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Committee on Legal Affairs

2011/0438(COD)

1.6.2012

DRAFT OPINION

of the Committee on Legal Affairs

for the Committee on the Internal Market and Consumer Protection

on the proposal for a directive of the European Parliament and of the Council
on public procurement
(COM(2011)0896 – C7-0006/2012 – 2011/0438(COD))

Rapporteur: Giuseppe Gargani

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SHORT JUSTIFICATION

Public contracts must be used to contribute to the realisation of the single market and to relaunch economic growth in Member States. In Europe, procurers spend around 18 % of the EU's GDP for goods, works and services.

The rapporteur believes that the updating of the Directives on public procurement must respond to the following principles:

- simplifying procedures to the benefit of all economic operators;
- encouraging the participation of SMEs;
- guaranteeing the best possible results in terms of the quality/price ratio;
- using public funds efficiently and transparently.

According to the rapporteur, the Commission's proposal seems to go in the right direction, in relation above all to the following elements:

- The modernisation of procedures: the contracting authorities can decide in what order to examine the criteria (that is, whether it is more practical to assess the adjudication criteria before the selection criteria) and to take account, since it is an adjudication criterion, of the organisation and quality of the staff engaged to carry out the contract.
- The contracting authorities will have the right to exclude economic operators which have shown significant or persistent failings in the execution of previous contracts.
- The contracting authorities can accept candidates or applicants despite the existence of a reason to exclude them, if measures are adopted to remedy the consequences of illegal conduct and to effectively prevent further consequences arising from incorrect conduct.

The rapporteur is considering presenting some juridical amendments to the legislative proposal presented by the Commission, in order to enhance and update the existing law which regulates public procurement in Europe.

This opinion aims to highlight the problematic situations of the proposals contained in the text from a juridical viewpoint, with the aim of contributing to the certainty of law.

The rapporteur recognises the following problematic situations:

- Procedures negotiated without prior publication must represent an exception in the broad range of procedures made available by the Directive and therefore it is considered opportune to provide for maximum amounts above which the exception cannot be permitted. (EUR 500 000 for works and EUR 100 000 for services).
- Use of variants: in order to avoid improper use of this instrument, it is considered necessary to define a maximum price allowed for the variant itself, which must be included in the minimum requirements mentioned in the tender documents.
- The possibility of dividing the contract into lots in line with the objectives of simplification and efficiency established by the Directives. For this to provide concrete support to the work of public authorities and at the same time encourage the participation of SMEs in the contract tenders, it is necessary to provide for an *ex ante* evaluation on the need to use this possibility or not.

- It is also held opportune to limit reliance on the capacities of other entities to acquiring only the material prerequisites (economic and financial). For the sake of greater legal and economic certainty, it is necessary to strengthen the joint liability between economic operators requesting the prerequisites of other economic entities and the economic entities themselves. In this way it is possible to offset the uncertainty about the realisation of the work, which is inherent in this concept. Since these are public works, vigilance over efficient use of public monies must be maximised.

- The Court of Justice of the European Union, in its sentence No 76 of 7 October 2004, established that the setting, in abstract and general terms, of a single attribution criterion is not only in contrast with EU legislation, but also deprives the contracting authorities of the possibility of taking into consideration the characteristics of each contract and of choosing for each of these the most suitable criterion to guarantee free competition and the selection of the best offer. It is therefore desirable that the contracting authorities follow an approach based on cost/effectiveness.

- Should the execution of the contract provide for the use of subcontracts, it is opportune to introduce the obligation of a direct payment by the contracting authority to the subcontractor. The risk of non-payment for services provided would thus be annulled, ensuring in particular for SMEs greater economic certainty.

- Changes in contracts which are still valid, if substantial, require a new contract procedure. The threshold of 5 % of the price of the initial contract may not be adequate for the purposes of evaluating substantial changes in the contract. The Commission indicates in its proposal that the change is substantial if it exceeds 5 % of the price of the initial contract and sets aside this provision if any price increase is not higher than 50 % of the initial contract value. It is considered opportune to raise the threshold to 10 % of the initial contract price.

AMENDMENTS

The Committee on Legal Affairs calls on the Committee on the Internal Market and Consumer Protection, as the committee responsible, to incorporate the following amendments in its report:

Amendment 1

Proposal for a directive

Recital 10

Text proposed by the Commission

(10) The results of the evaluation on the impact and effectiveness of EU public procurement legislation demonstrated that the exclusion of certain services from the full application of the Directive should be

Amendment

(10) The results of the evaluation on the impact and effectiveness of EU public procurement legislation demonstrated that the exclusion of certain services from the full application of the Directive should be

reviewed. As a result, the full application of this Directive is extended to a number of services (such as hotel **and legal** services, which **both** showed a particularly high percentage of cross-border trade).

reviewed. As a result, the full application of this Directive is extended to a number of services (such as hotel services, which showed a particularly high percentage of cross-border trade).

Or. it

Justification

Legal services, which are of a purely trust-based nature and linked to the Member States' traditions, must be excluded from the Directive Proposal since they require an evaluation of subjective elements referring to the particular needs of the commissioning body.

Amendment 2

Proposal for a directive Recital 18

Text proposed by the Commission

(18) In view of the detrimental effects on competition, negotiated procedures without prior publication of a contract notice **should** only be used in very exceptional circumstances. This exception **should be** limited to cases where publication is either not possible, for reasons of *force majeure* in line with the standing case-law of the Court of Justice of the European Union, or where it is clear from the outset that publication would not trigger more competition, not least because there is objectively only one economic operator that can perform the contract. Only situations of objective exclusivity can justify the use of the negotiated procedure without publication, where the situation of exclusivity has not been created by the contracting authority itself with a view to the future procurement procedure, and where there are no adequate substitutes, the availability of which should be assessed thoroughly.

Amendment

(18) In view of the detrimental effects on competition, negotiated procedures without prior publication of a contract notice **are** only **to** be used in very exceptional circumstances **and under the threshold as set out in Article 4 and with adequate justification**. This exception **is** limited to cases where publication is either not possible, for reasons of *force majeure* in line with the standing case-law of the Court of Justice of the European Union, or where it is clear from the outset that publication would not trigger more competition, not least because there is objectively only one economic operator that can perform the contract. Only situations of objective exclusivity can justify the use of the negotiated procedure without publication, where the situation of exclusivity has not been created by the contracting authority itself with a view to the future procurement procedure, and where there are no adequate substitutes, the availability of which should be assessed thoroughly.

Or. it

Justification

In order to avoid dangerous competition distortions, the use of the negotiated procedure without prior publication must represent an exception. In this sense it is considered opportune to set maximum amounts above which the exception cannot be permitted.

Amendment 3

Proposal for a directive
Recital 30

Text proposed by the Commission

(30) In order to foster the involvement of small and medium-sized enterprises (SMEs) in the public procurement market, contracting authorities should be encouraged to divide contracts into lots, and be obliged to state the reasons for not doing so. Where contracts are divided into lots, contracting authorities may, for instance in order to preserve competition or to ensure security of supply, limit the number of lots for which an economic operator may tender; they may also limit the number of lots that may be awarded to any one tenderer.

Amendment

(30) In order to foster the involvement of small and medium-sized enterprises (SMEs) in the public procurement market, contracting authorities should be encouraged to divide contracts into lots, and be obliged to state the reasons **for doing so or** for not doing so. Where contracts are divided into lots, contracting authorities may, for instance in order to preserve competition or to ensure security of supply, limit the number of lots for which an economic operator may tender; they may also limit the number of lots that may be awarded to any one tenderer.

Or. it

Justification

The division of the contracts into lots must be subject to prior and systematic evaluation by the contracting authority. Both the division into lots and failure to divide must in any case be justified. In the current formulation only the decision not to divide into lots must be justified.

Amendment 4

Proposal for a directive Article 8 a (New)

Text proposed by the Commission

Amendment

Article 8a

Specific exclusions in the postal services sector

This Directive does not apply to public procurement the main objective of which is to allow the contracting authorities the provision of postal services and of other services other than postal services.

For the purposes of this article, the following meanings are intended:

a) ‘postal services’: services consisting of the collection, sorting, transport and distribution of postal dispatches. These services include both the services which are part of the field of application of the universal service established in compliance with Directive 97/67/EC, and those which are excluded from it;

b) ‘other services other than postal services’: services provided in the following contexts:

(i) management services of postal services (services preceding the dispatch and services subsequent to dispatch, including ‘mailroom management services’);

(ii) special connected services which are wholly provided electronically (including the safe electronic transmission of codified documents, management services for addresses and the transmission of registered electronic post);

(iii) delivery services other than those as set out in Article 10, paragraph 2, point (a) of the Directive, sectors such as the delivery of unaddressed advertising material;

(iv) financial services, as defined in the

CPV (Common Procurement Vocabulary) with reference Nos from 66100000-1 to 66720000-3 and in Article 19, point (c), including in particular postal orders and transfers from postal current accounts;

(v) philatelic services;

(vi) logistical services (services which combine physical delivery and/or the deposit of goods and other functions unconnected to postal services).

Or. it

Justification

In consideration of the situation of effective competition of contracts in the postal services sector following implementation of EU legislation aimed at liberalising this sector, it is opportune to exclude from the applicable scope of this Directive public contracts in this sector, to the extent to which they are adjudicated for the main purpose of enabling the contracting authorities to exercise these activities in the postal services sector. These activities are defined in compliance with the definitions as set out in Article 6 of Directive 2004/17/EC of the European Parliament and of the Council, of 31 March 2004.

Amendment 5

Proposal for a directive Article 10 – paragraph 1 - point (c)

Text proposed by the Commission

Amendment

c) for arbitration and conciliation services;

c) for **legal**, arbitration and conciliation services;

Or. it

Justification

In consideration of the particular discretionary and trust-based nature which regulates legal services it is considered opportune to exclude them from the applicable scope of this Directive.

Amendment 6

Proposal for a directive Article 30 – paragraph 1

Text proposed by the Commission

1. Member States may provide that contracting authorities may award public contracts by a negotiated procedure without prior publication only in the cases laid down in paragraphs (2) to (5).

Amendment

1. Member States may provide that contracting authorities may award public contracts by a negotiated procedure without prior publication only in the cases laid down in paragraphs (2) to (5) **and for amounts below EUR 500 000 for public works contracts and amounts below EUR 100 000 for public supply and services contracts.**

Or. it

Justification

In order to avoid dangerous competition distortions, the use of the negotiated procedure without prior publication must represent an exception. In this sense it is considered opportune to set maximum amounts above which the exception cannot be permitted.

Amendment 7

Proposal for a directive Article 43 – paragraph 1

Text proposed by the Commission

1. Contracting authorities may authorise tenderers to submit variants. They shall indicate in the contract notice or, where a prior information notice is used as a means of calling for competition, in the invitation to confirm interest whether or not they authorise variants. Variants shall not be authorised without such indication.

Amendment

1. Contracting authorities may authorise tenderers to submit variants **which do not exceed 1/6 of the total agreed price.** They shall indicate in the contract notice or, where a prior information notice is used as a means of calling for competition, in the invitation to confirm interest whether or not they authorise variants. Variants shall not be authorised without such indication.

Or. it

Justification

Unchecked use of variants could distort competition and create juridical certainty problems. It is considered useful to introduce a specific provision in order to provide for a maximum allowed price for variants as a minimum predefined prerequisite for contracting authorities. National legislation offers reference parameters in this sense, confirming the effectiveness of this provision.

Amendment 8

Proposal for a directive Article 44 – paragraph 1

Text proposed by the Commission

1. Public contracts may be subdivided into homogenous or heterogeneous lots. For contracts with a value equal to or greater than the thresholds provided for in Article 4 but not less than EUR 500 000, determined in accordance with Article 5, **where the contracting authority does not deem it appropriate to split into lots, it** shall provide in the contract notice or in the invitation to confirm interest a specific explanation of its reasons.

Amendment

1. Public contracts may be subdivided into homogenous or heterogeneous lots. For contracts with a value equal to or greater than the thresholds provided for in Article 4 but not less than EUR 500 000, determined in accordance with Article 5, shall provide in the contract notice or in the invitation to confirm interest a specific explanation of its reasons **regarding the division or non-division into lots.**

Or. it

Justification

The division of contracts into lots must be systematically assessed in advance by the contracting authority, in order to prevent indiscriminate use of the concept. Therefore, both the division into lots and non-division must be explained; however, in the current formulation only the decision not to divide into lots must be explained.

Amendment 9

Proposal for a directive Article 62 – paragraph 1

Text proposed by the Commission

1. With regard to criteria relating to economic and financial standing as set out

Amendment

1. With regard to criteria relating to economic and financial standing as set out

pursuant to Article 56(3), and to criteria relating to technical and professional ability as set out pursuant to Article 56(4), an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, **regardless of** the legal nature of the links which it has with them. It shall in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect. **In the case of economic and financial standing, the** contracting authorities **may** require that the economic operator and those entities are jointly liable for the execution of the contract.

pursuant to Article 56(3), and to criteria relating to technical and professional ability as set out pursuant to Article 56(4), an economic operator may, where appropriate and for a particular contract, rely **only** on the **material** capacities of other entities, **without disregarding** the legal nature of the links which it has with them. It shall in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect. **The** contracting authorities require that the economic operator and those entities are jointly liable for the execution of the contract.

Or. it

Justification

In order to guarantee judicial and economic certainty in adjudicating and executing the contract, it is considered necessary to limit reliance on the capacities of other entities to acquiring only the material prerequisites and to strengthening the joint liability between the economic operator and the other entities it groups with in order to execute the contract, making it obligatory. The availability of resources can arise only from a juridical relationship between the benefiting party and the supporting company.

Amendment 10

Proposal for a directive Article 66 – paragraph 1

Text proposed by the Commission

1. Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the criteria on which contracting authorities shall base the award of public contracts shall be one of the following:

(a) the most economically advantageous

Amendment

1. Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the criteria on which contracting authorities shall base the award of public contracts shall be one of the following:

(a) the most economically advantageous

tender

(b) the lowest cost.

Costs may be assessed, *on the choice of the contracting authority, 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 67.

tender

(b) the lowest cost.

Costs may be assessed using a cost-effectiveness approach, such as a life-cycle costing approach, under the conditions set out in Article 67.

Or. it

Justification

The Court of Justice of the European Union, in its sentence No 76 of 7 October 2004, established that the setting, in abstract and general terms, of a single attribution criterion is not only in contrast with EU legislation, but also deprives the contracting authorities of the possibility of taking into consideration the characteristics of each contract and choosing for each of these the most suitable criterion to guarantee free competition and the selection of the best offer.

Amendment 11

Proposal for a directive Article 71 – paragraph 2

Text proposed by the Commission

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

Amendment

2. The Member States provide that, where the nature of the contract so allows, the contracting authority 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.

Justification

In order to encourage greater economic certainty, avoid judicial disputes and reduce the risk of non-payment for services supplied, it is necessary to make direct payment to the subcontractor obligatory where the nature of the contract allows it.

Amendment 12

**Proposal for a directive
Article 72 – 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.

Justification

In order not to excessively straitjacket the contracting authorities and burden the procedure with new contract procedures for the same work or service, it is considered opportune to expand the application scope of this provision and provide that a change in the contract, in order to be considered as not substantial and therefore not to necessitate a new contract procedure, must not exceed 10 % of the price of the initial contract.

Amendment 13

Proposal for a directive Article 84 – Paragraph 3 - point (b)

Text proposed by the Commission

Amendment

3.(b) providing legal advice to contracting authorities on the interpretation of public procurement rules and principles and on the application of public procurement rules in specific cases; *deleted*

Or. it

Justification

Legal services have always been and still are covered by a relationship of trust with the professional officer which is based on the effective professional ability of the latter and guaranteed by the stringent dictates of professional ethics. Therefore they cannot be ascribed to a public oversight body, or fall within the applicable scope of this Directive.

Amendment 14

Proposal for a directive Article 84 – Paragraph 3 - point (c)

Text proposed by the Commission

Amendment

3.c) issuing own-initiative opinions and guidance on questions of general interest pertaining to the interpretation and application of public procurement rules, on recurring questions and on systemic difficulties related to the application of public procurement rules, in the light of the provisions of this Directive and of the relevant case-law of the Court of Justice of the European Union;

3c) **elaborate guidelines** on questions of general interest pertaining to the interpretation and application of public procurement rules, on recurring questions and on systemic difficulties related to the application of public procurement rules, in the light of the provisions of this Directive and of the relevant case-law of the Court of Justice of the European Union;

Or. it

Justification

The new formulation proposed is more pertinent to the body's mandate, which must be

appointed to supervise the implementation and application of the envisaged laws.

Amendment 15

Proposal for a directive Article 87 – paragraph 1

Text proposed by the Commission

Amendment

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

deleted

Or. it

Justification

Legal services have always been and still are covered by a relationship of trust with the professional officer which is based on the effective professional ability of the latter and guaranteed by the stringent dictates of professional ethics. Therefore they cannot be ascribed to a public oversight body, or fall within the applicable scope of this Directive.