracts with a view to ***achieving the liberalisation and expansion of world trade.*** For contracts covered by the Agreement, as well as by other relevant international agreements by which the Union is bound, contracting entities fulfil the obligations under those agreements by applying this Directive to economic operators of third countries that are signatories to the agreements.

Amendment 7

Proposal for a directive Recital 8 a (new)

Text proposed by the Commission

Amendment

(8) Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the Agreements reached in the Uruguay Round multilateral negotiations (1986 to 1994), approved in particular the World Trade Organisation Agreement on Government Procurement, hereinafter referred to as the "Agreement". ***Within this*** multilateral framework of balanced rights and obligations relating to public contracts ***upholding equal opportunities for Union and third country economic operators to compete on equal terms in Union and third country markets*** with a view to ***facilitating the integration of small and medium-sized enterprises (SMEs) and stimulating employment and innovation within the Union.*** For contracts covered by the Agreement, as well as by other relevant international agreements by which the Union is bound, contracting entities fulfil the obligations under those agreements by applying this Directive to economic operators of third countries that are signatories to the agreements.

(8a) The Union needs an effective instrument to, on the one hand, encourage compliance with the principle of reciprocity and balance in relation to third countries which do not provide

equivalent access to European economic operators, particularly through an assessment of substantial reciprocity to be carried out by the Commission, and, on the other hand, ensure fair competition and a level playing field worldwide.

Amendment 8

Proposal for a directive Recital 13

Text proposed by the Commission

(13) Being addressed to Member States, this directive does not apply to procurement carried out by international organisations on their own behalf and for their own account. ***There is, however, a need to clarify to what extent this directive should be applied to procurement governed by specific international rules.***

Amendment

(13) Being addressed to Member States, this directive does not apply to procurement carried out by international organisations on their own behalf and for their own account. ***Although the EU has a largely open public procurement market, several third countries are reluctant to open their procurement markets to international competition. In order to apply the reciprocity principle and improve the access of EU economic operators to third country public procurement markets protected by restrictive procurement measures, special rules shall be introduced pursuant to COM(2012)124 / 2012/0060(COD).***

Amendment 9

Proposal for a directive Recital 15

Text proposed by the Commission

(15) There is a widespread need for additional flexibility and in particular for wider access to a procurement procedure providing for negotiations, as is explicitly foreseen in the Agreement, where negotiation is allowed in all procedures. Contracting authorities should, ***unless otherwise provided in the legislation of***

Amendment

(15) There is a widespread need for additional flexibility and in particular for wider access to a procurement procedure providing for negotiations, as is explicitly foreseen in the Agreement, where negotiation is allowed in all procedures. Contracting authorities should be able to use a competitive procedure with

the Member State concerned, be able to use a competitive procedure with negotiation as provided for in this Directive, *in various situations where open or restricted procedures without negotiations are not likely to lead to satisfactory procurement outcomes*. This procedure should be accompanied by adequate safeguards ensuring observance of the principles of equal treatment and transparency. This will give greater leeway to contracting authorities to buy works, supplies and services perfectly adapted to their specific needs. At the same time, it should also increase cross-border trade, as the evaluation has shown that contracts awarded by negotiated procedure with prior publication have a particularly high success rate of cross-border tenders.

negotiation as provided for in this Directive. This procedure should be accompanied by adequate safeguards ensuring observance of the principles of equal treatment and transparency. This will give greater leeway to contracting authorities to buy works, supplies and services perfectly adapted to their specific needs. At the same time, it should also increase cross-border trade, as the evaluation has shown that contracts awarded by negotiated procedure with prior publication have a particularly high success rate of cross-border tenders.

Justification

In reference to the Green Paper on the modernisation of EU public procurement policy (COM(2011) 15 final), and the European Parliament's report on modernisation of public procurement (2011/2048(INI)), negotiated procedures should be used without limitation in order to achieve the contract which is best suited to the specific needs of the contracting authority, as well as to achieve the best value for money. In order to achieve the highest possible level of transparency, adequate guarantees to counter market distortion - as a result of the application of this procedure - need to be elaborated.

Amendment 10

Proposal for a directive **Recital 17**

Text proposed by the Commission

(17) Research and innovation, including eco-innovation and social innovation, are among the main drivers of future growth and have been put at the centre of the Europe 2020 strategy for smart, sustainable and inclusive growth. Public authorities should make the best strategic use of public procurement to spur innovation. Buying innovative goods and services plays a key role in improving *the* efficiency and

Amendment

(17) Research and innovation, including eco-innovation and social innovation, are among the main drivers of future growth and have been put at the centre of the Europe 2020 strategy for smart, sustainable and inclusive growth. Public authorities should make the best strategic use of public procurement to spur **R&D and** innovation. Buying **the R&D and deployment of** innovative goods and services plays a key

quality of public services while addressing major societal challenges. It contributes to achieving best value for public money as well as wider economic, environmental and societal benefits in terms of generating new ideas, translating them into innovative products and services and thus promoting sustainable economic growth. ***This directive*** should contribute to facilitating public procurement of ***innovation*** and help Member States in achieving the Innovation Union targets. A specific procurement procedure should therefore be provided for which allows contracting authorities to establish a long-term innovation partnership for the development and subsequent purchase of a new, innovative product, service or works provided it can be delivered to agreed performance levels and costs. The partnership should be structured in such a way that it can provide the necessary ‘market-pull’, incentivising the development of an innovative solution without foreclosing the market.

role in improving efficiency and quality of public services while addressing major societal challenges. It contributes to achieving best value for public money as well as wider economic, environmental and societal benefits in terms of generating new ideas, translating them into innovative products and services and thus promoting sustainable economic growth. ***The Directive*** should contribute to facilitating public procurement of ***R&D*** and ***innovative goods and services*** and help Member States in achieving the Innovation Union targets ***but should not introduce mandatory quotas for innovative public procurement as this would restrict competition and the choice of the contracting authorities. It is therefore appropriate to clarify as much as possible the possibilities to procure R&D and innovative goods and services.*** A specific procurement procedure should therefore be provided for which allows contracting authorities to establish a long-term innovation partnership for the development and subsequent purchase of a new, innovative product, service or works provided it can be delivered to agreed performance levels and costs. The partnership should be structured in such a way that it can provide the necessary ‘market-pull’, incentivising the development of an innovative solution without foreclosing the market.

Justification

Public procurement can play an important part in encouraging research and innovation. The directive should therefore be clearer in terms of using public procurement to promote both R&D and innovative solutions.

Amendment 11

Proposal for a directive

Recital 19

Text proposed by the Commission

(19) Electronic means of information and communication can greatly simplify the publication of contracts and increase the efficiency and transparency of procurement processes. They should become the standard means of communication and information exchange in procurement procedures. The use of electronic means also leads to time savings. As a result, provision should be made for reducing the minimum periods where electronic means are used, subject, however, to the condition that they are compatible with the specific mode of transmission envisaged at Union level. Moreover, electronic means of information and communication including adequate functionalities can enable contracting authorities to prevent, detect and correct errors that occur during procurement procedures.

Amendment

(19) Electronic means of information and communication can greatly simplify the publication of contracts and increase the efficiency and transparency of procurement processes. They should become the standard means of communication and information exchange in procurement procedures. The use of electronic means also leads to time savings. As a result, provision should be made for reducing the minimum periods where electronic means are used, subject, however, to the condition that they are compatible with the specific mode of transmission envisaged at Union level. Moreover, electronic means of information and communication including adequate functionalities can enable contracting authorities to prevent, detect and correct errors that occur during procurement procedures ***and the execution phase as well. A reasonable period of time should be allowed for the move from paper to electronic means of communication, to allow the parties concerned the time needed for training.***

Amendment 12

Proposal for a directive

Recital 26

Text proposed by the Commission

(26) Joint awarding of public contracts by contracting authorities from different Member States currently encounters specific legal difficulties, with special reference to conflicts of national laws. Despite the fact that Directive 2004/18/EC implicitly allowed for cross-border joint

Amendment

(26) Joint awarding of public contracts by contracting authorities from different Member States currently encounters specific legal difficulties, with special reference to conflicts of national laws. Despite the fact that Directive 2004/18/EC implicitly allowed for cross-border joint

public procurement, in practice several national legal systems have explicitly or implicitly rendered cross-border joint procurement legally uncertain or impossible. Contracting authorities from different Member States may be interested in cooperating and in jointly awarding public contracts in order to derive maximum benefit from the potential of the internal market in terms of economies of scale and risk-benefit sharing, not least for innovative projects involving a greater amount of risk than reasonably bearable by a single contracting authority. Therefore new rules on cross-border joint procurement designating the applicable law should be established in order to facilitate cooperation between contracting authorities across the Single Market. In addition, contracting authorities from different Member States may set up joint legal bodies established under national or Union law. Specific rules should be established for such form of joint procurement.

public procurement, in practice several national legal systems have explicitly or implicitly rendered cross-border joint procurement legally uncertain or impossible. Contracting authorities from different Member States may be interested in cooperating and in jointly awarding public contracts in order to derive maximum benefit from the potential of the internal market in terms of economies of scale and risk-benefit sharing, not least for innovative projects involving a greater amount of risk than reasonably bearable by a single contracting authority. Therefore new rules on cross-border joint procurement designating the applicable law should be established in order to facilitate cooperation between contracting authorities across the Single Market. In addition, contracting authorities from different Member States may set up joint legal bodies established under national or Union law. Specific rules should be established for such form of joint procurement. ***Where cross-border procurement is unlikely to be achieved, contracting authorities should be able to deviate from European public procurement rules in favour of a simpler regime.***

Amendment 13

Proposal for a directive Recital 27

Text proposed by the Commission

(27) The technical specifications drawn up by public purchasers need to allow public procurement to be opened up to competition. To that end, it must be possible to submit tenders that reflect the diversity of technical solutions so as to obtain a sufficient level of competition. Consequently, technical specifications should be drafted in such a way to avoid

Amendment

(27) The technical specifications drawn up by public purchasers need to allow public procurement to be opened up to competition. To that end, it must be possible to submit tenders that reflect the diversity of technical solutions so as to obtain a sufficient level of competition. Consequently, ***the purpose of the*** technical specifications ***is to define the function that***

artificially narrowing down competition through requirements that favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator. Drawing up the technical specifications in terms of functional and performance requirements generally allows this objective to be achieved in the best way possible and favours innovation. Where reference is made to a European standard or, in the absence thereof, to a national standard, tenders based on equivalent arrangements must be considered by contracting authorities. To demonstrate equivalence, tenderers can be required to provide third-party verified evidence; however, other appropriate means of proof such as a technical dossier of the manufacturer should also be allowed where the economic operator concerned has no access to such certificates or test reports, or no possibility of obtaining them within the relevant time limits.

the subject-matter of a contract is to deliver and should in all cases be drafted in such a way to avoid artificially narrowing down competition through requirements that favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator. Drawing up the technical specifications in terms of functional and performance requirements generally allows this objective to be achieved in the best way possible and favours innovation. Where reference is made to a European standard or, in the absence thereof, to a national standard, tenders based on equivalent arrangements must be considered by contracting authorities. To demonstrate equivalence, tenderers can be required to provide third-party verified evidence; however, other appropriate means of proof such as a technical dossier of the manufacturer should also be allowed where the economic operator concerned has no access to such certificates or test reports, or no possibility of obtaining them within the relevant time limits.

Amendment 14

Proposal for a directive Recital 28 a (new)

Text proposed by the Commission

Amendment

(28a) With regards to the purchase of certain products and services and the purchase and rent of buildings, central governments which conclude public works, supply or service contracts should lead by example and make energy efficient purchasing decisions. This should apply to the administrative departments whose competence extends over the whole territory. When in a given Member State and for a given competence no such relevant administrative

department exists that covers the whole territory, the obligation should apply to those administrative departments whose competences cover collectively the whole territory. The provisions of this directive should not however be affected.

For other products than those covered by the energy efficiency requirements for purchasing in this Directive, Member States should encourage public bodies to take into account the energy efficiency of purchase.

Justification

Reference to the adopted version of Energy Efficiency Directive by ITRE (ITRE/7/06352).

Amendment 15

Proposal for a directive Recital 29 a (new)

Text proposed by the Commission

Amendment

(29a) Necessary legislative measures should be taken in view of the low level of participation by small and medium-sized enterprises (SMEs) in public procurement in general, and more particularly in the innovation and services sector. Several actions should be considered in this regard, such as compliance with the principle of non-discrimination, ensuring measures regarding the nationality of enterprises are neutral; account taken of the competitiveness of tenders; the introduction of preferential measures to help competitive SMEs. Monitoring and reporting measures should also be introduced to improve statistical monitoring by sector and by value of the public contracts awarded to SMEs, and to make contractors more aware of SMEs and the difficulties the latter experience in accessing the public procurement market.

Amendment 16

Proposal for a directive Recital 29 a (new)

Text proposed by the Commission

Amendment

(29a) The public procurement should follow the ‘think small first’ principle, and Member States should implement fully the European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts.

Amendment 17

Proposal for a directive Recital 29 b (new)

Text proposed by the Commission

Amendment

(29b) The importance of reciprocity in international trade needs to be reiterated together with the fact that the plurilateral Agreement on Government Procurement (GPA) plays a vital role in opening up public procurement (goods, services and construction contracts) to foreign competition and guarantees private tenderers transparent, fair and non-discriminatory conditions.

Amendment 18

Proposal for a directive Recital 30

Text proposed by the Commission

Amendment

(30) In order to foster the involvement of small and medium-sized enterprises (SMEs) in the public procurement market, contracting authorities should be encouraged *to divide* contracts into lots, and be obliged to state the reasons for not doing so. Where contracts are divided into

(30) In order to foster the involvement of small and medium-sized enterprises (SMEs) ***and civil society*** in the public procurement market, contracting authorities should be encouraged *to divide* contracts into lots, and be obliged to state the reasons for not doing so. Where

lots, contracting authorities may, for instance in order to preserve competition or to ensure security of supply, limit the number of lots for which an economic operator may tender; they may also limit the number of lots that may be awarded to any one tenderer.

contracts are divided into lots, contracting authorities may, for instance in order to preserve competition or to ensure security of supply, limit the number of lots for which an economic operator may tender; they may also limit the number of lots that may be awarded to any one tenderer.
However, such division into lots may not be performed with the aim of evading procurement procedures laid down by law.

Amendment 19

Proposal for a directive Recital 31 a (new)

Text proposed by the Commission

Amendment

(31a) In order to make public contracts - even below the Union thresholds - as accessible for SMEs as possible, Member States may introduce further public procurement measures.

Justification

More than half of the public procurement within the EU falls outside the scope of the Directive, bestowing an important role on Member States to aid the participation of SMEs. Procurement contracts at national level signify a better opportunity, as the size of those contracts is better suited for SMEs.

Amendment 20

Proposal for a directive Recital 32 a (new)

Text proposed by the Commission

Amendment

(32a) Participation in public procurement procedures consists of a substantial financial burden for many economic operators. In order to support the participation of SMEs, financial burdens in the procurement phase, the execution phase as well as in the legal remedy

phase, should be substantially decreased.

Amendment 21

Proposal for a directive

Recital 32 a (new)

Text proposed by the Commission

Amendment

(32a) In addition to the specific new tools, which are introduced in this Directive to foster the involvement of SMEs in the public procurement market, member states and contracting authorities should continue to create SME-friendly public procurement strategies. Implementing and applying these new rules, which are more favourable to SMEs than the current regime, will not be sufficient as such. The Commission has published a staff working document "European code of best practices facilitating access by SMEs to public procurement contracts" (SEC (2008)COM 2193, which aims at encouraging member states to launch national strategies, programs and action plans in order to improve SMEs participation in these markets. In this spirit, national, regional and local authorities should rigorously apply the rules set in the directive and implement consistent general policies designated to enhance SMEs access to public procurement markets.

Justification

SME-friendly new rules in the directive are to be welcomed. However, to ensure that SMEs can benefit from the significant potential, which public procurement markets represent, more has to be done. All member countries, regions and local authorities should be encouraged to launch strategies and policies enhancing SMEs wider overall participation in these markets, both at EU and national levels.

Amendment 22

Proposal for a directive Recital 32 b (new)

Text proposed by the Commission

Amendment

(32b) The Commission should prepare, and publish a Union-wide inventory of all fees related to the public procurement procedure, focusing on redress fees and other costs related to legal remedies.

Amendment 23

Proposal for a directive Recital 37

Text proposed by the Commission

Amendment

(37) Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment. These criteria should guarantee that tenders are assessed in conditions of effective competition, also where contracting authorities require high-quality works, supplies and services that are optimally suited to their needs, for instance where the chosen award criteria include factors linked to the production process. As a result, contracting authorities should be allowed to adopt as award criteria either ‘the most economically advantageous tender’ or ‘the lowest cost’, taking into account that in the latter case they are free to set adequate quality standards by using technical specifications or contract performance conditions.

(37) Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment. These criteria should guarantee that tenders are assessed in conditions of effective competition, also where contracting authorities require high-quality works, supplies and services that are optimally suited to their needs, for instance where the chosen award criteria include factors linked to the production process. As a result, contracting authorities should be allowed to adopt as award criteria either ‘the most economically advantageous tender’ or ‘the lowest cost’, taking into account that in the latter case they are free to set adequate quality standards by using technical specifications or contract performance conditions ***for highly standardised products.***

Amendment 24

Proposal for a directive Recital 39

(39) ***It is of utmost importance*** to fully exploit the potential of public procurement to achieve the objectives of the Europe 2020 Strategy for sustainable growth. In view of the important differences between individual sectors and markets, it would however not be appropriate to set general mandatory requirements for environmental, social and innovation procurement. The Union legislature has already set mandatory procurement requirements for obtaining specific goals in the sectors of road transport vehicles (Directive 2009/33/EC of the European Parliament and the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles) and office equipment (Regulation (EC) No 106/2008 of the European Parliament and the Council of 15 January 2008 on a Community energy-efficiency labelling programme for office equipment). In addition, the definition of common methodologies for life cycle costing has significantly advanced. It therefore appears appropriate to continue on that path, leaving it to sector-specific legislation to set mandatory objectives and targets in function of the particular policies and conditions prevailing in the relevant sector and to promote the development and use of European approaches to life-cycle costing as a further underpinning for the use of public procurement in support of sustainable growth.

(39) ***Efforts should be made*** to fully exploit the potential of public procurement to achieve the objectives of the Europe 2020 Strategy for sustainable growth, ***without encroaching on the powers of contracting entities. In particular public procurement is key to driving innovation, which is of great importance for future growth in Europe.*** In view of the important differences between individual sectors and markets, it would however not be appropriate to set general mandatory requirements for environmental, social and innovation procurement. The Union legislature has already set mandatory procurement requirements for obtaining specific goals in the sectors of road transport vehicles (Directive 2009/33/EC of the European Parliament and the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles) and office equipment (Regulation (EC) No 106/2008 of the European Parliament and the Council of 15 January 2008 on a Community energy-efficiency labelling programme for office equipment). In addition, the definition of common methodologies for life cycle costing has significantly advanced. It therefore appears appropriate to continue on that path, leaving it to sector-specific legislation to set mandatory objectives and targets in function of the particular policies and conditions prevailing in the relevant sector and to promote the development and use of European approaches to life-cycle costing as a further underpinning for the use of public procurement in support of sustainable growth.

Amendment 25

Proposal for a directive Recital 40

Text proposed by the Commission

(40) These sector-specific measures must be complemented by an adaptation of the public procurement Directives empowering contracting authorities to pursue the objectives of the Europe 2020 Strategy in their purchasing strategies. It should hence be made clear that contracting authorities can determine the most economically advantageous tender and the lowest cost using a life-cycle costing approach, provided that the methodology to be used is established in an objective and non-discriminatory manner and accessible to all interested parties. The notion of life-cycle costing includes all costs over the life cycle of works, supplies or services, both their internal costs (such as development, production, use, maintenance and end-of-life disposal costs) and their external costs, provided they can be monetised and monitored. Common methodologies should be developed at the level of the Union for the calculation of life-cycle costs for specific categories of supplies or services; whenever such a methodology is developed its use should be made compulsory.

Amendment

(40) These sector-specific measures must be complemented by an adaptation of the public procurement Directives empowering contracting authorities to pursue the objectives of the Europe 2020 Strategy in their purchasing strategies, ***for example measuring costs in relation to the energy saving potential of products or services***. It should hence be made clear that contracting authorities can determine the most economically advantageous tender and the lowest cost using a life-cycle costing approach, provided that the methodology to be used is established in an objective and non-discriminatory manner and accessible to all interested parties. The notion of life-cycle costing includes all costs over the life cycle of works, supplies or services, both their internal costs (such as development, production, use, maintenance and end-of-life disposal costs) and their external costs, provided they can be monetised and monitored. Common methodologies should be developed at the level of the Union for the calculation of life-cycle costs for specific categories of supplies or services; whenever such a methodology is developed its use should be made compulsory.

Amendment 26

**Proposal for a directive
Recital 40 a (new)**

Text proposed by the Commission

Amendment

(40a) When using a life-cycle costing approach to purchase energy efficient products and services, the energy efficiency of a collection or group of purchases as a whole should take priority over the energy efficiency of an individual purchase, taking into account technical

Amendment 27

Proposal for a directive

Recital 41

Text proposed by the Commission

(41) Furthermore, in technical specifications and in award criteria, contracting authorities should be allowed to refer to a specific production process, a specific mode of provision of services, or a specific process for any other stage of the life cycle of a product or service, provided that they are linked to the subject-matter of the public contract. In order to better integrate social considerations in public procurement, procurers may also be allowed to include, in the **award criterion** of the **most economically advantageous tender**, characteristics related to the working conditions of the persons directly participating in the process of production or provision in question. Those characteristics may only concern the protection of health of the staff involved in the production process or the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract, including accessibility for persons with disabilities. Any **award criteria** which include those characteristics should in any event remain limited to characteristics that have immediate consequences on staff members in their working environment. They should be applied in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services and in a way that does not discriminate directly or indirectly against economic operators from other Member States or from third countries parties to the

Amendment

(41) Furthermore, in technical specifications and in award criteria, contracting authorities should be allowed to refer to a specific production process, a specific mode of provision of services, or a specific process for any other stage of the life cycle of a product or service, provided that they are **directly** linked to the subject-matter of the public contract. In order to better integrate social considerations in public procurement, procurers may also be allowed to include, in the **implementing conditions** of the **contract**, characteristics related to the working conditions of the persons directly participating in the process of production or provision in question. Those characteristics may only concern the protection of health of the staff involved in the production process or the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract, including accessibility for persons with disabilities. Any **implementing conditions** which include those characteristics should in any event remain limited to characteristics that have immediate consequences on staff members in their working environment. They should be applied in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services and in a way that does not discriminate directly or indirectly against economic operators from other Member States or from third countries parties to the Agreement or to

Agreement or to Free Trade Agreements to which the Union is party. For service contracts and for contracts involving the design of works, contracting authorities should also be allowed to use as an award criterion the organisation, qualification and experience of the staff assigned to performing the contract in question, as this may affect the quality of contract performance and, as a result, the economic value of the tender.

Free Trade Agreements to which the Union is party. For service contracts and for contracts involving the design of works, contracting authorities should also be allowed to use as an award criterion the organisation, qualification and experience of the staff assigned to performing the contract in question, as this may affect the quality of contract performance and, as a result, the economic value of the tender ***and may therefore have a direct bearing on the subject-matter of the contract.***

Amendment 28

Proposal for a directive Recital 43

Text proposed by the Commission

(43) Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory, are ***linked*** to the subject-matter of the contract and are indicated in the contract notice, the prior information notice used as a means of calling for competition or the procurement documents. They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment, protection of the environment or animal welfare. For instance, mention may be made, amongst other things, of the requirements — applicable during performance of the contract — to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with fundamental International Labour Organisation (ILO) Conventions, even where such Conventions have not been implemented in national law, and to recruit more disadvantaged persons than are required

Amendment

(43) Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory, are ***directly related*** to the subject-matter of the contract and are indicated in the contract notice, the prior information notice used as a means of calling for competition or the procurement documents. They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment, protection of the environment or animal welfare. For instance, mention may be made, amongst other things, of the requirements — applicable during performance of the contract — to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with fundamental International Labour Organisation (ILO) Conventions, even where such Conventions have not been implemented in national law, and to recruit more disadvantaged persons than are required

under national legislation.

under national legislation.

Amendment 29

Proposal for a directive Recital 55

Text proposed by the Commission

(55) It is of particular importance that the Commission carries out appropriate consultations during its preparatory work, including at expert level. When preparing and drawing up delegated acts, the Commission should ensure simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and the Council.

Amendment

(55) It is of particular importance that the Commission carries out appropriate consultations ***with relevant actors such as representatives for local and regional authorities, civil society, stakeholders etc,*** during its preparatory work, including at expert level. When preparing and drawing up delegated acts, the Commission should ensure simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and the Council.

Amendment 30

Proposal for a directive Article 2 – point 22

Text proposed by the Commission

(22) ‘life cycle’ means all consecutive and/or interlinked stages, including production, transport, use and maintenance, throughout the existence of a product or a works or the provision of a service, from raw material acquisition or generation of resources to disposal, clearance and finalisation.

Amendment

(22) ‘life cycle’ means all consecutive and/or interlinked stages, including production ***and the place of production,*** transport, use and maintenance, throughout the existence of a product or a works or the provision of a service, from raw material acquisition or generation of resources to disposal, clearance and finalisation.

Amendment 31

Proposal for a directive Article 4 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

For works, goods and service contracts falling below these thresholds, Member States shall implement national procedures for open competitions that ensure compliance with the treaty principles of equal access, non-discrimination and transparency.

Justification

The current threshold for goods and services contracts by local and regional authorities should be increased to ensure contracts of an economic value that can attract cross-border suppliers and that therefore has the potential to genuinely boost the single market. The increase of thresholds should however not entail that contracts below that value should not be put out to a public tender and Member States should therefore be obliged to implement national rules that allows for such tenders.

Amendment 32

Proposal for a directive Article 6 – paragraph 1a (new)

Text proposed by the Commission

Amendment

1a. The practical implementation of the Government Procurement Agreement (GPA), which forms part of the legal framework of public procurement in the European Union, is based on a previous assessment of the proper application of the principle of substantial reciprocity with regard to the opening of markets between the European Union and third signatory States. Such an assessment of substantial reciprocity is also extended to third countries which are not contracting parties to the GPA and have access to the European public procurement market.

Amendment 33

Proposal for a directive Article 8 a (new)

Article 8a

Specific exclusions in the field of postal services

1. This Directive shall not apply to public contracts for the principal purpose of permitting the contracting authorities to provide postal services and other services than postal services.

2. For the purposes of this Article:

(a) 'postal services': means services consisting of the clearance, sorting, routing and delivery of postal items. This shall include both services falling within as well as services falling outside the scope of the universal service set up in conformity with Directive 97/67/EC;

(b) 'other services than postal services': means services provided in the following areas:

(i) mail service management services (services both preceding and subsequent to despatch, including "mailroom management services");

(ii) added-value services linked to and provided entirely by electronic means (including the secure transmission of coded documents by electronic means, address management services and transmission of registered electronic mail);

(iii) services concerning postal items not included in point (i), such as direct mail bearing no address;

(iv) financial services, as defined in the CPV under the reference numbers from 66100000-1 to 66720000-3 and in Article 19(c) and including in particular postal money orders and postal giro transfers;

(v) philatelic services;

(vi) logistics services (services combining

physical delivery and/or warehousing with other non-postal functions).

Justification

In view of the situation of effective market competition in the postal services' sector following the implementation of the EU rules aimed at liberalizing that sector, public contracts in that area should be excluded from the scope of this Directive insofar as they are intended primarily to allow the contracting authorities to exercise certain activities in the postal sector.

Amendment 34

Proposal for a directive

Article 11 – paragraph 1 – subparagraph 1 – point b

Text proposed by the Commission

(b) **at least 90 %** of the activities of that legal person are carried out for the controlling contracting authority or for other legal persons controlled by that contracting authority;

Amendment

(b) **all** of the activities of that legal person are carried out for the controlling contracting authority or for other legal persons controlled by that contracting authority;

Justification

Leaving the possibility for legal persons to carry out 10 % of their activity in the open market opens the way to serious distortions of competition and damage to SMEs, especially at local level.

Amendment 35

Proposal for a directive

Article 11 – paragraph 3 – subparagraph 1 – point b

Text proposed by the Commission

(b) **at least 90 %** of the activities of that legal person are carried out for the controlling contracting authorities or other legal persons controlled by the same contracting authorities;

Amendment

(b) **all** of the activities of that legal person are carried out for the controlling contracting authorities or other legal persons controlled by the same contracting authorities;

Justification

Leaving the possibility for legal persons to carry out 10 % of their activity in the open market

opens the way to serious distortions of competition and damage to SMEs, especially at local level.

Amendment 36

Proposal for a directive Article 15 – paragraph 1

Text proposed by the Commission

Contracting authorities shall treat economic operators ***equally and without discrimination and*** shall act in a transparent and proportionate way.

Amendment

Contracting authorities shall treat economic operators ***in accordance with the principles of equality, non-discrimination, free competition and openness. They shall also*** act in a transparent and proportionate way, ***always ensuring that public funds are used effectively.***

Amendment 37

Proposal for a directive Article 18 - paragraph 1 a (new)

Text proposed by the Commission

Amendment

1a. Contracting authorities and any other affected parties shall ensure the protection of confidential information and take steps to prevent any misuse of such information.

Amendment 38

Proposal for a directive Article 18 - paragraph 1 b (new)

Text proposed by the Commission

Amendment

1b. When elaborating the technical standards of e-procurement systems pursuant to Article 19, the Commission should work closely with the European Network and Information Security Agency (ENISA) in ensuring the highest confidentiality standards.

Amendment 39

Proposal for a directive Article 19 – paragraph 1 – subparagraph 2

Text proposed by the Commission

Member States may make mandatory the use of electronic means of communication in other situations than those provided for in Articles 32, 33, 34, 35(2), 49(2) or 51 of this Directive.

Amendment

Member States may make mandatory the use of electronic means of communication in other situations than those provided for in Articles 32, 33, 34, 35(2), 49(2) or 51 of this Directive, ***provided that they do not represent an insurmountable obstacle for SMEs and microenterprises.***

Amendment 40

Proposal for a directive Article 19 - paragraph 2 – subparagraph 2

Text proposed by the Commission

In all communication, exchange and storage of information, contracting authorities shall ensure that the integrity of data and the confidentiality of tenders and requests to participate are preserved. They shall examine the content of tenders and requests to participate only after the time limit set for submitting them has expired

Amendment

In all communication, exchange and storage of information, contracting authorities shall ensure that the integrity of data and the confidentiality of tenders and requests to participate ***as well as of information referred to in Article 18*** are preserved. They shall examine the content of tenders and requests to participate only after the time limit set for submitting them has expired.

Amendment 41

Proposal for a directive Article 19 - paragraph 7 – subparagraph 1 a (new)

Text proposed by the Commission

Amendment

Member States shall provide opportunities in due time for acquiring knowledge and skills necessary to conclude the electronic public procurement procedure.

Amendment 42

Proposal for a directive Article 22

Text proposed by the Commission

Amendment

Article 22

deleted

Illicit conduct

Candidates shall be required at the beginning of the procedure to provide a declaration on honour that they have not undertaken and will not undertake to:

(a) unduly influence the decision-making process of the contracting authority or obtain confidential information that may confer upon them undue advantages in the procurement procedure;

(b) enter into agreements with other candidates and tenderers aimed at distorting competition;

(c) deliberately provide misleading information that may have a material influence on decisions concerning exclusion, selection or award.

Amendment 43

Proposal for a directive Article 24 – paragraph 1 – subparagraph 3

Text proposed by the Commission

Amendment

Member States *may* provide that contracting authorities may apply innovation partnerships as regulated in this Directive.

Member States *shall* provide that contracting authorities may apply innovation partnerships as regulated in this Directive.

Amendment 44

Proposal for a directive

Article 24 - paragraph 1 – subparagraphs 4 and 5

Text proposed by the Commission

They may also provide that contracting authorities may use a competitive procedure with negotiation or a competitive dialogue ***in any of the following cases:***

(a) with regard to works, where the works contract has as its object both the design and the execution of works within the meaning of Article 2(8) or where negotiations are needed to establish the legal or financial makeup of the project;

(b) in respect of public works contracts, for works which are performed solely for purposes of research or innovation, testing or development and not with the aim of ensuring profitability or recovering research and development costs;

(c) with regard to services or supplies, where the technical specifications cannot be established with sufficient precision with reference to any of the standards, European technical approvals, Common technical specifications or technical references within the meaning of points 2 to 5 of Annex VIII;

(d) in the event of irregular or unacceptable tenders within the meaning of Article 30(2)(a) in response to an open or a restricted procedure;

(e) due to specific circumstances related to the nature or the complexity of the works, supplies or services or the risks attaching thereto, the contract cannot be awarded without prior negotiations.

Member States may decide not to transpose into their national law the competitive procedure with negotiation,

Amendment

They may also provide that contracting authorities may use a competitive procedure with negotiation or a competitive dialogue ***provided that it guarantees equal opportunities and prevents the distortion of competition.***

the competitive dialogue and the innovation partnership procedures.

Justification

In reference to the Green Paper on the modernisation of EU public procurement policy (COM(2011) 15 final) and the European Parliament's report on modernisation of public procurement (2011/2048(INI)), negotiated procedures should be used without limitation in order to achieve the contract which is best suited to the specific needs of contracting authority, as well as to achieve the best value for money. In order to achieve the highest possible level of transparency, adequate guarantees to counter market distortion - as a result of the application of this procedure - need to be elaborated.

Amendment 45

**Proposal for a directive
Article 25 – paragraph 4**

Text proposed by the Commission

4. The contracting authority may reduce by **five** days the time limit for receipt of tenders set out in the second subparagraph of paragraph 1 where it accepts that tenders may be submitted by electronic means in accordance with Article 19(3), (4) and (5).

Amendment

4. The contracting authority may reduce by **three** days the time limit for receipt of tenders set out in the second subparagraph of paragraph 1 where it accepts that tenders may be submitted by electronic means in accordance with Article 19(3), (4) and (5).

Amendment 46

**Proposal for a directive
Article 27 – paragraph 4 – subparagraph 2 a (new)**

Text proposed by the Commission

Amendment

Member States shall ensure that the non compliance of the obligation of neutrality by contracting authorities is punished with a sanction.

Amendment 47

**Proposal for a directive
Article 28 – paragraph 1 – subparagraph 2**

Text proposed by the Commission

The minimum time limit for receipt of requests to participate shall be **30** days from the date on which the contract notice is sent.

Amendment

The minimum time limit for receipt of requests to participate shall be **40** days from the date on which the contract notice is sent.

Justification

The minimum time limit for receipt of requests to participate should be 40 days as in the open procedure to ensure as similar as possible administrative rules across the different procedures.

Amendment 48

**Proposal for a directive
Article 28 – paragraph 4**

Text proposed by the Commission

4. Competitive dialogues may take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria defined in the contract notice or in the descriptive document. In the contract notice or the descriptive document, the contracting authority shall indicate whether it will **us** this option.

Amendment

4. Competitive dialogues may take place in successive stages in order to reduce the number of solutions to be discussed during the dialogue stage by applying the award criteria defined in the contract notice or in the descriptive document. In the contract notice or the descriptive document, the contracting authority shall indicate whether it will **use** this option.

Amendment 49

**Proposal for a directive
Article 28 – paragraph 6**

Text proposed by the Commission

6. Having declared that the dialogue is concluded and having so informed the participants, contracting authorities shall ask **them** to submit their final tenders on the basis of the solution or solutions presented and specified during the dialogue. Those tenders shall contain all the elements required and necessary for the

Amendment

6. Having declared that the dialogue is concluded and having so informed the participants, contracting authorities shall ask **each participant** to submit their final tenders on the basis of the solution or solutions presented and specified during the dialogue. Those tenders shall contain all the elements required and necessary for

performance of the project.

the performance of the project.

Justification

To be consistent with points on confidentiality not all tenderers may offer same solution, especially important in innovative solutions.

Amendment 50

Proposal for a directive Article 29 – paragraph 1

Text proposed by the Commission

1. In innovation partnerships, any economic operator may submit a request to participate in response to a contract notice with a view to establishing a structured partnership for the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works provided that they correspond to the agreed performance levels and costs.

Amendment

1. In innovation partnerships, any economic operator may submit a request to participate in response to a contract notice with a view to establishing a structured partnership for the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works provided that they correspond to the agreed performance levels and costs. ***A contracting authority should clearly describe which intellectual property rights, if any, it wants to acquire as a result of the contract either in advance, as part of the contract notice, the descriptive document or the invitation to confirm interest, or at a later stage as part of the contract negotiation.***

Amendment 51

Proposal for a directive Article 29 – paragraph 2

Text proposed by the Commission

2. The partnership shall be structured in successive stages following the sequence of steps in the research and innovation process, possibly up to the manufacturing of the supply or the provision of the services. It shall provide for intermediate targets to be attained by the partner and

Amendment

2. The partnership shall be structured in successive stages following the sequence of steps in the research and innovation process, possibly up to the manufacturing of the supply or the provision of the services. It shall provide for intermediate targets to be attained by the partner and

provide for payment of the remuneration in appropriate instalments. Based on those targets, the contracting authority may decide after each stage to terminate the partnership and launch a new procurement procedure for the remaining phases, provided that *it* has acquired the relevant intellectual property rights.

provide for payment of the remuneration in appropriate instalments. Based on those targets, the contracting authority may decide *either to contract on a phase by phase basis with the potential for different partners for different stages of the process, or it may decide to contract for multiple phases with the same partner or partners. The contracting authority may also decide* after each stage to terminate the partnership and launch a new procurement procedure for the remaining *phase or* phases, provided that *the contracting authority* has acquired the relevant intellectual property rights *or otherwise made appropriate remuneration as agreed with the partner or partners.*

Amendment 52

Proposal for a directive Article 29 – paragraph 3 – subparagraph 3

Text proposed by the Commission

Only those economic operators invited by the contracting authority following its assessment of the requested information may submit research and innovation projects aimed at meeting the needs identified by the contracting authority *that cannot be met by existing solutions*. The contract shall be awarded on the sole basis of the award criterion of the most economically advantageous tender in accordance with Article 66(1)(a).

Amendment

Only those economic operators invited by the contracting authority following its assessment of the requested information may submit research and innovation projects aimed at meeting the needs identified by the contracting authority. The contract shall be awarded on the sole basis of the award criterion of the most economically advantageous tender in accordance with Article 66(1)(a).

Amendment 53

Proposal for a directive Article 33 – paragraph 5 – subparagraph 3

Text proposed by the Commission

All tenderers that have submitted admissible tenders shall be invited

Amendment

All tenderers that have submitted admissible tenders shall be invited

simultaneously by electronic means to participate in the electronic auction using, as of the specified date and time, the connections in accordance with the instructions set out in the invitation. The electronic auction may take place in a number of successive phases. The electronic auction shall not start sooner than **two** working days after the date on which invitations are sent out.

simultaneously by electronic means to participate in the electronic auction using, as of the specified date and time, the connections in accordance with the instructions set out in the invitation. The electronic auction may take place in a number of successive phases. The electronic auction shall not start sooner than **five** working days after the date on which invitations are sent out.

Justification

All the while time periods could be shortened, two days does seem a bit too short to give economic operators a fair chance to react, especially SMEs who generally have fewer human resources available for participation in public procurement.

Amendment 54

Proposal for a directive Article 34 – paragraph 5 – subparagraph 2

Text proposed by the Commission

Contracting authorities shall allow for an adequate period between the notification and the actual collection of information.

Amendment

Contracting authorities shall allow for an adequate period **of a minimum of five working days** between the notification and the actual collection of information.

Amendment 55

Proposal for a directive Article 40 – paragraph 1 – subparagraph 1

Text proposed by the Commission

The technical specifications as defined in point 1 of Annex VIII shall be set out in the procurement documents. They shall define the **characteristics required of a works**, service or supply.

Amendment

The technical specifications as defined in point 1 of Annex VIII shall be set out in the procurement documents. They shall define the **functionality that a work**, service or supply **is to deliver**.

Justification

For all the amendments to Art. 40, the aim is to ensure contracting authorities focus on the functionality that a given contract is intended to deliver. This should open up the market to as

many economic operators as possible and to innovative solutions. Of course more specific technical requirements can still be added as to guide and explain the needs of the contracting authority. Furthermore, some amendments aim to further clarify the Commission's proposal that technical requirements must not be used in a manner that limits competition.

Amendment 56

Proposal for a directive

Article 40 – paragraph 1 – subparagraph 2

Text proposed by the Commission

*These characteristics **may also refer to** the specific process of production or provision of the requested works, supplies or services or of any other stage of its life cycle as referred to in point (22) of Article 2.*

Amendment

More detailed** characteristics **concerning** the specific process of production or provision of the requested works, supplies or services or of any other stage of its life cycle as referred to in point (22) of Article 2 **may be listed as guidelines but may not exclude any economic operator from participating in the procurement procedure.

Justification

For all the amendments to Art. 40, the aim is to ensure contracting authorities focus on the functionality that a given contract is intended to deliver. This should open up the market to as many economic operators as possible and to innovative solutions. Of course more specific technical requirements can still be added as to guide and explain the needs of the contracting authority. Furthermore, some amendments aim to further clarify the Commission's proposal that technical requirements must not be used in a manner that limits competition.

Amendment 57

Proposal for a directive

Article 40 – paragraph 1a (new)

Text proposed by the Commission

Amendment

1a. Technical specifications may also include, as appropriate, requirements relating to:

Amendment 58

Proposal for a directive
Article 40 – paragraph 1a – point a (new)

Text proposed by the Commission

Amendment

(a) performance, including levels of environmental and climate performance and performance in terms of socially sustainable production process;

Amendment 59

Proposal for a directive
Article 40 – paragraph 1a – point b (new)

Text proposed by the Commission

Amendment

(b) life-cycle characteristics;

Amendment 60

Proposal for a directive
Article 40 – paragraph 1a – point c (new)

Text proposed by the Commission

Amendment

(c) socially sustainable production process;

Amendment 61

Proposal for a directive
Article 40 – paragraph 1a – point d (new)

Text proposed by the Commission

Amendment

(d) the organisation, qualification and experience of the staff assigned to performing the contract in question;

Amendment 62

Proposal for a directive
Article 40 – paragraph 1a – point e (new)

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Text proposed by the Commission

Amendment

(e) safety or dimensions, including the procedures concerning quality assurance, terminology, symbols, testing and assessment methods, packaging, marking and labelling, user instructions;

Amendment 63

Proposal for a directive

Article 40 – paragraph 1a – point f (new)

Text proposed by the Commission

Amendment

(f) rules relating to design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all other technical conditions which the contracting authority is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve.

Amendment 64

Proposal for a directive

Article 41 – paragraph 1 – subparagraph 1 – point a

Text proposed by the Commission

Amendment

(a) the requirements for the label only concern characteristics which are linked to the subject-matter of the contract and are appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract;

(a) the requirements for the label only concern characteristics which are ***directly*** linked to the subject-matter of the contract and are appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract;

Amendment 65

Proposal for a directive

Article 42 – paragraph 2

Text proposed by the Commission

2. Contracting authorities shall accept other appropriate means of proof than those referred to in paragraph 1, such as a technical dossier of the manufacturer where the economic operator concerned has no access to the certificates or test reports referred to in paragraph 1, or no possibility of obtaining them within the relevant time limits.

Amendment

2. Contracting authorities shall accept other appropriate **and equivalent** means of proof than those referred to in paragraph 1, such as a technical dossier of the manufacturer where the economic operator concerned has no access to the certificates or test reports referred to in paragraph 1, or no possibility of obtaining them within the relevant time limits.

Amendment 66

**Proposal for a directive
Article 43 – paragraph 1**

Text proposed by the Commission

1. Contracting authorities **may** authorise tenderers to submit variants. ***They shall indicate in the contract notice or, where a prior information notice is used as a means of calling for competition, in the invitation to confirm interest whether or not they authorise variants. Variants shall not be authorised without such indication.***

Amendment

1. Contracting authorities **shall** authorise tenderers to submit variants.

Amendment 67

**Proposal for a directive
Article 43 – paragraph 3 – subparagraph 2**

Text proposed by the Commission

In procedures for awarding public supply or service contracts, contracting authorities ***that have authorised variants*** shall not reject a variant on the sole ground that it would, where successful, lead to either a service contract rather than a public supply contract or a supply contract rather than a public service contract.

Amendment

In procedures for awarding public supply or service contracts, contracting authorities shall not reject a variant on the sole ground that it would, where successful, lead to either a service contract rather than a public supply contract or a supply contract rather than a public service contract.

Amendment 68

Proposal for a directive

Article 44 – paragraph 1 – subparagraph 1

Text proposed by the Commission

Public contracts may be subdivided into homogenous or heterogeneous lots. **For contracts with a value equal to or greater than the thresholds provided for in Article 4 but not less than EUR 500 000, determined in accordance with Article 5,** where the contracting authority does not deem it appropriate to split into lots, **it shall provide in the contract notice or in the invitation to confirm interest a specific explanation of its reasons.**

Amendment

In order to enhance competition and help SMEs to get to the public procurement, public contracts may be subdivided into homogenous or heterogeneous lots, **except in the procurement** where the contracting authority does not deem it appropriate to split into lots.

Justification

It is important to encourage the contracting authority to subdivide the contract into lots in order to make it easier to SMEs to participate to public tendering competitions. However, there should not be obligation to splitting into lots, because then the contracting authority might split into lots an agreement that it should not have split. This is often the case in for example construction and IT contracts. The size and the value of the lots would also be difficult to define in practice.

Amendment 69

Proposal for a directive

Article 44 – paragraph 4

Text proposed by the Commission

4. Contracting authorities may require that all contractors coordinate their activities under the direction of the economic operator to which has been awarded a lot involving the coordination of the entire project or its relevant parts.

Amendment

deleted

Justification

Contracting authorities should not be able to dictate management and owner structures of private companies. If a division of a contract is not feasible without this it should be concluded that the contract is not appropriate for division

Amendment 70

Proposal for a directive Article 46 – paragraph 1

Text proposed by the Commission

1. Contracting authorities **may** make known their intentions of planned procurements through the publication of a prior information notice as soon as possible after the beginning of the budgetary year. Those notices shall contain the information set out in Annex VI part B section I. They shall be published either by the Commission or by the contracting authorities on their buyer profiles in accordance with point 2(b) of Annex IX. Where the notice is published by the contracting authorities on their buyer profile, they shall send a notice of the publication on their buyer profile in accordance with point 3 of Annex IX.

Amendment

1. Contracting authorities **shall** make known their intentions of planned procurements through the publication of a prior information notice as soon as possible after the beginning of the budgetary year. Those notices shall contain the information set out in Annex VI part B section I. They shall be published either by the Commission or by the contracting authorities on their buyer profiles in accordance with point 2(b) of Annex IX. Where the notice is published by the contracting authorities on their buyer profile, they shall send a notice of the publication on their buyer profile in accordance with point 3 of Annex IX.

Amendment 71

Proposal for a directive Article 47

Text proposed by the Commission

All contracting authorities **may** use a contract notice as a means of calling for competition in respect of all procedures. Such notices shall contain the information set out in Annex VI part C and shall be published in accordance with Article 49.

Amendment

All contracting authorities **shall** use a contract notice as a means of calling for competition in respect of all procedures. Such notices shall contain the information set out in Annex VI part C and shall be published in accordance with Article 49.

Amendment 72

Proposal for a directive Article 54 – paragraph 2

Text proposed by the Commission

2. Contracting authorities **may decide** not **to** award a contract to the tenderer submitting the best tender where **they have established** that the tender does not comply, **at least in an equivalent manner**, with obligations established by Union legislation **in the field of social and labour law** or **environmental law** or **of the international social and environmental law** provisions listed in Annex XI.

Amendment

2. Contracting authorities **shall** not award a contract to the tenderer submitting the best tender where **it is shown** that the tender does not comply with obligations **in the field of social and labour law or environmental law** established by Union **or national** legislation or **collective agreements which apply in the place where the work, service or supply is performed**, or **by the international social and environmental law** provisions listed in Annex XI.

Amendment 73

Proposal for a directive

Article 54 – paragraph 3 – subparagraph 1a (new)

Text proposed by the Commission

Amendment

Contracting authorities may consider small and medium-sized enterprises.

Amendment 74

Proposal for a directive

Article 55 – paragraph 1 – subparagraph 1 – point e a (new)

Text proposed by the Commission

Amendment

(ea) participation in exploitation of human trafficking and child labour covered by Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims¹.

¹ *OJ L 101, 15.4.2011, p. 1*

Amendment 75

Proposal for a directive

Article 55 – paragraph 1 – subparagraph 1 – point e b (new)

Text proposed by the Commission

Amendment

(eb) where rules are such that they contravene the principle of trade reciprocity enabling any EU enterprise to tender in the public procurement market in the candidate or tenderer’s country of origin;

Amendment 76

Proposal for a directive

Article 55 – paragraph 3 – subparagraph 1 – point a

Text proposed by the Commission

Amendment

(a) where it ***is aware of any*** violation of obligations established by Union legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XI. Compliance with Union legislation or with international provisions also includes compliance in an equivalent manner.

(a) where it ***can prove a*** violation of obligations established by Union legislation in the field of social and labour law or environmental law ***established by Union or national legislation and by collective agreements applicable to the place of work or service*** or of the international social and environmental law provisions listed in Annex XI. Compliance with Union legislation or with international provisions also includes compliance in an equivalent manner.

Amendment 77

Proposal for a directive

Article 55 – paragraph 3 – subparagraph 1 – point b a (new)

Text proposed by the Commission

Amendment

(ba) where the economic operator is from a third country that fails to open its own public procurement markets to the EU's companies;

Amendment 78

Proposal for a directive

Article 55 – paragraph 3 – subparagraph 1 – point c

Text proposed by the Commission

(c) where the contracting authority can **demonstrate by any means** that the economic operator is guilty of other grave professional misconduct;

Amendment

(c) where the contracting authority can **show evidence which proves** that the economic operator is guilty of other grave professional misconduct;

Amendment 79

Proposal for a directive

Article 56 – paragraph 1 – subparagraph 3

Text proposed by the Commission

Contracting authorities shall limit any conditions for participation to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the commercial and technical abilities to perform the contract to be awarded. All requirements shall be related and strictly proportionate to the subject-matter of the contract, taking into account the need to ensure genuine competition.

Amendment

Contracting authorities shall limit any conditions for participation to those that are appropriate to ensure that a candidate or tenderer has the legal and financial capacities and the commercial and technical abilities to perform the contract to be awarded. All requirements shall be **directly** related and strictly proportionate to the subject-matter of the contract, taking into account the need to ensure genuine competition.

Amendment 80

Proposal for a directive

Article 59 – paragraph 3

Text proposed by the Commission

3. The authority issuing the passport shall seek the relevant information directly from the competent authorities, except where prohibited by national rules on the protection of personal data.

Amendment

3. The authority issuing the passport shall seek the relevant information directly from the competent authorities, except where prohibited by national rules on the protection of personal data **and when the information can only be gathered from the economic operator itself. In those cases the economic operator shall deliver that information to the authority to obtain a Public Procurement Passport.**

Amendment 81

Proposal for a directive Article 59 – paragraph 4

Text proposed by the Commission

4. The European Procurement Passport shall be recognised by all contracting authorities as proof of fulfilment of the conditions for participation covered by it and shall not be questioned without justification. Such justification may be related to the fact that the passport was issued more than **six** months earlier.

Amendment

4. The European Procurement Passport shall be recognised by all contracting authorities as proof of fulfilment of the conditions for participation covered by it and shall not be questioned without justification. Such justification may be related to the fact that the passport was issued more than **twelve** months earlier.

Justification

The public procurement passport can be an important tool to bring down administrative costs but the period of validity should be extended as 6 months seems unreasonably short and it would be too costly for economic operators, in particular SMEs, to have their passport renewed twice a year.

Amendment 82

Proposal for a directive Article 62 – paragraph 1 – subparagraph 1

Text proposed by the Commission

With regard to criteria relating to economic and financial standing as set out pursuant to Article 56(3), and to criteria relating to technical and professional ability as set out pursuant to Article 56(4), an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It shall in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect. ***In the case of economic and financial standing, contracting authorities***

Amendment

With regard to criteria relating to economic and financial standing as set out pursuant to Article 56(3), and to criteria relating to technical and professional ability as set out pursuant to Article 56(4), an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It shall in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect.

may require that the economic operator and those entities are jointly liable for the execution of the contract.

Amendment 83

Proposal for a directive Article 62 – paragraph 2

Text proposed by the Commission

Amendment

2. In the case of works contracts, service contracts and siting and installation operations in the context of a supply contract, contracting authorities may require that certain critical tasks be performed directly by the tenderer itself or, where a tender is submitted by a group of economic operators as referred to in Article 6, a participant in the group. *deleted*

Amendment 84

Proposal for a directive Article 66 – paragraph 1 – subparagraph 2

Text proposed by the Commission

Amendment

Costs may be assessed, on the choice of the contracting authority, on the basis of the price only or using a cost-effectiveness approach, such as a life-cycle costing approach, under the conditions set out in Article 67. *deleted*

Justification

Deleted following the change of Article 66 – paragraph 1 – subparagraph 1 – points a and b.

Amendment 85

Proposal for a directive Article 66 – paragraph 2 – introductory part

Text proposed by the Commission

2. The most economically advantageous tender referred to in point (a) of paragraph 1 from the point of view of the contracting authority shall be identified on the basis of criteria linked to the subject-matter of the public contract in question. Those criteria shall include, in addition to the price or costs referred to in point (b) of paragraph 1, other criteria linked to the subject-matter of the public contract in question, such as:

Amendment

2. The most economically advantageous tender referred to in point (a) of paragraph 1 from the point of view of the contracting authority shall be identified on the basis of criteria **directly** linked to the subject-matter of the public contract in question. Those criteria shall include, in addition to the price or costs referred to in point (b) of paragraph 1, other criteria **directly** linked to the subject-matter of the public contract in question, such as:

Amendment 86

**Proposal for a directive
Article 66 – paragraph 2 – point a**

Text proposed by the Commission

(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, environmental characteristics and innovative character;

Amendment

(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, **energy efficiency performance**, design for all users, environmental characteristics and innovative character **including inter alia additional innovative solutions that are in addition to minimum requirements laid down in the contract notice, the descriptive document or the invitation to confirm interest**;

Amendment 87

**Proposal for a directive
Article 66 – paragraph 2 – point a (new)**

Text proposed by the Commission

Amendment

(aa) socially sustainable production process;

Amendment 88

Proposal for a directive
Article 66 – paragraph 2 – point d a (new)

Text proposed by the Commission

Amendment

(da) the specific local origin of the requested works, supplies or services or of any other stage of their life cycle, in accordance with the principles upheld by the treaties.

Amendment 89

Proposal for a directive
Article 67 – paragraph 1 – point a

Text proposed by the Commission

Amendment

(a) internal costs, including costs relating to acquisition, such as production costs, use, such as energy consumption, maintenance costs, and end of life, such as collection and recycling costs and

(a) internal costs, including costs relating to acquisition, such as production costs, use, such as energy consumption, maintenance costs ***and availability of the resource in question***, and end of life, such as collection and recycling costs and

Amendment 90

Proposal for a directive
Article 69 – paragraph 1 – point c

Text proposed by the Commission

Amendment

(c) at least five tenders have been submitted.

deleted

Amendment 91

Proposal for a directive
Article 69 – paragraph 3 – point d a (new)

Text proposed by the Commission

Amendment

(da) compliance with rules and standards in the field of health and safety, social and labour law laid down in Union and

national legislation and by collective agreements which apply in the place where the work, service or supply is to be performed.

Amendment 92

Proposal for a directive Article 69 – paragraph 3 – point e a (new)

Text proposed by the Commission

Amendment

(ea) Other aspects which sufficiently explain the abnormally low cost of the tender.

Amendment 93

Proposal for a directive Article 69 – paragraph 5

Text proposed by the Commission

Amendment

5. Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender *may* be rejected ***on that ground alone only after consultation with the tenderer where the latter is unable*** to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was compatible with the internal market within the meaning of Article 107 of the Treaty. Where the contracting authority rejects a tender in those circumstances, it shall inform the Commission thereof.

5. Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender ***shall*** be rejected ***unless*** the tenderer ***in a consultation*** is ***able*** to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was compatible with the internal market within the meaning of Article 107 of the Treaty. Where the contracting authority rejects a tender in those circumstances, it shall inform the Commission thereof.

Justification

For clarification that state aided bidders should be the exception and only in conformity with Art. 107 of the Treaty.

Amendment 94

Proposal for a directive Article 70 a (new)

Text proposed by the Commission

Amendment

Article 70a

Contracting authorities shall introduce adequate performance monitoring and quality assurance practices in connection with the performance of the contract, and indicate these practices in the call for competition. In order to increase the efficiency and transparency of the monitoring of the execution of the contract, electronic procurement shall support these monitoring practices.

Justification

The lack of monitoring of the performance of the contract may result in situations which need to be remedied afterwards. In order to shed light on non-compliance related to the execution of the contract as soon as possible, the performance and execution of the contract should be monitored. This would ensure the most efficient use of public finances. Electronic procurement could be used to prevent, detect and correct errors in the execution phase as well.

Amendment 95

Proposal for a directive Article 70 b (new)

Text proposed by the Commission

Amendment

Article 70b

The contract shall contain a clear procedure in the case of non-compliance related to the performance and execution of the contract.

Amendment 96

Proposal for a directive Article 70 c (new)

Text proposed by the Commission

Amendment

Article 70c

In order to allow as many market players as possible to participate in public procurement, Member States shall ensure objective, efficient and low-cost redress procedures.

Amendment 97

Proposal for a directive Article 70 d (new)

Text proposed by the Commission

Amendment

Article 70d

In case of a serious breach or non-compliance of the contractor, the contracting authority may introduce sanctions against the contractor to prevent non-compliance or serious breaches related to future contracts.

Justification

The opportunity to introduce future sanctions against contractors with serious breach or non-compliance may significantly improve the procurement culture and ensure the most efficient use of public finances.

Amendment 98

Proposal for a directive Article 71 – paragraph 1

Text proposed by the Commission

Amendment

1. In the procurement documents, ***the contracting authority may ask or may be***

1. In the procurement documents, the tenderer ***is required*** to indicate ***to the***

required by a Member State to ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors.

contracting authority in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors.

Amendment 99

Proposal for a directive Article 71 – paragraph 2

Text proposed by the Commission

2. Member States may provide that *at the request of the subcontractor and where the nature of the contract so allows, the contracting authority shall transfer due payments directly to the subcontractor for services, supplies or works provided to the main contractor. In such case, Member States shall put in place appropriate mechanisms permitting the main contractor to object to undue payments. The arrangements concerning that mode of payment shall be set out in the procurement documents.*

Amendment

2. Member States may provide that payments to the subcontractor for services, supplies or works provided *shall become due immediately if:*

(a) the main contractor has provided all or part of the services, works or supplies to the contracting authority;

(b) the contracting authority has accepted the services, supplies or works as having been provided in full; or

(c) the subcontractor has without success set the main contractor a reasonable deadline for the provision of information about the circumstances outlined in (a) and (b).

Amendment 100

Proposal for a directive Article 72 – paragraph 2 – point b

Text proposed by the Commission

Amendment

(b) the modification changes the economic balance of the contract in favour of the contractor;

deleted

Amendment 101

Proposal for a directive Article 73 – point c

Text proposed by the Commission

Amendment

(c) the Court of Justice of the European Union finds, in a procedure pursuant to Article 258 of the Treaty, that a Member State has failed to fulfil its obligations under the Treaties due to the fact that a contracting authority belonging to that Member State has awarded the contract in question without complying with its obligations under the Treaties and this Directive.

deleted

Amendment 102

Proposal for a directive Article 76 b (new)

Text proposed by the Commission

Amendment

Article 76b

The contracting authority should have adequate expertise to carry out the entire green public procurement procedure. Member States shall provide opportunities in due time for acquiring knowledge and skills necessary to conclude the green procurement procedure.

Amendment 103

Proposal for a directive Article 81

Text proposed by the Commission

The jury shall be composed exclusively of natural persons who are independent of participants in the contest. Where a particular professional qualification is required from participants in a contest, at least a third of the members of the jury shall have that qualification or an equivalent qualification.

Amendment

The jury shall be composed exclusively of natural persons who are independent of participants in the contest. Where a particular professional qualification is required from participants in a contest, at least a third of the members of the jury shall have that qualification or an equivalent qualification. ***Gender equality should be sought in the composition of the jury.***

Amendment 104

**Proposal for a directive
Article 84 - paragraph 3**

Text proposed by the Commission

The ***oversight body*** shall be responsible for the following tasks:

- (a) monitoring the application of public procurement rules and the related practice by contracting authorities and in particular by central purchasing bodies;
- (b) providing legal advice to contracting authorities on the interpretation of public procurement rules and principles and on the application of public procurement rules in specific cases;
- (c) issuing own-initiative opinions and guidance on questions of general interest pertaining to the interpretation and application of public procurement rules, on recurring questions and on systemic difficulties related to the application of public procurement rules, in the light of the provisions of this Directive and of the relevant case-law of the Court of Justice of the European Union;
- (d) establishing and applying comprehensive, actionable 'red flag' indicator systems to prevent, detect and

Amendment

The ***competent authorities*** shall be responsible for the following tasks:

- (a) monitoring the application of public procurement rules and the related practice by contracting authorities and in particular by central purchasing bodies;
- (b) providing legal advice to contracting authorities on the interpretation of public procurement rules and principles and on the application of public procurement rules in specific cases;
- (c) issuing own-initiative opinions and guidance on questions of general interest pertaining to the interpretation and application of public procurement rules, on recurring questions and on systemic difficulties related to the application of public procurement rules, in the light of the provisions of this Directive and of the relevant case-law of the Court of Justice of the European Union;
- (d) establishing and applying comprehensive, actionable 'red flag' indicator systems to prevent, detect and

adequately report instances of procurement fraud, corruption, conflict of interest and other serious irregularities;

(e) drawing the attention of the national competent institutions, including auditing authorities, to specific violations detected and to systemic problems;

(f) examining complaints from citizens and businesses on the application of public procurement rules in specific cases and transmitting the analysis to the competent contracting authorities, which shall have the obligation to take it into account in their decisions or, where the analysis is not followed, to explain the reasons for disregarding it;

(g) monitoring the decisions taken by national courts and authorities following a ruling given by the Court of Justice of the European Union on the basis of Article 267 of the Treaty or findings of the European Court of Auditors establishing violations of Union public procurement rules related to projects cofinanced by the Union; the oversight body shall report to the European Anti-Fraud Office any infringement to Union procurement procedures where these were related to contracts directly or indirectly funded by the European Union.

The tasks referred to in point (e) shall be without prejudice to the exercise of rights of appeal under national law or under the system established on the basis of Directive 89/665/EEC.

Member States shall empower the **oversight body** to seize the jurisdiction competent according to national law for the review of contracting authorities' decisions where it has detected a violation in the course of its monitoring and legal advising activity.

adequately report instances of procurement fraud, corruption, conflict of interest and other serious irregularities;

(e) drawing the attention of the national competent institutions, including auditing authorities, to specific violations detected and to systemic problems;

(f) examining complaints from citizens and businesses on the application of public procurement rules in specific cases and transmitting the analysis to the competent contracting authorities, which shall have the obligation to take it into account in their decisions or, where the analysis is not followed, to explain the reasons for disregarding it;

(g) monitoring the decisions taken by national courts and authorities following a ruling given by the Court of Justice of the European Union on the basis of Article 267 of the Treaty or findings of the European Court of Auditors establishing violations of Union public procurement rules related to projects cofinanced by the Union; the oversight body shall report to the European Anti-Fraud Office any infringement to Union procurement procedures where these were related to contracts directly or indirectly funded by the European Union.

The tasks referred to in point (e) shall be without prejudice to the exercise of rights of appeal under national law or under the system established on the basis of Directive 89/665/EEC.

Member States shall empower the **competent authorities** to seize the jurisdiction competent according to national law for the review of contracting authorities' decisions where it has detected a violation in the course of its monitoring and legal advising activity.

Justification

As the monitoring and regulation of public procurement is already taking place in Members

States, the authorities already responsible for these functions should provide information, prepare the annual report, and report to the Commission. At the time of economic crisis, it is important to streamline administrative tasks, and utilise the existing regimes, and public finances efficiently.

Amendment 105

Proposal for a directive Article 84 - paragraph 4

Text proposed by the Commission

Without prejudice to the general procedures and working methods established by the Commission for its communications and contacts with Member States, the **oversight body** shall act as a specific contact point for the Commission when it monitors the application of Union law and the implementation of the budget from the Union on the basis of Article 17 of the Treaty on the European Union and Article 317 of the Treaty on the Functioning of the European Union. It shall report to the Commission any violation of this Directive in procurement procedures for the award of contracts directly or indirectly funded by the Union.

The Commission may in particular refer to the oversight body the treatment of individual cases where a contract is not yet concluded or a review procedure can still be carried out. It may also entrust the oversight body with the monitoring activities necessary to ensure the implementation of the measures to which Member States are committed in order to remedy a violation of Union public procurement rules and principles identified by the Commission.

The Commission may require the oversight body to analyse alleged breaches to Union public procurement rules affecting projects co-financed by the budget of the Union. The Commission

Amendment

Without prejudice to the general procedures and working methods established by the Commission for its communications and contacts with Member States, the **competent authorities** shall act as a specific contact point for the Commission when it monitors the application of Union law and the implementation of the budget from the Union on the basis of Article 17 of the Treaty on the European Union and Article 317 of the Treaty on the Functioning of the European Union. It shall report to the Commission any violation of this Directive in procurement procedures for the award of contracts directly or indirectly funded by the Union.

may entrust the oversight body to follow-up certain cases and to ensure that the appropriate consequences of breaches to Union public procurement rules affecting projects co-financed are taken by the competent national authorities which will be obliged to follow its instructions.

Justification

As the monitoring and regulation of public procurement is already taking place in Members States, the authorities already responsible for these functions should provide information, prepare the annual report, and report to the Commission. At the time of economic crisis, it is important to streamline administrative tasks, and utilise the exiting regimes, and public finances efficiently.

Amendment 106

**Proposal for a directive
Article 84 - paragraph 5**

Text proposed by the Commission

The investigation and enforcement activities carried out by ***the oversight body*** to ensure that contracting authorities' decisions comply with this Directive and the principles of the Treaty shall not replace or prejudge the institutional role of the Commission as guardian of the Treaty. When the Commission decides to refer the treatment of an individual case pursuant to paragraph 4, it shall also retain the right to intervene in accordance with the powers conferred to it by the Treaty.

Amendment

The investigation and enforcement activities carried out by ***competent authorities*** to ensure that contracting authorities' decisions comply with this Directive and the principles of the Treaty shall not replace or prejudge the institutional role of the Commission as guardian of the Treaty. When the Commission decides to refer the treatment of an individual case pursuant to paragraph 4, it shall also retain the right to intervene in accordance with the powers conferred to it by the Treaty.

Justification

As the monitoring and regulation of public procurement is already taking place in Members States, the authorities already responsible for these functions should provide information, prepare the annual report, and report to the Commission. At the time of economic crisis, it is important to streamline administrative tasks, and utilise the exiting regimes, and public finances efficiently.

Amendment 107

Proposal for a directive

Article 84 - paragraph 6 - introductory part

Text proposed by the Commission

Contracting authorities shall transmit to the **national oversight body** the full text of all concluded contracts with a value equal to or greater than

Amendment

Contracting authorities shall transmit to the **competent authorities** the full text of all concluded contracts with a value equal to or greater than

Justification

As the monitoring and regulation of public procurement is already taking place in Members States, the authorities already responsible for these functions should provide information, prepare the annual report, and report to the Commission. At the time of economic crisis, it is important to streamline administrative tasks, and utilise the exiting regimes, and public finances efficiently.

Amendment 108

Proposal for a directive

Article 84 - paragraph 7 - subparagraph 1

Text proposed by the Commission

Without prejudice to the national law concerning access to information, and in accordance with national and EU legislation on data protection, **the oversight body** shall, upon written request, give unrestricted and full direct access, free of charge, to the concluded contracts referred to in paragraph 6. Access to certain parts of the contracts may be refused where their disclosure would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interests of economic operators, public or private, or might prejudice fair competition between them.

Amendment

Without prejudice to the national law concerning access to information, and in accordance with national and EU legislation on data protection, **competent authorities** shall, upon written request, give unrestricted and full direct access, free of charge, to the concluded contracts referred to in paragraph 6. Access to certain parts of the contracts may be refused where their disclosure would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interests of economic operators, public or private, or might prejudice fair competition between them.

Justification

As the monitoring and regulation of public procurement is already taking place in Members

States, the authorities already responsible for these functions should provide information, prepare the annual report, and report to the Commission. At the time of economic crisis, it is important to streamline administrative tasks, and utilise the exiting regimes, and public finances efficiently.

Amendment 109

Proposal for a directive Article 84 - paragraph 8

Text proposed by the Commission

A summary of all the activities carried out by **the oversight body** in accordance with paragraphs 1 to 7 shall be included in the annual report referred to in paragraph 2.

Amendment

A summary of all the activities carried out by **competent authorities** in accordance with paragraphs 1 to 7 shall be included in the annual report referred to in paragraph 2.

Justification

As the monitoring and regulation of public procurement is already taking place in Members States, the authorities already responsible for these functions should provide information, prepare the annual report, and report to the Commission. At the time of economic crisis, it is important to streamline administrative tasks, and utilise the exiting regimes, and public finances efficiently.

Amendment 110

Proposal for a directive Article 84 a (new)

Text proposed by the Commission

Amendment

Article 84a

By the end of 2013 the Commission shall submit a report on the differing procedures used to award contracts with a value below the thresholds laid down in Article 12, in particular as regards services currently regarded as non-priority.

Amendment 111

Proposal for a directive
Article 87 – paragraph 2

Text proposed by the Commission

2. With a view to improving access to public procurement for economic operators, in particular SMEs, and in order to facilitate correct understanding of the provisions of this Directive, Member States shall ensure that appropriate assistance can be obtained, including by electronic means or using existing networks dedicated to business assistance.

Amendment

2. With a view to improving access to public procurement for economic operators, in particular SMEs ***and civil society***, and in order to facilitate correct understanding of the provisions of this Directive, Member States shall ensure that appropriate assistance can be obtained, including by electronic means or using existing networks dedicated to business assistance. ***The support also includes joint offers made by different actors.***

Amendment 112

Proposal for a directive
Article 91 – paragraph 1

Text proposed by the Commission

1. The Commission shall be assisted by the Advisory Committee for Public Contracts established by Council Decision 71/306/EEC. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011.

Amendment

1. The Commission shall be assisted by the Advisory Committee for Public Contracts established by Council Decision 71/306/EEC. That committee shall be a committee within the meaning of Regulation (EU) No 182/2011. ***Gender equality shall be promoted in the composition of the committee.***

Amendment 113

Proposal for a directive
Article 94 – paragraph 1

Text proposed by the Commission

The Commission shall review the economic effects on the internal market resulting from the application of the thresholds set in Article 4 and report thereon to the European Parliament and the

Amendment

The Commission shall review the economic effects on the internal market resulting from the application of the thresholds set in Article 4 and report thereon to the European Parliament and the

Amendment 114

Proposal for a directive Annex VIII – paragraph 1 – point b

Text proposed by the Commission

(b) in the case of public supply or service contracts a specification in a document defining the required characteristics of a product or a service, such as quality levels, environmental and climate performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, ***production processes and methods at any stage of the life cycle of the supply or service*** and conformity assessment procedures;

Amendment

(b) in the case of public supply or service contracts a specification in a document defining the required characteristics of a product or a service, such as quality levels, environmental and climate performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions and conformity assessment procedures;

Amendment 115

Proposal for a directive Annex XIII – point a

Text proposed by the Commission

(a) Identification of the economic operator;

Amendment

(a) Identification of the economic operator;
company registration number, name, address and bank;

Justification

Increased standardisation of information regarding formalities of the economic operator in procurement documents will contribute to reduce overall transaction costs and at the same time not influence competition, since this information is only central to determine whether the tenderer is reliable, and not central in choosing between tenders.

Amendment 116

Proposal for a directive Annex XIII – point a a (new)

Text proposed by the Commission

Amendment

(aa) Description of the company: year of establishment, corporate form, owner(s), members of the board, industry code, short description of the main services and/or production of the company;

Justification

Increased standardisation of information regarding formalities of the economic operator in procurement documents will contribute to reduce overall transaction costs and at the same time not influence competition, since this information is only central to determine whether the tenderer is reliable, and not central in choosing between tenders.

Amendment 117

Proposal for a directive Annex XIII – point c a (new)

Text proposed by the Commission

Amendment

(ca) Certification that the economic operator has fulfilled its obligations in relation to payment of taxes, social security systems according to individual Member States laws etc;

Justification

Increased standardisation of information regarding formalities of the economic operator in procurement documents will contribute to reduce overall transaction costs and at the same time not influence competition, since this information is only central to determine whether the tenderer is reliable, and not central in choosing between tenders.

Amendment 118

Proposal for a directive Annex XIII – point d a (new)

Text proposed by the Commission

Amendment

(da) Key economic indicators of the economic operator for the last three accounting years: gross sales, EBIT and solvency ratio. Start-up companies will be in compliance with this requirement when information from start-up till present date is adopted into their Public Procurement Passport;

Justification

Increased standardisation of information regarding formalities of the economic operator in procurement documents will contribute to reduce overall transaction costs and at the same time not influence competition, since this information is only central to determine whether the tenderer is reliable, and not central in choosing between tenders.

Amendment 119

Proposal for a directive Annex XIII – point d b (new)

Text proposed by the Commission

Amendment

(db) Key organizational indicators of the economic operator: average number of employees during the last three years and number of employees by the end of last year. Start-up companies will be in compliance with this requirement when information from start-up till present date is adopted into their Public Procurement Passport;

Justification

Increased standardisation of information regarding formalities of the economic operator in procurement documents will contribute to reduce overall transaction costs and at the same time not influence competition, since this information is only central to determine whether the tenderer is reliable, and not central in choosing between tenders.

Amendment 120

Proposal for a directive
Annex XIII – point f

Text proposed by the Commission

Amendment

(f) Indication of the period of validity of the Passport, which shall be not less than **6** months.

(f) Indication of the period of validity of the Passport, which shall be not less than **12** months.

Justification

The public procurement passport can be an important tool to bring down administrative costs but the period of validity should be extended as 6 months seems unreasonably short and it would be too costly for economic operators, in particular SMEs, to have their passport renewed twice a year.

Amendment 121

Proposal for a directive
Annex XVI – row 2 – column 1

Text proposed by the Commission

Amendment

79611000-0 and from 85000000-9 to 85323000-9 (except 85321000-5 and 85322000-2)

79611000-0 and from 85000000-9 to 85323000-9 (except 85321000-5 and 85322000-2 **and 85143000-3**)

Amendment 122

Proposal for a directive
Annex XVI – rows 8 a (new) and 8 b (new)

<i>Amendment</i>	
<i>From 74110000-3 to 74114000-1</i>	<i>Legal services</i>
	<i>Other services</i>

PROCEDURE

Title	Public procurement
References	COM(2011)0896 – C7-0006/2012 – 2011/0438(COD)
Committee responsible Date announced in plenary	IMCO 17.1.2012
Opinion by Date announced in plenary	ITRE 17.1.2012
Rapporteur Date appointed	András Gyürk 13.2.2012
Discussed in committee	31.5.2012
Date adopted	24.9.2012
Result of final vote	+: 40 –: 6 0: 2
Members present for the final vote	Amelia Andersdotter, Josefa Andrés Barea, Jean-Pierre Audy, Ivo Belet, Bendt Bendtsen, Reinhard Bütikofer, Maria Da Graça Carvalho, Giles Chichester, Pilar del Castillo Vera, Vicky Ford, Robert Goebbels, Jacky Hénin, Edit Herczog, Kent Johansson, Romana Jordan, Philippe Lamberts, Judith A. Merkies, Angelika Niebler, Jaroslav Paška, Vittorio Prodi, Jens Rohde, Paul Rübig, Amalia Sartori, Salvador Sedó i Alabart, Francisco Sosa Wagner, Evžen Tošenovský, Ioannis A. Tsoukalas, Claude Turmes, Marita Ulvskog, Vladimir Urutchev, Kathleen Van Brempt
Substitute(s) present for the final vote	Daniel Caspary, António Fernando Correia de Campos, Ioan Enciu, Vicente Miguel Garcés Ramón, Elisabetta Gardini, Françoise Grossetête, Andrzej Grzyb, Cristina Gutiérrez-Cortines, Roger Helmer, Jolanta Emilia Hibner, Gunnar Hökmark, Eija-Riitta Korhola, Werner Langen, Pavel Poc, Vladimír Remek
Substitute(s) under Rule 187(2) present for the final vote	Jorgo Chatzimarkakis, Keith Taylor

21.9.2012

OPINION OF THE COMMITTEE ON TRANSPORT AND TOURISM

for the Committee on the Internal Market and Consumer Protection

on the proposal for a directive of the European Parliament and of the Council on public procurement
(COM(2011)0896 – C7-0006/2012 – 2011/0438(COD))

Rapporteur: Eva Lichtenberger

SHORT JUSTIFICATION

Public procurement plays an important role in the overall economic performance of the European Union. Public authorities spend around 18 % of GDP on supplies, works and services. Given the volume of purchases, public procurement can be used as a powerful lever for achieving a Single Market fostering smart, sustainable and inclusive growth.

Public procurement plays also a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve the objectives of improving the business environment and conditions for business to innovate and of encouraging wider use of green procurement supporting the shift towards a resource efficient and low-carbon economy. At the same time, the Europe 2020 strategy stresses that public procurement policy must ensure the most efficient use of public funds and that procurement markets must be kept open Union-wide.

The Rapporteur welcomes the Commission's proposal to modernise the public procurement directives. The legislative proposal should result in simpler and more flexible procurement procedures for contracting authorities and provide easier access for companies, especially SMEs. The revision of the legislation should strike a balance between simplification of the rules, sound and effective procedures related to innovative and sustainable award criteria, while also securing a wider use of e-procurement.

Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment. These criteria should guarantee that tenders are assessed in conditions of effective competition, also where contracting authorities require high-quality works, supplies and services that are optimally suited to their needs, for instance where the award decision includes factors linked to the production process.

The Rapporteur strongly believes that contracting authorities should use as award criterion the ‘most economically advantageous and sustainable tender’ (MEAST) and discard the alternative criterion based on the ‘lowest cost’. Given that price is also taken into account in the MEAST, contracting authorities will be able to make the most appropriate choices in relation to their specific needs, including the consideration of cost, strategic societal goals, innovative solutions and social and environmental criteria.

Public procurement should be used as a means to foster innovation. Public purchasers must be encouraged to buy innovative products and services in order to achieve the goals of sustainable development. New innovative solutions and ideas are necessary in particular in the field of transport, and public procurement should be used as a tool to meet such needs.

Life cycle considerations should be upgraded, and the social and environmental effects of the entire production process must be taken into consideration. Contracting authorities should have further possibilities to impose demands on the production process and not only on the product. This will lead to more sustainable procurement, including in the transport sector.

For all procurement intended for use by persons, it is necessary that contracting authorities lay down technical specifications so as to take into account accessibility criteria for people with disabilities or design for all users. This is particularly crucial in the area of public transport and tourism.

The provisions on subcontracting should be strengthened. A tenderer must be required to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors. Furthermore, it has to be possible for the main contractor and all of the subcontractors involved to be made liable in the event of failure to comply with legislation. There is need for a control system which covers all parts of the contractors' chain.

The Rapporteur has tabled a number of amendments to address the issues outlined above. In some cases, it was considered necessary to delete some provisions proposed by the Commission, as the Rapporteur considers that certain issues can be addressed more effectively in national legislation, taking into account sectoral and regional specificities, in line with the principles of subsidiarity and better regulation.

Last but not least, the Rapporteur would like to stress the need to ensure legal certainty and consistency of the public procurement directives with current Union legislation in the field of transport and postal services.

AMENDMENTS

The Committee on Transport and Tourism calls on the Committee on the Internal Market and Consumer Protection, as the committee responsible, to incorporate the following amendments in its report:

Amendment 1 Proposal for a directive Recital 53

Text proposed by the Commission

(53) Effective cooperation is necessary to ensure consistent advice and practice within each Member State and across the Union. Bodies designated for monitoring, implementation, control and technical assistance should be able to share information and cooperate; in the same context, the national authority designated by each Member State should act as the preferred contact point with the Commission services for the purpose of collecting data, exchanging information and monitoring the implementation of Union public procurement law.

Amendment

(53) Effective cooperation **and transparency** is necessary to ensure consistent advice and practice within each Member State and across the Union. Bodies designated for monitoring, implementation, control and technical assistance should be able to share information and cooperate; in the same context, the national authority designated by each Member State should act as the preferred contact point with the Commission services for the purpose of collecting data, exchanging information and monitoring the implementation of Union public procurement law.

Amendment 2

Proposal for a directive

Article 2 – paragraph 1 – point 22

Text proposed by the Commission

(22) ‘life cycle’ means ***all consecutive and/or interlinked stages, including production, transport, use and maintenance, throughout the existence of a product or a works or the provision of a service, from raw material acquisition or generation of resources to disposal, clearance and finalisation.***

Amendment

(22) ‘life cycle’ means ***monetising, wherever possible, the full costs associated with the public procurement, including maintenance and resource (including energy) efficiency costs, end-of-life recycling costs, and social impact costs where these relate to performance of the contract. Efficient design, planning and use of electronic means can also be included in life cycle monetisation. For the purposes of public procurement, the life cycle runs from the point of purchase throughout the lifetime of the works, supplies or services and forms an integral and in-dissociable part of the calculation of what constitutes the Most Economically Advantageous Tender.***

Justification

While contracting authorities shall, in the interest of the taxpayer, be responsible for ensuring

that value for money is secured as regards whatever solution is selected through public procurement and that this does not end up costing more to society or the environment overall on the long run, this responsibility can only reasonably run from the point of purchase.

Amendment 3

Proposal for a directive

Article 19 – paragraph 2 – subparagraph 1

Text proposed by the Commission

The means of communication chosen must be generally available and not restrict economic operators' access to the procurement procedure.

Amendment

The means of communication chosen must be generally available ***and accessible also to persons with disabilities*** and not restrict economic operators' access to the procurement procedure.

Amendment 4

Proposal for a directive

Article 19 – paragraph 7 – subparagraphs 1 and 1 a (new)

Text proposed by the Commission

Member States shall ensure that, ***at the latest 2 years after the date provided for in Article 92(1), all*** procurement procedures under this Directive are performed using electronic means of communication, in particular e-submission, in accordance with the requirements of this Article.

Amendment

Member States shall ensure that, ***by 1 January 2017, at least 70% of*** procurement procedures under this Directive are performed using electronic means of communication, in particular e-submission, in accordance with the requirements of this Article.

Member States shall ensure that, by 1 January 2020, all procurement procedures under this Directive are performed using electronic means of communication, in particular e-submission, in accordance with the requirements of this Article.

Justification

This two-step approach is considered as a more realistic target than the Commission's proposed target, and allows contracting authorities sufficient planning and implementation time.

Amendment 5
Proposal for a directive
Article 21 – paragraph 1 – subparagraph 3

Text proposed by the Commission

Amendment

For the purposes of this Article, ‘private interests’ means any family, emotional life, economic, political or other shared interests with the candidates or the tenderers, including conflicting professional interests.

deleted

Justification

This issue can be addressed more effectively in national legislation.

Amendment 6
Proposal for a directive
Article 21 – paragraph 3 – subparagraph 1 – point a

Text proposed by the Commission

Amendment

(a) that staff members referred to in paragraph 2(a) are required to disclose any conflict of interests in relation to any of the candidates or tenderers, as soon as they become aware of such conflicts, in order to enable the contracting authority to take remedial action;

deleted

Justification

This issue can be addressed more effectively in national legislation.

Amendment 7
Proposal for a directive
Article 21 – paragraph 3 – subparagraph 2

Text proposed by the Commission

Amendment

In the event of a conflict of interests, the contracting authority shall take appropriate measures. *Those measures may include the recusal of the staff member in question from involvement in the affected*

In the event of a conflict of interests, the contracting authority shall take appropriate measures.

obtain confidential information that may confer upon them undue advantages in the procurement procedure;

Amendment 11
Proposal for a directive
Article 22 – paragraph 1 – point b

Text proposed by the Commission

Amendment

(b) enter into agreements with other candidates and tenderers aimed at distorting competition; **deleted**

Amendment 12
Proposal for a directive
Article 22 – paragraph 1 – point c

Text proposed by the Commission

Amendment

(c) deliberately provide misleading information that may have a material influence on decisions concerning exclusion, selection or award. **deleted**

Amendment 13
Proposal for a directive
Article 24 – paragraph 1 – subparagraph 4 – introductory part

Text proposed by the Commission

Amendment

They may also provide that contracting authorities may use a competitive procedure with negotiation or a competitive dialogue in any of the following cases:

They may also provide that contracting authorities may use a competitive procedure with negotiation or a competitive dialogue, ***provided that they ensure the equal treatment of all tenderers***, in any of the following cases:

Amendment 14
Proposal for a directive
Article 24 – paragraph 1 – subparagraph 5

Text proposed by the Commission

Amendment

Member States may decide not to transpose into their national law the competitive procedure with negotiation, the competitive dialogue and the innovation partnership procedures.

deleted

Justification

The promotion of flexibility in the choice of procedures and the promotion of innovative procurement practice are key priorities in this modernisation exercise. Therefore, transposition of the most relevant procedures should not be optional but uniform across all Member States to ensure a level playing field.

Amendment 15

Proposal for a directive

Article 30 – paragraph 2 – subparagraph 1 – point a

Text proposed by the Commission

Amendment

(a) where no tenders or no suitable tenders or no requests to participate have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not substantially altered and that a report is sent to the Commission ***or the national oversight body designated according to Article 84 where they so request.***

(a) where no tenders or no suitable tenders or no requests to participate have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not substantially altered and that a report is sent to the Commission.

Justification

The proposed amendment is connected with amendments proposed to Article 84.

Amendment 16

Proposal for a directive

Article 40 – paragraph 1 – subparagraph 4

Text proposed by the Commission

Amendment

For all procurement the subject of which is intended for use by persons, whether general public or staff of the contracting authority, those technical specifications shall, except in duly justified cases, be

For all procurement the subject of which is intended for use by persons, whether general public or staff of the contracting authority, those technical specifications shall, except in duly justified cases ***that***

drawn up so as to take into account accessibility criteria for people with disabilities or design for all users.

shall be stated in the call for competition,
be drawn up so as to take into account accessibility criteria for people with disabilities or design for all users.

Amendment 17
Proposal for a directive
Article 40 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

1a. Technical specifications may also include, as appropriate, requirements relating to:

(a) performance, including levels of environmental and climate performance and performance in terms of socially sustainable production process;

(b) life cycle;

(c) socially sustainable production process;

(d) the organisation, qualification and experience of the staff assigned to performing the contract in question;

(e) safety or dimensions, including the procedures concerning quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions;

(f) rules relating to design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all other technical conditions which the contracting authority is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve.

Amendment 18
Proposal for a directive
Article 53 – paragraph 2 – point d

Text proposed by the Commission

Amendment

(d) any tenderer that has made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers.

deleted

Amendment 19
Proposal for a directive
Article 54 – paragraph 2

Text proposed by the Commission

Amendment

2. Contracting authorities may ***decide*** not ***to*** award a contract to the tenderer submitting the best tender where they have established that the tender does not comply, ***at least in an equivalent manner***, with obligations ***established*** by Union legislation in the field of social ***and*** labour ***law*** or environmental law or ***of*** the international social and environmental law provisions listed in Annex XI.

2. Contracting authorities may not award a contract to the tenderer submitting the best tender where they have established that the tender does not comply with obligations by Union ***or national*** legislation in the field of social, labour, ***health, safety*** or environmental law, ***collective agreements applicable in the place where the work, service or supply is to be performed, or by*** the international social and environmental law provisions listed in Annex XI.

Amendment 20
Proposal for a directive
Article 55 – paragraph 3 – subparagraph 1 – point a

Text proposed by the Commission

Amendment

(a) where it is aware of any violation of obligations established by Union legislation in the field of social ***and*** labour ***law*** or environmental law or ***of*** the international social and environmental law provisions listed in Annex XI. Compliance with Union legislation or with international provisions also includes compliance in an equivalent manner.

(a) where it is aware of any violation of obligations established by Union ***or national*** legislation in the field of social, labour, ***health, safety*** or environmental law, ***collective agreements applicable in the place where the work, service or supply is to be performed, or by*** the international social and environmental law provisions listed in Annex XI. Compliance with Union legislation or with international provisions also includes compliance in an equivalent manner.

Amendment 21
Proposal for a directive
Article 55 – paragraph 4 – subparagraph 1

Text proposed by the Commission

Any candidate or tenderer that is in one of the situations referred to in paragraphs 1, 2 and 3 may provide the contracting authority with evidence demonstrating its reliability despite the existence of the relevant ground for exclusion.

Amendment

Any candidate or tenderer that is in one of the situations referred to in paragraphs 1, 2 and 3 may provide the contracting authority with evidence demonstrating its reliability, ***or, as appropriate, the reliability of its sub-contractor***, despite the existence of the relevant ground for exclusion.

Amendment 22
Proposal for a directive
Article 55 – paragraph 6 a (new)

Text proposed by the Commission

Amendment

6a. This Article shall apply to subcontracting procedures and subcontractors.

Amendment 23
Proposal for a directive
Article 56 – paragraph 1 – subparagraph 1 – point c a (new)

Text proposed by the Commission

Amendment

(ca) compliance with obligations established by Union or national legislation in the field of social, labour, health, safety or environmental law, collective agreements applicable in the place where the work, service or supply is to be performed, or by the international social and environmental law provisions listed in Annex XI;

Amendment 24
Proposal for a directive
Article 56 – paragraph 5 a (new)

Text proposed by the Commission

Amendment

5a. This Article shall apply to subcontracting procedures and subcontractors.

Amendment 25

Proposal for a directive

Article 60 – paragraph 2 – subparagraph 1

Text proposed by the Commission

Amendment

Proof of the economic operator's economic and financial standing may, as a general rule, be provided by one or more of the references listed in Annex XIV, **part 1**.

Proof of the economic operator's economic and financial standing, **as well as compliance with obligations established by Union or national legislation in the field of social, labour, health, safety or environmental law, collective agreements applicable in the place where the work, service or supply is to be performed**, may, as a general rule, be provided by one or more of the references listed in Annex XIV.

Amendment 26

Proposal for a directive

Article 66 – paragraph 1 – subparagraph 1 – introductory part

Text proposed by the Commission

Amendment

Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the **criteria** on which contracting authorities shall base the award of public contracts shall be **one of the following**:

Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the **criterion** on which contracting authorities shall base the award of public contracts shall be the **most economically advantageous and sustainable tender**.

(This amendment applies throughout the text. Adopting it will necessitate corresponding changes throughout.)

Amendment 27
Proposal for a directive
Article 66 – paragraph 1 – subparagraph 1 – point a

Text proposed by the Commission

Amendment

(a) the most economically advantageous tender; **deleted**

Amendment 28
Proposal for a directive
Article 66 – paragraph 1 – subparagraph 1 – point b

Text proposed by the Commission

Amendment

(b) the lowest cost. **deleted**

Amendment 29
Proposal for a directive
Article 66 – paragraph 2 – point a

Text proposed by the Commission

Amendment

(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, environmental characteristics and innovative character;

(a) quality, including technical merit, aesthetic and functional characteristics, accessibility **to persons with disabilities**, design for all users, environmental characteristics and innovative character;

Amendment 30
Proposal for a directive
Article 66 – paragraph 2 – point b

Text proposed by the Commission

Amendment

(b) for service contracts and contracts involving the design of works, the organisation, qualification and experience of the staff assigned to performing the contract in question may be taken into consideration, **with the consequence that**, following the award of the contract, **such staff may only be replaced with the consent of** the contracting authority, **which**

(b) for service contracts and contracts involving the design of works, the organisation, qualification and experience of the staff assigned to performing the contract in question may be taken into consideration; **replacements of the staff** following the award of the contract **shall ensure equivalent organisation and quality and shall be notified to** the

must verify that replacements ensure equivalent organisation and quality;

contracting authority;

Amendment 31
Proposal for a directive
Article 66 – paragraph 3 a (new)

Text proposed by the Commission

Amendment

3a. Award criteria shall ensure effective and fair competition and shall be accompanied by requirements that allow the information provided by the tenderers to be effectively verified by the contracting authority in order to determine whether the tenderers meet the award criteria.

Amendment 32
Proposal for a directive
Article 69 – title

Text proposed by the Commission

Amendment

Abnormally low tenders

Price of the tender

Amendment 33
Proposal for a directive
Article 69 – paragraph 1 – introductory part

Text proposed by the Commission

Amendment

1. Contracting authorities shall require economic operators to explain the price or costs charged, ***where all of the following conditions are fulfilled:***

1. Contracting authorities shall require economic operators to explain ***in a detailed manner*** the price or costs charged ***for their tender.***

Amendment 34
Proposal for a directive
Article 69 – paragraph 1 – point a

Text proposed by the Commission

Amendment

(a) the price or cost charged is more than

deleted

**50 % lower than the average price or costs
of the remaining tenders**

Justification

This issue can be addressed more effectively in national legislation, taking into account sectoral and regional specificities.

**Amendment 35
Proposal for a directive
Article 69 – paragraph 1 – point b**

Text proposed by the Commission

Amendment

**(b) the price or cost charged is more than
20 % lower than the price or costs of the
second lowest tender;** **deleted**

Justification

This issue can be addressed more effectively in national legislation, taking into account sectoral and regional specificities.

**Amendment 36
Proposal for a directive
Article 69 – paragraph 1 – point c**

Text proposed by the Commission

Amendment

**(c) at least five tenders have been
submitted.** **deleted**

Justification

This issue can be addressed more effectively in national legislation, taking into account sectoral and regional specificities.

**Amendment 37
Proposal for a directive
Article 69 – paragraph 2**

Text proposed by the Commission

Amendment

2. Where tenders appear to be abnormally
low **for other reasons**, contracting

2. Where tenders appear to be abnormally
low, contracting authorities **shall** request

authorities *may also* request *such* explanations.

additional explanations *before rejecting a tender*.

Amendment 38

Proposal for a directive

Article 69 – paragraph 4 – subparagraph 2

Text proposed by the Commission

Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with obligations established by Union legislation in the field of social *and* labour *law* or environmental law or by the international social and environmental law provisions listed in Annex XI.

Amendment

Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with obligations established by Union *and national* legislation in the field of social, labour, *health, safety* or environmental law, *collective agreements applicable in the place where the work, service or supply is to be performed, or* by the international social and environmental law provisions listed in Annex XI.

Amendment 39

Proposal for a directive

Article 71 – paragraph 1

Text proposed by the Commission

1. In the procurement documents, the contracting authority may ask *or may be required by a Member State to ask* the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors.

Amendment

1. In the procurement documents, the contracting authority may ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors. *Any change in the subcontracting chain and any new subcontractor shall be indicated without delay to the contracting authority.*

Amendment 40

Proposal for a directive

Article 71 – paragraph 2

Text proposed by the Commission

2. Member States may provide that at the

Amendment

2. Member States may provide that at the

request of the subcontractor and where the nature of the contract so allows, the contracting authority **shall** transfer due payments directly to the subcontractor for services, supplies or works provided to the main contractor. ***In such case, Member States shall put in place appropriate mechanisms permitting the main contractor to object to undue payments.***
The arrangements concerning that mode of payment shall be set out in the procurement documents.

request of the subcontractor and where the nature of the contract so allows, the contracting authority **may** transfer, ***in duly justified cases***, due payments directly to the subcontractor for services, supplies or works provided to the main contractor. The arrangements concerning that mode of payment shall be set out in the procurement documents.

Justification

Directive 2011/7/EU of the European Parliament and of the Council on combating late payment in commercial transactions shall apply (as of March 2013) to transactions between undertakings and public authorities, and transactions between undertakings (B2B).

Amendment 41 **Proposal for a directive** **Article 72 – paragraph 2 – point a**

Text proposed by the Commission

Amendment

(a) the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the selection of other candidates than those initially selected or would have allowed for awarding the contract to another tenderer; ***deleted***

Amendment 42 **Proposal for a directive** **Article 72 – paragraph 4**

Text proposed by the Commission

Amendment

4. Where the value of a modification can be expressed in monetary terms, the modification shall not be considered to be substantial within the meaning of paragraph 1, where its value does not exceed the thresholds set out in Article 4 and where it is below 5 % of the price of ***deleted***

the initial contract, provided that the modification does not alter the overall nature of the contract. Where several successive modifications are made, the value shall be assessed on the basis of the cumulative value of the successive modifications.

Amendment 43
Proposal for a directive
Article 84

Text proposed by the Commission

Amendment

Article 84

deleted

Public oversight

1. Member States shall appoint a single independent body responsible for the oversight and coordination of implementation activities (hereinafter 'the oversight body'). Member States shall inform the Commission of their designation.

All contracting authorities shall be subject to such oversight.

2. The competent authorities involved in the implementation activities shall be organised in such a manner that conflicts of interests are avoided. The system of public oversight shall be transparent. For this purpose, all guidance and opinion documents and an annual report illustrating the implementation and application of rules laid down in this Directive shall be published.

The annual report shall include the following:

(a) an indication of the success rate of small and medium-sized enterprises (SMEs) in public procurement; where the percentage is lower than 50 % in terms of values of contracts awarded to SMEs, the report shall provide an analysis of the reasons therefore;

(b) a global overview of the implementation of sustainable procurement policies, including on procedures taking into account considerations linked to the protection of the environment, social inclusion including accessibility for persons with disabilities, or fostering innovation;

(c) information on the monitoring and follow-up of breaches to procurement rules affecting the budget of the Union in accordance with paragraphs 3 to 5 of the present article;

(d) centralized data about reported cases of fraud, corruption, conflict of interests and other serious irregularities in the field of public procurement, including those affecting projects cofinanced by the budget of the Union.

3. The oversight body shall be responsible for the following tasks:

(a) monitoring the application of public procurement rules and the related practice by contracting authorities and in particular by central purchasing bodies;

(b) providing legal advice to contracting authorities on the interpretation of public procurement rules and principles and on the application of public procurement rules in specific cases;

(c) issuing own-initiative opinions and guidance on questions of general interest pertaining to the interpretation and application of public procurement rules, on recurring questions and on systemic difficulties related to the application of public procurement rules, in the light of the provisions of this Directive and of the relevant case-law of the Court of Justice of the European Union;

(d) establishing and applying comprehensive, actionable 'red flag' indicator systems to prevent, detect and adequately report instances of procurement fraud, corruption, conflict of

interest and other serious irregularities;

(e) drawing the attention of the national competent institutions, including auditing authorities, to specific violations detected and to systemic problems;

(f) examining complaints from citizens and businesses on the application of public procurement rules in specific cases and transmitting the analysis to the competent contracting authorities, which shall have the obligation to take it into account in their decisions or, where the analysis is not followed, to explain the reasons for disregarding it;

(g) monitoring the decisions taken by national courts and authorities following a ruling given by the Court of Justice of the European Union on the basis of Article 267 of the Treaty or findings of the European Court of Auditors establishing violations of Union public procurement rules related to projects cofinanced by the Union; the oversight body shall report to the European Anti-Fraud Office any infringement to Union procurement procedures where these were related to contracts directly or indirectly funded by the European Union.

The tasks referred to in point (e) shall be without prejudice to the exercise of rights of appeal under national law or under the system established on the basis of Directive 89/665/EEC.

Member States shall empower the oversight body to seize the jurisdiction competent according to national law for the review of contracting authorities' decisions where it has detected a violation in the course of its monitoring and legal advising activity.

4. Without prejudice to the general procedures and working methods established by the Commission for its communications and contacts with Member States, the oversight body shall

act as a specific contact point for the Commission when it monitors the application of Union law and the implementation of the budget from the Union on the basis of Article 17 of the Treaty on the European Union and Article 317 of the Treaty on the Functioning of the European Union. It shall report to the Commission any violation of this Directive in procurement procedures for the award of contracts directly or indirectly funded by the Union.

The Commission may in particular refer to the oversight body the treatment of individual cases where a contract is not yet concluded or a review procedure can still be carried out. It may also entrust the oversight body with the monitoring activities necessary to ensure the implementation of the measures to which Member States are committed in order to remedy a violation of Union public procurement rules and principles identified by the Commission.

The Commission may require the oversight body to analyse alleged breaches to Union public procurement rules affecting projects co-financed by the budget of the Union. The Commission may entrust the oversight body to follow-up certain cases and to ensure that the appropriate consequences of breaches to Union public procurement rules affecting projects co-financed are taken by the competent national authorities which will be obliged to follow its instructions.

5. The investigation and enforcement activities carried out by the oversight body to ensure that contracting authorities' decisions comply with this Directive and the principles of the Treaty shall not replace or prejudge the institutional role of the Commission as guardian of the Treaty. When the Commission decides to refer the treatment of an individual case pursuant to paragraph 4, it shall also retain the right to intervene in accordance

with the powers conferred to it by the Treaty.

6. Contracting authorities shall transmit to the national oversight body the full text of all concluded contracts with a value equal to or greater than

(a) 1 000 000 EUR in the case of public supply contracts or public service contracts;

(b) 10 000 000 EUR in the case of public works contracts.

7. Without prejudice to the national law concerning access to information, and in accordance with national and EU legislation on data protection, the oversight body shall, upon written request, give unrestricted and full direct access, free of charge, to the concluded contracts referred to in paragraph 6. Access to certain parts of the contracts may be refused where their disclosure would impede law enforcement or otherwise be contrary to the public interest, would harm the legitimate commercial interests of economic operators, public or private, or might prejudice fair competition between them.

Access to the parts that may be released shall be given within a reasonable delay and no later than 45 days from the date of the request.

The applicants filing a request for access to a contract shall not need to show any direct or indirect interest related to that particular contract. The recipient of information should be allowed to make it public.

8. A summary of all the activities carried out by the oversight body in accordance with paragraphs 1 to 7 shall be included in the annual report referred to in paragraph 2.

Amendment 44
Proposal for a directive
Article 86 – paragraph 1

Text proposed by the Commission

1. The bodies *established or appointed in accordance with Article 84* shall forward to the Commission an implementation and statistical report on each year, based on a standard form, not later than 31 October of the following year.

Amendment

1. The **competent** bodies **of Member States** shall forward to the Commission an implementation and statistical report on each year, based on a standard form, not later than 31 October of the following year.

Amendment 45
Proposal for a directive
Article 89 – paragraph 2

Text proposed by the Commission

2. The delegation of power referred to in Articles 6, 13, 19, 20, 23, 54, 59, 67 and 86 shall be conferred on the Commission for **an indeterminate** period of **time** from the [date of entry into force of the present Directive].

Amendment

2. The delegation of power referred to in Articles 6, 13, 19, 20, 23, 54, 59, 67 and 86 shall be conferred on the Commission for **a** period of **five years** from the [date of entry into force of the present Directive]. **The Commission shall draw up a report in respect of the delegation of power not later than nine months before the end of the five-year period. The delegation of power shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension not later than three months before the end of each period.**

Amendment 46
Proposal for a directive
Annex 14 – paragraph 1 – point e a (new)

Text proposed by the Commission

Amendment

(ea) appropriate certificates or statements relating to evidence of respect of social, labour, health, safety or environmental rules as defined by Union and national legislation and by collective agreements

*applicable in the place where the work,
service or supply is to be performed;*

PROCEDURE

Title	Public procurement
References	COM(2011)0896 – C7-0006/2012 – 2011/0438(COD)
Committee responsible Date announced in plenary	IMCO 17.1.2012
Opinion by Date announced in plenary	TRAN 17.1.2012
Rapporteur Date appointed	Eva Lichtenberger 27.2.2012
Discussed in committee	10.7.2012 6.9.2012
Date adopted	18.9.2012
Result of final vote	+: 36 -: 4 0: 0
Members present for the final vote	Magdi Cristiano Allam, Georges Bach, Erik Bánki, Izaskun Bilbao Barandica, Philip Bradbourn, Antonio Cancian, Michael Cramer, Luis de Grandes Pascual, Christine De Veyrac, Saïd El Khadraoui, Ismail Ertug, Carlo Fidanza, Knut Fleckenstein, Jacqueline Foster, Mathieu Grosch, Jim Higgins, Juozas Imbrasas, Dieter-Lebrecht Koch, Georgios Koumoutsakos, Werner Kuhn, Jörg Leichtfried, Eva Lichtenberger, Marian-Jean Marinescu, Gesine Meissner, Hubert Pirker, Vilja Savisaar-Toomast, Olga Sehnalová, Debora Serracchiani, Brian Simpson, Keith Taylor, Silvia-Adriana Țicău, Giommara Uggias, Dominique Vlasto, Artur Zasada, Roberts Zīle
Substitute(s) present for the final vote	Spyros Danellis, Nathalie Griesbeck, Zita Gurmai, Sabine Wils, Janusz Władysław Zemke

17.10.2012

OPINION OF THE COMMITTEE ON REGIONAL DEVELOPMENT

for the Committee on the Internal Market and Consumer Protection

on the proposal for a directive of the European Parliament and of the Council on public procurement
(COM(2011)0896 – C7-0006/2012 – 2011/0438(COD))

Rapporteur: Ramona Nicole Mănescu

SHORT JUSTIFICATION

Transparent and credible public procurement plays a particularly important role in the efficiency of public spending and also in the impact of public investment on the economy, particularly on sustainable growth and innovation.

The public procurement regime is by nature highly complex, in particular for small local authorities and SMEs, and a broader access to clear information and advice concerning EU rules on public procurement for contracting authorities, in particular at regional and local level and SMEs alike should be a must. The objective of further developing EU procurement law must be to make procurement procedures simultaneously simpler, cheaper and more SME- and investment-friendly.

The Commission and the Member States share a great responsibility of ensuring the training and the consultation needed to inform and assist regional and local authorities and SMEs, and also to involve other interested parties, in order to ensure that there is effective informed participation in public procurement, thus reducing the frequency of errors and irregularities and developing the required expertise among the contracting authorities of local and regional authorities in the field of public procurement.

Indeed, SMEs have a huge potential for job creation, growth and innovation, and in order to derive maximum benefit from the economic and innovative potential of SMEs in the context of procurement procedures, these should be encouraged to participate in public procurement procedures organised by local and regional authorities.

As your Rapporteur, with the support of the Committee, has made clear in her opinion on the modernisation of public procurement, public procurement should not follow the lowest price principle but should take into account the sustainable and economically most advantageous tender, including life-cycle cost. This rule should be further strengthened in the

It should be made clear, however, that the effectiveness and efficiency of any rules enacted at European level on public is conditional upon a sound and as much simplified as possible transposition of those rules into the laws of the Member States. Member States, with the assistance and monitoring of the Commission, should therefore ensure that fragmentation of rules across the Union is avoided, and that simplification of regimes is not hampered, due to the quite very complex and detailed nature of the rules contained in the proposed directives.

Legal and practical clarification of the directives in order to avoid further failures in applying the public procurement rules is crucial. In this context, your Rapporteur hopes that the serious failures to comply with public procurement rules repeatedly identified by the Court of Auditors in the implementation of projects under the ERDF and the Cohesion Fund, mainly due to the complexity of public procurement procedures, the lack of consistency between them and those on which the use of the Structural Funds and Cohesion Fund is based and the incorrect implementation of EU legislation into national law, will be finally solved and duly taken into account in the framework of the interpretation and application of future public procurement rules.

AMENDMENTS

The Committee on Regional Development calls on the Committee on the Internal Market and Consumer Protection, as the committee responsible, to incorporate the following amendments in its report:

Amendment 1

Proposal for a directive Recital 1

Text proposed by the Commission

(1) The award of public contracts by or on behalf of Member States authorities has to comply with the principles of the ***Treaty on the Functioning*** of the European Union, and in particular the free movement of goods, freedom of establishment and the freedom to provide services as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that these principles are given practical

Amendment

(1) The award of public contracts by or on behalf of Member States authorities has to comply with the principles of the ***Treaties*** of the European Union, and in particular the free movement of goods, freedom of establishment and the freedom to provide services as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency ***and with the distribution of competencies as enshrined in Article 14 (1) TFEU and the Protocol No 26. The European regulation of public procurement should respect the wide discretion of public authorities in***

effect and public procurement is opened up to competition.

carrying out their public service tasks. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that these principles are given practical effect and public procurement is opened up to competition.

Justification

Adaption to the new provisions of the Lisbon Treaty

Amendment 2

Proposal for a directive

Recital 2

Text proposed by the Commission

(2) Public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the current public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts have to be revised and modernised in order to increase the efficiency of public spending, ***facilitating*** in particular the participation of small and medium-sized enterprises ***in*** public procurement and to enable procurers to make better use of public procurement ***in support of common societal goals***. There is also a need to clarify basic notions and concepts to ensure better legal certainty

Amendment

(2) Public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the current public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts have to be revised and modernised in order to ***enable procurers to make better use of public procurement in support of sustainable development in compliance with social and labour rights and other common societal goals and in order thereby to*** increase the efficiency of public spending. ***Therefore, it is necessary to facilitate and encourage*** in particular the participation of small and medium-

and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.

sized enterprises, *to simplify their access to* public procurement and to enable procurers to make better use of public procurement, *without prejudice to the latter autonomy of decision on what to procure and to buy*. There is also a need to clarify basic notions and concepts to ensure better legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.

Amendment 3

Proposal for a directive Recital 5 a (new)

Text proposed by the Commission

Amendment

(5a) This Directive ensures the enforcement of Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses in order to ensure the respect of the rules of equal competition and the protection of workers in the context of the transfer of an undertaking. In particular the right to require employees to be taken over by the legal entity that take over the business.

Amendment 4

Proposal for a directive Recital 6

Text proposed by the Commission

Amendment

(6) Even if they do not necessarily lead to corrupt conduct, actual, potential or perceived conflicts of interest have a high potential to improperly influence public

(6) Even if they do not necessarily lead to corrupt conduct, actual, potential or perceived conflicts of interest have a high potential to improperly influence public

procurement decisions with the effect of distorting competition *and* jeopardising equal treatment of tenderers. Effective mechanisms should therefore be set up to prevent, identify and remedy conflicts of interest.

procurement decisions with the effect of distorting competition, jeopardising equal treatment of tenderers *and delaying the implementation of public procurement procedures*. Effective mechanisms should therefore be set up to prevent, identify and remedy conflicts of interest *and eliminate obstacles to the implementation thereof*.

Amendment 5

Proposal for a directive Recital 7

Text proposed by the Commission

(7) Illicit conduct by participants in a procurement procedure, such as attempts to unduly influence the decision-making process or to enter into agreements with other candidates to manipulate the outcome of the procedure, can result in violations of the basic principles of Union law and in serious distortions of competition. Economic operators should therefore be required to submit a declaration on honour that they do not engage in such illicit activities and be excluded if this declaration proves to be false.

Amendment

(7) Illicit conduct by participants in a procurement procedure, such as attempts to unduly influence the decision-making process or to enter into agreements with other candidates to manipulate the outcome of the procedure, can result in violations of the basic principles of Union law and in serious distortions of competition. Economic operators should therefore be required to submit a declaration on honour that they do not engage in such illicit activities and be excluded *from both this and subsequent procurement procedures within the EU* if this declaration proves to be false.

Amendment 6

Proposal for a directive Recital 26

Text proposed by the Commission

(26) Joint awarding of public contracts by contracting authorities from different Member States currently encounters specific legal difficulties, with special reference to conflicts of national laws. Despite the fact that Directive 2004/18/EC implicitly allowed for cross-border joint

Amendment

(26) Joint awarding of public contracts by contracting authorities from different Member States currently encounters specific legal difficulties, with special reference to conflicts of national laws. Despite the fact that Directive 2004/18/EC implicitly allowed for cross-border joint

public procurement, in practice several national legal systems have explicitly or implicitly rendered cross-border joint procurement legally uncertain or impossible. Contracting authorities from different Member States may be interested in cooperating and in jointly awarding public contracts in order to derive maximum benefit from the potential of the internal market in terms of economies of scale and risk-benefit sharing, not least for innovative projects involving a greater amount of risk than reasonably bearable by a single contracting authority. Therefore new rules on cross-border joint procurement designating the applicable law should be established in order to facilitate cooperation between contracting authorities across the Single Market. In addition, contracting authorities from different Member States may set up joint legal bodies established under national or Union law. Specific rules should be established for such form of joint procurement.

public procurement, in practice several national legal systems have explicitly or implicitly rendered cross-border joint procurement legally uncertain or impossible. Contracting authorities from different Member States may be interested in cooperating and in jointly awarding public contracts in order to derive maximum benefit from the potential of the internal market in terms of economies of scale and risk-benefit sharing, not least for innovative projects involving a greater amount of risk than reasonably bearable by a single contracting authority. Therefore new rules on cross-border joint procurement designating the applicable law should be established in order to facilitate cooperation between contracting authorities across the Single Market. In addition, contracting authorities from different Member States may set up joint legal bodies established under national or Union law. Specific rules should be established for such form of joint procurement. ***Similarly, for the purposes of cross-border public procurement, it is essential to clarify the aspects relating to intellectual property law.***

Amendment 7

Proposal for a directive Recital 30

Text proposed by the Commission

(30) In order to foster the involvement of small and medium-sized enterprises (SMEs) in the public procurement market, contracting authorities should be encouraged to divide contracts into lots, and be obliged to state the reasons for not doing so. Where contracts are divided into lots, contracting authorities may, for instance in order to preserve competition or to ensure security of supply, limit the number of lots for which an economic

Amendment

(30) In order to foster the involvement of small and medium-sized enterprises (SMEs) in the public procurement market, contracting authorities should be encouraged to divide contracts into lots, ***implement measures to encourage SME participation*** and be obliged to state the reasons for not doing so. Where contracts are divided into lots, contracting authorities may, for instance in order to preserve competition or to ensure security of supply,

operator may tender; they may also limit the number of lots that may be awarded to any one tenderer.

limit the number of lots for which an economic operator may tender; they may also limit the number of lots that may be awarded to any one tenderer.

Amendment 8

Proposal for a directive Recital 31

Text proposed by the Commission

Amendment

(31) Overly demanding requirements concerning economic and financial capacity frequently constitute an unjustified obstacle to the involvement of SMEs in public procurement. Contracting authorities should therefore not be allowed to require economic operators to have a minimum turnover exceeding three times the estimated contract value. However, in duly justified circumstances, higher requirements may be applied. Such circumstances may relate to the high risks attached to the performance of the contract or the fact that its timely and correct performance is critical, for instance because it constitutes a necessary preliminary for the performance of other contracts.

deleted

Amendment 9

Proposal for a directive Recital 32

Text proposed by the Commission

Amendment

(32) Many economic operators, and ***not least*** SMEs, find that a major obstacle to their participation in public procurement consists in administrative burdens deriving from the need to produce ***a substantial*** number of certificates or other documents related to exclusion and selection criteria. Limiting such requirements, for example

(32) Many economic operators, and ***especially*** SMEs, find that a major obstacle to their participation in public procurement consists in administrative burdens deriving from the need to produce ***an excessive*** number of certificates or other documents related to exclusion and selection criteria. Limiting such requirements, for example

through self-declarations, can result in considerable simplification for the benefit of both contracting authorities and economic operators. The tenderer to which it has been decided to award the contract should, however, be required to provide the relevant evidence and contracting authorities should not conclude contracts with tenderers unable to do so. **Further simplification can be achieved through** standardised documents such as the European Procurement Passport, which should be recognized by all contracting authorities and widely promoted among economic operators, in particular SMEs, for whom they can substantially lessen the administrative burden.

through self-declarations, can result in considerable simplification for the benefit of both contracting authorities and economic operators. The tenderer to which it has been decided to award the contract should, however, be required to provide the relevant evidence and contracting authorities should not conclude contracts with tenderers unable to do so. **It is necessary to introduce** standardised documents such as the European Procurement Passport, which should be recognized by all contracting authorities and widely promoted among economic operators, in particular SMEs, for whom they can substantially lessen the administrative burden.

Amendment 10

Proposal for a directive

Recital 37

Text proposed by the Commission

(37) Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment. These criteria should guarantee that tenders are assessed in conditions of effective competition, also where contracting authorities require high-quality works, supplies and services that are optimally suited to their needs, for instance where the chosen award criteria include factors linked to the production process. As a result, contracting authorities should be allowed to adopt as award criteria **either** ‘the most economically advantageous tender’ **or** ‘the lowest cost’, taking into account that in the latter case they are free to set adequate quality standards by using technical specifications or contract performance conditions.

Amendment

(37) Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment. These criteria should guarantee that tenders are assessed in conditions of effective competition, also where contracting authorities require high-quality works, supplies and services that are optimally suited to their needs, for instance where the chosen award criteria include factors linked to the production process. As a result, contracting authorities should be allowed to adopt as award criteria **preferably** ‘the most economically advantageous tender’ **and after** ‘the lowest cost’, taking into account that in the latter case they are free to set adequate quality standards by using technical specifications or contract performance conditions.

Justification

Public procurement should not follow the lowest price principle but should take into account the sustainable and economically most advantageous tender.

Amendment 11

Proposal for a directive

Recital 38

Text proposed by the Commission

(38) *Where contracting authorities choose to award a contract to the most economically advantageous tender, they must determine the award criteria on the basis of which they will assess tenders in order to identify which one offers the best value for money. The determination of these criteria depends on the subject-matter of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the **subject-matter** of the contract, as defined in the technical specifications, and the value for money of each tender to be measured. Furthermore, the chosen award criteria should not confer an unrestricted freedom of choice on the contracting authority and they should ensure the possibility of effective competition and be accompanied by requirements that allow the information provided by the tenderers to be effectively verified.*

Amendment

(38) Contracting authorities must determine the award criteria on the basis of which they will assess tenders in order to identify which one offers the best value, **including environmental and social responsibility**, for money. The determination of these criteria depends on the subject-matter of the contract **or the subject matter of the production** since they must allow the level of performance offered by each tender to be assessed in the light of the **subject-matters of the contract and production**, as defined in the technical specifications, and the value for money of each tender to be measured. Furthermore, the chosen award criteria should not confer an unrestricted freedom of choice on the contracting authority and they should ensure the possibility of effective **and fair** competition and be accompanied by requirements that allow the information provided by the tenderers to be effectively verified.

Justification

The criteria of life cycle considerations should be upgraded to include the added value of social and environmental responsibility alongside economic value for money.

Amendment 12

Proposal for a directive

Recital 43

Text proposed by the Commission

(43) Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory, are linked to the subject-matter of the contract and are indicated in the contract notice, the prior information notice used as a means of calling for competition or the procurement documents. They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment, protection of the environment or animal welfare. For instance, mention may be made, amongst other things, of the requirements - applicable during performance of the contract - to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with fundamental International Labour Organisation (ILO) Conventions, even where such Conventions have not been implemented in national law, and to recruit more disadvantaged persons than are required under national legislation.

Amendment

(43) Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory, are linked to the subject-matter of the contract **and/or production, and** are indicated in the contract notice, the prior information notice used as a means of calling for competition or the procurement documents. They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment, protection of the environment or animal welfare. For instance, mention may be made, amongst other things, of the requirements - applicable during performance of the contract - to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with fundamental International Labour Organisation (ILO) Conventions, **in particular ILO Convention 94**, even where such Conventions have not been implemented in national law, and to recruit more disadvantaged persons than are required under national legislation.

Justification

This amendment stresses the importance of ILO Convention 94 on Labour Clauses (Public Contracts) which specifically regulates public procurement. EU must commit itself to ILO standards.

Amendment 13

Proposal for a directive

Recital 49

Text proposed by the Commission

(49) The evaluation has shown that

Amendment

(49) The evaluation has shown that

Member States do not consistently and systematically monitor the implementation and functioning of public procurement rules. This has a negative impact on the correct implementation of provisions stemming from these directives, which is a major source of cost and uncertainty. Several Member States have appointed a national central body dealing with public procurement issues, but the tasks entrusted to such bodies vary considerably across Member States. Clearer, more consistent and authoritative monitoring and control mechanisms would increase knowledge of the functioning of procurement rules, improve legal certainty for businesses and contracting authorities, and contribute to establishing a level playing field. Such mechanisms could serve as tools for the detection and early resolution of problems, especially with regard to projects cofunded by the Union, and for the identification of structural deficiencies. There is in particular a strong need to coordinate these mechanisms to ensure consistent application, control and monitoring of public procurement policy, as well as systematic assessment of the outcomes of procurement policy across the Union.

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Amendment 14

Proposal for a directive Recital 50

Text proposed by the Commission

(50) Member States should designate a single national authority in charge of monitoring, implementation and control of public procurement. Such a central body should have first-hand and timely information, particularly in relation to different problems affecting the implementation of public procurement law.

Amendment

(50) Member States should designate a single national authority in charge of monitoring, implementation and control of public procurement. Such a central body should have first-hand and timely information, particularly in relation to different problems affecting the implementation of public procurement law

It should be able to provide immediate feedback on the functioning of the policy and the potential weaknesses in national legislation and practice and contribute to the quick identification of solutions. In view of efficiently fighting corruption and fraud, this central body and the general public should also have the possibility to inspect the texts of concluded contracts. High-value contracts should hence be transmitted to the oversight body with a possibility of interested persons to have access to these documents, to the extent that legitimate public or private interests are not jeopardized.

and should recommend procedures to be followed if tenders for public procurement contracts are contested. It should be able to provide immediate feedback on the functioning of the policy and the potential weaknesses in national legislation and practice and contribute to the quick identification of solutions. In view of efficiently fighting corruption and fraud, this central body and the general public should also have the possibility to inspect the texts of concluded contracts. High-value contracts should hence be transmitted to the oversight body with a possibility of interested persons to have access to these documents, to the extent that legitimate public or private interests are not jeopardized.

Amendment 15

Proposal for a directive Recital 51

Text proposed by the Commission

(51) ***Not all*** contracting authorities ***may*** have the internal expertise to deal with economically or technically complex contracts. Against this background, appropriate professional support ***would be*** an effective complement to monitoring and control activities. On the one hand, this objective can be achieved by knowledge sharing tools (knowledge centres) offering technical assistance to contracting authorities; on the other hand, business, ***not least*** SMEs, should benefit from administrative assistance, in particular when participating in procurement procedures on a cross-border basis.

Amendment

(51) ***Certain*** contracting authorities, ***particularly at regional level, do not*** have the internal expertise to deal with economically or technically complex contracts. Against this background, appropriate professional support ***constitutes*** an effective complement to monitoring and control activities. On the one hand, this objective can be achieved by knowledge sharing tools (knowledge centres) offering technical assistance to contracting authorities; on the other hand, business, ***and in particular*** SMEs, should benefit from administrative assistance, in particular when participating in procurement procedures on a cross-border basis.

Justification

It is particularly important to enhance the role of SMEs in the field of public procurement.

Amendment 16

Proposal for a directive Recital 53 a (new)

Text proposed by the Commission

Amendment

(53a) The way this Directive is transposed is of utmost importance to the efforts of simplification, as well as to ensure an uniform approach to the interpretation and application of the EU rules on public procurement, thus contributing to the necessary legal certainty required by contracting authorities, in particular at sub-central level, and by SMEs alike. The Commission and the Member States should therefore ensure that transposition of this Directive is done having also in mind the major impact of the public procurement national legislation on the process of accessing the European Union funds. Therefore it is of utmost importance for the Member States to avoid as much as possible any fragmentation in the interpretation and application, while contributing as well to the simplification at national level.

Justification

It is necessary to ensure that transposition does not hamper the efforts of simplification and harmonisation, in order to avoid the fragmentation of rules across the Union, which would affect mostly SMEs and smaller contacting authorities, at regional and local level.

Amendment 17

Proposal for a directive Recital 53 b (new)

Text proposed by the Commission

Amendment

(53b) In addition, the Commission and the Member States should periodically conduct training and awareness raising campaigns and engage in consultation targeted at regional and local authorities

and SMEs involving also other interested parties, so as to ensure informed participation in public procurement, reduce the frequency of errors and develop the required expertise among the contracting authorities within local and regional administrations in order to implement innovative procurement.

Amendment 18

Proposal for a directive Article 1 – paragraph 2 – subparagraph 2

Text proposed by the Commission

Amendment

An entirety of works, supplies and/or services, even if purchased through different contracts, constitutes a single procurement within the meaning of this Directive, if the contracts are part of one single project.

deleted

Justification

This notion is too general and too vague.

Amendment 19

Proposal for a directive Article 1 – paragraph 2 – subparagraph 2 a (new)

Text proposed by the Commission

Amendment

Contracts for social and other specific services listed in Annex XVI are exclusively regulated by Articles 74 to 76 of this Directive.

Justification

The form of the proposed directive is such that social and other services are regulated only by articles 74-76. For reasons of clarity this should be stated as early as possible in the text of the proposal.

Amendment 20

Proposal for a directive

Article 1 – paragraph 2 – subparagraph 2 b (new)

Text proposed by the Commission

Amendment

This Directive is without prejudice to the right of public authorities at all levels to decide whether, how, and to what extent they want to perform public functions themselves. Public authorities may perform public interest tasks using their own resources, without being obliged to call on outside economic operators. They may do so in cooperation with other public authorities.

Amendment 21

Proposal for a directive

Article 2 – paragraph 1 – point 11

Text proposed by the Commission

Amendment

(11) ‘public service contracts’ means public contracts having as their object the provision of services other than those referred to in point (8);

(11) ‘public service contracts’ means public contracts having as their object the provision of services other than those referred to in point (8); ***these include "knowledge-based" or intellectual services, i.e. services which do not necessarily produce the same results, as their essence lies in providing a solution to a task by performing intellectual work. For services of this type it may be possible to provide a description of the goal or the task, depending on the type of service, nevertheless providing in advance an unambiguous and complete service description (statement of work with pre-defined parameters) is not possible.***

Justification

Some considerations and provisions of the Directive might be irrelevant/meaningless if used for intellectual services due to the specific/particular nature of such services: the result cannot be specified in detail before they are delivered. Ex: inversed auctions.

Amendment 22

Proposal for a directive
Article 2 – paragraph 1 – point 22 a (new)

Text proposed by the Commission

Amendment

(22a) 'socially sustainable production process' means the production process in which the provision of works, services and supplies, respects health and safety, social and labour law, rules and standards, in particular with regard to the principle of equal treatment at the workplace. The principle of equal treatment at the workplace refers to the respect of the applicable terms and conditions of employment, including health and safety, social and labour law, rules and standards, defined by Union and national legislation and collective agreements, which apply where the provision of works, services and supplies takes place;

Justification

It is important to enable contracting authorities to encourage good working conditions and to halt social dumping in order to protect public health. The purpose of this definition is to be able to refer to socially sustainable production process later in the directive.

Amendment 23

Proposal for a directive
Article 4 – paragraph 1 – point b

Text proposed by the Commission

Amendment

(b) EUR **130 000** for public supply and service contracts awarded by central government authorities and design contests organised by such authorities; where public supply contracts are awarded by contracting authorities operating in the field of defence, that threshold shall apply only to contracts concerning products covered by Annex III;

(b) EUR **300 000** for public supply and service contracts awarded by central government authorities and design contests organised by such authorities; where public supply contracts are awarded by contracting authorities operating in the field of defence, that threshold shall apply only to contracts concerning products covered by Annex III;

Justification

Adjusted values for the thresholds guarantee for a more efficient balance between administrative burdens and control in the procedures of procurement. The indicated values are more realistic than the EC's estimates.

Amendment 24

Proposal for a directive Article 4 – paragraph 1 – point c

Text proposed by the Commission

(c) EUR **200 000** for public supply and service contracts awarded by sub-central contracting authorities and design contests organised by such authorities.

Amendment

(c) EUR **500 000** for public supply and service contracts awarded by sub-central contracting authorities and design contests organised by such authorities.

Justification

Adjusted values for the thresholds guarantee for a more efficient balance between administrative burdens and control in the procedures of procurement. The indicated values are more realistic than the EC's estimates.

Amendment 25

Proposal for a directive Article 4 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

The value of the thresholds will be adjusted according to changes in the harmonized European Economic Area Index of Consumer Prices on a yearly basis.

Justification

A fixed value for thresholds does not reflect constant changes in real purchasing power. To link and adjust the thresholds according to a well-established index would be an appropriate action.

Amendment 26

Proposal for a directive

Article 6 – paragraph 1 – subparagraph 1

Text proposed by the Commission

Every two years from 30 June 2014, the Commission shall verify that the thresholds set out in points (a), (b) and (c) of Article 4 correspond to the thresholds established in the Government Procurement Agreement and shall, where necessary, revise them.

Amendment

Every two years from 30 June 2014, the Commission shall verify that the thresholds set out in points (a), (b) and (c) of Article 4 correspond to the thresholds established in the Government Procurement Agreement and shall, where necessary ***and after consulting the Member States on the application of the thresholds to certain sectors and types of contracts***, revise them.

Justification

Member States should be consulted before the revision of the thresholds in certain sectors and types of contracts.

Amendment 27

Proposal for a directive

Article 6 – paragraph 2 – introductory part

Text proposed by the Commission

2. When carrying out the revision pursuant to paragraph 1 of this Article, the Commission shall, in addition, revise:

Amendment

2. When carrying out the revision pursuant to paragraph 1 of this Article, ***and after consulting the Member States, the*** Commission shall, in addition, revise:

Justification

Member States should be consulted before the revision of the thresholds in certain sectors and types of contracts.

Amendment 28

Proposal for a directive

Article 10 – paragraph 1 – point c

Text proposed by the Commission

(c) arbitration and conciliation services;

Amendment

(c) arbitration and conciliation services,
***including dispute adjudication services,
legal and notarial services;***

Amendment 29

Proposal for a directive

Article 10 – paragraph 1 – point d

Text proposed by the Commission

(d) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive 2004/39/EC of the European Parliament and of the Council , central bank services and operations conducted with the European Financial Stability Facility;

Amendment

(d) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive 2004/39/EC of the European Parliament and of the Council , ***financial services necessary for implementation of the financial engineering instruments as defined in Article 44 of Council Regulation (EC) No 1083/2006***, central bank services and operations conducted with the European Financial Stability Facility ***and transactions to enable contracting authorities to raise money or capital;***

Amendment 30

Proposal for a directive

Article 10 – paragraph 1 – point e

Text proposed by the Commission

(e) employment contracts;

Amendment

(e) employment contracts ***or collective agreements which contribute to the improvement of conditions of work and employment;***

Justification

This amendment aims to address the concerns caused by ECJ judgement Commission v. Germany 271/08 ECJ. The proposed text is based on paragraph 59 of the Albany case 67/97/ECJ and aims to exclude collective agreements which contributes to the improvement of conditions of work and employment, inter alia agreements on supplementary pensions schemes and insurances etc.

Amendment 31

Proposal for a directive

Article 11 – paragraph 1 – subparagraph 1 – point b

Text proposed by the Commission

(b) **at least 90 % of** the activities of that legal person are carried out for the controlling contracting authority or for other legal persons controlled by that contracting authority;

Amendment

(b) the activities **in their entirety** of that legal person are carried out for the controlling contracting authority or for other legal persons controlled by that contracting authority **or with respect to the provision of services of general interest**;

Justification

The provision of Services of general interest (SGI) is not profit-oriented, but aimed to fulfil the citizen's needs. Therefore activities in the field of SGIs have to be taken into account.

Amendment 32

Proposal for a directive

Article 11 – paragraph 5 – subparagraph 2

Text proposed by the Commission

The exclusions provided for in paragraphs 1 to 4 shall cease to apply from the moment any private participation takes place, with the effect that ongoing contracts need to be opened to competition through regular procurement procedures.

Amendment

The exclusions provided for in paragraphs 1 to 4 shall cease to apply from the moment any private participation takes place, with the effect that ongoing contracts need to be opened to competition through regular procurement procedures, **unless the private participation is legally enforced at the time of initial contracting.**

Amendment 33

Proposal for a directive Article 15 – title

Text proposed by the Commission

Amendment

Principles of procurement

Purpose and principles of procurement

Justification

Some Member States indicated that a reference to the purpose of the directive should be included.

Amendment 34

Proposal for a directive Article 15 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

The purpose of this Directive is to safeguard the efficiency of the use of public funds, promote high-quality procurement, strengthen competition and the functioning of the public procurement markets and safeguard equal opportunities for companies and other providers in offering supply, service and public works contracts under competitive bidding for public procurement. Public procurement is to be used to achieve a smart, sustainable and inclusive growth and to support common societal goals and to provide goods and services of high quality. It is the right of public authorities at all levels to decide how they want to provide commissioning and organise their services.

Amendment 35

Proposal for a directive Article 15 – paragraph 2 b (new)

Text proposed by the Commission

Amendment

Economic operators shall apply obligations relating to social and employment protection and the working conditions which apply in the place where the work, service or supply is to be performed as set out by national legislation and/or collective agreements or international labour law provisions listed in Annex XI and in particular ILO Convention 94.

Justification

This amendment stresses the importance of ILO Convention 94 on Labour Clauses (Public Contracts) which specifically regulates public procurement. EU must commit itself to ILO standards.

Amendment 36

Proposal for a directive

Article 16 – paragraph 1 – subparagraph 2

Text proposed by the Commission

Amendment

However, in the case of public service and public works contracts as well as public supply contracts covering in addition services or siting and installation operations, legal persons may be required to indicate, in the tender or the request to participate, ***the names and*** relevant professional ***qualifications*** of the staff to be responsible for the performance of the contract in question.

However, in the case of public service and public works contracts as well as public supply contracts covering in addition services or siting and installation operations, legal persons may be required to indicate, in the tender or the request to participate, relevant professional ***qualification levels*** of the staff to be responsible for the performance of the contract in question.

Justification

The current text seems to indicate that, for the provision of services which in their largest part consist of professional staff (such as engineering consultancy), the project teams may need to be defined by the candidates in the request to participate. It is in practical terms impossible for a tender to commit the allocated staff at this stage, taking into consideration the whole duration of the selection and award procedure.

Amendment 37

Proposal for a directive Article 17 – paragraph 1

Text proposed by the Commission

Member States may reserve the right to participate in public procurement procedures to sheltered workshops **and economic operators whose main aim is the social and professional integration of disabled and disadvantaged workers** or provide for such contracts to be performed in the context of sheltered employment programmes, provided that more than 30% of the employees of those **workshops, economic operators** or programmes are disabled or disadvantaged workers.

Amendment

Member States may reserve the right to participate in public procurement procedures to:

a) sheltered workshops, or provide for such contracts to be performed in the context of sheltered employment programmes, provided that *the majority of the employees concerned are disabled persons who, by reason of the nature of the seriousness of their disabilities, cannot carry on occupations under normal conditions or easily find employment on the ordinary market;*

b) social enterprises or programmes whose main aim is the social and professional integration of disadvantaged workers, provided that more than 30% of the employees of those *enterprises* or programmes are disabled or disadvantaged workers.

Justification

The specific situations of disabled people and of disadvantaged workers should be taken into account, in order to ensure equal opportunities and contribute to social cohesion. However, both situations should be separated and treated differently.

Amendment 38

Proposal for a directive Article 18 – paragraph 1

Text proposed by the Commission

1. Unless otherwise provided in this Directive or in the national law concerning access to information, and without prejudice to the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 48 and 53 of this Directive, the contracting authority shall not disclose information forwarded to it by economic operators **which** they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.

Amendment

1. Unless otherwise provided in this Directive or in the national law concerning access to information, and without prejudice to the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 48 and 53 of this Directive, the contracting authority shall not disclose **any** information forwarded to it by economic operators **either** they have designated **it** as confidential **or not**, including, but not limited to, technical or trade secrets and the confidential aspects of tenders, **unless it is absolutely necessary for the purpose of this directive or of the applicable national law.**

Justification

For businesses, and especially SMEs, it is important that no information at all is disclosed, unless there is a justification to do otherwise.

Amendment 39

Proposal for a directive Article 19 – paragraph 7 – subparagraph 1

Text proposed by the Commission

Member States shall ensure that, at the latest **2** years after the date provided for in Article 92(1), all procurement procedures under this Directive are performed using electronic means of communication, in particular e-submission, in accordance with the requirements of this Article.

Amendment

Member States shall ensure that, at the latest **four** years after the date provided for in Article 92(1), all procurement procedures under this Directive are performed using electronic means of communication, in particular e-submission, in accordance with the requirements of this Article.

Amendment 40

Proposal for a directive

Article 19 – paragraph 7 – subparagraph 2

Text proposed by the Commission

This obligation shall not apply where the use of electronic means would require specialised tools or file formats that are not generally available in all the Member States within the meaning of paragraph 3. ***It is the responsibility of the contracting authorities using other means of communication for submission of tenders to demonstrate in the procurement documents that the use of electronic means, due to the particular nature of the information to be exchanged with the economic operators, would require specialised tools or file formats that are not generally available in all the Member States.***

Amendment

This obligation shall not apply where the use of electronic means would require specialised tools or file formats that are not generally available in all the Member States within the meaning of paragraph 3.

Justification

The following paragraph ensures sufficiently that contracting authorities only have limited grounds for justification.

Amendment 41

Proposal for a directive

Article 24 – paragraph 1 – subparagraph 4 – point c a (new)

Text proposed by the Commission

Amendment

(c a) with regard to knowledge based services;

Justification

The competitive procedure with negotiation is the only possible procedure that is appropriate for creative services because their result cannot be anticipated. Therefore "intellectual or knowledge-based services" (definition proposed in Article 1), should be clearly mentioned as such and the transposition of the competitive procedure with negotiation made compulsory.

Amendment 42

Proposal for a directive

Article 25 – paragraph 1 – subparagraph 2

Text proposed by the Commission

The minimum time limit for the receipt of tenders shall be **40** days from the date on which the contract notice was sent.

Amendment

The minimum time limit for the receipt of tenders shall be **52** days from the date on which the contract notice was sent.

Justification

New time limits are too short in practical terms, and in particular for SMEs, and could limit competition.

Amendment 43

Proposal for a directive

Article 26 – paragraph 1 – subparagraph 2

Text proposed by the Commission

The minimum time limit for receipt of requests to participate shall be **30** days from the date on which the contract notice or, where a prior information notice is used as a means of calling for competition, the invitation to confirm interest is sent.

Amendment

The minimum time limit for receipt of requests to participate shall be **37** days from the date on which the contract notice or, where a prior information notice is used as a means of calling for competition, the invitation to confirm interest is sent.

Justification

New time limits are too short in practical terms, and in particular for SMEs, and could limit competition.

Amendment 44

Proposal for a directive

Article 26 – paragraph 2 – subparagraph 2

Text proposed by the Commission

The minimum time limit for the receipt of tenders shall be **35** days from the date on which the invitation to tender is sent.

Amendment

The minimum time limit for the receipt of tenders shall be **40** days from the date on which the invitation to tender is sent.

Justification

New time limits are too short in practical terms, and in particular for SMEs, and could limit competition.

Amendment 45

Proposal for a directive

Article 26 – paragraph 3 – introductory part

Text proposed by the Commission

3. Where contracting authorities have published a prior information notice which is not used as a means of calling for competition, the minimum time limit for the receipt of tenders as laid down in the second subparagraph of paragraph 2 of this Article may be shortened to **15** days, provided that all of the following conditions are fulfilled:

Amendment

3. Where contracting authorities have published a prior information notice which is not used as a means of calling for competition, the minimum time limit for the receipt of tenders as laid down in the second subparagraph of paragraph 2 of this Article may, **as a general rule**, be shortened to **36** days **but under no circumstances to less than 22 days**, provided that all of the following conditions are fulfilled:

Justification

New time limits are too short in practical terms, and in particular for SMEs, and could limit competition.

Amendment 46

Proposal for a directive

Article 26 – paragraph 3 – point b

Text proposed by the Commission

(b) it was sent for publication between **45** days and 12 months before the date on which the contract notice was sent.

Amendment

(b) it was sent for publication between **52** days and 12 months before the date on which the contract notice was sent.

Justification

New time limits are too short in practical terms, and in particular for SMEs, and could limit competition.

Amendment 47

Proposal for a directive

Article 27 – paragraph 3 – subparagraph 1

Text proposed by the Commission

Contracting authorities shall negotiate with **tenderers** the tenders **submitted by them to improve** the content of the **offers in order to better correspond** to the **award criteria and** minimum requirements referred to in the second subparagraph of paragraph 1.

Amendment

Contracting authorities shall negotiate with the tenders the content of the **tender, subject** to the minimum requirements referred to in the second subparagraph of paragraph 1.

Justification

There is a need for clarification of how to conduct the negotiation and for the minimum requirements not to be changed.

Amendment 48

Proposal for a directive

Article 28 – paragraph 3 – subparagraph 3

Text proposed by the Commission

Contracting authorities shall not reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the dialogue without its agreement. **Such agreement shall not take the form of a general waiver but shall be given with reference to the intended communication of specific solutions or other specific confidential information.**

Amendment

Contracting authorities shall **behave with utmost good faith and shall** not reveal to the other participants solutions proposed or other confidential information communicated by a candidate participating in the dialogue without its agreement, **which cannot be imposed as a condition for participating in the competitive dialogue procedure.**

Justification

It is important to ensure sufficient protection of the intellectual property rights on the solutions proposed by a tenderer within the framework of its tender.

Amendment 49

Proposal for a directive

Article 28 – paragraph 8 – subparagraph 1 a (new)

Text proposed by the Commission

Amendment

The maximum duration of the competitive dialogue procedure shall be 12 months from the call for competition.

Justification

The competitive dialogue procedure was introduced in the 2004 Directive. The experience to date is that due to the risk of cherry-picking in the competitive dialogue, candidates may refrain from bringing in innovative solutions up to the last phase of the dialogue or in the final tender. Consequently, the procedure could require an abnormal long time. The experience to date is that the required engineering input is significant.

Amendment 50

Proposal for a directive

Article 30 – paragraph 2 – subparagraph 1 – point c – point i

Text proposed by the Commission

Amendment

i) the absence of competition for technical reasons;

i) the absence of competition for ***legal or*** technical reasons;

Amendment 51

Proposal for a directive

Article 30 – paragraph 2 – subparagraph 1 – point d

Text proposed by the Commission

Amendment

(d) insofar as is strictly necessary where, for reasons of extreme urgency brought about by ***force majeure***, the time limits for the open, restricted or competitive procedures with negotiation cannot be complied with; the circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority;

(d) insofar as is strictly necessary where, for reasons of extreme urgency brought about by ***events which the contracting authority could not have foreseen***, the time limits for the open, restricted or competitive procedures with negotiation cannot be complied with; the circumstances invoked to justify extreme urgency must not in any event be attributable to the contracting authority;

Amendment 52

Proposal for a directive

Article 30 – paragraph 5 – subparagraph 1

Text proposed by the Commission

The negotiated procedure without prior publication may be foreseen for new works or services consisting in the repetition of similar works or services entrusted to the economic operator to which the same contracting authorities awarded an original contract, provided that such works or services are in conformity with a basic project for which the original contract was awarded according to a procedure in accordance with Article 24(1). ***The basic project shall indicate the extent of possible additional works or services and the conditions under which they will be awarded.***

Amendment

The negotiated procedure without prior publication may be foreseen for new works or services consisting in the repetition of similar works or services entrusted to the economic operator to which the same contracting authorities awarded an original contract, provided that such works or services are in conformity with a basic project for which the original contract was awarded according to a procedure in accordance with Article 24(1).

Justification

Possible additional works or services to the basic project will be indicated via the instrument of an "Option". Therefore an additional declaration is redundant.

Amendment 53

Proposal for a directive

Article 31 – paragraph 1 – subparagraph 3

Text proposed by the Commission

The term of a framework agreement shall not exceed ***four years, save in exceptional cases duly justified, in particular by the subject of the framework agreement.***

Amendment

A framework agreement shall not exceed ***the term put in place by national provisions of the individual Member States.***

Justification

In terms of better regulation it would be an appropriate measure to set the maximum term with respect to the specific needs in the individual Member States.

Amendment 54

Proposal for a directive

Article 33 – paragraph 1 – subparagraph 1

Text proposed by the Commission

Contracting authorities may use electronic auctions, in which new prices, revised downwards, and/or new values concerning certain elements of tenders are presented.

Amendment

Only for standardised services and supplies contracting authorities may use electronic auctions, in which new prices, revised downwards, and/or new values concerning certain elements of tenders are presented. ***Service contracts and works' contracts having as their subject matter intellectual property, such as the design of works, may not be the objects of electronic auctions.***

Amendment 55

Proposal for a directive

Article 38 – paragraph 5 – introductory part

Text proposed by the Commission

5. In the absence of an agreement determining the applicable public procurement law, the national legislation governing the contract award shall be determined following the rules set out below:

Amendment

5. In the absence of an agreement determining the applicable public procurement law ***under paragraph 3***, the national legislation governing the contract award shall be determined following the rules set out below:

Justification

Like in paragraph 6, the concrete situation of a lack of agreement to which this paragraph applies should be specified as well.

Amendment 56

Proposal for a directive

Article 39 – paragraph 2 – subparagraph 2

Text proposed by the Commission

Such measures shall include the

Amendment

Such measures shall include the

communication to the other candidates and tenderers of any relevant information exchanged in the context of or resulting from the involvement of the candidate or tenderer in the preparation of the procurement procedure and the fixing of adequate time limits for the receipt of tenders. The candidate or tenderer concerned shall only be excluded from the procedure where there are no other means to ensure compliance with the duty to observe the principle of equal treatment.

communication to the other candidates and tenderers of any relevant information exchanged in the context of or resulting from the involvement of the candidate or tenderer in the preparation of the procurement procedure and the fixing of adequate time limits for the receipt of tenders. The candidate or tenderer concerned shall only be excluded from the procedure where ***the contracting authority proves that*** there are no other means to ensure compliance with the duty to observe the principle of equal treatment.

Justification

To the legitimate mean of allowing companies that are involved with regards to a decision of exclusion founded on the risk of competition distortion, to be heard; the last subparagraph of point 2 reverses the burden of proof so that it falls on the company in question. Indeed in order to challenge a decision to exclude, the company must "prove" that its participation does not distort competition. In the absence of relevant proof, the decision to exclude will then be legitimised. In fact, it is up to the contracting authority, upon its intention to announce the exclusion of a company, to supply proof that the participation of such company would distort competition. The company in question should be able to challenge such a decision, provided that the inverted proof, that its participation would not distort competition, cannot fall under its responsibility.

Amendment 57

Proposal for a directive

Article 40 – paragraph 1 – subparagraph 2

Text proposed by the Commission

These characteristics ***may*** also refer to the specific process of production or provision of the requested works, supplies or services or of any other stage of its life cycle as referred to in point (22) of Article 2.

Amendment

These characteristics also refer to the specific process of production or provision of the requested works, supplies or services or of any other stage of its life cycle ***and socially sustainable production process*** as referred to in point (22) ***and 22 a (new)*** of Article 2.

Justification

It is important to enable contracting authorities to encourage social and environmental considerations. A contracting authority can already in the technical specifications set high environmental and social demands.

Amendment 58

Proposal for a directive

Article 40 – paragraph 1 – subparagraph 3

Text proposed by the Commission

The technical specifications shall also specify whether the transfer of intellectual property rights will be required.

Amendment

The technical specifications shall also specify whether the transfer of intellectual property rights will be required ***and if so, the conditions of remuneration for the acquisition of such rights;***

Justification

Promoting the innovation of companies relies on the confidence of the operators towards the internal market, and in particular when it comes to protecting their property rights. In order to ensure a perfect coherence between the European regulation ensuring the protection of intellectual property rights, such as the Directive 2004/48/EC of 29 April 2009 on measures and procedures on the reinforcement of intellectual property rights and the "public procurement" directives, it is important to underline that the acquisition of intellectual property rights must be based on the remuneration of the right holder.

Amendment 59

Proposal for a directive

Article 40 – paragraph 1 – subparagraph 5 a (new)

Text proposed by the Commission

Amendment

Technical specifications may for instance also include requirements relating to: performance, including levels of environmental and climate performance and performance in terms of socially sustainable production process; the organisation, qualification and experience of the staff assigned to performing the contract in question; safety or dimensions, including the procedures concerning quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions; life cycle characteristics (as defined in point 22 of Article 2); socially sustainable production process characteristics (as defined in point 22a of Article 2); rules relating to

design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all other technical conditions which the contracting authority is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve.

Amendment 60

Proposal for a directive

Article 40 – paragraph 3 – point a

Text proposed by the Commission

(a) in terms of performance or functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract;

Amendment

(a) in terms of performance or functional requirements, including **social and** environmental characteristics, provided that the parameters are sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract; ***in accordance with paragraph 1 above, technical specifications can be formulated in terms of performance or functional requirements relating to life cycle or socially sustainable production process characteristics of the requested works, supplies or services, in addition to technical specifications in terms of the performance or functional requirements of the works, supplies, or services in use;***

Amendment 61

Proposal for a directive

Article 41 – paragraph 1 – subparagraph 1 – point a

Text proposed by the Commission

(a) the requirements for the label only concern characteristics which are linked to the subject-matter of the contract and are appropriate to define characteristics of the

Amendment

(a) the requirements for the label only concern characteristics which are linked to the subject-matter of the contract ***or the production of the subject-matter of the***

works, supplies or services that are the subject-matter of the contract;

contract and are appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract;

Justification

When limiting the requirements to the characteristics which are linked to the subject-matter of the contract there is no room for labels concerning for example the working environment.

Amendment 62

**Proposal for a directive
Article 46 – paragraph 1**

Text proposed by the Commission

1. Contracting authorities **may** make known their intentions of planned procurements through the publication of a prior information notice as soon as possible after the beginning of the budgetary year. Those notices shall contain the information set out in Annex VI part B section I. They shall be published either by the Commission or by the contracting authorities on their buyer profiles in accordance with point 2(b) of Annex IX. Where the notice is published by the contracting authorities on their buyer profile, they shall send a notice of the publication on their buyer profile in accordance with point 3 of Annex IX.

Amendment

1. Contracting authorities **shall** make known their intentions of planned procurements through the publication of a prior information notice as soon as possible after the beginning of the budgetary year. Those notices shall contain the information set out in Annex VI part B section I. They shall be published either by the Commission or by the contracting authorities on their buyer profiles in accordance with point 2(b) of Annex IX. Where the notice is published by the contracting authorities on their buyer profile, they shall send a notice of the publication on their buyer profile in accordance with point 3 of Annex IX.

Justification

The publication of prior information notices should be mandatory, for the sake of transparency and of full information to businesses, and in particular SMEs, giving them time to prepare tenders well in advance.

Amendment 63

Proposal for a directive

Article 46 – paragraph 2 – subparagraph 1 – introductory part

Text proposed by the Commission

For restricted and competitive procedures with negotiation, sub-central contracting authorities *may* use a prior information notice as a call for competition pursuant to Article 24(2), provided that the notice fulfils all of the following conditions:

Amendment

For restricted and competitive procedures with negotiation, sub-central contracting authorities *shall* use a prior information notice as a call for competition pursuant to Article 24(2), provided that the notice fulfils all of the following conditions:

Justification

The publication of prior information notices should be mandatory, for the sake of transparency and of full information to businesses, and in particular SMEs, giving them time to prepare tenders well in advance.

Amendment 64

Proposal for a directive

Article 54 – paragraph 1 – point b

Text proposed by the Commission

(b) the tender comes from a tenderer that is not excluded in accordance with Articles 21 and 55 and that meets the selection criteria set out by the contracting authority in accordance with Article 56 and, where appropriate, the non-discriminatory rules and criteria referred to in Article 64.

Amendment

(b) the tender comes from a tenderer that is not excluded in accordance with Articles 21 and 55 and that meets the selection criteria set out by the contracting authority in accordance with Article 56 and, where appropriate, the non-discriminatory rules and criteria referred to in Article 64 *and Article 71*.

Justification

Article 71 relates to sub-contracting which also should be taken into consideration.

Amendment 65

Proposal for a directive

Article 54 – paragraph 2

Text proposed by the Commission

2. Contracting authorities may decide not

Amendment

2. Contracting authorities may decide not

to award a contract to the tenderer submitting the best tender where they have established that the tender does not comply, ***at least in an equivalent manner***, with obligations established by Union legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XI.

to award a contract to the tenderer submitting the best tender where the tender does not comply with obligations established by Union ***or national*** legislation, ***regulations and other binding provisions*** in the field of social and labour law or environmental law or ***collective agreements which apply in the place where the work, service or supply is performed or by the*** international social and environmental law provisions listed in Annex XI ***and provided they are linked to the subject matter of the contract.***

Amendment 66

Proposal for a directive

Article 55 – paragraph 3 – subparagraph 1 – introductory part

Text proposed by the Commission

A contracting authority ***may*** exclude from participation in a public contract any economic operator if one of the following conditions is fulfilled:

Amendment

A contracting authority ***shall*** exclude from participation in a public contract any economic operator if one of the following conditions is fulfilled:

Justification

The exclusion on serious grounds must be an obligation across all Member States without exception.

Amendment 67

Proposal for a directive

Article 55 – paragraph 3 – subparagraph 1 – point a

Text proposed by the Commission

(a) where it is aware of any violation of obligations established by Union legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XI. Compliance with Union legislation or with international provisions also includes compliance in an equivalent manner.

Amendment

(a) where it is aware of any violation of obligations established by ***national or*** Union legislation in the field of social and labour law or environmental law ***or of collective agreements such as wage agreements, for example,*** or of the international social and environmental law provisions listed in Annex XI. Compliance with Union legislation or with international

provisions also includes compliance in an equivalent manner.

Amendment 68

Proposal for a directive

Article 55 – paragraph 3 – subparagraph 1 – point d

Text proposed by the Commission

Amendment

(d) where the economic operator has shown significant or persistent deficiencies in the performance of any substantive requirement under a prior contract or contracts of a similar nature ***with the same contracting authority.***

(d) where the economic operator has shown significant or persistent deficiencies in the performance of any substantive requirement under a prior contract or contracts of a similar nature.

Justification

The deletion is necessary to avoid repeated cases of abuse in the member state and among local governments that all are a part of the public sector.

Amendment 69

Proposal for a directive

Article 55 – paragraph 3 – subparagraph 2

Text proposed by the Commission

Amendment

In order to apply the ground for exclusion referred to in point (d) of the first subparagraph, contracting authorities shall provide a method for the assessment of contractual performance that is based on objective and measurable criteria and applied in a systematic, consistent and transparent way. Any performance assessment shall be communicated to the contractor in question, which shall be given the opportunity to object to the findings and to obtain judicial protection.

deleted

Amendment 70

Proposal for a directive
Article 56 – paragraph 5 – subparagraph 1a (new)

Text proposed by the Commission

Amendment

Provisions set in paragraphs 1, 2, 3, 4 and 5 apply to subcontracting procedures and subcontracting operators.

Justification

The aim is to give contracting authorities better possibilities to take subcontracting into account.

Amendment 71

Proposal for a directive
Article 59 – paragraph 2

Text proposed by the Commission

Amendment

2. At the latest 2 years after the date provided for in Article 92(1), the passport shall be provided exclusively in electronic form.

2. At the latest 2 years after the date provided for in Article 92(1), the passport shall be provided exclusively in electronic form, ***unless there are technical reasons which justifiedly do not allow contracting authorities to comply with that deadline.***

Justification

Some contracting authorities will possibly need more time to implement this provision, and more time should be given to them.

Amendment 72

Proposal for a directive
Article 64 – paragraph 1 – subparagraph 1

Text proposed by the Commission

Amendment

In restricted procedures, competitive procedures with negotiation, competitive dialogue procedures and innovation partnerships, contracting authorities may limit the number of candidates meeting the selection criteria that they will invite to

In restricted procedures, competitive procedures with negotiation, competitive dialogue procedures and innovation partnerships, contracting authorities may limit the number of candidates meeting the selection criteria that they will invite to

tender or to conduct a dialogue, provided **a sufficient** number of qualified candidates is available.

tender or to conduct a dialogue, provided **the minimum** number, **according to paragraph 2** of qualified candidates is available.

Justification

In order to avoid misinterpretations of the provisions, the criterion should be clearer and easier to determine.

Amendment 73

Proposal for a directive

Article 66 – paragraph 1 – subparagraph 1 a (new)

Text proposed by the Commission

Amendment

The criterion referred to in point (a) shall have precedence over the criterion referred to in point (b), unless there are reasons to deviate from it.

Justification

The most economically advantageous tender should be preferred, as it allows to get to the best and most advantageous tender in economic and social terms and to pursue better value for money. However, contracting authorities should be given the opportunity to apply the second one, if there are good reasons to do so.

Amendment 74

Proposal for a directive

Article 66 – paragraph 2 – introductory part

Text proposed by the Commission

Amendment

2. The most economically advantageous tender referred to in point (a) of paragraph 1 from the point of view of the contracting authority shall be identified on the basis of criteria linked to the subject-matter of the public contract in question. Those criteria shall include, in addition to the price or costs referred to in point (b) of paragraph 1, other criteria linked to the subject-matter of the public contract in question, such as:

2. The most economically, ***socially and environmentally*** advantageous tender referred to in point (a) of paragraph 1 from the point of view of the contracting authority shall be identified on the basis of criteria linked to the subject-matter of the public contract in question. Those criteria shall include, in addition to the price or costs referred to in point (b) of paragraph 1, other criteria linked to the subject-matter ***or the production*** of the ***subject-matter of***

the public contract in question, such as:

Justification

It should be made clear that a contracting authority is able to take the entire production process into account in the award criteria.

Amendment 75

**Proposal for a directive
Article 66 – paragraph 2 – point a**

Text proposed by the Commission

(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, environmental characteristics and innovative character;

Amendment

(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, environmental **and social** characteristics, **contributing to sustainable growth and employment, and** innovative character; **life-cycle process criteria and socially sustainable production process criteria, which may also involve the employment of disadvantaged individuals or members of vulnerable groups;**

Amendment 76

**Proposal for a directive
Article 66 – paragraph 2 – point b**

Text proposed by the Commission

(b) for service contracts and contracts involving the design of works, the organisation, qualification and experience of the staff assigned to performing the contract in question may be taken into consideration, with the consequence that, following the award of the contract, such staff may only be replaced with the consent of the contracting authority, which must verify that replacements ensure equivalent organisation and quality;

Amendment

(b) for service contracts and contracts involving the design of works, the organisation, qualification and experience of the staff assigned to performing the contract in question **as well as the capacities, abilities and professional conduct of any subcontractor** may be taken into consideration, with the consequence that, following the award of the contract, such staff may only be replaced **and further subcontracting will only be permitted** with the consent of the contracting authority, which must verify

that replacements *or further subcontracting* ensure equivalent organisation and quality;

Justification

This amendment aims at giving contracting authorities larger scope to take subcontracting into account.

Amendment 77

**Proposal for a directive
Article 69 – paragraph 1 – point a**

Text proposed by the Commission

(a) the price or cost charged is more than **50** % lower than the average price or costs of the remaining tenders

Amendment

(a) the price or cost charged is more than **25** % lower than the average price or costs of the remaining tenders

Amendment 78

**Proposal for a directive
Article 69 – paragraph 1 – point b**

Text proposed by the Commission

(b) the price or cost charged is more than **20** % lower than the price or costs of the second lowest tender;

Amendment

(b) the price or cost charged is more than **10** % lower than the price or costs of the second lowest tender;

Amendment 79

**Proposal for a directive
Article 69 – paragraph 3 – point b**

Text proposed by the Commission

(b) the technical solutions chosen *or* any exceptionally favourable conditions available to the tenderer for the execution of the work or for the supply of the goods or services;

Amendment

(b) the technical solutions chosen *and/or* any exceptionally favourable conditions available to the tenderer for the execution of the work or for the supply of the goods or services;

Justification

Reinstatement of the wording of the current directive.

Amendment 80

Proposal for a directive

Article 69 – paragraph 4 – subparagraph 2

Text proposed by the Commission

Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with obligations established by Union legislation in the field of social and labour law or environmental law or by the international social and environmental law provisions listed in Annex XI.

Amendment

Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with obligations established by Union legislation ***or national laws, regulations and other binding provisions*** in the field of social and labour law or environmental law or by the international social and environmental law provisions listed in Annex XI.

Justification

This amendment reintroduces Article 55, paragraph 1, point d from the present public procurement Directive (2004/18/EC). Contracting authorities should have the right to refuse giving a contract to a tender that does not comply with laws and regulations. The reference to regulations in this article should not be limited to Union legislation in specific regulatory fields. The article should be extended to include national legislation and systems for regulating the labour market.

Amendment 81

Proposal for a directive

Article 70 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

Obligations relating to taxes, environmental protection, employment protection provisions and working conditions:

(a) A contracting authority may state in the contract documents, or be obliged by a Member State so to state, the body or bodies from which a candidate or tenderer

may obtain the appropriate information on the obligations relating to taxes, to environmental protection, to the employment protection provisions and to the working conditions which are normally applied in the place where the works are to be carried out or services are to be provided and which shall be applicable to the works carried out on site or to the services provided during the performance of the contract.

(b) A contracting authority which supplies the information referred to in paragraph 1 shall request the tenderers or candidates in the contract award procedure to indicate that they have taken account, when drawing up their tender, of the obligations relating to employment protection provisions and the working conditions which are normally applied in the place where the works are to be carried out or the service is to be provided.

(c) Member States that have whistleblower protection for public employees (within the public sector) may request that an equivalent protection is given to employees employed by the economic operator, if the economic operator performs public funded services.

Justification

Reintroduces, with some minor changes, Article 27 from the present directive on public procurement (EC 2004/18). This important article should not be deleted. The protection for whistleblowers in Member states that have or want to have such rights and regulations need to be respected.

Amendment 82

Proposal for a directive Article 71 – paragraph 2

Text proposed by the Commission

2. Member States may provide that at the request of the subcontractor and where the

Amendment

2. Member States may provide that at the request of the subcontractor and where the

nature of the contract so allows, the contracting authority shall transfer due payments directly to the subcontractor for services, supplies or works provided to the main contractor. In such case, Member States shall put in place appropriate mechanisms permitting the main contractor to object to undue payments. The arrangements concerning that mode of payment shall be set out in the procurement documents.

nature of the contract so allows, the contracting authority shall transfer due payments directly to the subcontractor for services, supplies or works provided to the main contractor. In such case, Member States shall put in place appropriate mechanisms permitting the main contractor to object to undue payments ***ex-post and provide for regulation that allow the contracting authority to take over the main contractor's signatory status without re-tendering if necessary, in order to endure legal certainty.*** The arrangements concerning that mode of payment shall be set out in the procurement documents.

Justification

If necessary, (ex: in case of an insolvent main contractor) the contracting authority has to be able to bring the mandate to a termination without losing legal certainty. Therefore national provisions should make it possible to take over the signatory status and renegotiate disputed terms of the contracts. In addition the right to object undue payments for the main contractor should be permitted only after fulfilment of the contract, otherwise sub-contractors would eventually block competition.

Amendment 83

Proposal for a directive

Article 72 – paragraph 3 – subparagraph 2

Text proposed by the Commission

However, the first subparagraph shall not apply in the event of universal or partial succession into the position of the initial contractor, following corporate restructuring operations or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Directive.

Amendment

However, the first subparagraph shall not apply in the event of universal or partial succession into the position of the initial contractor, following corporate restructuring operations, ***transfer of capital or assets, insolvency or on the basis of a contractual clause,*** of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Directive.

Justification

It is perfectly legitimate for the contracting authority to, under the Court's control, oppose a substitution of contractual partner because the new contracting party would not submit the same financial and competence guarantees as that which it is replacing, for the proper performance of the contract - unchanged terms - in progress.

Amendment 84

Proposal for a directive Article 75 – paragraph 1

Text proposed by the Commission

Amendment

1. Contracting authorities intending to award a public contract for the services referred to in Article 74 shall make known their intention by means of a contract notice.

deleted

Amendment 85

Proposal for a directive Article 75 – paragraph 3 – subparagraph 1

Text proposed by the Commission

Amendment

The notices referred to in ***paragraphs 1 and 2*** shall contain the information referred to in Annexes VI Part ***H and I, in accordance with the standard forms.***

The notices referred to in ***paragraph 2*** shall contain the information referred to in Annexes VI Part I.

Amendment 86

Proposal for a directive Article 75 – paragraph 3 – subparagraph 2

Text proposed by the Commission

Amendment

The Commission shall establish the standard forms. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 91.

deleted

Amendment 87

Proposal for a directive Article 75 – paragraph 4

Text proposed by the Commission

4. The notices referred to in **paragraphs 1 and 2** shall be published in accordance with Article 49.

Amendment

4. The notices referred to in **paragraph 2** shall be published in accordance with Article 49.

Justification

A specific treatment of services is only justified insofar it applies to all services of the same character, legal services – underlying the same principles of confidentiality should not be discriminated.

Amendment 88

Proposal for a directive Article 76 – paragraph 1

Text proposed by the Commission

1. Member States shall put in place appropriate procedures for the award of contracts subject to this Chapter, ensuring full compliance with the principles of transparency and equal treatment of economic operators and allowing contracting authorities to take into account the specificities of the services in question.

Amendment

deleted

Amendment 89

Proposal for a directive Article 76 – paragraph 2

Text proposed by the Commission

2. Member States shall ensure that contracting authorities **may** take into account the need to ensure quality, continuity, accessibility, availability and comprehensiveness of the services, the specific needs of different categories of

Amendment

2. Member States shall ensure that contracting authorities take into account the need to ensure **universal access**, quality, continuity, accessibility, **affordability**, availability, **safety** and comprehensiveness of the services, the

users, the involvement and empowerment of users and innovation. ***Member States may also provide that the choice of the service provider shall not be made solely on the basis of the price for the provision of the service.***

specific needs of different categories of users, the involvement and empowerment of users and innovation.

Justification

These characteristics of SGIs are essential and should be ensured as much as possible in this framework.

Amendment 90

**Proposal for a directive
Article 76 – paragraph 2 a (new)**

Text proposed by the Commission

Amendment

2a. Member States are free to prescribe that social and other specific services listed in Annex XVI are to be undertaken in a specific type of economic operator.

Justification

To prevent that social services are undertaken in a type of company that only promotes profit and does not promote care for individuals, Member States should be allowed to prescribe that social services are to be undertaken in a specific form of company. The amendment relates to European regions' possibilities to formulate their individual strategies for creating growth and development, to build inclusive societies and to increase their attractiveness as places for people to live and work.

Amendment 91

**Proposal for a directive
Article 76 – paragraph 2 b (new)**

Text proposed by the Commission

Amendment

2b. In contracts for social and other specific services listed in Annex XVI, contracting authorities may require economic operators to re-invest in the specific operation any profit gained in the same operation or only allow non-profit entities as tenderers.

Justification

To emphasize that contracting authorities have the right to impose demands that ensure that tax-payers money for social services is used for this purpose, also when they use public procurement and not only in in-house operations. The amendment relates to European regions' possibilities to formulate their individual strategies for creating growth and development, to build inclusive societies and to increase their attractiveness as places for people to live and work.

Amendment 92

Proposal for a directive

Article 84 – paragraph 3 – subparagraph 1 – point b

Text proposed by the Commission

(b) providing legal advice to contracting authorities on the interpretation **of public procurement rules and principles and** on the application of public procurement rules **in specific cases**;

Amendment

(b) providing **general and specific** legal advice **and practical guidance** to contracting authorities on the interpretation and on the application of public procurement rules **and principles**;

Justification

As a specialised and central body, the independent body should be responsible to provide legal advice and practical guidance in general terms and in specific cases to contracting authorities, both on the interpretation and on the application of rules and principles of public procurement.

Amendment 93

Proposal for a directive

Article 84 – paragraph 3 – subparagraph 1 – point d

Text proposed by the Commission

(d) establishing and applying comprehensive, actionable ‘red flag’ indicator systems to prevent, detect and adequately report instances of procurement fraud, corruption, conflict of interest **and other serious** irregularities;

Amendment

(d) establishing and applying comprehensive, actionable ‘red flag’ indicator systems to prevent, detect and adequately report instances of procurement fraud, corruption, conflict of interest **or any** irregularities;

Justification

To further reinforce the regularity of the procedures organised by contracting authorities and

with a pedagogical objective, it is important to include here all types of irregularities, irrespective of how serious they are.

Amendment 94

Proposal for a directive

Article 85 – paragraph 1 – introductory part

Text proposed by the Commission

For every contract or framework agreement, and every time a dynamic purchasing system is established, contracting authorities shall draw up a written report which shall include at least the following:

Amendment

For every **procurement above threshold, be it a** contract or framework agreement, and every time a dynamic purchasing system is established, contracting authorities shall draw up a written report which shall include at least the following:

Justification

The need to draw up written reports in line with the provisions made in Art. 85 should only be necessary for "above threshold procurement". Doing so for "below threshold procurement" would lead to a lot of bureaucratic procedures. Such burdens have to be in a reasonable proportion to the monetary values at stake.

Amendment 95

Proposal for a directive

Article 85 – paragraph 3

Text proposed by the Commission

The report, or its main elements, shall be communicated to the Commission or to the national oversight body **where they so request**.

Amendment

The report, or its main elements, shall be communicated to the Commission or to the national oversight body.

Justification

It doesn't make much sense to impose a reporting obligation of this nature if its is not for the purposes of mandatory submitting of its findings.

Amendment 96

Proposal for a directive Article 87 – paragraph 2

Text proposed by the Commission

2. With a view to improving access to public procurement for economic operators, in particular SMEs, and in order to facilitate correct understanding of the provisions of this Directive, Member States shall ensure that appropriate assistance can be obtained, including by electronic means or using existing networks dedicated to business assistance.

Amendment

2. With a view to improving access to public procurement for economic operators, in particular SMEs, and in order to facilitate correct understanding of the provisions of this Directive, ***the Commission and the*** Member States shall ensure that appropriate ***and timely information and*** assistance can be obtained, including by electronic means or using existing networks dedicated to business assistance.

Justification

The Commission should also participate in this effort, given the highly technical nature of the texts. Moreover, it is crucial that SMEs may obtain the information they need in due time.

Amendment 97

Proposal for a directive Article 87 – paragraph 4 a (new)

Text proposed by the Commission

Amendment

4 a. The notices referred to in Articles 46, 47 and 48 shall include the information on the body or bodies as referred to in paragraph 4 of this Article.

Justification

There should be widespread and easy to find information on the bodies providing assistance to contracting authorities and businesses.

Amendment 98

Proposal for a directive Article 88 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

1 a. Member States shall cooperate, with the assistance of the Commission, on the guidance to contracting authorities in assessing the existence or not of a cross-border interest in specific cases, in particular in order to increase spending efficiency in the implementation of programmes funded by cohesion policy instruments or other EU instruments.

Justification

This is in line with REGI opinion on the modernisation of public procurement, and in particular paragraphs 7 and 15 of that opinion.

Amendment 99

Proposal for a directive Annex XVI a (new)

Text proposed by the Commission

Amendment

The following legal services:

79112000-2 Legal representation services

79100000-5 Legal services

79110000-8 Legal advisory and representation services

79111000-5 Legal advisory services

79112100-3 Stakeholders representation services

79120000-1 Patent and copyright consultancy services

79121000-8 Copyright consultancy services

79121100-90 Software copyright consultancy services

79130000-4 Legal documentation and certification services

79131000-1 Documentation services

79132000-8 Certification services

79140000-7 Legal advisory and information services

Justification

A specific treatment of services is only justified insofar it applies to all services of the same character, legal services – underlying the same principles of confidentiality should not be discriminated.

PROCEDURE

Title	Public procurement
References	COM(2011)0896 – C7-0006/2012 – 2011/0438(COD)
Committee responsible Date announced in plenary	IMCO 17.1.2012
Opinion by Date announced in plenary	REGI 17.1.2012
Rapporteur Date appointed	Ramona Nicole Mănescu 26.1.2012
Date adopted	10.10.2012
Result of final vote	+: 32 –: 9 0: 3
Members present for the final vote	Luís Paulo Alves, Charalampos Angourakis, Catherine Bearder, Victor Boştinaru, John Bufton, Alain Cadec, Salvatore Caronna, Nikos Chrysogelos, Francesco De Angelis, Tamás Deutsch, Rosa Estaràs Ferragut, Danuta Maria Hübner, Filiz Hakaeva Hyusmenova, Vincenzo Iovine, María Irigoyen Pérez, Seán Kelly, Mojca Kleva, Constanze Angela Krehl, Petru Constantin Luhan, Elżbieta Katarzyna Łukacijewska, Ramona Nicole Mănescu, Vladimír Maňka, Iosif Matula, Erminia Mazzoni, Ana Miranda, Jens Nilsson, Lambert van Nistelrooij, Jan Olbrycht, Younous Omarjee, Markus Pieper, Tomasz Piotr Poręba, Ewald Stadler, Georgios Stavrakakis, Csanád Szegedi, Nuno Teixeira, Oldřich Vlasák, Kerstin Westphal, Hermann Winkler, Joachim Zeller
Substitute(s) present for the final vote	Karima Delli, Jens Geier, Heide Rühle, Czesław Adam Siekierski, Giommara Uggias

16.10.2012

OPINION OF THE COMMITTEE ON LEGAL AFFAIRS

for the Committee on the Internal Market and Consumer Protection

on the proposal for a directive of the European Parliament and of the Council on public procurement
(COM(2011)0896 – C7-0006/2012 – 2011/0438(COD))

Rapporteur: Giuseppe Gargani

SHORT JUSTIFICATION

Public contracts must be used to contribute to the realisation of the single market and to relaunch economic growth in Member States. In Europe, procurers spend around 18 % of the EU's GDP for goods, works and services.

The rapporteur believes that the updating of the Directives on public procurement must respond to the following principles:

- simplifying procedures to the benefit of all economic operators;
- encouraging the participation of SMEs;
- guaranteeing the best possible results in terms of the quality/price ratio;
- using public funds efficiently and transparently.

According to the rapporteur, the Commission's proposal seems to go in the right direction, in relation above all to the following elements:

- The modernisation of procedures: the contracting authorities can decide in what order to examine the criteria (that is, whether it is more practical to assess the adjudication criteria before the selection criteria) and to take account, since it is an adjudication criterion, of the organisation and quality of the staff engaged to carry out the contract.
- The contracting authorities will have the right to exclude economic operators which have shown significant or persistent failings in the execution of previous contracts.
- The contracting authorities can accept candidates or applicants despite the existence of a reason to exclude them, if measures are adopted to remedy the consequences of illegal conduct and to effectively prevent further consequences arising from incorrect conduct.

The rapporteur is considering presenting some juridical amendments to the legislative proposal presented by the Commission, in order to enhance and update the existing law which regulates public procurement in Europe.

This opinion aims to highlight the problematic situations of the proposals contained in the text from a juridical viewpoint, with the aim of contributing to the certainty of law.

The rapporteur recognises the following problematic situations:

- Procedures negotiated without prior publication must represent an exception in the broad range of procedures made available by the Directive and therefore it is considered opportune to provide for maximum amounts above which the exception cannot be permitted. (EUR 500 000 for works and EUR 100 000 for services).
- Use of variants: in order to avoid improper use of this instrument, it is considered necessary to define a maximum price allowed for the variant itself, which must be included in the minimum requirements mentioned in the tender documents.
- The possibility of dividing the contract into lots in line with the objectives of simplification and efficiency established by the Directives. For this to provide concrete support to the work of public authorities and at the same time encourage the participation of SMEs in the contract tenders, it is necessary to provide for an *ex ante* evaluation on the need to use this possibility or not.
- It is also held opportune to limit reliance on the capacities of other entities to acquiring only the material prerequisites (economic and financial). For the sake of greater legal and economic certainty, it is necessary to strengthen the joint liability between economic operators requesting the prerequisites of other economic entities and the economic entities themselves. In this way it is possible to offset the uncertainty about the realisation of the work, which is inherent in this concept. Since these are public works, vigilance over efficient use of public monies must be maximised.
- The Court of Justice of the European Union, in its sentence No 76 of 7 October 2004, established that the setting, in abstract and general terms, of a single attribution criterion is not only in contrast with EU legislation, but also deprives the contracting authorities of the possibility of taking into consideration the characteristics of each contract and of choosing for each of these the most suitable criterion to guarantee free competition and the selection of the best offer. It is therefore desirable that the contracting authorities follow an approach based on cost/effectiveness.
- Should the execution of the contract provide for the use of subcontracts, it is opportune to introduce the obligation of a direct payment by the contracting authority to the subcontractor. The risk of non-payment for services provided would thus be annulled, ensuring in particular for SMEs greater economic certainty.
- Changes in contracts which are still valid, if substantial, require a new contract procedure. The threshold of 5 % of the price of the initial contract may not be adequate for the purposes of evaluating substantial changes in the contract. The Commission indicates in its proposal that the change is substantial if it exceeds 5 % of the price of the initial contract and sets aside this provision if any price increase is not higher than 50 % of the initial contract value. It is considered opportune to raise the threshold to 10 % of the initial contract price.

AMENDMENTS

The Committee on Legal Affairs calls on the Committee on the Internal Market and Consumer Protection, as the committee responsible, to incorporate the following amendments into its report:

Amendment 1

Proposal for a directive

Recital 5

Text proposed by the Commission

(5) Under **Article 11** of the Treaty on the Functioning of the European Union, environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, **in particular** with a view to promoting sustainable development. This Directive clarifies how the contracting authorities may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring that they can obtain the best value for money for their contracts.

Amendment

(5) Under **Articles 9, 10 and 11** of the Treaty on the Functioning of the European Union, environmental protection requirements, **with the promotion of a high level of employment, the guarantee of suitable social protection, the fight against social exclusion and a high level of education, training and the protection of human health protection** must be integrated into the definition and implementation of the Union policies and activities, with a view to promoting **socially and environmentally** sustainable development. This Directive clarifies how the contracting authorities may **use their discretionary power in the definition and awarding of public contracts, in order to** contribute to the protection of the environment, **social welfare** and the promotion of sustainable development, whilst ensuring that they can obtain the best value for money for their contracts.

Amendment 2

Proposal for a directive

Recital 10

Text proposed by the Commission

(10) The results of the evaluation on the impact and effectiveness of EU public

Amendment

(10) The results of the evaluation on the impact and effectiveness of EU public

procurement legislation demonstrated that the exclusion of certain services from the full application of the Directive should be reviewed. As a result, the full application of this Directive is extended to a number of services (such as hotel *and legal* services, which *both* showed a particularly high percentage of cross-border trade).

procurement legislation demonstrated that the exclusion of certain services from the full application of the Directive should be reviewed. As a result, the full application of this Directive is extended to a number of services (such as hotel services, which showed a particularly high percentage of cross-border trade).

Justification

Legal services, which are of a purely trust-based nature and linked to the Member States' traditions, must be excluded from the Directive Proposal since they require an evaluation of subjective elements referring to the particular needs of the commissioning body.

Amendment 3

Proposal for a directive

Recital 14

Text proposed by the Commission

(14) There is considerable legal uncertainty as to how far cooperation between public authorities should be covered by public procurement rules. The relevant case-law of the Court of Justice of the European Union is interpreted divergently between Member States and even between contracting authorities. It is therefore necessary to clarify in what cases contracts concluded between contracting authorities are not subject to the application of public procurement rules. Such clarification should be guided by the principles set out in the relevant case-law of the Court of Justice. The sole fact that both parties to an agreement are themselves contracting authorities does not as such rule out the application of procurement rules. However, the application of public procurement rules should not interfere with the freedom of public authorities to decide how to organise the way they carry out their public service tasks. Contracts awarded to controlled entities or cooperation for the joint execution of the public service tasks

Amendment

(14) There is considerable legal uncertainty as to how far cooperation between public authorities should be covered by public procurement rules. The relevant case-law of the Court of Justice of the European Union is interpreted divergently between Member States and even between contracting authorities. It is therefore necessary to clarify in what cases contracts concluded between contracting authorities are not subject to the application of public procurement rules. Such clarification should be guided by the principles set out in the relevant case-law of the Court of Justice. The sole fact that both parties to an agreement are themselves contracting authorities does not as such rule out the application of procurement rules. However, the application of public procurement rules should not interfere with the freedom of public authorities to decide how to organise the way they carry out their public service tasks. Contracts awarded to controlled entities or cooperation for the joint execution of the public service tasks

of the participating contracting authorities should therefore be exempted from the application of the rules if the conditions set out in this directive are fulfilled. This directive should aim to ensure that any exempted public-public cooperation does not cause a distortion of competition in relation to private economic operators. Neither should the participation of a contracting authority as a tenderer in a procedure for the award of a public contract cause any distortion of competition.

of the participating contracting authorities should therefore be exempted from the application of the rules if the conditions set out in this directive are fulfilled.

Cooperation between public service broadcasters and between public service broadcasters and their subsidiaries should be exempted from these provisions, insofar as they are subject to the specific European competition rules, in order to prevent any distortion of competition. This directive should aim to ensure that any exempted public-public cooperation does not cause a distortion of competition in relation to private economic operators. Neither should the participation of a contracting authority as a tenderer in a procedure for the award of a public contract cause any distortion of competition.

Justification

Competition law must have priority here: according to the regulations for the awarding of contracts for in-house business, the 'controlled legal person' must operate on the basis of the reimbursement of costs, which is not compatible with the principles of European competition law. This requires that subsidiaries of establishments governed by public law should conform to the market. Furthermore, in the case of radio, broadcasters and subsidiaries are required by law to have different objectives in implementing any compromise on aid.

Amendment 4

Proposal for a directive Recital 18

Text proposed by the Commission

(18) In view of the detrimental effects on competition, negotiated procedures without prior publication of a contract notice should only be used in very exceptional circumstances. This exception should be limited to cases where publication is either not possible, for reasons of *force majeure* in line with the standing case-law of the Court of Justice of the European Union, or where it is clear from the outset that

Amendment

(18) In view of the detrimental effects on competition, negotiated procedures without prior publication of a contract notice should only be used in very exceptional circumstances ***and with adequate justification, to be sent to the governance authority as defined by Article 84.*** This exception ***is*** limited to cases where publication is either not possible, for reasons of *force majeure* in line with the

publication would not trigger more competition, not least because there is objectively only one economic operator that can perform the contract. Only situations of objective exclusivity can justify the use of the negotiated procedure without publication, where the situation of exclusivity has not been created by the contracting authority itself with a view to the future procurement procedure, and where there are no adequate substitutes, the availability of which should be assessed thoroughly.

standing case-law of the Court of Justice of the European Union, or where it is clear from the outset that publication would not trigger more competition, not least because there is objectively only one economic operator that can perform the contract. Only situations of objective exclusivity can justify the use of the negotiated procedure without publication, where the situation of exclusivity has not been created by the contracting authority itself with a view to the future procurement procedure, and where there are no adequate substitutes, the availability of which should be assessed thoroughly.

Justification

In order to avoid dangerous competition distortions, the use of the negotiated procedure without prior publication must represent an exception. In this sense it is considered opportune to set maximum amounts above which the exception cannot be permitted.

Amendment 5

Proposal for a directive

Recital 30

Text proposed by the Commission

(30) In order to foster the involvement of small and medium-sized enterprises (SMEs) in the public procurement market, contracting authorities should be encouraged to divide contracts into lots, and be obliged to state the reasons for not doing so. Where contracts are divided into lots, contracting authorities may, for instance in order to preserve competition or to ensure security of supply, limit the number of lots for which an economic operator may tender; they may also limit the number of lots that may be awarded to any one tenderer.

Amendment

(30) In order to foster the involvement of small and medium-sized enterprises (SMEs) in the public procurement market, contracting authorities should be encouraged to divide contracts into lots, and be obliged to state the reasons **for doing so or** for not doing so. Where contracts are divided into lots, contracting authorities may, for instance in order to preserve competition or to ensure security of supply, limit the number of lots for which an economic operator may tender; they may also limit the number of lots that may be awarded to any one tenderer.

Justification

The division of the contracts into lots must be subject to prior and systematic evaluation by

the contracting authority. Both the division into lots and failure to divide must in any case be justified. In the current formulation only the decision not to divide into lots must be justified.

Amendment 6

Proposal for a directive

Recital 42

Text proposed by the Commission

(42) Tenders that appear abnormally low in relation to the works, supplies or services might be based on technically, economically or legally unsound assumptions or practices. In order to prevent possible disadvantages during contract performance, contracting authorities should be obliged to ask for an explanation of the price charged where a tender significantly undercuts the prices demanded by other tenderers. Where the tenderer cannot provide a sufficient explanation, the contracting authority should ***be entitled to*** reject the tender. Rejection should be mandatory in cases where the contracting authority has established that the abnormally low price charged results from non-compliance with ***mandatory*** Union legislation in the fields of social, labour or environmental law ***or international labour law provisions***.

Amendment

(42) Tenders that appear abnormally low in relation to the works, supplies or services might be based on technically, economically or legally unsound assumptions or practices. In order to prevent possible disadvantages during contract performance, contracting authorities should be obliged to ask for an explanation of the price charged where a tender significantly undercuts the prices demanded by other tenders. Where the tender cannot provide a sufficient explanation, the contracting authority should reject the tender. Rejection should be mandatory ***also*** in cases where the contracting authority has established that abnormally low price charged results from non-compliance with ***national, international and European*** Union legislation, ***in particular*** in the fields of social, labour or environmental law.

Amendment 7

Proposal for a directive

Recital 43 a (new)

Text proposed by the Commission

Amendment

(43a) In order to ensure the correct functioning of public procurement, the subcontracting instrument must be correctly regulated, in order to ensure that the public procurement is performed in accordance with the bid. Subcontracting should be limited to a maximum of three

consecutive vertical subcontracts, without prejudice to more restrictive national legislation in this field.

Amendment 8

Proposal for a directive Recital 48 a (new)

Text proposed by the Commission

Amendment

(48 a) Contracting authorities should respect the delay of payment as established in Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions¹.

¹ OJ L 48, 23.2.2011, p. 1.

Amendment 9

Proposal for a directive Article 1 – paragraph 2 – subparagraph 2 a (new)

Text proposed by the Commission

Amendment

This Directive is without prejudice to the right of public authorities at all levels to decide whether, how and to what extent they want to perform public functions themselves. Public authorities may perform public interest tasks using their own resources, without being obliged to call on outside economic operators. They may do so in cooperation with other public authorities.

Amendment 10

Proposal for a directive Article 2 – point 6 – introductory wording

Text proposed by the Commission

Amendment

(6) ‘**bodies** governed by public law’ means **bodies** that **have** all of the following characteristics:

(6) ‘**a body** governed by public law’ means **a body** that **has** all of the following characteristics:

Amendment 11

Proposal for a directive

Article 2 – point 6 – point a

Text proposed by the Commission

Amendment

(a) **they are** established for **or have** the specific purpose of meeting needs in the general interest, not having **an** industrial **or** commercial character; **for that purpose, a body which operates in normal market conditions, aims to make a profit, and bears the losses resulting from the exercise of its activity does not have the purpose of meeting needs in the general interest, not having an industrial or commercial character;**

(a) **it is** established for the specific purpose of meeting needs in the general interest, not having **a merely** industrial **and** commercial character;

Amendment 12

Proposal for a directive

Article 2 – point 6 – point b

Text proposed by the Commission

Amendment

(b) **they have** legal personality;

(b) **it has** legal personality;

Amendment 13

Proposal for a directive

Article 2 – point 10

Text proposed by the Commission

Amendment

(10) ‘public supply contracts’ means public contracts having as their object the purchase, lease, rental or hire-purchase, with or without an option to buy, of

(10) ‘public supply contracts’ means public contracts having as their object the purchase, lease, rental or hire-purchase, with or without an option to buy, of

products. A public supply contract may include, as an incidental matter, siting and installation operations;

products. A public supply contract may include ***the provision of supplies broken down into various instalments. A supply contract may include***, as an incidental matter, siting and installation operations;

Amendment 14

Proposal for a directive Article 8 a (new)

Text proposed by the Commission

Amendment

Article 8a

Specific exclusions in the field of other services than postal services

This Directive shall not apply to public contracts for the principal purpose of permitting the contracting authorities to provide other services than postal services.

For the purposes of this Directive, "other services than postal services" means services provided in the following areas:

(i) mail service management services (services both preceding and subsequent to dispatch, including "mailroom management services");

(ii) added-value services linked to and provided entirely by electronic means (including the secure transmission of coded documents by electronic means, address management services and transmission of registered electronic mail);

(iii) services concerning postal items not included in point (a) of Article 10(2) of the Utilities Directive, such as direct mail bearing no address or delivery of unaddressed advertising material;

(iv) financial services, as defined in the CPV under the reference number from 66100000-1 to 66720000-3 and in Article 19(c) and including in particular postal money orders and postal giro

transfers;

(v) philatelic services;

(vi) logistics services (services combining physical delivery and/or warehousing with other non-postal functions).

Amendment 15

Proposal for a directive

Article 10 – paragraph 1 – point b

Text proposed by the Commission

(b) the acquisition, development, production or co-production of programme material intended for audiovisual media services, that are awarded by broadcasters, **or** contracts for broadcasting ***time that are awarded to audiovisual media service providers;***

Amendment

(b) the acquisition, development, production or co-production of programme material intended for ***audio and*** audiovisual media services, that are awarded by broadcasters, ***as well as associated preparatory services, and*** contracts for ***the*** broadcasting ***or distribution and transmission of*** media services;

Justification

In order to ensure technological neutrality, the exemption should also include radio and Internet services.

Amendment 16

Proposal for a directive

Article 10 – paragraph 1 - point c

Text proposed by the Commission

(c) arbitration and conciliation services;

Amendment

(c) ***legal,*** arbitration and conciliation services;

Justification

In consideration of the particular discretionary and trust-based nature which regulates legal services it is considered opportune to exclude them from the applicable scope of this Directive.

Amendment 17

Proposal for a directive
Article 10 – paragraph 1 – point d

Text proposed by the Commission

(d) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive 2004/39/EC of the European Parliament and of the Council, central bank services and operations conducted with the European Financial Stability Facility;

Amendment

(d) financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments within the meaning of Directive 2004/39/EC of the European Parliament and of the Council, ***in particular transactions to enable contracting authorities to raise money or capital, as well as*** central bank services and operations conducted with the European Financial Stability Facility;

Justification

Borrowing by local government should not come under the scope of the Directive. There is no need for regulatory action by the EU in relation to awarding procedures for local government borrowing, as national local government budgetary laws contain clear guidelines for the admissibility of borrowing.

Amendment 18

Proposal for a directive
Article 10 – paragraph 2

Text proposed by the Commission

The audiovisual media services referred to in point (b) of the first paragraph shall include any transmission and distribution using any form of electronic network.

Amendment

The ***audio and*** audiovisual media services referred to in point (b) of the first paragraph shall include any transmission and distribution using any form of electronic network.

Justification

In order to ensure technological neutrality, both audio and audiovisual media services should be mentioned in this paragraph

Amendment 19

Proposal for a directive
Article 15 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

The details of public contracts shall be made public.

Amendment 20

Proposal for a directive
Article 18 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. Paragraphs 1 and 2 shall not prevent the public disclosure of contracts once concluded including any subsequent changes.

Amendment 21

Proposal for a directive
Article 30 – paragraph 1

Text proposed by the Commission

Amendment

1. Member States may provide that contracting authorities may award public contracts by a negotiated procedure without prior publication only in the cases laid down in paragraphs (2) to (5).

1. Member States may provide that contracting authorities may award public contracts by a negotiated procedure without prior publication only in the cases laid down in paragraphs 2 to 5. ***In that case contracting authorities have to provide to the oversight body referred to in Article 84 a detailed report with adequate justification.***

Amendment 22

Proposal for a directive
Article 30 – paragraph 2 – subparagraph 1 – point a

Text proposed by the Commission

Amendment

(a) where no tenders or no suitable tenders

(a) where no tenders or no suitable tenders

or no requests to participate have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not **substantially** altered **and that a report is sent to the Commission or the national oversight body designated according to Article 84 where they so request.**

or no requests to participate have been submitted in response to an open procedure or a restricted procedure, provided that the initial conditions of the contract are not altered.

Amendment 23

Proposal for a directive Article 43 – paragraph 1

Text proposed by the Commission

1. Contracting authorities may authorise tenderers to submit variants. They shall indicate in the contract notice or, where a prior information notice is used as a means of calling for competition, in the invitation to confirm interest whether or not they authorise variants. Variants shall not be authorised without such indication.

Amendment

1. Contracting authorities may authorise tenderers to submit variants **which do not exceed 1/6 of the total agreed price.** They shall indicate in the contract notice or, where a prior information notice is used as a means of calling for competition, in the invitation to confirm interest whether or not they authorise variants. Variants shall not be authorised without such indication.

Justification

Unchecked use of variants could distort competition and create juridical certainty problems. It is considered useful to introduce a specific provision in order to provide for a maximum allowed price for variants as a minimum predefined prerequisite for contracting authorities. National legislation offers reference parameters in this sense, confirming the effectiveness of this provision.

Amendment 24

Proposal for a directive Article 44 – paragraph 1 – subparagraph 1

Text proposed by the Commission

1. Public contracts may be subdivided into homogenous or heterogeneous lots. For contracts with a value equal to or greater than the thresholds provided for in Article 4 but not less than EUR 500 000,

Amendment

1. Public contracts may be subdivided into homogenous or heterogeneous lots. For contracts with a value equal to or greater than the thresholds provided for in Article 4 but not less than EUR 500 000,

determined in accordance with Article 5, **where** the contracting authority **does not deem it appropriate to split into lots**, it shall provide in the contract notice or in the invitation to confirm interest a specific explanation of its reasons.

determined in accordance with Article 5, the contracting authority shall provide in the contract notice or in the invitation to confirm interest a specific explanation of its reasons **regarding the division or non-division into lots**.

Justification

The division of contracts into lots must be systematically assessed in advance by the contracting authority, in order to prevent indiscriminate use of the concept. Therefore, both the division into lots and non-division must be explained; however, in the current formulation only the decision not to divide into lots must be explained.

Amendment 25

Proposal for a directive Article 49 – paragraph 3

Text proposed by the Commission

3. Notices referred to in Article 46(2) and Article 47 shall be published in full in an official language of the Union as chosen by the contracting authority. That language version shall constitute the sole authentic text. ***A summary of the important elements of each notice shall be published in the other official languages.***

Amendment

3. Notices referred to in Article 46(2) and Article 47 shall be published in full in an official language of the Union as chosen by the contracting authority. That language version shall constitute the sole authentic text.

Amendment 26

Proposal for a directive Article 53 – paragraph 2 – point d

Text proposed by the Commission

(d) any tenderer that has made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers.

Amendment

deleted

Amendment 27

Proposal for a directive Article 54 – paragraph 4

Text proposed by the Commission

4. The Commission shall be empowered to adopt delegated acts in accordance with Article 89 to **amend** the list in Annex XI, where necessary due to the conclusion of new international agreements or modification of existing international agreements.

Amendment

4. The Commission shall be empowered to adopt delegated acts in accordance with Article 89 to **complement** the list in Annex XI, where necessary due to the conclusion of new international agreements or modification of existing international agreements.

Amendment 28

Proposal for a directive

Article 55 – paragraph 1 – subparagraph 1 – point e a (new)

Text proposed by the Commission

Amendment

(ea) participation in exploitation of human trafficking and child labour covered by Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims¹

¹ OJ L 101, 15.4.2011, p. 1.

Amendment 29

Proposal for a directive

Article 55 – paragraph 3 – subparagraph 1 – introductory wording

Text proposed by the Commission

Amendment

3. A contracting authority **may** exclude from participation in a public contract any economic operator if one of the following conditions is fulfilled:

3. A contracting authority **shall** exclude from participation in a public contract any economic operator if one of the following conditions is fulfilled:

Amendment 30

Proposal for a directive

Article 56 – paragraph 1 – subparagraph 2

Text proposed by the Commission

They are not obliged to impose all the conditions listed in paragraphs 2, 3 and 4, **but they shall not** provide requirements other than those listed.

Amendment

They are not obliged to impose all the conditions listed in paragraphs 2, 3 and 4 **and they may** provide requirements other than those listed.

Amendment 31

Proposal for a directive

Article 56 – paragraph 4 – subparagraph 1

Text proposed by the Commission

With regard to technical and professional ability, contracting authorities **may** require that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard. Contracting authorities may conclude that economic operators will not perform the contract to an appropriate quality standard where the contracting authority established that they have conflicting interests which may negatively affect the performance of the contract.

Amendment

With regard to technical and professional ability, contracting authorities **shall** require that economic operators possess the necessary human and technical resources and experience to perform the contract to an appropriate quality standard **and, where so requested by the contracting authority, in accordance with any contract performance clause specified in accordance with Article 70**. Contracting authorities may conclude that economic operators will not **be able to ensure the required performance** where the contracting authority established that they have conflicting interests which may negatively affect the performance of the contract.

Amendment 32

Proposal for a directive

Article 62 – paragraph 1 – subparagraph 1

Text proposed by the Commission

1. With regard to criteria relating to economic and financial standing as set out pursuant to Article 56(3), and to criteria relating to technical and professional ability as set out pursuant to Article 56(4), an economic operator may, where

Amendment

1. With regard to criteria relating to economic and financial standing as set out pursuant to Article 56(3), and to criteria relating to technical and professional ability as set out pursuant to Article 56(4), an economic operator may, where

appropriate and for a particular contract, rely on the capacities of other entities, **regardless of** the legal nature of the links which it has with them. It shall in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect. ***In the case of economic and financial standing***, the contracting authorities **may** require that the economic operator and those entities are jointly liable for the execution of the contract.

appropriate and for a particular contract, rely **only** on the **material** capacities of other entities, **without disregarding** the legal nature of the links which it has with them. It shall in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect. The contracting authorities **shall** require that the economic operator and those entities are jointly liable for the execution of the contract.

Justification

In order to guarantee judicial and economic certainty in adjudicating and executing the contract, it is considered necessary to limit reliance on the capacities of other entities to acquiring only the material prerequisites and to strengthening the joint liability between the economic operator and the other entities it groups with in order to execute the contract, making it obligatory. The availability of resources can arise only from a juridical relationship between the benefiting party and the supporting company.

Amendment 33

Proposal for a directive Article 62 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

1a. The requirements for reliance on the capacities of other entities may not be used contextually by the economic operator or said entities.

Amendment 34

Proposal for a directive Article 66

Text proposed by the Commission

Amendment

1. Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the criteria on which contracting

1. Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the criteria on which contracting

authorities shall base the award of public contracts shall be *one* of the *following*:

(a) the most economically advantageous tender

(b) the lowest cost.

Costs may be assessed, on the choice of the contracting authority, on the basis of the price only or using a cost-effectiveness approach, such as a life-cycle costing approach, under the conditions set out in Article 67.

2. The most economically advantageous tender referred to in *point (a)* of paragraph 1 *from the point of view of the contracting authority shall be identified* on the basis of criteria linked to the subject-matter of the public contract in question.

Those criteria shall include, in addition to the price or costs *referred to in point (b) of paragraph 1*, other criteria linked to the subject-matter of the public contract in question, *such as*:

(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, environmental characteristics and innovative character;

(b) for service contracts and contracts involving the design of works, the organisation, qualification and experience

authorities shall base the award of public contracts shall be *that* of the *most economically advantageous tender*.

2. The *contracting authority shall assess the* most economically advantageous tender referred to in paragraph 1, on the basis of criteria linked to the subject-matter of the public contract in question. .

Those criteria shall include, in addition to the price or costs, other criteria linked to the subject-matter of the public contract in question.

Costs may be assessed using a cost-effectiveness approach, such as a life-cycle costing approach, under the conditions set out in Article 67.

Price/cost criterion may be the decisive award criterion in case of standardized products and services whose content can be predetermined by its own nature.

Other criteria may include:

a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, environmental *and social* characteristics and innovative character;

(b) for service contracts and contracts involving the design of works, the organisation, qualification and experience

of the staff assigned to performing the contract in question *may* be taken into consideration, with the consequence that, following the award of the contract, such staff may only be replaced with the consent of the contracting authority, which must verify that replacements ensure equivalent organisation and quality;

(c) after-sales service and technical assistance, delivery date and delivery period or period of completion;

(d) the specific process of production or provision of the requested works, supplies or services or of any other stage of its life cycle as referred to in point (22) of Article 2, to the extent that those criteria are specified in accordance with paragraph 4 and they concern factors directly involved in these processes and characterise the specific process of production or provision of the requested works, supplies or services.

3. Member States may provide that the award of certain types of contracts shall be based on the most economically advantageous tender as referred to in point (a) of paragraph 1 and in paragraph 2.

4. Award criteria shall ***not confer an unrestricted freedom of choice on the contracting authority.*** They shall ensure the possibility of effective competition and shall be accompanied by requirements that allow the information provided by the tenders to be effectively verified. Contracting authorities shall verify effectively, on the basis of the information and proof provided by the tenders, whether the tenders meet the award criteria.

5. In the case referred to in point (a) of paragraph 1 the contracting authority shall specify, in the contract notice, in the invitation to confirm interest, in the

of the staff assigned to performing the contract in question ***shall*** be taken into consideration, with the consequence that, following the award of the contract, such staff may only be replaced with the consent of the contracting authority, which must verify that replacements ensure equivalent organisation and quality;

(c) after-sales service and technical assistance, delivery date and delivery period or period of completion;

(d) the specific process of production or provision of the requested works, supplies or services or of any other stage of its life cycle as referred to in point (22) of Article 2, to the extent that those criteria are specified in accordance with paragraph 4 and they concern factors directly involved in these processes and characterise the specific process of production or provision of the requested works, supplies or services.

4. Award criteria shall ensure the possibility of effective competition and shall be accompanied by requirements that allow the information provided by the tenders to be effectively verified. Contracting authorities shall verify effectively, on the basis of the information and proof provided by the tenders, whether the tenders meet the award criteria.

5. The contracting authority shall specify, in the contract notice, in the invitation to confirm interest, in the procurement documents or, in the case of a competitive

procurement documents or, in the case of a competitive dialogue, in the descriptive document, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

Those weightings may be expressed by providing for a range with an appropriate maximum spread.

Where weighting is not possible for objective reasons, the contracting authority shall indicate the criteria in decreasing order of importance.

dialogue, in the descriptive document, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

Those weightings may be expressed by providing for a range with an appropriate maximum spread.

Where weighting is not possible for objective reasons, the contracting authority shall indicate the criteria in decreasing order of importance.

Amendment 35

Proposal for a directive Article 67 – paragraph 3 – subparagraph 1

Text proposed by the Commission

3. Whenever a common methodology for the calculation of life-cycle costs is adopted as part of a legislative act of the Union, including by delegated acts pursuant to sector specific legislation, it shall be applied ***where life-cycle costing is included in the award criteria*** referred to in Article 66(1).

Amendment

3. Whenever a common methodology for the calculation of life-cycle costs is adopted as part of a legislative act of the Union, including by delegated acts pursuant to sector specific legislation, it shall be applied in ***accordance with the award criterion*** referred to in Article 66(1).

Amendment 36

Proposal for a directive Article 69 – paragraphs 1 to 3

Text proposed by the Commission

1. Contracting authorities shall require economic operators to explain the price or costs charged, where all of the following conditions are fulfilled:

a) the price or cost charged is more than 50 % lower than the average price or costs

Amendment

1. The contracting authority states in the invitation to tender that the maximum possible discount cannot exceed 25 % of the base tender price.

Contracting authorities shall require economic operators to explain the price or

of the remaining tenders

(b) the price or cost charged is more than 20 % lower than the price or costs of the second lowest tender;

(c) at least five tenders have been submitted

2. Where tenders appear to be abnormally low for other reasons, contracting authorities *may also* request such explanations.

3. The explanations referred to in paragraphs 1 and 2 *may* in particular relate to:

(a) the economics of the construction method, the manufacturing process or the services provided;

(b) the technical solutions chosen or any exceptionally favourable conditions available to the tender for the execution of the work or for the supply of the goods or services;

(c) the originality of the work, supplies or services proposed by the tender;

(d) compliance, *at least in an equivalent manner*, with obligations established by Union legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XI or, where not applicable, with other provisions ensuring an equivalent level of protection;

(e) the possibility of the tender obtaining State aid.

costs charged, where the price or costs charged are more than 25 % lower than the average price or average costs of the remaining tenders.

2. Where tenders appear to be abnormally low for other reasons, contracting authorities *shall* request such explanations.

3. The explanations referred to in paragraphs 1 and 2 *are related* to:

(a) the economics of the construction method, the manufacturing process or the services provided;

(b) the technical solutions chosen or any exceptionally favourable conditions available to the tender for the execution of the work or for the supply of the goods or services;

(c) the originality of the work, supplies or services proposed by the tender;

(d) compliance with obligations established by Union legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XI or, where not applicable, with other provisions ensuring an equivalent level of protection;

(e) the possibility of the tender obtaining State aid.

Amendment 37

Proposal for a directive
Article 71 – paragraph 2

Text proposed by the Commission

2. Member States may provide that **at the request of the** subcontractor and where the nature of the contract so allows, the contracting authority shall transfer due payments directly to the subcontractor for services, supplies or works provided to the main contractor. In such case, Member States shall put in place appropriate mechanisms permitting the main contractor to object to undue payments. The arrangements concerning that mode of payment shall be set out in the procurement documents.

Amendment

2. Member States may provide that, **if requested by** the subcontractor and where the nature of the contract so allows, the contracting authority shall transfer due payments directly to the subcontractor for services, supplies or works provided to the main contractor. In such case, Member States shall put in place appropriate mechanisms permitting the main contractor to object to undue payments. The arrangements concerning that mode of payment shall be set out in the procurement documents.

Justification

Direct payment should first only be considered at the request of the subcontractor and not in all cases where the nature of the contract so allows. Requesting that contracting authorities put in place direct payment for all subcontractors where the nature of the contract so allows is an administrative burden that not all authorities can manage.

Amendment 38

Proposal for a directive
Article 72 – paragraph 4

Text proposed by the Commission

4. Where the value of a modification can be expressed in monetary terms, the modification shall not be considered to be substantial within the meaning of paragraph 1, where its value does not exceed the thresholds set out in Article 4 and where it is below **5 %** of the price of the initial contract, provided that the modification does not alter the overall nature of the contract. Where several successive modifications are made, the value shall be assessed on the basis of the cumulative value of the successive modifications.

Amendment

4. Where the value of a modification can be expressed in monetary terms, the modification shall not be considered to be substantial within the meaning of paragraph 1, where its value does not exceed the thresholds set out in Article 4 and where it is below **10 %** of the price of the initial contract, provided that the modification does not alter the overall nature of the contract. Where several successive modifications are made, the value shall be assessed on the basis of the cumulative value of the successive modifications.

Justification

In order not to excessively straitjacket the contracting authorities and burden the procedure with new contract procedures for the same work or service, it is considered opportune to expand the application scope of this provision and provide that a change in the contract, in order to be considered as not substantial and therefore not to necessitate a new contract procedure, must not exceed 10 % of the price of the initial contract.

Amendment 39

Proposal for a directive Article 75 – paragraph 1

Text proposed by the Commission

Amendment

1. Contracting authorities intending to award a public contract for the services referred to in Article 74 shall make known their intention by means of a contract notice.

deleted

Amendment 40

Proposal for a directive Article 75 – paragraph 3 – subparagraph 1

Text proposed by the Commission

Amendment

3. The notices referred to in paragraphs 1 and 2 shall contain the information referred to in Annexes VI Part H and I, in accordance with the standard forms.

3. The notices referred to in paragraph 2 shall contain the information referred to in Annex VI Part I.

Amendment 41

Proposal for a directive Article 75 – paragraph 3 – subparagraph 2

Text proposed by the Commission

Amendment

The Commission shall establish the standard forms. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 91.

deleted

Amendment 42

Proposal for a directive Article 75 – paragraph 4

Text proposed by the Commission

4. The notices referred to in **paragraphs 1 and 2** shall be published in accordance with Article 49.

Amendment

4. The notices referred to in **paragraph 2** shall be published in accordance with Article 49.

Amendment 43

Proposal for a directive Article 76 – paragraph 2

Text proposed by the Commission

2. Member States shall ensure that contracting authorities may take into account the need to ensure quality, continuity, accessibility, availability and comprehensiveness of the services, the specific needs of different categories of users, the involvement and empowerment of users and innovation. Member States may also provide that the choice of the service provider shall not be made solely on the basis of the price for the provision of the service.

Amendment

2. Member States shall ensure that contracting authorities may take into account the need to ensure quality, continuity, accessibility, availability and comprehensiveness of the services, the specific needs of different categories of users, the involvement and empowerment of users and innovation, **consumers' protection and social inclusion**. Member States may also provide that the choice of the service provider shall not be made solely on the basis of the price for the provision of the service.

Amendment 44

Proposal for a directive Article 76 – paragraph 2 – subparagraph 1 a (new)

Text proposed by the Commission

Amendment

Member States shall ensure that the contracting authorities are fully solvent in their dealings with the economic operators and shall ensure that the said authorities put in place beforehand a suitable instrument for securing the credit of the operator.

Justification

The continuing insolvency of public authorities in dealings with private businesses for work and services provided can no longer be tolerated. The putting in place of a suitable instrument to secure the credit which the economic operator would possess following the completion of the work could represent an indispensable tool to ensure effective remuneration.

Amendment 45

Proposal for a directive

Article 84 – paragraph 1 – subparagraph 1

Text proposed by the Commission

1. Member States shall appoint a single independent body responsible for the oversight and coordination of implementation activities (hereinafter 'the oversight body'). Member States shall inform the Commission of their designation.

Amendment

1. ***In accordance with their national or federal structure***, Member States shall appoint ***one or more*** independent ***bodies*** responsible for the oversight and coordination of implementation activities (hereinafter 'the oversight ***bodies***'). Member States shall inform the Commission of their designation.

Member States that already have in place independent bodies can retain these bodies as long as they fulfil all responsibilities as stated below.

Amendment 46

Proposal for a directive

Article 84 – paragraph 3 – subparagraph 1 – point b

Text proposed by the Commission

(b) providing legal advice to contracting authorities on the interpretation of public procurement rules and principles and on the application of public procurement rules in specific cases;

Amendment

deleted

Justification

Legal services have always been and still are covered by a relationship of trust with the professional officer which is based on the effective professional ability of the latter and guaranteed by the stringent dictates of professional ethics. Therefore they cannot be ascribed

to a public oversight body, or fall within the applicable scope of this Directive.

Amendment 47

Proposal for a directive

Article 84 – paragraph 3 – subparagraph 1 – point c

Text proposed by the Commission

(c) **issuing own-initiative opinions and guidance** on questions of general interest pertaining to the interpretation and application of public procurement rules, on recurring questions and on systemic difficulties related to the application of public procurement rules, in the light of the provisions of this Directive and of the relevant case-law of the Court of Justice of the European Union;

Amendment

(c) **elaborate guidelines** on questions of general interest pertaining to the interpretation and application of public procurement rules, on recurring questions and on systemic difficulties related to the application of public procurement rules, in the light of the provisions of this Directive and of the relevant case-law of the Court of Justice of the European Union;

Justification

The new formulation proposed is more pertinent to the body's mandate, which must be appointed to supervise the implementation and application of the envisaged laws.

Amendment 48

Proposal for a directive

Article 84 – paragraph 3 – subparagraph 1 – point d

Text proposed by the Commission

(d) establishing and applying comprehensive, actionable 'red flag' indicator systems to prevent, detect and adequately report instances of procurement fraud, corruption, conflict of interest and other serious irregularities;

Amendment

(d) establishing and applying comprehensive, actionable 'red flag' indicator **and monitoring** systems to prevent, detect and adequately report instances of procurement fraud, corruption, conflict of interest and other serious irregularities **as well as specific breaches of provisions contained in Articles 54, 55 and 71**;

Amendment 49

Proposal for a directive

Article 84 – paragraph 3 – subparagraph 1 – point f a (new)

Text proposed by the Commission

Amendment

(fa) examining the reports sent to them by contracting authorities intending to use a negotiated procedure without publication;

Amendment 50

Proposal for a directive

Article 84 – paragraph 3 – subparagraph 3

Text proposed by the Commission

Amendment

Member States shall empower the oversight body to seize the jurisdiction competent according to national law for the review of contracting authorities' decisions where it has detected a violation in the course of its monitoring ***and legal advising*** activity.

Member States shall empower the oversight body to seize the jurisdiction competent according to national law for the review of contracting authorities' decisions where it has detected a violation in the course of its monitoring activity ***or when examining reports provided by the contracting authorities on the basis of Article 30.***

Amendment 51

Proposal for a directive

Article 87 – paragraph 1

Text proposed by the Commission

Amendment

1. Member States shall make available technical support structures in order to provide legal and economic advice, guidance and assistance to contracting authorities in preparing and carrying out procurement procedures. Member States shall also ensure that each contracting authority can obtain competent assistance and advice on individual questions.

1. Member States shall make available technical support structures in order to provide legal and economic advice, guidance and assistance to contracting authorities in preparing and carrying out procurement procedures. Member States shall also ensure that each contracting authority can obtain competent assistance and advice on individual questions, ***in particular in relation to provisions contained in Articles 54, 55 and 71.***

Amendment 52

Proposal for a directive
Annex XI – indent 1 a (new)

Text proposed by the Commission

Amendment

**- Convention 94 on Labour Clauses in
Public Contracts;**

PROCEDURE

Title	Public procurement		
References	COM(2011)0896 – C7-0006/2012 – 2011/0438(COD)		
Committee responsible Date announced in plenary	IMCO 17.1.2012		
Opinion by Date announced in plenary	JURI 17.1.2012		
Rapporteur Date appointed	Giuseppe Gargani 13.2.2012		
Discussed in committee	26.4.2012	30.5.2012	19.6.2012
Date adopted	11.10.2012		
Result of final vote	+: 13	–: 9	0: 0
Members present for the final vote	Luigi Berlinguer, Sebastian Valentin Bodu, Giuseppe Gargani, Lidia Joanna Geringer de Oedenberg, Gerald Häfner, Sajjad Karim, Klaus-Heiner Lehne, Antonio Masip Hidalgo, Bernhard Rapkay, Evelyn Regner, Francesco Enrico Speroni, Rebecca Taylor, Alexandra Thein, Rainer Wieland, Cecilia Wikström, Tadeusz Zwiefka		
Substitute(s) present for the final vote	Piotr Borys, Eva Lichtenberger, József Szájer, Axel Voss		
Substitute(s) under Rule 187(2) present for the final vote	Sylvie Guillaume, Salvatore Tatarella		

PROCEDURE

Title	Public procurement			
References	COM(2011)0896 – C7-0006/2012 – 2011/0438(COD)			
Date submitted to Parliament	20.12.2011			
Committee responsible Date announced in plenary	IMCO 17.1.2012			
Committee(s) asked for opinion(s) Date announced in plenary	AFET 17.1.2012	INTA 17.1.2012	ECON 17.1.2012	EMPL 17.1.2012
	ENVI 17.1.2012	ITRE 17.1.2012	TRAN 17.1.2012	REGI 17.1.2012
	JURI 17.1.2012	LIBE 17.1.2012		
Not delivering opinions Date of decision	AFET 17.4.2012	ECON 13.2.2012	LIBE 28.2.2012	
Rapporteur(s) Date appointed	Marc Tarabella 30.11.2011			
Discussed in committee	25.1.2012	29.2.2012	20.3.2012	30.5.2012
	18.9.2012	25.9.2012	5.11.2012	28.11.2012
	29.11.2012			
Date adopted	18.12.2012			
Result of final vote	+ : 23 - : 8 0 : 7			
Members present for the final vote	Pablo Arias Echeverría, Adam Bielan, Cristian Silviu Buşoi, Jorgo Chatzimarkakis, Sergio Gaetano Cofferati, Birgit Collin-Langen, Lara Comi, Anna Maria Corazza Bildt, Cornelis de Jong, Christian Engström, Vicente Miguel Garcés Ramón, Evelyne Gebhardt, Louis Grech, Thomas Händel, Małgorzata Handzlik, Malcolm Harbour, Philippe Juvin, Sandra Kalniete, Toine Manders, Hans-Peter Mayer, Franz Obermayr, Sirpa Pietikäinen, Phil Prendergast, Zuzana Roithová, Heide Rühle, Christel Schaldemose, Andreas Schwab, Catherine Stihler, Gino Trematerra, Bernadette Vergnaud, Barbara Weiler			
Substitute(s) present for the final vote	Raffaele Baldassarre, Jürgen Creutzmann, Frank Engel, Marc Tarabella, Sabine Verheyen			
Substitute(s) under Rule 187(2) present for the final vote	Sylvie Guillaume, Francesco Enrico Speroni			
Date tabled	11.1.2013			