



EUROPEAN PARLIAMENT

2009 - 2014

Committee on the Internal Market and Consumer Protection

2011/0439(COD)

14.5.2012

*****I**

DRAFT REPORT

on 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

(COM(2011)0895 – C7-0007/2012– 2011/0439(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 procurement by entities operating in the water, energy, transport and postal services sectors

(COM(2011)0895 – C7-0007/2012– 2011/0439(COD))

(Ordinary legislative procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to Parliament and the Council (COM(2011)0895),
 - 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 (C7-0007/2012),
 - 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 Swedish Parliament and by the United Kingdom House of Commons, 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 xx xx 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 on International Trade, the Committee on Employment and Social Affairs, the Committee on Industry, Research and Energy, the Committee on Transport and Tourism, the Committee on Regional Development, and the Committee on Legal Affairs (A7-0000/2012),
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 Not yet published in the Official Journal.

² Not yet published in the Official Journal.

Amendment 1
Proposal for a directive
Recital 4

Text proposed by the Commission

(4) 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

(4) 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 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, **ensuring the best possible outcome in cost-benefit ratio terms and** facilitating in particular the participation of small and medium-sized enterprises in public procurement. There is also a need to **simplify EU rules on public procurement, particularly with regard to the method used to achieve the sustainability objectives which should be included in 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.

Or. fr

Justification

In connection with Articles 54, 70, 76, 77 and 79: the role of public procurement in achieving the strategy 2020 objectives must be underlined, including societal objectives and sustainable development. The simplification of the Directive must take into account methods of incorporating societal and sustainability objectives in public procurement policy.

Amendment 2 **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 entities **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 concept 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 health, public safety and social norms and national and EU labour legislation**. This Directive clarifies how the contracting agencies **should** contribute to the protection of the environment and the promotion of sustainable development **and how they can use the discretionary power assigned to them to select technical specifications and award criteria with the aim of achieving socially-sustainable public procurement policy** whilst ensuring **the link with the subject-matter of the contract and** that they can obtain the best value for money for their contracts.

Or. fr

Justification

Recital modified in line with amendment to Article 2(23).

Amendment 3
Proposal for a directive
Recital 5 a (new)

Text proposed by the Commission

Amendment

(5a) Technical specifications, award criteria and terms of performance of the contract play distinct roles in the process of awarding contracts, but the specifications and criteria are similar in substance. The technical specifications form the basis for the contracting entities' definitions of the qualities required of tender applicants. The ability to satisfy the technical specifications is a necessary condition for consideration as a candidate for contract award; only the work, supplies and services which satisfy the specifications should be taken into consideration. In addition, the award criteria enable the contracting entities to compare the advantages of different combinations of criteria. Every tender should be assessed according to each criterion, but the ability to satisfy all the award criteria is not a necessary condition for consideration as a candidate for contract award. Finally, the contract performance conditions should be included in the contract in order to show how the latter should be implemented.

Or. fr

Justification

Recital modified in line with amendments to Articles 54, 76 and 80.

Amendment 4
Proposal for a directive
Recital 13

Text proposed by the Commission

Amendment

(13) Illicit conduct by participants in a procurement procedure, such as attempts to unduly influence the decision-making

(13) 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.

process or to enter into agreements with other candidates to manipulate the outcome of the procedure, **as well as all actions which violate standards of work, the environment and public health**, can result in **serious distortion of competition and** 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.

Or. fr

Amendment 5
Proposal for a directive
Recital 14

Text proposed by the Commission

(14) 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.

Amendment

(14) 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, ***the Member States should make every effort to ensure that EU enterprises and those of third countries receive equal treatment in the single market*** with a view to ***enabling the integration of small and medium-sized enterprises (SMEs) and stimulating employment and innovation in the EU***. 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.

Or. fr

Amendment 6
Proposal for a directive
Recital 15 a (new)

Texte proposé par la Commission

Amendement

(15a) Furthermore, the Union needs an effective instrument to, on the one hand, encourage compliance with the principle of reciprocity 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.

Or. en

Amendment 7
Proposal for a directive
Recital 19

Text proposed by the Commission

Amendment

(19) 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. As this jurisprudence would be equally applicable to public authorities when operating in the sectors covered by this directive, it is appropriate to ensure that the same rules apply in both this directive and Directive

(19) 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. As this jurisprudence would be equally applicable to public authorities when operating in the sectors covered by this directive, it is appropriate to ensure that the same rules apply in both this directive and Directive

[.../.../EU][on public procurement].

[.../.../EU][on public procurement]. *It is therefore necessary to clarify the cases in which 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. 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. These conditions should, in particular, take into account the idea of social enterprise as defined by the Commission in its communication of 25 October 2011 entitled ‘Social Business Initiative’. 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.*

Or. fr

Justification

Recital modified in line with amendment to Article 21.

Amendment 8 **Proposal for a directive** **Recital 27**

Text proposed by the Commission

(27) Electronic means of information and communication can greatly simplify the

Amendment

(27) 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.

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. ***Nonetheless, the minimum time limits applied to procurement procedures in Directive 2004/17/EC should not be altered, since adequate time limits for submission need to be guaranteed.*** Moreover, electronic means of information and communication including adequate functionalities can enable contracting ***entities*** to prevent, detect and correct errors that occur during procurement procedures.

Or. fr

Amendment 9

Proposal for a directive

Recital 31

Text proposed by the Commission

(31) In addition, new electronic purchasing techniques are constantly being developed, such as electronic catalogues. They help to increase competition and streamline public purchasing, particularly in terms of savings in time and money. Certain rules should however be laid down to ensure that such use complies with the rules of this Directive and the principles of equal treatment, non-discrimination and transparency. In particular where competition has been reopened under a framework agreement or where a dynamic purchasing system is being used and where sufficient guarantees are offered in respect of ensuring traceability, equal treatment and predictability, contracting entities should be allowed to generate tenders in relation to specific purchases on the basis

Amendment

(31) In addition, new electronic purchasing techniques are constantly being developed, such as electronic catalogues. They help to increase competition and streamline public purchasing, particularly in terms of savings in time and money. Certain rules should however be laid down to ensure that such use complies with the rules of this Directive and the principles of equal treatment, non-discrimination and transparency. ***In addition, the handling of data in this context should be conducted in accordance with national and EU data protection provisions.*** In particular where competition has been reopened under a framework agreement or where a dynamic purchasing system is being used and where sufficient guarantees are offered in respect of ensuring traceability, equal treatment

of previously transmitted electronic catalogues. In line with the requirements of the rules for electronic means of communication, contracting entities should avoid unjustified obstacles to economic operators' access to procurement procedures in which tenders are to be presented in the form of electronic catalogues and which guarantee compliance with the general principles of non-discrimination and equal treatment.

and predictability, contracting entities should be allowed to generate tenders in relation to specific purchases on the basis of previously transmitted electronic catalogues. In line with the requirements of the rules for electronic means of communication, contracting entities should avoid unjustified obstacles to economic operators' access to procurement procedures in which tenders are to be presented in the form of electronic catalogues and which guarantee compliance with the general principles of non-discrimination and equal treatment.

Or. fr

Justification

art 48

Amendment 10 **Proposal for a directive** **Recital 35**

Text proposed by the Commission

(35) The technical specifications drawn up by 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

Amendment

(35) The technical specifications drawn up by purchasers ***should allow the objectives of sustainability and the opening up of procurement to competition to be achieved.*** To that end, ***tenders*** that reflect the diversity of technical solutions ***should be specified on the basis of performance linked to the life-cycle and socially-sustainable production process of the works, supplies and services*** so as to ***ensure a balance between functional and sustainable objectives and*** obtain a sufficient level of competition. Consequently, technical specifications should be drafted ***and applied in conformity with the principles of transparency, non-discrimination and equality of opportunity. These principles should not only protect the interests of tenderers but also safeguard effective***

made to a European standard or, in the absence thereof, to a national standard, tenders based on other equivalent arrangements which meet the requirements of the contracting entities and are equivalent in terms of safety **must** be considered by the contracting entities. 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.

competition, enabling more efficient spending targeting contracts providing the best cost-benefit ratio. 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 other equivalent arrangements which meet the requirements of the contracting entities and are equivalent in terms of safety **should** be considered by the contracting entities. 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.

Or. fr

Amendment 11
Proposal for a directive
Recital 43

Text proposed by the Commission

(43) Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment. Those criteria should guarantee that tenders are assessed in conditions of effective competition, **also where** contracting entities require high-quality works, supplies and services that are optimally suited to their needs. As a result, contracting entities should be allowed to adopt as award criteria **either** "the most economically advantageous tender" **or** "**the lowest cost**", taking into account that **in**

Amendment

(43) 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, **at the same time ensuring that** contracting authorities require high-quality works, supplies and services that are optimally suited to their needs **and which include factors linked to socially-sustainable production process criteria and involve disadvantaged persons**. As a result, contracting entities

the latter case they are free to set adequate quality standards by using technical specifications or contract performance conditions.

should be allowed to adopt as award criteria ‘the most economically advantageous tender’, taking into account *the fact that they must make reference to* adequate quality standards by using technical specifications or contract performance conditions.

Or. fr

Justification

Articles 54 and 76.

Amendment 12 **Proposal for a directive** **Recital 44**

Text proposed by the Commission

(44) Where contracting entities *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 entity 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

(44) Where contracting entities 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 entity 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.

Or. fr

Amendment 13
Proposal for a directive
Recital 45

Text proposed by the Commission

(45) 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.

Amendment

(45) 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 **approaches in terms of life-cycle costing and socially-sustainable production processes** 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 **and a socially-sustainable production process** as a further underpinning for the use of public procurement in support of sustainable growth. **The sectoral legislation should also include technical specifications and award criteria which take into consideration the benefits of social and environmental sustainability where they cannot be monetised whilst providing a**

link to the subject-matter of the contract and complying with the principles of transparency, non-discrimination and equality of opportunity.

Or. fr

Justification

Recital modified in line with amendment to Article 54 Annex VIII.

Amendment 14
Proposal for a directive
Recital 46

Text proposed by the Commission

(46) Those sector-specific measures ***must*** be complemented by an adaptation of the public procurement Directives empowering contracting entities to pursue the objectives of the Europe 2020 Strategy in their purchasing strategies. It should hence be made clear that contracting entities ***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 a 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

(46) Those sector-specific measures ***should*** be complemented by an adaptation of the public procurement Directives empowering contracting entities to pursue the objectives of the Europe 2020 Strategy in their purchasing strategies. It should hence be made clear that contracting entities ***should*** determine the most economically-advantageous tender using a costing approach ***based on life-cycle and sustainable production processes, in accordance with Articles 9, 10 and 11 of the Treaty on the Functioning of the European Union which lay down the social and environmental protection conditions to be taken into account when determining and implementing EU policy.*** The notion of life-cycle costing includes all costs over the life-cycle of a 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.

Or. fr

Amendment 15
Proposal for a directive
Recital 47

Text proposed by the Commission

(47) Furthermore, in technical specifications and in award criteria, contracting entities 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 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

Amendment

(47) Furthermore, in technical specifications and in award criteria, contracting entities should be allowed to refer to ***life-cycle characteristics and a socially-sustainable production process***, provided that ***these characteristics or this process*** are linked to the subject-matter of the contract. ***The technical specifications and award criteria should be understood in a broad sense. They should therefore make reference to the life-cycle and socially-sustainable production process, including the social and environmental aspects of the production process or the provision of products or services. The contracting authorities may also use the technical specifications or award criteria in order to minimise the detrimental social or environmental impact or maximise the positive social or environmental impact.*** In order to better integrate social considerations in public procurement, procurers ***should*** also be allowed to include, in the ***technical specifications and the*** award criteria, characteristics related to the working conditions of the persons directly participating in the process of production or provision in question. They should be applied 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.

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.

Or. fr

Amendment 16
Proposal for a directive
Recital 48

Text proposed by the Commission

(48) For service contracts and for contracts involving the design of works, contracting entities should also be allowed to use as **an** award **crit***erion* the organisation **qual***ification* and experience of the staff assigned to performing the contract in question, as this may affect the quality of the contract performance and, as a result, **the economic value of the** tender.

Amendment

(48) For service contracts and for contracts involving the design of works, contracting entities should also be allowed to use, as **technical specifications and** award **crit***eria*, the organisation, **qual***ifications* and experience of the staff assigned to performing the contract in question, as this may affect the quality **and social sustainability** of the contract performance and, as a result, **on determining which** tender **gives the best result in terms of the cost-benefit ratio**.

Or. fr

Amendment 17
Proposal for a directive
Recital 49

Text proposed by the Commission

(49) 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 entities should be obliged to ask for an explanation of the price charged where a tender significantly undercuts the prices

Amendment

(49) 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 entities 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 entity should be entitled to reject the tender.*** Rejection should be mandatory in cases where the contracting entity has established that the abnormally low price results from non-compliance with mandatory Union legislation in the fields of social, labour or environmental law or international labour law provisions.

demanded by other tenderers. Rejection ***of the tender*** should be mandatory in cases where the contracting entity has established that the abnormally low price results from non-compliance with mandatory Union legislation in the fields of social, labour or environmental law or international labour law provisions ***or, if the contractor cannot give a satisfactory explanation of the abnormally low price of his tender, it should be rejected by the contracting entity.***

Or. fr

Amendment 18
Proposal for a directive
Recital 50

Text proposed by the Commission

(50) 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 notice used to make the call for competition, or in 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

(50) 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 notice used to make the call for competition, or in 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 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.

Or. fr

Amendment 19
Proposal for a directive
Recital 51

Text proposed by the Commission

(51) 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 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.

Amendment

(51) The laws **and** regulations, 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, **as do the collective agreements applicable in the territory where the works, services and supplies are carried out or delivered**. 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.

Or. fr

Justification

art. 79

Amendment 20
Proposal for a directive
Recital 59

Text proposed by the Commission

(59) Not all contracting entities 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 entities; 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

(59) Not all contracting entities 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 ***be provided with useful information***, in particular when participating in procurement procedures on a cross-border basis.

Or. fr

Amendment 21
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.

Or. en

Amendment 22
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 location 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;

Or. en

Amendment 23
Proposal for a directive
Article 2 – point 22 a (new)

Text proposed by the Commission

Amendment

(22a) ‘Life-cycle characteristics’ means elements relating to any part of the life-cycle of a product or works or the provision of a service, as defined in point 22 of this Article. Life-cycle characteristics can be invisible characteristics that are embedded in a product as a result of choices made in the production or other non-use phases of the life-cycle of the product, even if such characteristics are not apparent in the physical characteristics or functional qualities of the resulting product or service;

Or. en

Amendment 24
Proposal for a directive
Article 2 – point 22 b (new)

Text proposed by the Commission

Amendment

(22b) 'socially sustainable production process' means a production process in which the provision of works, services and supplies complies with 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 compliance with 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;

Or. en

Amendment 25

Proposal for a directive Article 11 a (new)

Texte proposé par la Commission

Amendement

Article 11 a

Derogation from application of this Directive with a view to protecting a commercial strategy

Whenever a procurement procedure is likely to reveal a commercial strategy which it would be detrimental to bring to the attention of the competition, the contracting entity may refer the matter to the control body referred to in Article 93 in order to obtain a derogation from application of this Directive.

To this end, the contracting entity making the application shall present a duly motivated request to the control body mentioned in Article 93, in accordance

with point b(a) of the first subparagraph of Article 93(3).

If the control body authorises the derogation in accordance with the first subparagraph, this Directive shall not apply to the procurement procedure in question.

Or. fr

Amendment 26
Proposal for a directive
Article 14 a (new)

Text proposed by the Commission

Amendment

Article 14a

Substantial reciprocity

The practical implementation of the Agreement on Government Procurement¹ within the Union legislative framework on public procurement shall be based on a prior assessment of the correct application of the principle of substantial reciprocity in market opening between the European Union and third country signatories. Such assessment of substantial reciprocity shall be extended to third countries which are not party to the Agreement on Government Procurement and which have access to the European public procurement market.

¹ OJ L 336, 23.12.1994.

Or. en

Amendment 27
Proposal for a directive
Article 19 – paragraph 1 – point c

Text proposed by the Commission

(c) 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 and operations conducted with the European Financial Stability Facility;

Amendment

(c) 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 and operations conducted with the European Financial Stability Facility, ***in particular, transactions by the contracting entities to raise money or capital and services provided by central banks;***

Or. fr

Amendment 28
Proposal for a directive
Article 21 – title

Text proposed by the Commission

Relations between ***public*** authorities

Amendment

Cooperation between ***contracting*** authorities.

Or. fr

Amendment 29
Proposal for a directive
Article 21 – 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) ***most*** 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;

Or. fr

Amendment 30
Proposal for a directive
Article 21 – 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, ***except where the private participation of the controlling contracting authority or the controlled legal person is specific to its status as a body established under public law, in keeping with the concept of social enterprise.***

Or. fr

Amendment 31
Proposal for a directive
Article 21 – 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 contract.

Amendment

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 contract, ***except where the private participation of the controlling contracting authority or the legal person controlled by the same contracting authority is specific to its status as a body established under public law, in keeping with the concept of social enterprise.***

Or. fr

Amendment 32
Proposal for a directive
Article 21 – paragraph 3 – subparagraph 1 – point b

Text proposed by the Commission

Amendment

(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;

(b) **most** 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;

Or. fr

Amendment 33
Proposal for a directive
Article 21 – paragraph 3 – subparagraph 1 – point c

Text proposed by the Commission

Amendment

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

(c) there is no private participation in the controlled legal person, ***except where the private participation of the controlling contracting authority or the controlled legal person is specific to its status as a bodies established under public law, in keeping with the concept of social enterprise.***

Or. fr

Amendment 34
Proposal for a directive
Article 21 – 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 “works, supply or service contract” within the meaning of point 7 of Article 2 of this Directive, where the following cumulative conditions are met:

(a) the agreement establishes ***a genuine*** co-operation between the participating contracting authorities ***aimed at*** carrying out ***jointly their*** public service tasks ***and***

4. An agreement concluded between two or more contracting authorities shall not be deemed to be a “works, supply or service contract” within the meaning of point 7 of Article 2 of this Directive, where the following cumulative conditions are met:

(a) the agreement establishes cooperation between the participating contracting authorities ***for the purpose of*** carrying out ***a shared*** public service ***task or of pooling***

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.

resources to enable them to carry out their specific tasks;

(b) the agreement does not provide for, and is without prejudice to, such procurement procedures as might be necessary in order to carry out the public service task referred to in point (a);

(c) the agreement is concluded solely by public authorities, without the involvement of any private party, except in cases where the private participation of the contracting authorities participating in the cooperation is specific to their status as bodies established under public law and they have been instructed by a Member State to carry out a public service task, in keeping with the concept of social enterprise.

Or. fr

Amendment 35
Proposal for a directive
Article 21 – 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, ***except in cases where the private participation of the participating***

contracting authorities carrying out a public service task assigned by a Member State is specific to their status as bodies established under public law and is therefore governed solely by considerations relating to the public interest or to social utility, without pursuing aims of a different nature, in keeping with the concept of social enterprise.

Or. fr

Amendment 36
Proposal for a directive
Article 30 – paragraph 2 – subparagraph 1

Text proposed by the Commission

2. Groups of economic operators may submit tenders or put themselves forward as candidates. Contracting entities shall not establish specific conditions for participation of such groups in procurement procedures which are not imposed on individual candidates. In order to submit a tender or a request to participate, those groups shall not be required by the contracting entities to assume a specific legal form.

Amendment

2. Groups of economic operators may submit tenders or put themselves forward as candidates. ***Groups of economic operators, particularly small and medium-sized enterprises (SMEs), may take the form of a consortium of enterprises.*** Contracting entities shall not establish specific conditions for participation of such groups in procurement procedures which are not imposed on individual candidates. In order to submit a tender or a request to participate, those groups shall not be required by the contracting entities to assume a specific legal form.

Or. en

Amendment 37
Proposal for a directive
Article 30 – paragraph 2 – subparagraph 1 a (new)

Text proposed by the Commission

Amendment

Contracting entities shall give the possibility to a group 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.*

Or. en

Amendment 38
Proposal for a directive
Article 33 – paragraph 1 – subparagraph 1 – point c

Texte proposé par la Commission

Amendement

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

deleted

Or. en

Amendment 39
Proposal for a directive
Article 33 – paragraph 6 – subparagraph 1 – point a

Text proposed by the Commission

Amendment

*(a) requests to participate in procedures for
the award of 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;***

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

Or. en

Amendment 40
Proposal for a directive
Article 36 – paragraph 1 – subparagraph 2

Text proposed by the Commission

Amendment

*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*

*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.

shared interest in the outcome of the procurement procedure, which may be perceived to impair the impartial and objective performance of their duties.

Or. en

Amendment 41
Proposal for a directive
Article 36 – paragraph 1 – subparagraph 3

Text proposed by the Commission

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

For the purposes of this Article, '*shared interests*' means any economic *interest or family ties*, shared with the candidates or the tenderers, including conflicting professional interests.

Or. en

Amendment 42
Proposal for a directive
Article 40 – 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.

Or. fr

Amendment 43
Proposal for a directive
Article 40 – paragraph 1 – subparagraph 3 a (new)

Text proposed by the Commission

Amendment

The contract shall be awarded on the sole basis of the award criterion of the most

economically advantageous tender in accordance with Article 67(1).

Or. en

Amendment 44

Proposal for a directive

Article 40 – paragraph 2 – introductory part

Text proposed by the Commission

2. Where contracting entities have published a periodic indicative 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 1 of this Article, may be shortened to **20 days**, provided that both of the following conditions are fulfilled:

Amendment

2. Where contracting entities have published a periodic indicative 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 1 of this Article, may be shortened to **36 days**, provided that both of the following conditions are fulfilled:

Or. fr

Amendment 45

Proposal for a directive

Article 40 – paragraph 2 – 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.

Or. fr

Amendment 46

Proposal for a directive Article 40 – paragraph 3

Text proposed by the Commission

3. Where a state of urgency duly substantiated by the contracting entities renders impracticable the time limit laid down in the second subparagraph of paragraph 1, they may fix a time limit which shall be not less than **20 days** from the date on which the contract notice was sent.

Amendment

3. Where a state of urgency duly substantiated by the contracting entities renders impracticable the time limit laid down in the second subparagraph of paragraph 1, they may fix a time limit which shall be not less than **22 days** from the date on which the contract notice was sent.

Or. fr

Amendment 47

Proposal for a directive Article 40 – paragraph 4

Text proposed by the Commission

4. The contracting entity 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 33(3), (4) and (5).

Amendment

4. The contracting entity may reduce by **seven 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 33(3), (4) and (5).

Or. fr

Amendment 48

Proposal for a directive Article 41 – paragraph 1 – subparagraph 2

Text proposed by the Commission

The minimum time limit for the receipt of requests to participate shall, as a general rule, be fixed at no less than **30 days** from the date on which the contract notice or the invitation to confirm interest is sent and

Amendment

The minimum time limit for the receipt of requests to participate shall, as a general rule, be fixed at no less than **37 days** from the date on which the contract notice or the invitation to confirm interest is sent and

may in no case be less than **15 days**.

may in no case be less than **22 days**.

Or. fr

Amendment 49

Proposal for a directive

Article 41 – paragraph 2 – subparagraph 2

Text proposed by the Commission

The time limit for the receipt of tenders may be set by mutual agreement between the contracting entity and the selected 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 entity shall fix a time limit which shall in no case be less than **10 days** from the date on which the invitation to tender is sent.

Amendment

The time limit for the receipt of tenders may be set by mutual agreement between the contracting entity and the selected 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 entity shall fix a time limit which shall in no case be less than **24 days** from the date on which the invitation to tender is sent.

Or. fr

Amendment 50

Proposal for a directive

Article 42 – paragraph 1 – subparagraph 2

Text proposed by the Commission

The minimum time limit for the receipt of requests to participate shall, as a general rule, be fixed at no less than **30 days** from the date on which the contract notice or, where a periodic indicative notice is used as a means of calling for competition, the invitation to confirm interest is sent and may in no case be less than **15 days**.

Amendment

The minimum time limit for the receipt of requests to participate shall, as a general rule, be fixed at no less than **37 days** from the date on which the contract notice or, where a periodic indicative notice is used as a means of calling for competition, the invitation to confirm interest is sent and may in no case be less than **22 days**.

Or. fr

Amendment 51

Proposal for a directive

Article 42 – paragraph 2 – subparagraph 2

Text proposed by the Commission

The time limit for the receipt of tenders may be set by mutual agreement between the contracting entity and the selected 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 entity shall fix a time limit which shall in no case be less than **10 days** from the date on which the invitation to tender is sent.

Amendment

The time limit for the receipt of tenders may be set by mutual agreement between the contracting entity and the selected 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 entity shall fix a time limit which shall in no case be less than **24 days** from the date on which the invitation to tender is sent.

Or. fr

Amendment 52

Proposal for a directive

Article 43 – paragraph 1

Text proposed by the Commission

1. Member States **may** provide that contracting entities may apply innovation partnerships as regulated in this Directive. ***Member States may decide not to transpose into their national law innovation partnerships or to restrict the use of it to certain types of procurement.***

Amendment

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

Or. en

Amendment 53

Proposal for a directive

Article 45 – paragraph 1 – subparagraph 3

Text proposed by the Commission

The term of a framework agreement shall

Amendment

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.*

not exceed four years, save in *any one of the following* cases:

(a) the implementation of the framework agreement necessitates investment:

(i) not recoupable within four years;

(ii) related to staff training or skill maintenance; or

(iii) to be made in the field of innovation, research, and development;

(b) the framework agreement is linked to safety or security considerations; or

(c) the subject of the framework agreement or the time-frame for its implementation is such as to necessitate a term exceeding four years.

Or. fr

Amendment 54
Proposal for a directive
Article 47 – 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 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

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

Or. en

Amendment 55
Proposal for a directive
Article 47 – paragraph 5 - subparagraph 1

Text proposed by the Commission

5. Before proceeding with the electronic auction, contracting entities 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

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

Or. en

Amendment 56
Proposal for a directive
Article 54 – 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 shall be set out in the procurement documents. They shall define the characteristics required of a works, service or supply ***in order to achieve both the use and sustainability objectives of the contracting entity.***

Or. en

Amendment 57
Proposal for a directive
Article 54 – 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 ***shall*** 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 ***points (22), (22a) and (22b)*** of Article 2.

Or. en

Amendment 58
Proposal for a directive
Article 54 – paragraph 1 – subparagraph 4

Text proposed by the Commission

For all procurement the subject of which is intended for use by persons, whether general public or staff of the contracting entity, those technical specifications shall, except in duly justified cases, be drawn up so as to take into account accessibility criteria for people with disabilities or design for all users.

Amendment

For all procurement the subject of which is intended for use by persons, whether general public or staff of the contracting entity, those technical specifications shall, except in duly justified cases, ***which shall be stated in the call for competition and the tender documents***, be drawn up so as to take into account accessibility criteria for people with disabilities or design for all users.

Or. en

Amendment 59
Proposal for a directive
Article 54 – paragraph 1 – subparagraph 5 a (new)

Text proposed by the Commission

Amendment

Technical specifications may also include, as appropriate, requirements relating to:

Or. en

Amendment 60
Proposal for a directive
Article 54 – paragraph 1 – subparagraph 5 – 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;

Or. en

Amendment 61
Proposal for a directive
Article 54 – paragraph 1 – subparagraph 5 – point b (new)

Text proposed by the Commission

Amendment

(b) life-cycle characteristics;

Or. en

Amendment 62
Proposal for a directive
Article 54 – paragraph 1 – subparagraph 5 – point c (new)

Text proposed by the Commission

Amendment

(c) socially sustainable production process;

Or. en

Amendment 63
Proposal for a directive
Article 54 – paragraph 1 – subparagraph 5 – 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;

Or. en

Amendment 64
Proposal for a directive
Article 54 – paragraph 1 – subparagraph 5 – point e (new)

Text proposed by the Commission

Amendment

(e) safety or dimensions, including the procedures concerning quality assurance, terminology, symbols, testing and test methods, packaging, marking and

labelling, user instructions;

Or. en

Amendment 65
Proposal for a directive
Article 54 – paragraph 1 – subparagraph 5 – 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 entity 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.

Or. en

Amendment 66
Proposal for a directive
Article 54 – paragraph 3 – point a

Text proposed by the Commission

Amendment

(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 entities to award the contract;

(a) in terms of performance or functional requirements, including *social* environmental characteristics, provided that the parameters are sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting entities to award the contract; *In accordance with paragraph 1, technical specifications may 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, and not only to the performance or functional requirements of the works, supplies, or*

services in use;

Or. en

Amendment 67
Proposal for a directive
Article 54 – paragraph 3 – point b

Text proposed by the Commission

(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*";

Amendment

(b) by reference to specifications and ***standards, as defined in point 2 of Annex VIII, with preference given to European and international standards, and only in the absence thereof to national standards***; each reference shall be accompanied by the words '*or equivalent*';

Or. en

Amendment 68
Proposal for a directive
Article 54 – paragraph 3 – point c

Text proposed by the Commission

(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;

Amendment

(c) in terms of performance or functional requirements as referred to in point (a), with reference to the technical specifications ***and standards*** referred to in point (b) as a means of presuming conformity with such performance or functional requirements;

Or. en

Amendment 69
Proposal for a directive
Article 54 – 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 **and standards** 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.

Or. en

Amendment 70
Proposal for a directive
Article 54 – paragraph 4

Text proposed by the Commission

4. ***Unless*** justified by the subject-matter of the contract, technical specifications ***shall not*** refer to a specific make or source, or to a particular process, or to trade marks, patents, types or a specific origin or production ***with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted, on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraph 3 is not possible.*** Such reference shall be accompanied by the words "or equivalent".

Amendment

4. ***When*** justified by the subject-matter of the contract, technical specifications ***may*** refer to a specific make or source, ***location of production*** or to a particular process, or to trade marks, patents, types or a specific origin or production. Such reference shall be accompanied by the words 'or equivalent'.

Or. en

Amendment 71
Proposal for a directive
Article 54 – paragraph 5

Text proposed by the Commission

5. Where a contracting entity uses the option of referring to the specifications referred to in point (b) of paragraph 3, it shall not reject a tender on the ground that the works, supplies and services tendered for do not comply with the specifications to which it has referred, once the tenderer proves in its tender, by whatever appropriate means, including the means of proof referred to in Article 56, that the solutions which it proposes satisfy in an equivalent manner the requirements defined by the technical specifications.

Amendment

5. Where a contracting entity uses the option of referring to the specifications **and standards** referred to in point (b) of paragraph 3, it shall not reject a tender on the ground that the works, supplies and services tendered for do not comply with the specifications **and standards** to which it has referred, once the tenderer proves in its tender, by whatever appropriate means, including the means of proof referred to in Article 56, that the solutions which it proposes satisfy in an equivalent manner the requirements defined by the technical specifications.

Or. en

Amendment 72

Proposal for a directive

Article 54 – paragraph 6 – subparagraph 1

Text proposed by the Commission

Where a contracting entity uses the option provided for in point (a) of paragraph 3 to formulate technical specifications in terms of performance or functional requirements, it shall not reject a tender for supplies, services or works which comply with a national standard **transposing a European standard, with a European technical approval, a common technical specification, an international standard, or a technical reference system established by a European standardisation body, where those specifications** address the performance or functional requirements which it has laid down.

Amendment

Where a contracting entity uses the option provided for in point (a) of paragraph 3 to formulate technical specifications in terms of performance or functional requirements, it shall not reject a tender for supplies, services or works which comply with a national standard, **where the criteria for that** standard address the performance or functional requirements which it has laid down.

Or. en

Amendment 73
Proposal for a directive
Article 55 – title

Text proposed by the Commission

Labels

Amendment

***Labels and certificates of a third party
verified standard***

Or. en

Amendment 74
Proposal for a directive
Article 55 – paragraph 1 – subparagraph 1 – introductory part

Text proposed by the Commission

Where contracting entities 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 54 *paragraph 3*, they may require that those works, supplies or services 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 the 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

Amendment

Where contracting entities 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 54(3), they may require that those works, supplies or services bear a specific label ***and/or a certificate of a third party verified standard***, provided that all of the following conditions are fulfilled:

- (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 the characteristics of the works, supplies or services that are the subject-matter of the contract;
- (b) the requirements for the label ***and/or the certificate of a third party verified standard*** are drawn up on the basis of scientific information or based on other objectively verifiable and non-discriminatory criteria and data;
- (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,

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.

manufacturers, distributors and environmental organisations, may participate;

(d) the labels ***and/or certificates of a third party verified standard*** are accessible to all interested parties;

(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;***

Or. en

Amendment 75
Proposal for a directive
Article 55 – paragraph 2

Text proposed by the Commission

2. Where a ***label fulfils the conditions of provided in points (b), (c), (d) and (e) of paragraph 1 but also sets outs*** out requirements not linked to the subject-matter of the contract, contracting entities may use ***those of*** the detailed specifications of that ***label***, or, if 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 fall within the definition set out in point 5a of Annex VIII because its criteria*** sets out requirements not linked to the subject-matter of the contract, contracting entities may use the detailed specifications of that ***standard*** or, if necessary, parts thereof, that are linked to the subject-matter of the contract and are appropriate to define characteristics of this subject-matter.

Or. en

Amendment 76
Proposal for a directive
Article 55 – paragraph 2 – subparagraph 1 a (new)

Text proposed by the Commission

Amendment

The contracting entity 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 entities shall also accept all equivalent standards that fulfil the specifications established by the contracting entity. For works, supplies or services that have not been verified by a third party to comply with such a standard, contracting entities shall also accept a technical dossier of the manufacturer or other appropriate means of proof such as certificates and declarations.

Or. en

Amendment 77
Proposal for a directive
Article 59 – paragraph 1 – subparagraph 1

Text proposed by the Commission

1. *Contracts may be subdivided into homogenous or heterogeneous lots.*
Article 13(7) applies.

Amendment

1. *Except where the subject of a contract is such that services cannot be broken down individually, the contracting entity shall award the contract in separate lots.*
Article 13(7) applies.

Or. fr

Amendment 78
Proposal for a directive
Article 59 – paragraph 1 – subparagraph 2

Text proposed by the Commission

Contracting entities shall indicate, in the contract notice, in the invitation to confirm interest, or, where the means of calling for competition is a notice on the existence of a qualification system, in the invitation to tender or to negotiate, whether tenders are limited to one or more lots only.

Amendment

Contracting entities shall indicate, in the contract notice, in the invitation to confirm interest, or, where the means of calling for competition is a notice on the existence of a qualification system, in the invitation to tender or to negotiate, whether tenders are limited to one or more lots only. ***They shall be free to determine the number of lots, taking into account in particular the***

technical characteristics of the services requested, the structure of the economic sector concerned, and, where necessary, the rules applicable to given professions.

Or. fr

Amendment 79
Proposal for a directive
Article 59 – paragraph 2

Text proposed by the Commission

2. Contracting entities *may, even where the possibility to tender for all lots has been indicated*, limit the number of lots that may be awarded to a tenderer provided that the maximum number is stated in the contract notice or in the invitation to confirm interest. Contracting entities shall determine and indicate in the procurement documents the objective and non-discriminatory criteria or rules for awarding the different lots *where the application of the chosen award criteria would result in the award to one tenderer of more lots than the maximum number*.

Amendment

2. *Candidates may not submit different tenders for differing numbers of lots.* Contracting authorities *shall* limit the number of lots that may be awarded to a tenderer, provided that the maximum number is stated in the contract notice or in the invitation to confirm interest. Contracting authorities shall determine and indicate in the procurement documents the objective and non-discriminatory criteria or rules for awarding the different lots.

Or. fr

Amendment 80
Proposal for a directive
Article 59 – paragraph 2 – subparagraph 1 a (new)

Text proposed by the Commission

Amendment

In the procurement documents relating to information on lots, contracting entities shall ask the tenderer to indicate in its tender any share of the contract he may intend to subcontract to third parties and any proposed subcontractors, per tendered lot, within the limit of three subsequent subcontracting levels, in accordance with Article 81.

Or. en

Amendment 81
Proposal for a directive
Article 70 – paragraph 5

Text proposed by the Commission

2. Contracting entities **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 XIV.

Amendment

2. Contracting entities **shall** not award a contract to the tenderer submitting the best tender where they have established 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 XIV **or with obligations in the field of intellectual property law**.

Or. en

Amendment 82
Proposal for a directive
Article 70 – paragraph 5 a (new)

Text proposed by the Commission

Amendment

2a. Where such laws do not apply, violations of other laws applying to the tenderer and which ensure an equivalent level of protection shall also provide a basis for exclusion.

Or. en

Amendment 83
Proposal for a directive
Article 70 – paragraph 7

Text proposed by the Commission

Amendment

4. The Commission shall be empowered to

deleted

adopt delegated acts in accordance with Article 98 to amend the list in Annex XIV, where necessary due to the conclusion of new international agreements or modification of existing international agreements.

Or. en

Amendment 84
Proposal for a directive
Article 75 – title

Text proposed by the Commission

Quality assurance standards and environmental management standards

Amendment

Quality assurance standards and **social and** environmental management standards

Or. en

Amendment 85
Proposal for a directive
Article 75 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2a. Contracting entities may require the production of certificates drawn up by independent bodies attesting that the economic operator complies 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 to be performed.

Or. en

Amendment 86
Proposal for a directive
Article 75 – paragraph 3

Text proposed by the Commission

3. Upon request, Member States shall make available to other Member States, in accordance with Article 97, 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 97, any information relating to the documents produced as evidence of compliance with quality, environmental **and social** standards referred to in paragraphs 1 and 2 of this Article.

Or. en

Amendment 87
Proposal for a directive
Article 76 – paragraph 1 – subparagraph 1

Text proposed by the Commission

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

(a) the most economically advantageous tender;

(b) **the lowest cost**.

Amendment

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

Or. en

Amendment 88
Proposal for a directive
Article 76 – paragraph 1 – subparagraph 2

Text proposed by the Commission

Costs may be assessed, at the choice of the contracting entity, 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 77.

Amendment

deleted

Amendment 89
Proposal for a directive
Article 76 – 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 entity shall be identified on the basis of criteria linked to the subject-matter of the 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 contract in question, such as:

Amendment

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

Or. en

Amendment 90
Proposal for a directive
Article 76 – paragraph 2 – point a a (new)

Text proposed by the Commission

Amendment

(aa) life-cycle process and life-cycle characteristics;

Or. en

Amendment 91
Proposal for a directive
Article 76 – paragraph 2 – point a b (new)

Text proposed by the Commission

Amendment

(ab) socially sustainable production process

Or. en

Amendment 92
Proposal for a directive
Article 76 – 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 entity, 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 *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 entity, which must verify that replacements ensure equivalent organisation and quality;

Or. en

Amendment 93
Proposal for a directive
Article 76 – 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 referred to in point (a) of paragraph 1 and in paragraph 2.

Amendment

deleted

Or. en

Amendment 94
Proposal for a directive
Article 76 – paragraph 3 a (new)

Text proposed by the Commission

Amendment

Award criteria 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 by the contracting entity in order to determine whether the tenderers meet the award criteria;

Or. en

Amendment 95
Proposal for a directive
Article 76 – paragraph 4

Text proposed by the Commission

4. Award criteria shall not confer an unrestricted freedom of choice on the contracting entity. *They shall ensure the possibility of effective competition and shall* be accompanied by requirements which allow the information provided by the tenderers to be effectively verified. Contracting entities shall verify effectively, on the basis of the information and proof provided by the tenderers, whether the tenders meet the award criteria.

Amendment

4. Award criteria shall not confer an unrestricted freedom of choice on the contracting entity. *Award criteria used to identify the tender representing the most economically advantageous tender shall:*

(a) be linked to the subject matter;

(b) be accompanied by requirements which allow the information provided by the tenderers to be effectively verified;

(c) ensure the possibility of effective competition.

Contracting entities shall verify effectively, on the basis of the information and proof provided by the tenderers, whether the tenders meet the award criteria.

Or. en

Amendment 96
Proposal for a directive
Article 76 – paragraph 5 – subparagraph 1

Text proposed by the Commission

In the case referred to in point (a) of paragraph 1 the contracting entity shall specify the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

Amendment

The contracting entity shall specify the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

Or. en

Amendment 97
Proposal for a directive
Article 77 – title

Text proposed by the Commission

Life-cycle *costing*

Amendment

Life-cycle *considerations*

Or. en

Amendment 98
Proposal for a directive
Article 78 – paragraph 1 – point a

Text proposed by the Commission

(a) the tenderer is not able to provide the certificates and documents required pursuant to Article 74(3);

Amendment

(a) the tenderer is not able to provide the certificates and documents required pursuant to Article 74(3) ***and Article 73(1)***;

Or. en

Amendment 99
Proposal for a directive
Article 78 – paragraph 1 – point a a (new)

Text proposed by the Commission

Amendment

(aa) the tenderer is unable to provide up to date information regarding the payment of social security contributions

and taxes required before awarding the contract.

Or. en

Amendment 100
Proposal for a directive
Article 79 – 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 **30** % lower than the average price or costs of the remaining tenders

Or. en

Amendment 101
Proposal for a directive
Article 79 – 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

deleted

Or. en

Amendment 102
Proposal for a directive
Article 79 – paragraph 1 – point c

Text proposed by the Commission

(c) at least **five** tenders have been submitted.

Amendment

(c) at least **three** tenders have been submitted.

Or. en

Amendment 103
Proposal for a directive
Article 79– paragraph 2

Text proposed by the Commission

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

Amendment

2. Where tenders appear to be abnormally low for other reasons, contracting entities *shall* also request such explanations.

Or. en

Amendment 104
Proposal for a directive
Article 79 – 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 paragraphs 1 and 2 *should* in particular relate to:

Or. en

Amendment 105
Proposal for a directive
Article 79 – 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 XIV or, where not applicable, with other provisions ensuring an equivalent level of protection;

Amendment

(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 XIV or, where not applicable, with other provisions ensuring an equivalent level of protection;

Or. en

Amendment 106
Proposal for a directive
Article 79 – 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.

Or. en

Amendment 107
Proposal for a directive
Article 79 – paragraph 3 – point d b (new)

Text proposed by the Commission

Amendment

(db) compliance with subcontracting requirements set out in Article 81.

Or. en

Amendment 108
Proposal for a directive
Article 79 – paragraph 4 – subparagraph 3

Text proposed by the Commission

Amendment

Contracting entities 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 XIV.

Contracting entities 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 and by collective agreements which apply in the place where the work, service or supply is performed***, in the field of social and labour law or environmental law or by the international social and environmental law provisions listed in Annex XIV.

Amendment 109
Proposal for a directive
Article 81 – paragraph 1

Text proposed by the Commission

1. In the procurement documents, the contracting entity **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 entity **shall** 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.

Or. en

Amendment 110
Proposal for a directive
Article 81 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

1a. Member States shall limit the possibility for a tenderer to subcontract any parts of the works or services to be performed or goods to be delivered to no more than three successive levels of subcontracting.

Or. en

Amendment 111
Proposal for a directive
Article 81 - 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 entity shall transfer due

Amendment

2. Member States **shall** provide that at the request of the subcontractor and where the nature of the contract so allows, the contracting entity 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.

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.

Or. en

Amendment 112
Proposal for a directive
Article 81 – paragraph 3

Text proposed by the Commission

3. Paragraphs 1 and 2 shall be without prejudice to the question of the *principal economic operator's* liability.

Amendment

3. Paragraphs 1 and 2 shall be without prejudice to the question of the *main contractor's* liability. *Member States shall provide for a system of joint and several liability down the subcontracting chain. They shall ensure that the main contractor and any intermediate subcontractor which have violated fundamental rights, health and safety requirements or social and labour rules and standards as laid down in Union and national legislation and in collective agreements which apply in the place where the work, service or supply is performed, may be liable to make the payments due in relation to such violations, such as outstanding remuneration, taxes or social contributions, in addition to or in place of the employing subcontractor or the contractor of which the employer is a direct subcontractor.*

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

The contracting entity 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 reasons 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.

Or. en

Amendment 113
Proposal for a directive
Article 82 – 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.

Or. en

Amendment 114
Proposal for a directive
Article 83 a (new)

Text proposed by the Commission

Amendment

Article 83a

Monitoring of contract performance

1. Contracting entities may or may be required by Member States to monitor the performance of the contractor awarded the contract and, at appropriate stages during the contract term, carry out an assessment of performance using a method 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 within a reasonable timeframe and to obtain judicial protection.

2. Where an assessment is carried out in accordance with paragraph 1 and an economic operator or a subcontractor appointed for that contract by the economic operator has been found to have shown significant or persistent deficiencies in the performance of any substantive requirement under the contract and the economic operator has not objected to the findings or the economic operator's objections have not been validated through seeking judicial protection, the contracting entity shall communicate the fact and the necessary detail of such an assessment to the supervisory and administrative authorities as referred to in Articles 93 and 97.

3. Member States shall ensure that contracting entities can easily obtain information and assistance with regard to the application of this Article through the assistance provided by supervisory and administrative authorities as mentioned in Articles 93, 96 and 97.

Or. en

Amendment 115
Proposal for a directive
Article 85 – paragraph 1

Text proposed by the Commission

Amendment

1. Contracting entities intending to award a contract for the services referred to in Article 84 shall make known their intention by means of a contract notice.

deleted

Or. en

Amendment 116
Proposal for a directive
Article 86 – paragraph 2

Text proposed by the Commission

Amendment

2. Member States shall ensure that contracting entities 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.**

2. Member States shall ensure that contracting entities 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 **as well as consumer protection and social inclusion.**

2a. Contracting entities shall ensure that, for the choice of the service provider, **due account is given to social standards and considerations in accordance with point 22b of Article 2 and Articles 54, 70, 72, 74 and 81.**

2b. When choosing the service provider, contracting entities shall consider using reserved contracts as provided for in Article 31.

Or. en

Amendment 117
Proposal for a directive
Article 87 – paragraph 2 – point a

Text proposed by the Commission

Amendment

(a) by reference to the territory or part of the territory of a Member State;

deleted

Or. en

Amendment 118
Proposal for a directive
Article 93 – paragraph 1 – subparagraph 1

Text proposed by the Commission

Amendment

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.

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

In those Member States where an oversight body already exists, the Member States shall confer to it the performance of the responsibilities described in this Article.

Or. en

Amendment 119
Proposal for a directive
Article 93 – paragraph 3 – subparagraph 1 – point b a (new)

Text proposed by the Commission

Amendment

(ba) granting a derogation from the application of this Directive to any contracting entity which so requests in accordance with Article 11a;

Or. fr

Amendment 120
Proposal for a directive
Article 93 – 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, other serious irregularities **as well as specific breaches of provisions contained in Articles 70, 74 and 81;**

Or. en

Amendment 121
Proposal for a directive
Article 96 – title

Text proposed by the Commission

Assistance to contracting entities **and businesses**

Amendment

Assistance to contracting entities

Or. en

Amendment 122
Proposal for a directive
Article 96 – paragraph 1

Text proposed by the Commission

1. Member States shall make available technical support structures in order to provide legal and economic advice, guidance and assistance to contracting entities in preparing and carrying out procurement procedures. Member States shall also ensure that each contracting entity can obtain competent assistance and advice on individual questions.

Amendment

1. Member States shall make available technical support structures in order to provide legal and economic advice, guidance and assistance to contracting entities in preparing and carrying out procurement procedures. Member States shall also ensure that each contracting entity can obtain competent assistance and advice on individual questions, **in particular in relation to provisions**

contained in Articles 70, 74 and 81.

Or. en

Amendment 123
Proposal for a directive
Article 96 – 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

Or. en

Amendment 124
Proposal for a directive
Article 96 – paragraph 3 – subparagraph 1

Text proposed by the Commission

Amendment

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

Or. en

Amendment 125
Proposal for a directive
Article 96 – paragraph 3 – subparagraph 2

Text proposed by the Commission

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 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.

deleted

Or. en

Amendment 126
Proposal for a directive
Article 96 – 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 ***case*** due coordination between those bodies and structures.

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

Or. en

Amendment 127
Proposal for a directive
Article 96 a (new)

Text proposed by the Commission

Amendment

Article 96a

Information to economic operators
In order to facilitate correct understanding of the provisions of this

Directive, Member States shall ensure that appropriate information can be obtained, including by electronic means or using existing networks dedicated to business assistance.

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

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.

Or. en

Amendment 128
Proposal for a directive
Article 98 – paragraph 2

Text proposed by the Commission

2. The delegation of power referred to in Articles 4, 35, 33, 38, 25, 65, **70**, 77, 85 and 95 shall be conferred on the Commission for an indeterminate period of time from *the [date of entry into force of this Directive]*.

Amendment

2. The delegation of power referred to in Articles 4, 35, 33, 38, 25, 65, 77, 85 and 95 shall be conferred on the Commission for an indeterminate period of time from *.

* OJ: please insert the date of entry into force of this Directive.

Amendment 129
Proposal for a directive
Annex VIII – point 1 – points e and b

Text proposed by the Commission

Amendment

(1) "technical specification" means one of the following:

deleted

(e) in the case of service or supply 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;

(b) in the case of works contracts, the totality of the technical prescriptions contained in particular in the procurement documents, defining the characteristics required of a material, product or supply, which permits a material, a product or a supply to be described in a manner such that it fulfils the use for which it is intended by the contracting entity; those characteristics include levels of environmental and climate performance, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, safety or dimensions, including the procedures concerning quality assurance,

terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, and production processes and methods at any stage of the life cycle of the works; those characteristics also include 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 entity 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;

Or. en

Amendment 130
Proposal for a directive
Annex VIII – point 2

Text proposed by the Commission

(2) "standard" means a *technical* specification approved by a recognised standardisation body for repeated or continuous application, compliance with which is not compulsory and which falls into one of the following categories:

(a) "international standard": a standard adopted by an international standards organisation and made available to the general public;

(b) "European standard": a standard adopted by a European standards organisation and made available to the general public;

(c) "national standard": a standard adopted

Amendment

(2) "standard" means

(a) a specification approved by a recognised standardisation body for repeated or continuous application, compliance with which is not compulsory and which falls into one of the following categories:

(i) "international standard": a standard adopted by an international standards organisation and made available to the general public;

(ii) "European standard": a standard adopted by a European standards organisation and made available to the general public;

(iii) "national standard": a standard adopted

by a national standards organisation and made available to the general public;

by a national standards organisation and made available to the general public;

(b) European technical approvals;

(c) common technical specification;

(d) technical reference; or

(e) third party verified standard and certification.

Or. en

Amendment 131
Proposal for a directive
Annex VIII – point 3

Text proposed by the Commission

Amendment

(3) "European technical approval" means a favourable technical assessment of the fitness for use of a product, based on the fulfilment of the essential requirements for building works, by means of the inherent characteristics of the product and the defined conditions of application and use. European technical approvals are issued by an approval body designated for this purpose by the Member State;

deleted

Or. en

Amendment 132
Proposal for a directive
Annex VIII – point 4

Text proposed by the Commission

Amendment

(4) "Common technical specifications" 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

deleted

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;

Or. en

Amendment 133
Proposal for a directive
Annex VIII – point 5

Text proposed by the Commission

Amendment

(5) "Technical reference" means any deliverable produced by European standardisation bodies, other than official standards, according to procedures adapted to developments in market needs.

deleted

Or. en

Amendment 134
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:

(i) only concern characteristics which are linked to the subject-matter of the contract;

(ii) are drawn up on the basis of scientific information or based on other objectively verifiable and non-discriminatory criteria;

(iii) 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;

(iv) are set by a third party which is independent from any economic operator applying for the verification of compliance.

Or. en

Amendment 135

Proposal for a directive Annex XIV - indent 3 a (new)

Text proposed by the Commission

Amendment

*- Convention 94 on Labour Clauses in
Public Contracts;*

Or. en

EXPLANATORY STATEMENT

The rapporteur believes that the modernisation of the public procurement directives should strike a balance between simplification of the rules, on the one hand, and, on the other, sound, effective procedures related to innovative, sustainable award criteria, while also securing a higher rate of SME participation and making wider use of e-procurement.

The aim should be to exploit the potential of public procurement to the full within the single market in order to foster sustainable growth, employment, and social inclusion. Given that public procurement makes up quite a substantial proportion of the economy (accounting for an estimated 19% of EU GDP), the successful revision and enforcement of public procurement rules would do much to revitalise investment in the real economy and overcome Europe's economic crisis.

The rapporteur welcomes the Commission proposals, which, in his view, put forward some interesting new principles and ideas. They need, however, to be improved in order to achieve the best possible result. The rapporteur's proposals are discussed in more detail in his working document of 23 February 2012 (PE483.690), which he drew up in anticipation of this draft report.

▪ **Effective and socially sustainable public procurement**

Especially where social aspects are concerned, the rapporteur does not think that the Commission proposal goes far enough. He therefore wishes to ensure compliance with social standards at every stage of public procurement procedures.

The rapporteur is accordingly enlarging upon the **technical specifications** set out in the tender documents, which define the requisite features of the works, services, or supplies, in order to enable a contracting authority to attain sustainability objectives if it so wishes. The technical specifications should therefore be allowed to include requirements concerning performance (e.g. environmental performance), the organisation, qualifications, and experience of the workers called upon to carry out the contract, safety, in particular methods for assessing product quality, packaging and instructions for use, life cycle, and features related to the socially sustainable production process.

The **socially sustainable production process**, a concept devised by the rapporteur and mentioned in the award criteria, means a production process linked to the purpose of the contract, be it to provide supplies, works, or services, which is such as to take the health and safety of workers into account and observe social standards. The social criteria underlying it will refer to social standards defined and certified in accordance with national and European law and by collective agreements.

The rapporteur is also tightening up the **grounds for exclusion** by means of a stipulation that an economic operator must be excluded from public procurement contracts if it has breached its obligations under social, labour, and gender equality law as defined by national and European legislation and collective agreements. Similarly, contracting authorities may not award a 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 its social security contributions.

As regards the **selection criteria**, the rapporteur believes that contracting authorities should be permitted to lay down conditions of participation linked to compliance with employee health and safety standards and with social and labour legislation as defined by national and European law and by collective agreements.

Finally, regarding the **award criteria** stage of public procurement contracts, the rapporteur considers that the ‘lowest price’ concept should be permanently abandoned and replaced by the concept of the ‘most economically advantageous tender’. Given that this latter approach also allows for price, contracting authorities would be able to make the choices most appropriate to their specific needs and, not least, consider strategic societal aspects, social criteria – including social and labour rights, working conditions, health and safety at the workplace, and access to employment for disadvantaged persons, young persons, women, older workers, and the long-term unemployed – environmental criteria, and, in particular, fair trade. As already mentioned, the concept of a socially sustainable production process is included in the evaluation of the most economically advantageous tender. Furthermore, the definition of the life cycle must include a reference to the place of production. The European Union should be able to give preference to local producers, in particular SMEs, when awarding public procurement contracts in certain specific cases. Besides promoting sustainable development and safeguarding local and regional production, this provision would offer contracting authorities a means of alleviating the local impact of the economic crisis.

However, for reasons of efficiency and legal certainty, 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 afford scope for effective competition.

To ensure that public procurement contracts are implemented effectively, Member States should also have the option of requiring contracting authorities to check the performance of the economic operator to which a contract has been awarded.

- **Sound subcontracting for effective SME participation**

The rapporteur supports subcontracting to the extent that it helps SMEs to develop. However, there have been some alarming cases in which the practice of ‘cascade subcontracting’ has led to the exploitation of workers and hence to lower quality in public procurement contracts. It is in the interest of all parties, companies as well as contracting authorities, to ensure that work carried out in the performance of public procurement contracts is of high quality and complies with labour law. The rapporteur is accordingly proposing that, to restrict cascade subcontracting, the number of consecutive subcontractors should be limited to not more than three. He also proposes that the principle of responsibility be established throughout the subcontracting chain so that all stages in the process would share the responsibility of respecting fundamental rights and complying with employee health and safety regulations and existing labour laws.

In addition, a contracting entity must ask a tenderer to indicate in its tender what proportion of the contract it intends to contract out to third parties and specify the subcontractors proposed.

The provisions on abnormally low bids should also be strengthened to avoid any possibility of subcontracting not in conformity with labour law.

The rapporteur supports the Commission's proposal to make e-procurement the general rule, as this will facilitate and encourage SME participation. However, he believes that the current submission deadlines under Directive 2004/17/EC should continue to apply, since he takes the view that a minimum time-frame is necessary to enable tenderers, particularly SMEs, to draw up an appropriate tender.

▪ **Simplifying public procurement for contracting authorities**

The rapporteur is focusing particular attention on the contracting authorities which will be responsible for applying the provisions of the forthcoming directive on public procurement in the water, energy, transport, and postal services sectors. That is why he is anxious 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. In order to safeguard the free movement of goods, freedom of establishment, freedom to provide services, and the principles deriving from those freedoms, for example equal treatment, non-discrimination, mutual recognition, proportionality, and transparency, and taking into account the nature of the sectors concerned and the varying degrees of liberalisation achieved in the Member States, the rapporteur takes the view that this directive cannot be applied when public procurement procedures fail to guarantee fair competition among economic operators.

He therefore considers it essential for all the procedures laid down in the directive to be transposed in the Member States: each contracting authority should be provided with a toolbox enabling it to choose the procedure best suited to its needs. The rapporteur feels that the negotiated procedure should be used more widely in the future.

Moreover, he believes that Member States should provide contracting authorities with the technical and financial resources they need in order to adapt to e-procurement and draw up their calls for tender.

The rapporteur also wishes to improve flexibility in the relations between public authorities along the lines that the Commission is proposing. The Commission is codifying current precedents in quite a restrictive way: local authorities will thus have considerably less room for manoeuvre, and the overall efficiency of public procurement will consequently be undermined. The rapporteur is therefore providing for exceptions to the principle of a total ban on private participation, while insisting on the need to pursue the general interest. Given that the above doctrine would be equally applicable to public authorities operating in the sectors covered by this directive, it should be ensured that the same rules apply both in this directive and in Directive [...]/EU[on public procurement].

The rapporteur supports the Commission's proposal to do away with the distinction between priority and non-priority services. He believes that a special scheme should be established for social services, given their specific characteristics and the desirability of making strategic use of public procurement, but wishes to make the scheme less stringent by removing the requirement for *ex ante* publication, while stressing the need to comply with the principles of transparency and equal treatment.

As regards the national governance authority, the rapporteur considers it important for each Member State to have an authority responsible for the proper operation of public procurement. However, he wishes to avoid any additional administrative burden which might

slow down the work of contracting authorities. He therefore takes the view that, if Member States already have such authorities, these should be given new responsibilities.