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Committee on Legal Affairs

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AMENDMENTS

16 - 90

Draft report
Giuseppe Gargani
(PE489.642v01-00)

Procurement by entities operating in the water, energy, transport and postal services sectors

Proposal for a directive
(COM(2011)0895 – C7-0007/2012 – 2011/0439(COD))

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United in diversity

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Amendment 16
Sergio Gaetano Cofferati

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, **requirements pertaining to environmental protection and promoting a high level of employment, guaranteeing adequate social protection, fighting against social exclusion and providing a high level of teaching, training and safeguarding human health** must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting **socially and environmentally** sustainable development. This Directive clarifies how the contracting entities may **use their discretionary power in defining and awarding public contracts, to** contribute to the protection of the environment, **to social wellbeing** and the promotion of sustainable development, whilst ensuring that they can obtain the best value for money for their contracts.

Or. it

Amendment 17
Sergio Gaetano Cofferati

Proposal for a directive
Recital 13

Text proposed by the Commission

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

Amendment

(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 *said* procedure, ***as well as failure to respect measures in the field of environmental protection and health, working conditions and social protection, as defined in the international legislation referred to in Annex XIV of this European and national directive and/or in collective agreements applicable in the place where the service, work or supply is undertaken***, 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.

Or. it

Amendment 18
Sergio Gaetano Cofferati

Proposal for a directive
Recital 26

Text proposed by the Commission

(26) In view of the detrimental effects on competition, negotiated procedures without a call for competition 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 a call for competition, where the

Amendment

(26) In view of the detrimental effects on competition, negotiated procedures without a call for competition 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 a call for competition, where the

situation of exclusivity has not been created by the contracting entity itself with a view to the future procurement procedure, and where there are no adequate substitutes, the availability of which should be assessed thoroughly.

situation of exclusivity has not been created by the contracting entity itself with a view to the future procurement procedure, and where there are no adequate substitutes, the availability of which should be assessed thoroughly. ***It is appropriate for contracting authorities that resort to a negotiated procedure without prior publication, in the cases defined in this directive, to send the supervisory body a report justifying the reason for this decision. The supervisory body's tasks should include that of analysing and evaluating such reports.***

Or. it

Amendment 19 **Giuseppe Gargani**

Proposal for a directive **Recital 26**

Text proposed by the Commission

(26) In view of the detrimental effects on competition, negotiated procedures without a call for competition 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 a call for competition, where the situation of exclusivity has not been created by the contracting entity itself with a view to the future procurement procedure, and where there are no adequate substitutes, the availability of which should

Amendment

(26) In view of the detrimental effects on competition, negotiated procedures without a call for competition should only be used in very exceptional circumstances ***and below the thresholds stated in Article 12, with sufficient justification.*** 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 a call for competition, where the situation of exclusivity has not been created by the contracting entity itself with a view to the future procurement

be assessed thoroughly.

procedure, and where there are no adequate substitutes, the availability of which should be assessed thoroughly.

Or. it

Amendment 20
Sergio Gaetano Cofferati

Proposal for a directive
Recital 38 bis (new)

Text proposed by the Commission

Amendment

(38a) In order to facilitate access by SMEs to the public procurement market, groups of economic operators, which could take the form of business consortiums, should also be allowed to submit a bid for a contract jointly. In this event, the contracting authorities should allow the group of economic operators to combine the individual characteristics of the group members in order to satisfy the stated financial, technical and legal requirements as a single entity.

Or. it

Amendment 21
Sergio Gaetano Cofferati

Proposal for a directive
Recital 47

Text proposed by the Commission

Amendment

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

47. Furthermore, in technical specifications and in award criteria, contracting entities should be allowed to refer to a specific production process, ***to elements of the life cycle or socially sustainable production process***, to a specific mode of provision of

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 services¹ 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.***

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 question***. In order to better integrate social considerations in public procurement, procurers may also be allowed to include ***social characteristics connected with the purpose of the tender in the conditions of implementation and in the award criteria***. ***Social characteristics may refer, for example, to the working conditions of the persons directly participating in the process of production or provision in question, the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract, the accessibility for persons with disabilities, gender equality, access to professional training in the workplace and the involvement of users***. Any award criteria should be applied 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. ***For service contracts and contracts involving the planning of works, the contracting entities should use the organisation, qualification and experience of the staff engaged to undertake the contract in question as the awarding criteria, as these will affect the quality of the execution of the contract and, consequently, the economic value of the tender***.

Or. it

Amendment 22
Sergio Gaetano Cofferati

¹ OJ L 18, 21.1.1997, p.1.

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 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**.

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 **or illegal practices and a failure to uphold work requirements or measures for environmental protection**. 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 **or in cases in which, for other reasons, a tender appears abnormally low**. Where the tenderer cannot provide a sufficient explanation, the contracting entity should be entitled to reject the tender. Rejection should be **also** mandatory in cases where the contracting entity has established that the abnormally low price results from non-compliance with **requirements set out in international law, in Union or national legislation and/or in collective agreements that apply where the work, service or provision is undertaken**, in the fields of social **security**, labour **conditions** or environmental **protection**.

Or. it

Amendment 23
Sergio Gaetano Cofferati

Proposal for a directive
Recital 50 bis (new)

Text proposed by the Commission

Amendment

(50a) In order to ensure the correct

functioning of public procurement, subcontracting must be appropriately regulated. The contracting entity must be informed, in the tender document, of the parts of a contract that the tenderer intends to subcontract, as well as of the proposed subcontractors. Any change in the subcontracting chain that may occur during performance of the contract should ensure that the contract is undertaken to the same standard as defined in the submitted tender and should be agreed by the contracting entity. Where allowed by the nature of the contract, the contracting entity should pay the subcontractors directly. Finally, a system of 'joint and several liability' should be established in the subcontracting chain and the chain should be limited to a maximum of three consecutive vertical subcontracts.

Or. it

Amendment 24
Sergio Gaetano Cofferati

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 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***

Amendment

(51) The laws, regulations and collective agreements, at both national and Union level, ***and collective agreements that apply to the place where the works, services or supplies are undertaken shall*** apply during the performance of a contract. 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.

concerning the posting of workers in the framework of the provision of services¹ 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.

Or. it

Amendment 25
Sergio Gaetano Cofferati

Proposal for a directive
Recital 56 a (new)

Text proposed by the Commission

Amendment

(56 a) Contracting entities should respect the delay of payment as established in Directive 2011/7/EU.

Or. en

Amendment 26
Sergio Gaetano Cofferati

Proposal for a directive
Article 1 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2 a. This Directive is without prejudice to the right of contracting entities, as defined in Article 4, to decide whether, how and to

¹ OJ L 18, 21.1.1997, p. 1.

what extent they want to perform public functions themselves. Contracting entities 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 contracting entities.

Or. en

Amendment 27
Sergio Gaetano Cofferati

Proposal for a directive
Article 2 – paragraph 1 – point 22 a (new)

Text proposed by the Commission

Amendment

(22 a) '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 28
Sergio Gaetano Cofferati

Proposal for a directive
Article 2 – paragraph 1 – 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 conforms with health and safety regulations, social security and employment law, notably with regard to the principle of equal treatment in the workplace. The principle of equal treatment in the workplace refers to compliance with relevant work and employment conditions, including provisions on health and safety, social security and employment law as defined by the international laws listed in Annex XIV, in Union law and in Member State law as well as in collective agreements, which apply to the place where the works, services and supplies are undertaken;

Or. it

Amendment 29
Sergio Gaetano Cofferati

Proposal for a directive
Article 29 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

Contracting entities shall aim for "best value" in procurement policy. This is achieved through the awarding of the public contract to the most economically advantageous tender.

Or. en

Amendment 30
Sergio Gaetano Cofferati

Proposal for a directive
Article 29 – paragraph 2 b (new)

Text proposed by the Commission

Amendment

Economic operators shall comply with obligations relating to social and employment protection and the working conditions which apply in the place where the work, service or supply is to be performed as set out by Union and national legislation and/or collective agreements or international labour law provisions listed in Annex XI.

Or. en

Amendment 31
Sergio Gaetano Cofferati

Proposal for a directive
Article 29 – paragraph 2 c (new)

Text proposed by the Commission

Amendment

The details of procurement contracts shall be made public.

Or. en

Amendment 32
Sergio Gaetano Cofferati

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

Text proposed by the Commission

Amendment

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

Groups of economic operators may submit tenders or put themselves forward as candidates. ***Groups of economic operators, notably 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

participate, those groups shall not be required by the contracting entities to assume a specific legal form.

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 33
Sergio Gaetano Cofferati

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 34
Sergio Gaetano Cofferati

Proposal for a directive
Article 32 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2 a. Article 32 (1) and (2) shall not prevent the public disclosure of contracts once concluded including any subsequent changes.

Or. en

Amendment 35
Sergio Gaetano Cofferati

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, ‘private interests’ means any family, economic or other shared interests with the candidates or the tenderers *or any subcontractor proposed in the tender in accordance with the provisions of Article 81*, including conflicting professional interests.

Or. en

Amendment 36
Sergio Gaetano Cofferati

Proposal for a directive
Article 44 – paragraph 1 – point a

Text proposed by the Commission

where no tenders or no suitable tenders or no requests to participate have been submitted in response to a procedure with a prior call for competition, provided that the initial conditions of the contract are not *substantially* altered;

Amendment

where no tenders or no suitable tenders or no requests to participate have been submitted in response to a procedure with a prior call for competition, provided that the initial conditions of the contract are not altered;

Or. it

Amendment 37
Sergio Gaetano Cofferati

Proposal for a directive
Article 44 – paragraph 1 – point d – point i

Text proposed by the Commission

(i) *the absence of competition for*

Amendment

deleted

technical reasons;

Or. it

Amendment 38
Sergio Gaetano Cofferati

Proposal for a directive
Article 44 – paragraph 5 bis (new)

Text proposed by the Commission

Amendment

If a contracting body decides, under the provisions of this Article, to make use of the negotiated procedure without prior publication, it must provide the supervisory body in Article 93 with a detailed report justifying this choice and containing the tender documents and related information, and, if it should choose to resort to a negotiated procedure without prior publication based on point (a), the tender documents from the previous call to tender.

Or. it

Amendment 39
Sergio Gaetano Cofferati

Proposal for a directive
Article 54 – paragraph 1 – subparagraph 2

Text proposed by the Commission

Amendment

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.

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 **and socially sustainable production process** as referred to in *points* (22), (22a) and (22b) of Article 2.

Or. en

Amendment 40
Sergio Gaetano Cofferati

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:

- (a) performance, including levels of environmental and climate performance and performance in terms of socially sustainable production process;*
- (b) life cycle characteristics;*
- (c) socially sustainable production process;*
- (d) the organisation, qualification and experience of the staff assigned to performing the contract in question;*
- (e) safety or dimensions, including the procedures concerning quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions;*
- (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;*
- (g) social characteristics, including social inclusion, gender balance, access to on-site vocational training.*

Or. en

Amendment 41
Sergio Gaetano Cofferati

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

Text proposed by the Commission

(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;

Amendment

(a) in terms of performance or functional requirements, including ***social and*** 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 42
Giuseppe Gargani

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 ***and if they are not subdivided into lots, providing a specific explanation for this.***

Or. it

Amendment 43
Sergio Gaetano Cofferati

Proposal for a directive
Article 70 – paragraph 1 – point b

Text proposed by the Commission

(b) they shall select tenderers and candidates in accordance with the objective rules and criteria laid down pursuant to Articles 72 and 74;

Amendment

(b) they shall select tenderers and candidates in accordance with the objective rules and criteria laid down pursuant to Articles 72, 74 and 81;

Or. en

Amendment 44
Sergio Gaetano Cofferati

Proposal for a directive
Article 70 – paragraph 5

Text proposed by the Commission

5. 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

5. 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 *employment protection, working conditions and environmental legislation*, *as set out by Union and national legislation and/or collective agreements that apply in the place where the work, service or supply is to be performed* or *by* the international law provisions listed in Annex *XI*.

Or. en

Amendment 45
Sergio Gaetano Cofferati

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

Text proposed by the Commission

Amendment

5 a. Where such laws do not apply, not compliance of the tender with other laws which ensure an equivalent level of protection and apply in the place where the work, service or supply is to be performed shall also provide a basis for exclusion.

Or. en

Amendment 46
Sergio Gaetano Cofferati

Proposal for a directive
Article 70 – paragraph 7

Text proposed by the Commission

Amendment

7. The Commission shall be empowered to **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.

7. The Commission shall be empowered to **complement** 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 47
Giuseppe Gargani

Proposal for a directive
Article 73 – paragraph 1 bis (new)

Text proposed by the Commission

Amendment

1a. The fulfilment of pooling requirements may not be used at the same

time by the assisting and benefiting entities.

Or. it

Amendment 48
Sergio Gaetano Cofferati

Proposal for a directive
Article 74 – paragraph 1 – subparagraph 1

Text proposed by the Commission

The objective rules and criteria for the exclusion and selection of economic operators requesting qualification in a qualification system and the objective rules and criteria for the exclusion and selection of candidates and tenderers in open, restricted or negotiated procedures or in innovation partnerships *may* include the exclusion grounds listed in Article 55 of Directive **2004/18** on the terms and conditions set out therein.

Amendment

The objective rules and criteria for the exclusion and selection of economic operators requesting qualification in a qualification system and the objective rules and criteria for the exclusion and selection of candidates and tenderers in open, restricted or negotiated procedures or in innovation partnerships *shall* include the exclusion grounds listed in Article 55 of Directive *[.../.../EU]* on **public procurement** on the terms and conditions set out therein.

Or. en

Amendment 49
Sergio Gaetano Cofferati

Proposal for a directive
Article 74 – paragraph 1 – subparagraph 2

Text proposed by the Commission

Where the contracting entity is a contracting authority, those criteria and rules shall include the exclusion grounds listed in Article 55(1) and (2) of Directive 2004/18 on the terms and conditions set out in that Article.

Amendment

deleted

Or. en

Amendment 50
Raffaele Baldassarre, Sergio Gaetano Cofferati

Proposal for a directive
Article 76 – paragraph 1 – subparagraph 1 – introductory part

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*:

Amendment

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

Or. it

Amendment 51
Raffaele Baldassarre, Sergio Gaetano Cofferati

Proposal for a directive
Article 76 – paragraph 1 – subparagraph 1 – point a

Text proposed by the Commission

(a) the most economically advantageous tender;

Amendment

deleted

Or. it

Amendment 52
Raffaele Baldassarre, Sergio Gaetano Cofferati

Proposal for a directive
Article 76 – paragraph 1 – subparagraph 1 – point b

Text proposed by the Commission

(b) the lowest cost.

Amendment

deleted

Or. it

Amendment 53
Raffaele Baldassarre, Sergio Gaetano Cofferati

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

Text proposed by the Commission

Amendment

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. *deleted*

Or. it

Amendment 54
Giuseppe Gargani

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

Text proposed by the Commission

Amendment

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.*

Costs *are* assessed using a cost-effectiveness approach, such as a life-cycle costing approach, under the conditions set out in *Article 77.*

Or. it

Amendment 55
Raffaele Baldassarre, Sergio Gaetano Cofferati

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

Text proposed by the Commission

Amendment

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.

deleted

Or. it

Amendment 56

Raffaele Baldassarre, Sergio Gaetano Cofferati

Proposal for a directive

Article 76 – paragraph 2 – subparagraph 2 – introductory part

Text proposed by the Commission

Amendment

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:

The contracting entity shall identify the most economically advantageous tender in accordance with paragraph 1, based on criteria linked to the subject-matter of the contract in question. In addition to price and costs, evaluated with a cost-effectiveness approach only, including the determination of life cycle costs according to the conditions set out in Article 77, such criteria shall include:

Or. it

Amendment 57

Sergio Gaetano Cofferati

Proposal for a directive

Article 76 – paragraph 2 – subparagraph 2 – point a (new)

Text proposed by the Commission

Amendment

(a a) life cycle process and life cycle characteristics;

Amendment 58
Sergio Gaetano Cofferati

Proposal for a directive
Article 76 – paragraph 2 – subparagraph 2 – point a bis (new)

Text proposed by the Commission

Amendment

(aa) the socially sustainable production process;

Or. it

Amendment 59
Sergio Gaetano Cofferati

Proposal for a directive
Article 76 – paragraph 2 – subparagraph 2 – point b

Text proposed by the Commission

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 ***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;

(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 ***are*** 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. it

Amendment 60
Sergio Gaetano Cofferati

Proposal for a directive
Article 76 – paragraph 2 – subparagraph 2 – point d bis (new)

Text proposed by the Commission

Amendment

(da) social criteria such as, for example, decent working conditions, health and safety, respect for collective bargaining, gender equality, social inclusion, including work opportunities for disabled, disadvantaged or vulnerable workers, access to professional training in the workplace, consultation with and participation of users, economic accessibility, human rights and ethical trade;

Or. it

Amendment 61

Raffaele Baldassarre, Sergio Gaetano Cofferati

**Proposal for a directive
Article 76 – paragraph 3**

Text proposed by the Commission

Amendment

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.

deleted

Or. it

Amendment 62

Raffaele Baldassarre, Sergio Gaetano Cofferati

**Proposal for a directive
Article 76 – paragraph 4**

Text proposed by the Commission

Amendment

4. Award criteria shall not confer an unrestricted freedom of choice on the contracting entity. They shall ensure the

4. Award criteria shall ensure effective competition and shall be accompanied by requirements which allow the information

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.

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

Or. it

Amendment 63
Raffaele Baldassarre, Sergio Gaetano Cofferati

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

Text proposed by the Commission

Amendment

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.

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. it

Amendment 64
Raffaele Baldassarre, Sergio Gaetano Cofferati

Proposal for a directive
Article 76 – paragraph 5 – subparagraph 2

Text proposed by the Commission

Amendment

Those weightings may be expressed by providing for a range with an appropriate maximum spread.

deleted

Or. it

Amendment 65
Raffaele Baldassarre, Sergio Gaetano Cofferati

Proposal for a directive
Article 76 – paragraph 5 – subparagraph 4

Text proposed by the Commission

The relative weighting or order of importance shall be specified, **as appropriate**, in the notice used as a means of calling for competition, in the invitation to confirm interest, in the invitation to tender or to negotiate, or in the specifications.

Amendment

The relative weighting or order of importance shall be specified, **appropriately**, in the notice used as a means of calling for competition, in the invitation to confirm interest, in the invitation to tender or to negotiate, or in the specifications.

Or. it

Amendment 66
Raffaele Baldassarre, Sergio Gaetano Cofferati

Proposal for a directive
Article 77 – paragraph 3 – subparagraph 1

Text proposed by the Commission

Whenever a common methodology for the calculation of life-cycle costs is adopted as part of a legislative act of the Union, including by delegated acts pursuant to sector specific legislation, it shall be applied **where life-cycle costing is included in the** award criteria referred to in *Article 76 (1)*.

Amendment

Whenever a common methodology for the calculation of life-cycle costs is adopted as part of a legislative act of the Union, including by delegated acts pursuant to sector specific legislation, it shall be applied **in accordance with** the award criteria referred to in *Article 76(1)*.

Or. it

Amendment 67
Raffaele Baldassarre, Sergio Gaetano Cofferati

Proposal for a directive
Article 79 – paragraph 1 – introductory part

Text proposed by the Commission

Amendment

1. The contracting entity shall request economic operators to explain the price or costs charged, where ***all of the following conditions are fulfilled:***

1. The contracting entity shall request economic operators to explain the price or costs charged, where ***the price or the cost charged is more than 25 % less than the average price or average costs charged in the other tender documents.***

Or. it

Amendment 68

Raffaele Baldassarre, Sergio Gaetano Cofferati

Proposal for a directive

Article 79 – paragraph 1 – point a

Text proposed by the Commission

Amendment

(a) the price or cost charged is more than 50 % lower than the average price or costs of the remaining tenders;

deleted

Or. it

Amendment 69

Raffaele Baldassarre, Sergio Gaetano Cofferati

Proposal for a directive

Article 79 – paragraph 1 – point b

Text proposed by the Commission

Amendment

(b) the price or cost charged is more than 20 % lower than the price or costs of the second lowest tender;

deleted

Or. it

Amendment 70

Raffaele Baldassarre, Sergio Gaetano Cofferati

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

Text proposed by the Commission

Amendment

(c) at least five tenders have been submitted.

deleted

Or. it

Amendment 71
Giuseppe Gargani

Proposal for a directive
Article 79 – paragraph 1 – subparagraph -1 (new)

Text proposed by the Commission

Amendment

-1. The contracting entity specifies in the invitation to tender that the maximum accepted discount cannot exceed 25 % of the lowest tender price.

Or. it

Amendment 72
Raffaele Baldassarre, Sergio Gaetano Cofferati

Proposal for a directive
Article 79 – paragraph 2

Text proposed by the Commission

Amendment

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

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

Or. it

Amendment 73
Raffaele Baldassarre, Sergio Gaetano Cofferati

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 *relate* in particular to:

Or. it

Amendment 74
Raffaele Baldassarre, Sergio Gaetano Cofferati

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. it

Amendment 75
Sergio Gaetano Cofferati

Proposal for a directive
Article 79 a (new)

Text proposed by the Commission

Amendment

Article 79 a

Tenders comprising products originating in third countries

1. This Article shall apply to tenders

covering products originating in third countries with which the Union has not concluded, whether multilaterally or bilaterally, an agreement ensuring comparable and effective access for Community undertakings to the markets of those third countries. It shall be without prejudice to the obligations of the Union or its Member States in respect of third countries.

2. Contracting entities may require tenderers to provide information on the origin of the goods and services contained in the tender, and their value. Any tender submitted for the award of a supply contract where the value of the products originating in third countries, as determined in accordance with Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code¹, exceeds 50 % of the total value of the products or services constituting the tender may be rejected under the following conditions.

3. Upon request of contracting entities, the Commission shall assess whether to approve, for contracts of an estimated value equal or above EUR 5 000 000 exclusive of value-added tax (VAT) the exclusion from procedures for the award of contract tenders comprising goods or services originating outside the Union, if the value of goods or services originating in a country with which the Union has not concluded an international agreement in the field of public procurement including market access commitments or goods or services originating in a country with which the Union has concluded such an agreement, but in respect of which the agreement does not apply, exceeds 50% of the total value of the goods or services constituting the tender.

4. For contracts referred to in paragraph 3, the Commission shall adopt an implementing act concerning the approval of the intended exclusion. Those

implementing acts shall be adopted according to the examination procedure.

5. When adopting implementing acts pursuant to paragraph 4, the Commission shall approve the intended exclusion in the following cases:

(a) if the international agreement concerning market access in the field of public procurement between the Union and the country where the goods and/or services originate contains, for the goods and/or services for which the exclusion is proposed, explicit market access reservations taken by the Union;

(b) where an agreement referred to in point (a) does not exist and the third country maintains restrictive procurement measures leading to a lack of substantial reciprocity in market opening between the Union and the third country concerned.

For the purposes of point (b), a lack of substantial reciprocity is presumed where restrictive procurement measures result in serious and recurring discriminations of Union economic operators, goods and services.

When adopting implementing acts pursuant to paragraph 6, the Commission shall not approve an intended exclusion where it would violate market access commitments entered into by the Union in its international agreements.

6. When assessing whether a lack of substantial reciprocity exists, the Commission shall examine the following:

(a) to what degree public procurement laws of the country concerned ensure transparency in line with international standards in the field of public procurement and preclude any discrimination against Union goods, services and economic operators;

(b) to what degree public authorities and/or individual procuring entities

maintain or adopt discriminatory practices against Union goods, services and economic operators.

7. Contracts concluded with an economic operator in violation of Commission implementing acts adopted pursuant to paragraph 4 upon intended exclusion notified by contracting authorities shall be declared ineffective within the meaning of Directive 2007/66/EC.

Or. en

Amendment 76
Sergio Gaetano Cofferati

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, *providing information regarding the subcontractor including names, contact details and legal representatives.*

Any changes in the subcontracting chain shall be proposed by the economic operator and agreed by the contracting entity. In the case the proposed change regards also the involvement of a new subcontractor, the main contractor shall indicate its name, contact details and legal representatives

Any operators in the subcontracting chain shall ensure the respect of the provisions of this Directive and of the conditions established in the procurement documents and shall guarantee a performance of the duties connected to the contract equivalent to the one defined in the

tender.

Or. en

Amendment 77
Sergio Gaetano Cofferati

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

Text proposed by the Commission

Amendment

1 a. Member States shall limit the possibility for a tenderer to subcontract when executing a public contract to a maximum of three or less successive subcontractors. The contracting entities may establish further limitations to the use of subcontracting, with regard to the number of subcontractors or of successive subcontractors or to the possibility of changes in the subcontracting chain, or may establish that no parts of the contracts shall be subcontracted to third parties.

Or. en

Amendment 78
Rebecca Taylor

Proposal for a directive
Article 81 – paragraph 2

Text proposed by the Commission

Amendment

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 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

2. Member States may provide that, *if requested by* 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.

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 79
Sergio Gaetano Cofferati

Proposal for a directive
Article 81 – paragraph 2 a (new)

Text proposed by the Commission

Amendment

2 a. The reasons for the use of subcontractors shall be set out in the procurement documents, strictly motivated by technical considerations and not circumvent relevant legislation and obligations which apply where the provision of works, services and supplies takes place;

Or. en

Amendment 80
Sergio Gaetano Cofferati, Raffaele Baldassarre

Proposal for a directive
Article 81 – paragraph 3

Text proposed by the Commission

Amendment

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

3. Paragraphs 1 and 2 shall be without prejudice to the question of the ***main contractor's and subcontractors' liability.***
Member states shall provide for a system of joint and several liability down the sub-contracting chain.

The principal economic operator ***and any subcontractor involved in doing work on a***

public contract shall be jointly and severally liable for any liability which arises from the failure by a subcontractor to comply with provisions relating to fundamental rights, health and safety requirements, social rules and standards, employment and working conditions, health and safety at workplace and social security, as set out by EU and national laws, regulations or administrative provisions, collective agreement and contracts, and international labour law provisions listed in Annex XI, that apply in the place where the work, service or supply is performed.

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

Or. en

Amendment 81
Sergio Gaetano Cofferati

Proposal for a directive
Article 81 – paragraph 3 a (new)

Text proposed by the Commission

Amendment

3 a. The main contractor and any intermediate subcontractor in their contracts with their subcontractors, shall stipulate that in the event that they have reason to believe that their immediate subcontractor is violating the rules referred to in Paragraph 3, the immediate subcontractor shall take immediate action to remedy the situation, and that, failing this, the contract concerned shall be terminated.

Or. en

Amendment 82
Sergio Gaetano Cofferati

Proposal for a directive
Article 86 – paragraph 2

Text proposed by the Commission

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.***

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, ***as well as consumer protection and social inclusion.***

Or. it

Amendment 83
Sergio Gaetano Cofferati

Proposal for a directive
Article 86 – paragraph 2 bis (new)

Text proposed by the Commission

Amendment

2a. The general principles in Article 70, the reasons for exclusion in Article 74 and the subcontracting rules in Article 81 also apply for contracts defined in Article 84.

Or. it

Amendment 84
Rebecca Taylor

Proposal for a directive
Article 93 – paragraph 1 – subparagraph 1 a (new)

Text proposed by the Commission

Amendment

Member States that have particular constitutional arrangements which would prevent them from establishing a single independent body, and already have in place a structure of several administrative bodies can retain these arrangements, as long as the bodies concerned fulfill all responsibilities as stated below.

Or. en

Justification

More flexibility needs to be provided in this Article, in the same way as it is in Article 87. It is necessary to take into account the constitutional structures of some Member States (such as the United Kingdom) who could not put in place a single independent oversight body without going against national constitutional principles (such as the principle of devolution in the United Kingdom). If these Member States already have in place a functioning system, then this should remain as long as the responsibilities as stated in Article 84 are fulfilled.

Amendment 85

Sergio Gaetano Cofferati

Proposal for a directive

Article 93 – paragraph 3 – subparagraph 1 – point d

Text proposed by the Commission

Amendment

(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;

(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 and other serious irregularities **as well as specific breaches of provisions contained in Articles 70, 74 and 81;**

Or. en

Amendment 86
Sergio Gaetano Cofferati

Proposal for a directive
Article 93 – paragraph 3 – subparagraph 1 – point f bis (new)

Text proposed by the Commission

Amendment

(fa) examining the reports issued by the contracting entities that intend to resort to a negotiated procedure without publication;

Or. it

Amendment 87
Sergio Gaetano Cofferati

Proposal for a directive
Article 93 – paragraph 3 – subparagraph 3

Text proposed by the Commission

Amendment

Member States shall empower the oversight body to seize the jurisdiction competent according to national law for the review of contracting entities' decisions where it *has* detected a violation in the course of its monitoring and legal advising activity.

Member States shall empower the oversight body to seize the jurisdiction competent according to national law for the review of contracting entities' decisions where it detected a violation in the course of its monitoring and legal advising activity *or during examination of the reports provided by the contracting entities, in accordance with Article 44.*

Or. it

Amendment 88
Sergio Gaetano Cofferati

Proposal for a directive
Article 96 – paragraph 1

Text proposed by the Commission

Amendment

1. Member States shall make available

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.

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 89
Sergio Gaetano Cofferati

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

Text proposed by the Commission

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.

Amendment

Contracting entities shall state in the contract documents, the body or bodies from which a candidate or tenderer may obtain the appropriate information on the obligations relating to taxes, environmental protection, social and employment protection and working conditions which apply in the place where the works are to be carried out or services are to be provided as set out by international labour law provisions listed in Annex XI, Union and national legislation and/or collective agreements.

Or. en

Amendment 90
Sergio Gaetano Cofferati

Proposal for a directive
Annex 14 – point 1 a (new)

Text proposed by the Commission

Amendment

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

Or. en