

Procurement in the water, energy, transport and postal services sectors

2011/0439(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”** which appears also in the title of the proposed Directive 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 **notion of special or exclusive rights** is central to the definition of the scope of this Directive, since entities which are neither contracting authorities nor public undertakings within the meaning of this Directive are subject to this Directive only to the extent that they exercise one of the activities covered on the basis of such rights. It is therefore appropriate to clarify that rights which have been granted by means of a procedure in which adequate publicity has been ensured and where the granting of those rights was based on objective criteria, notably pursuant to Union legislation, do not constitute special or exclusive rights for the purposes of this Directive;
- **the traditional distinction between so-called priority and non-priority services** (“A” and “B” services) **will be abolished**. The results of the evaluation have shown that it is no longer justified to restrict the full application of procurement law to a limited group of services. However, it became also clear that the regular procurement regime is not adapted to social services which need a specific set of rules;
- the scope in terms of sectors covered remains largely unchanged. However, **procurement made for the purpose of exploring oil and gas has been withdrawn from the scope** as that sector has been found to be subject to such competitive pressure that the procurement discipline brought about by the Directive is no longer needed.

Toolbox approach:

- Member State systems will provide the **three basic forms of procedure which already exist** under current Directives: open and restricted procedures as well as negotiated procedures with prior call for competition. They may, in addition, foresee either as standard procedure or subject to certain conditions the innovation partnership, a new form of procedure for innovative procurement;
- contracting entities 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, those tools have been improved and clarified with a view to facilitating e-procurement.

Promotion of e-procurement:

- the proposal 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 contracting entities 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 procedure for exemption** of contracts awarded in sufficiently competitive markets (the current “Article 30 decisions”) has been simplified and streamlined. A number of exemptions, in particular the intra-group and joint venture exemptions which are important in practice have also been reviewed and clarified;
- **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 purchasers the possibility to base their award decisions on life-cycle costs of the products, services or works to be purchased.
- **Production process:** contracting entities 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 that are not related to the process of producing the products, works or services covered by the procurement, such as a general corporate social responsibility requirement covering the whole operation of the contractor.
- **Labels:** contracting entities 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 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 1 000 000 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***: it is foreseen that contracting entities may apply the selection criteria provided for in the proposed Directive on public procurement and that, where they do, they are then obliged to apply the provisions concerning notably the ceiling to requirements on minimum turnover as well as the provisions on in particular self-certification.
- ***Better access to framework agreements***: under the current Directives, there is no limitation to the duration of framework agreements concluded in the utilities sectors. This can lead to market foreclosure. The proposal limits the duration to four years (except in duly justified circumstances).
- ***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 therefore 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, which will thus be able to scrutinize these contracts for suspicious patterns, and give access to these documents to interested persons to the extent that legitimate public or private interests are not jeopardized.
- ***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).