

Procurement water, energy, transport and postal sectors: coordination of procedures for award, utilities directive

2000/0117(COD) - 06/05/2002 - Modified legislative proposal

The Commission has accepted, either in their entirety or in part, and with reformulations where appropriate, 47 of the 83 amendments adopted by the European Parliament. With regard to the amendments accepted by the Commission in their entirety or reformulated for purely formal reasons, these concern: -introducing a new recital stating that nothing in this Directive shall prevent any contracting entity from imposing or enforcing measures necessary to protect public morality, public policy, public security or human, animal or plant life or health; -modifying a recital in order to specify that tenders based on solutions other than those envisaged by the contracting entity must be taken into account if they are equivalent, and that contracting entities must give reasons for any decision concluding that there is no equivalence; -modifying a recital which adds engineers' services to the examples of services whose remuneration is governed by national laws and which must not be affected; -removing the very detailed provisions concerning the arrangements for indicating the weighting given to each of the criteria applied in determining the most economically advantageous tender. The deletion of the three paragraphs is acceptable in order to simplify the arrangements for indicating weighting. As far as amendments accepted by the Commission with reformulation, in part or in substance are concerned, these : -introduce a new recital designed to emphasise the integration of environmental policy into public procurement policy. - introduces a new recital specifying that contracting entities may require particular conditions concerning the performance of contracts, especially concerning the promotion of social objectives, provided that these clauses are compatible with Community law. In order to ensure consistency between the two public procurement Directives, it is appropriate to extend this possibility to conditions relating to environmental protection; -modifies an Article in order to specify that conditions concerning performance of the contract may include conditions linked to the promotion of social policy objectives; it is also intended to further reinforce compliance with the principles of equal treatment, non-discrimination and transparency, where contracting entities require particular conditions concerning performance of contracts; -introduces a new recital specifying that contracting authorities may reject tenders which are abnormally low owing to non-compliance with social legislation. As this possibility already exists under existing law, it suffices to clarify it in an appropriate way; -provide that technical specifications may be formulated in terms of requirements with regard to the environmental impact of the product throughout its lifetime; - introduces a new definition, namely the "equivalent standard", at a place where, on the contrary, a tender ensuring an equivalent solution is what is meant. Even if the amendment is understood to be concerned with equivalent solutions, the inclusion of costs in the definition of equivalent solutions is not acceptable, as the price element must come into play at the stage where tenders are evaluated on the basis of the award criteria, and not in order to enable tenders based on other solutions to be excluded for non-compliance with the technical specifications of the contracting entity; -modifying Annex XX, alters the definition of technical specifications by adding the taking into account of environmental impact, user-instructions and production processes or methods; - providing that a contracting entity requires the production of a certificate relating to an environmental management system, it must accept EMAS certificates, certificates attesting to compliance with international standards, as well as any their equivalent means of proof; -are designed to enable economic operators tendering as a group to bring their collective capacities to bear for selection purposes, as regards: suitability to pursue the professional activity concerned, economic and financial capacity and technical and/or professional capability. However, the length of any professional experience required may not be cumulated. Moreover, the amendment provides that there may be a requirement for minimum criteria to be met by the head of the group. - introduce a list of exclusion criteria concerning the selection of participants in open, restricted or negotiated procedures with a prior call for competition; - increasing transparency regarding the information to be provided to

economic operators on obligations under social legislation. However, such information cannot be limited solely to obligations deriving from social legislation, as other (environmental or tax) legislation must also be taken into account. There is, however, a risk of this information becoming so extensive that it could not be included in the notice where the call for competition is made by means of a periodic indicative notice or a notice on the existence of a qualification system, which may not only relate to a large number of individual contracts, but may also be published so far in advance of the launch of a particular contract (sometimes one or two years) that the information is at risk of becoming obsolete. It is preferable, therefore, to limit the obligation to provide this information to contracts for which the call for competition is made by means of a contract notice. Where this is not the case, the necessary transparency will nevertheless be assured, as the contract documents relating to individual contracts must contain the particulars needed to enable economic operators to obtain relevant and up-to-date information. -provides moreover that the Directive is not applicable to postal services which can be supplied by other agencies on an unrestricted basis or are simply subject to a licensing procedure; -modifies Article 19 regarding the methods for estimating the value of service contracts ; -reintroduces an exclusion, existing in the current Directive, for purchases of energy or fuels for the production of energy made by contracting entities operating in the energy sector in the broad sense of the term; -specifies that the obligation on the part of the purchaser to preserve the confidentiality and integrity of the data submitted to it covers the entire operational cycle of the procedure: storage, processing and holding; -introduces a maximum period of two months within which economic operators whose application for qualification under a qualification system has been refused; -modifies Article 50, describing the procedure, so as to introduce an obligation to check tender's' or candidates' compliance with obligations under environmental, social and tax legislation; -impose in the case of open, restricted and negotiated procedures for which the prior call for competition is issued by way of a contract notice an obligation on the part of contracting entities to state in the contract notice the name and address of the body responsible for appeals in relation to the award of public contracts. On the other hand, the Commission cannot accept the amendments which aim to : -guarantee of "a high standard of reliable services of general interest at affordable prices". -justify the extension, to supply and works contracts, of the exemption provided for in Article 26 (affiliated undertakings), as amended. -change the concept of "framework agreement", which is part of established law, into that of "framework contract" - specifically designed to regulate framework contracts¹⁸ in the field of translation and interpretation. -make the awarding of prizes to participants in design contests compulsory and accordingly modifies the definition of "design contests" by limiting them exclusively to contests in which prizes are awarded -includes "purchasing groups" among public authorities in order to enhance legal certainty vis--vis such joint procurement bodies. -rejects the modifications to the definition of exclusive and special rights proposed by the Commission, and thus has the effect of reverting to existing law. -extends to supply and works contracts an exclusion which relates to service contracts only. -modifies the general exclusion mechanism provided for in Article 29 by reducing the substantive conditions for exclusion to the sole condition that access to the activity concerned is not restricted, and adds that access to an activity shall legally be deemed not to be restricted if Community legislation liberalising that activity has been transposed. -include, in particular, eco-labels and environmental management systems among the instruments which may be used as technical references for drawing up technical specifications. -ensure that contracting entities do not impose any "quantitative restrictions on the exercise, by the undertakings, of freedom of organisation of their own inputs"; oblige contracting entities to ask the tenderer to indicate in his tender the share of the contract he may intend to subcontract, and the names of the subcontractors; oblige contracting entities to prohibit any subcontracting to undertakings which are in the situation referred to in Article 46 of the classic Directive "and/or undertakings which do not meet the requirements laid down in Articles 47, 48 and 49"; prohibit the contracting out of "intellectual services, with the exception of translation and interpretation services and management and related services". -broaden the scope for awarding contracts for the purpose of research, experiment, study or development without a call for competition, -tenders submitted by electronic means are to be rejected unless an advanced electronic signature within the meaning of Directive 1999/93/EC and a reliable means of encrypting the contents are used. -imposes an obligation to involve an accredited third party in order to guarantee the confidentiality of data transmitted by tenderers. -specifies that contracting entities must inform economic operators of their decisions regarding applications for qualification within a maximum period of two months. -intended

to extend the period for which the contracting entities must store information on the course of an award procedure from 4 to 6 years. -to introduce a system for appeals against the decisions made by the contracting entities and to provide for it to be open to workers and their representatives. -introduces a rule according to which the provisions which apply to a given sector overrule the rules for public contracts if there is a conflict; -as far as the award criterion of the most economically advantageous tender is concerned, to: remove the clarification that this means the most economically advantageous tender for the contracting entities; specify that environmental characteristics may include production methods"; add the criterion of "equal treatment policy.