

# Public procurement

2011/0438(COD) - 20/12/2011 - Legislative proposal

**PURPOSE:** to modernise existing public procurement legislation in order to make it better suited to deal with the evolving political, social and economic context.

**PROPOSED ACT:** Directive of the European Parliament and of the Council.

**BACKGROUND:** public procurement plays an important role in the overall economic performance of the European Union. In Europe, 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.

A comprehensive economic evaluation has shown that the public procurement Directives have achieved their objectives to a considerable extent. They have resulted in greater transparency and higher levels of competition while achieving measurable savings through lower prices.

The Commission published on 27 January 2011 a [Green Paper](#) on the modernisation of EU public procurement policy — Towards a more efficient European Procurement Market launching a broad public consultation on options for legislative changes to make the award of contracts easier and more flexible and enable public contracts to be put to better use in support of other policies.

A very large majority of **stakeholders appreciated the initiative of the Commission to review the current public procurement policy**. They voiced demand for a review of the public procurement directives to simplify the rules, increase their efficiency and effectiveness and make them better suited to deal with the evolving political, social and economic context.

This proposal has two complementary objectives:

1. **Increase the efficiency of public spending** to ensure the best possible procurement outcomes in terms of value for money. This implies in particular a simplification and flexibilisation of the existing public procurement rules. Streamlined, more efficient procedures will benefit all economic operators and facilitate the participation of SMEs and cross-border bidders.
2. **Allow procurers to make better use of public procurement in support of common societal goals** such as protection of the environment, higher resource and energy efficiency, combating climate change, promoting innovation, employment and social inclusion and ensuring the best possible conditions for the provision of high quality social services.

This initiative implements the Europe 2020 strategy for smart, sustainable and inclusive growth and the Europe 2020 Flagship Initiatives on a [Digital Agenda for Europe](#), the [Innovation Union](#), an [Integrated Industrial Policy for the Globalisation Era](#), [Energy 2020](#) and a [Resource Efficient Europe](#). It also implements the [Single Market Act](#), in particular its twelfth key action ‘Revised and Modernised Public Procurement Legislative Framework’.

Together with the proposed [new utilities Directive](#), the proposal will replace Directives 2004/17/EC and 2004/18/EC as the core elements of the European Union public procurement legislative framework.

**IMPACT ASSESSMENT:** the impact assessment and its executive summary give an overview of the different options for each of the five groups of basic problems (administrative organisation, scope, procedures, strategic procurement and access to procurement markets).

Based on an analysis of the advantages and disadvantages of the different options, a package of preferred options was identified that should optimise the synergies between the different solutions allowing savings due to one type of action to neutralise related costs caused by another (e.g. possible increased procedural requirements caused by strategic procurement actions could partially be neutralised by savings related to the improved design of procurement procedures). These preferred options form the basis of the present proposal.

**LEGAL BASIS:** Article 53(1), Article 62 and Article 114 of the TFEU.

**CONTENT:** the main axes of the proposal are as follows:

## **(1) Simplification and flexibilisation of procurement procedures**

***Clarification of scope:***

- **the basic concept of ‘procurement’ has been newly introduced** in order to better determine the scope and purpose of procurement law and to facilitate the application of the thresholds. The **definitions of certain key notions** determining the scope of the Directive (such as body governed by public law, public works and service contracts, mixed contracts) have been revised in the light of the case-law of the Court of Justice;
- **the traditional distinction between so-called priority and non-priority services (‘A’ and ‘B’ services) will be abolished.** However, it became also clear that the regular procurement regime is not adapted to social services which need a specific set of rules.

***Toolbox approach:***

- Member State systems will provide **two basic forms of procedure**, open and restricted procedure. They may, in addition, foresee, subject to certain conditions, the competitive procedure with negotiation, the competitive dialogue and/or the innovation partnership, a new form of procedure for innovative procurement;
- contracting authorities will furthermore have at their disposal a set of **six specific procurement techniques and tools** intended for aggregated and electronic procurement: framework agreements, dynamic purchasing systems, electronic auctions, electronic catalogues, central purchasing bodies and joint procurement. Compared to the existing Directive, these tools have been improved and clarified with a view to facilitating eprocurement.

***Lighter regime for sub-central contracting authorities:***

- in line with the WTO Government Procurement Agreement, the proposal provides a simplified procurement regime that applies to all contracting authorities below the central government level, such as local and regional authorities. These purchasers may use a prior information notice as a means of calling for competition. If they make use of this faculty, they don’t have to publish a separate contract notice before launching the procurement procedure.

***Promotion of e-procurement:***

- the proposal aims at helping Member States to achieve the switchover to e-procurement enabling suppliers to take part in online procurement procedures across the Internal Market. It provides for the mandatory transmission of notices in electronic form, the mandatory electronic availability of the procurement documents and imposes the switch to fully electronic communication, in particular e-submission, in all procurement procedures within a transition period of two years.

***Modernisation of procedures:***

- **time-limits for participations and submission of offers have been shortened.** The distinction between selection of tenderers and award of the contract which is often a source of errors and misunderstandings has been made more flexible, allowing it for contracting authorities to decide on the most practical sequencing by examining award criteria before selection criteria and to take into account the organisation and quality of the staff assigned to performing the contract as an award criterion;
- **the grounds for exclusion of candidates and tenderers have been reviewed and clarified.** Contracting authorities will be entitled to exclude economic operators which have shown significant or persistent deficiencies in performing prior contracts. The proposal provides also for the possibility of 'self-cleaning': contracting authorities may accept candidates or tenderers in spite of the existence of an exclusion ground if they have taken appropriate measures to remedy the consequences of any illicit behaviour and effectively prevent further occurrences of the misbehaviour;
- **the modification of contracts during their term** has become an increasingly relevant and problematic issue for practitioners. A specific provision on modification of contracts takes up the basic solutions developed by case-law and provides a pragmatic solution for dealing with unforeseen circumstances requiring an adaption of a public contract during its term.

(2) **Strategic use of public procurement in response to new challenges:** the proposed Directive is based on *enabling approach* providing contracting authorities with the instruments needed to contribute to the achievement of the Europe 2020 strategic goals by using their purchasing power to procure goods and services that foster innovation, respect the environment and combat climate change while improving employment, public health and social conditions.

- **Life-cycle costing:** the proposal gives public purchasers the possibility to base their award decisions on life-cycle costs of the products, services or works to be purchased.
- **Production process:** contracting authorities may refer to all factors directly linked to the production process in the technical specifications and in the award criteria, as long as they refer to aspects of the production process which are closely related to the specific production or provision of the good or service purchased. This excludes requirements not related to the process of producing the products, works or services covered by the procurement, such as general corporate social responsibility requirements covering the whole operation of the contractor.
- **Labels:** contracting authorities may require that works, supplies or services bear specific labels certifying environmental, social or other characteristics, provided that they accept also equivalent labels.
- **Sanctioning violations of mandatory social, labour or environmental law:** under the proposed Directive, a contracting authority can exclude economic operators from the procedure, if it identifies infringements of obligations established by Union legislation in the field of social, labour or environmental law or of international labour law provisions.
- **Social services:** The evaluation on the impact and effectiveness of EU public procurement legislation has shown that social, health and education services have specific characteristics which make them inappropriate for the application of the regular procedures for the award of public service contracts. These services are typically provided within a specific context that varies widely between Member States due to different administrative, organisational and cultural circumstances. The services have, by their very nature, only a very limited cross-border dimension. Member States should therefore have large discretion to organise the choice of service providers. The proposal takes account of this by providing a specific regime for public contracts for these services, with a higher threshold of EUR 500 000 and imposing only the respect of basic principles of transparency and equal treatment.
- **Innovation:** the proposal provides for this purpose the innovation partnership, a new special procedure for the development and subsequent purchase of new, innovative products, works and services, provided they can be delivered to agreed performance levels and costs.

### (3) Better access to the market for SMEs and Start-ups

***Simplification of information obligations:*** the proposal provides for the mandatory acceptance of self-declarations as *prima-facie* evidence for selection purposes. The actual production of documentary evidence will be facilitated by a standardised document, the European Procurement Passport which is a means of proof for the absence of grounds for exclusion.

- ***Division into lots:*** contracting authorities will be invited to divide public contracts into — homogeneous or heterogeneous — lots to make them more accessible for SMEs.
- ***Limitation on requirements for participation:*** to avoid unjustified barriers in the way of participation by SMEs, the proposed Directive contains an exhaustive list of possible conditions for participation in procurement procedures. Turnover requirements which are frequently a formidable obstacle to access by SMEs are explicitly limited to three times the estimated contract value, except in duly justified cases. Finally, any conditions for participation by groups of economic operators — an instrument of particular relevance for SMEs — must be justified by objective reasons and proportionate.
- ***Direct payment of subcontractors:*** Member State can provide that subcontractors may request for direct payment by the contracting authority of supplies, works and services provided to the main contractor in the context of the contract performance.

### (4) Sound procedures

- ***Conflicts of interest:*** the proposal contains a specific provision on conflicts of interest covering actual, potential or perceived conflict of interest situations affecting staff members of the contracting authority or of procurement service providers intervening in the procedure and members of the contracting authority's management who may influence the outcome of a procurement procedure even if they are not formally involved in it.
- ***Illicit conduct:*** the proposal contains a specific provision against illicit behaviour by candidates and tenderers, such as attempts to improperly influence the decision-making process or entering into agreements with other participants to manipulate the outcome of the procedure have to be excluded from the procedure.
- ***Unfair advantages:*** the proposal contains a specific provision on safeguards against undue preference in favour of participants who have advised the contracting authority or been involved in the preparation of the procedure.

### (5) Governance

- ***National oversight bodies:*** the proposal provides that Member States designate a **single national authority** in charge of monitoring, implementation and control of public procurement.
- ***Knowledge centres:*** the proposal obliges Member States to provide support structures offering legal and economic advice, guidance, training and assistance in preparing and conducting procurement procedures. To reinforce the fight against corruption and favouritism, contracting authorities will be obliged to transmit the text of concluded contracts to the oversight body. However, the creation of disproportionate administrative burden must be avoided; the obligation to transmit the full text of concluded contracts should therefore remain limited to relatively high value contracts. The thresholds proposed would strike the right balance between increasing administrative burden and ensuring greater transparency: with a threshold of EUR 1 000 000 for supplies and services, and of EUR 10 000 000, this obligation would apply to 10 - 20 % of all procurement published in the Official Journal.
- ***Administrative cooperation:*** the proposal provides also for effective cooperation allowing national oversight bodies to share information and best practices and to cooperate through the Internal Market Information System (IMI).

**BUDGETARY IMPLICATION:** the proposal has no budgetary implications for the EU.

**DELEGATED ACTS:** the Commission shall be empowered to adopt delegated acts in accordance with Article 290 of the Treaty on the Functioning of the European Union (TFEU).