

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

2011/0439(COD) - 15/01/2014 - Text adopted by Parliament, 1st reading/single reading

The European Parliament adopted by 618 votes to 26 with 36 abstentions, a legislative resolution the proposal for a directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors.

Parliament adopted its position in first reading following the ordinary legislative procedure. The amendments adopted in plenary are the result of an agreement between Parliament and Council. They amend the proposal as follows:

Public services: nothing in the Directive obliges Member States to contract out or externalise the provision of services that they wish to provide themselves or to organise by means other than procurement. The provision of services based on laws, regulations or employment contracts, should not be covered. In some Member States, this might for example be the case for the provision of certain services to the community, such as the supply of drinking water.

The directive should not 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.

Principles of procurement: contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner. The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition.

Grounds for exclusion: 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, terrorist offences, money laundering or terrorist financing. Also, the non-payment of taxes or social security contributions should also lead to mandatory exclusion at the level of the Union.

Contracting entities will be able to exclude economic operators which have proven unreliable, for instance because of 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.

Social and environmental requirements: contracting entities shall take relevant measures to ensure compliance with obligations in the fields of environmental, social and labour law that result from laws, regulations, decrees and decisions, at both national and Union level, as well as from collective agreements, and obligations stemming from international agreements listed in Annex XIV.

Allow SME participation: Parliament stressed the need to give particular attention to small and medium sized enterprises.

In order to further the possibilities for SMEs to participate in a large contracts, the latter may be **divided into lots**.

Furthermore, time limits for participation in procurement procedures should be kept as short as possible.

Groupings of economic operators: such groupings, including any temporary association of undertakings, may participate in the market irrespective of the legal form under which they have chosen to operate.

Confidentiality: contracting entities may impose on economic operators requirements aimed at protecting the confidential nature of information which the contracting entities make available throughout the procurement procedure.

Electronic communications: contracting authorities should, except in certain specific situations, use electronic means of communication which are non-discriminatory, generally available and interoperable with the ICT products in general use and which do not restrict economic operators' access to the procurement procedure.

Certain service contracts and certain works contracts having as their subject-matter **intellectual performances**, such as the design of works, which cannot be ranked using automatic evaluation methods, shall not be the object of electronic auctions.

Conflicts of interests: contracting authorities should make use of all possible means at their disposal in order to prevent distortions in procurement procedures stemming from conflicts of interest. This could include procedures in order to identify, prevent and remedy conflicts of interests.

Mixed contracts: the applicable rules should be determined with respect to the main subject of the contract where the different parts which constitute the contract are objectively not separable. In the case of mixed contracts, which can be separated, contracting entities are always free to award separate contracts for the separate parts of the mixed contract, in which case the provisions applicable to each separate part should be determined exclusively with respect to the characteristics of that specific contract. There are separate provisions on mixed contracts dealing with defence.

Innovative solutions and innovation partnerships: Parliament introduced a new procedure to encourage tenders proposing innovative solutions where a need for the development of an innovative product or service or innovative works and the subsequent purchase of the resulting supplies, services or works cannot be met by solutions already available on the market.

The new innovation partnership should be based on the procedural rules that apply to the **competitive procedure with negotiation** and contracts should be awarded on the sole basis of the best price-quality ratio, which is most suitable for comparing tenders for innovative solutions.

Best price-quality ratio: awards must be made on the basis of '**most economically advantageous tender**'.

The most economically advantageous tender from the point of view of the contracting authority shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle, and may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question. Such criteria may comprise, for instance trading and delivery conditions.

Abnormally low offers: to fight social dumping and ensure that workers' rights are respected, stricter rules are introduced regarding abnormally low bids. 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.

Relations with third countries: 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 service contracts

in third countries. The Commission shall endeavour, by approaching the third country concerned, to remedy any situation whereby it finds a third country does not grant Union undertakings effective access comparable to that granted by the Union to undertakings from that country.