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Committee on Legal Affairs

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

Rapporteur: Giuseppe Gargani

PA_Legam

SHORT JUSTIFICATION

Public procurement contracts must be used to contribute to the achievement of the Single Market and to boost economic growth in the Member States. In Europe, public purchasers spend around 18% of GDP on supplies, works and services.

Your rapporteur takes the view that the updating of the Directives on procurement by entities operating in the water, energy, transport and postal services sectors should:

- simplify procedures to the benefit of all economic operators;
- facilitate SME participation;
- ensure the best possible results in terms of value for money;
- use public funds efficiently and transparently.

Your rapporteur explicitly welcomes the aims of the Commission's legislative proposal, which are to strengthen and update existing legislation governing procurement by entities operating in the water, energy, transport and postal services sectors in Europe.

More specifically, your rapporteur welcomes the substance of the proposal concerning the aim of strengthening the legal framework relating to procurement, so that this instrument can be used to boost public and private investment in infrastructure and strategic services. He also agrees with the need to innovate and to simplify procurement procedures, in addition to striking a fair balance between priorities against a background of budgetary austerity and the need to ensure that public purchasing is effective.

Your rapporteur takes the view that procurement should continue to be regulated in the sectors in which there is a partial opening of the markets in which the entities operate, given the existence of special or exclusive rights granted by the Member States concerning the supply to, provision or operation of networks for providing the service concerned.

However, he believes that a number of changes are necessary in order to achieve the best possible outcome with regard to the achievement of the proposed aims:

- Legal services, which are typically based on trust, are governed by stringent ethical codes and are linked to the traditions of Member States, should be excluded from the proposal for a directive, since they call for an assessment of subjective elements relating to the specific requirements of the client.

- The inclusion of the postal sector in the proposal for a directive does not adequately take into account the changes which have taken place in Europe over the past few years, in particular the growth in competition in the market for such services, which is already the subject of Directive 2004/17/EC. In keeping with the rationale for the relevant rules and the evolution of case-law, this sector should therefore be excluded, given that there is already competition based on criteria such as the characteristics of the goods and services in question, the existence of alternatives, prices and the presence of several competitors.

- With reference to recent rulings of the Court of Justice of the European Union (Judgment of 10 April 2008, Case C-393/05, Fourth Chamber), an interpretation has been given of the

definition of a body governed by public law which includes also commercial companies under public control. The 'industrial or commercial character', therefore, relates to the goals to be pursued and the needs to be met rather than to the type of organisation and activities.

- The stipulation that a framework agreement may not exceed four years, even for the special sectors, appears to be restrictive to the extent that it might hamper, in specific cases (assistance agreements and plant maintenance), the efficiency of the contracting authorities.

- The obligation to inform economic operators of the conduct and progress of negotiations with tenderers, if so requested by an economic operator, is too burdensome for contracting entities and infringes the tenderers' right to confidentiality.

- The compulsory and no longer optional establishment of a single independent body responsible for the oversight and coordination of implementation activities relating to the directives under Article 93(1) is of undoubted value. However, such oversight should not be an end in itself; it should ensure that the objectives of quality, cost-effectiveness, efficiency and transparency laid down in the directives are achieved and should not delay or hamper the activity of the public authorities.

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 16

Text proposed by the Commission

(16) The results of the Evaluation demonstrated that the exclusion of certain services from the full application of this directive should be reviewed. As a result, the full application of *the* 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).

Amendment

(16) 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 services, which showed a particularly high percentage of cross-border trade).

Or. it

Justification

- *Legal services, which are typically based on trust and linked to the traditions of Member States, should be excluded from the proposal for a directive, since they call for an assessment of subjective elements relating to the specific requirements of the client.*

Amendment 2

Proposal for a directive

Article 2 - point 4 - point a and b

Text proposed by the Commission

(4) a "body governed by public law" means any body that has all of the following characteristics:

a) *It is established for or has the specific purpose of meeting needs in the general interest, not having an industrial or commercial character; for that purpose, a body which operates in normal market conditions, aims to make a profit, and bears the losses resulting from the exercise of its activity does not have the purpose of meeting needs in the general interest, not having an industrial or commercial character;*

b) *it has legal personality;*

Amendment

(4) a "body governed by public law" means any body that has all of the following characteristics:

a) *It has legal personality;*

b) *it is established for the specific purpose of meeting needs in the general interest, not having a merely industrial or commercial character;*

Or. it

Justification

I punti a) e b) della proposta della Commissione sono diventati, per motivi legati alla coerenza legislativa del testo, rispettivamente i punti b) e a). Il punto a), nuovo punto b) è stato altresì emendato. In particolare, quest'ultima modifica si basa su recenti pronunce della Corte di Giustizia dell'Unione europea (Sentenza 10/04/2008 causa C - 393/05/ IV sez) nelle quali si riconosce un'interpretazione della definizione di organismo di diritto pubblico che comprende anche le società commerciali sotto controllo pubblico. Il carattere industriale o commerciale, riguarda, pertanto, le finalità da perseguire e i bisogni da soddisfare, piuttosto che il tipo di organizzazione e di attività.

Amendment 3

Proposal for a directive Article 2 – point 10

Text proposed by the Commission

10. "supply contracts" means contracts having as their object the purchase, lease, rental or hire-purchase, with or without an option to buy, of products. A supply contract may include, as an incidental matter, siting and installation operations;

Amendment

10. "supply contracts" means contracts having as their object the purchase, lease, rental or hire-purchase, with or without an option to buy, of products. ***A supply contract may include an on-demand contract involving multiple deliveries.*** A supply contract may include, as an incidental matter, siting and installation operations;

Or. it

Justification

This definition of supply contracts should also include on-demand supply contracts involving multiple deliveries. This would govern a number of increasingly widespread contractual practices whereby supplies are provided in multiple deliveries according to the requirements of the contracting authorities throughout the duration of the contract.

Amendment 4

Proposal for a directive Article 10

Text proposed by the Commission

Article 10

Amendment

deleted

Postal services

1. This Directive shall apply to activities relating to the provision of:

a) postal services;

b) other services than postal services, on condition that such services are provided by an entity which also provides postal services within the meaning of point (b) of paragraph 2 and provided that the conditions set out in Article 27(1) are not satisfied in respect of the services falling within point (b) of paragraph 2.

2. For the purpose of this Directive and without prejudice to Directive 97/67/EC:

(a) "postal item": means an item addressed in the final form in which it is to be carried, irrespective of weight. In addition to items of correspondence, such items also include for instance books, catalogues, newspapers, periodicals and postal packages containing merchandise with or without commercial value, irrespective of weight;

(b) "postal services": means services consisting of the clearance, sorting, routing and delivery of postal items. This shall include both services falling within as well as services falling outside the scope of the universal service set up in conformity with Directive 97/67/EC;

c) "other services than postal services": means services provided in the following areas:

(i) mail service management services (services both preceding and subsequent to despatch, including "mailroom management services");

(ii) added-value services linked to and provided entirely by electronic means (including the secure transmission of coded documents by electronic means, address management services and transmission of registered electronic

mail);

(iii) services concerning postal items not included in point (a), such as direct mail bearing no address;

(iv) financial services, as defined in the CPV under the reference numbers from 66100000-1 to 66720000-3 and in Article 19(c) and including in particular postal money orders and postal giro transfers;

(v) philatelic services;

(vi) logistics services (services combining physical delivery and/or warehousing with other non-postal functions).

Or. it

Justification

Directive 2008/6/EC opened the postal sector up to competition also because it eliminated the remaining areas that were still reserved for the universal service provider. The postal sector has therefore gradually attained a satisfactory level of liberalisation.

Non-postal services provided by postal operators, i.e. 'other services than postal services', should therefore be excluded from the scope of the new directives.

Amendment 5

Proposal for a directive Article 19 – paragraph 1 – point b

Text proposed by the Commission

b) arbitration and conciliation services;

Amendment

b) **legal**, arbitration and conciliation services;

Or. it

Justification

In view of the discretionary and trust-based nature of legal services, they should be excluded from the scope of this directive.

Amendment 6

Proposal for a directive Article 45 – paragraph 1

Text proposed by the Commission

1. Contracting entities may conclude framework agreements, provided that they apply the procedures provided for in this Directive.

A framework agreement means an agreement between one or more contracting entities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantities envisaged.

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.

Amendment

1. Contracting entities may conclude framework agreements, provided that they apply the procedures provided for in this Directive.

A framework agreement means an agreement between one or more contracting entities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantities envisaged.

The term of a framework agreement shall not exceed **six** years, save in exceptional cases duly justified, in particular by the subject of the framework agreement.

Or. it

Justification

- The stipulation that a framework agreement should not exceed four years, even for the special sectors, appears to be restrictive to the extent that it might hamper, in specific cases (assistance agreements and plant maintenance), the efficiency of the contracting authorities.

Amendment 7

Proposal for a directive Article 58 – paragraph 1

Text proposed by the Commission

1. Contracting entities may take account of variants which are submitted by a tenderer **and** meet the minimum requirements specified by the contracting entities.

Amendment

1. Contracting entities may take account of variants which are submitted by a tenderer **where they** meet the minimum requirements specified by the contracting entities **and do not exceed 1/6 of the**

overall price agreed upon.

Or. it

Justification

An unscrupulous use of variants could distort competition and create problems of legal certainty. A specific provision should be introduced to provide for a maximum permissible price for variants. National legislation provides benchmarks in this regard, confirming the effectiveness of such a provision.

Amendment 8

**Proposal for a directive
Article 65 – paragraph 3**

Text proposed by the Commission

3. Calls for competition within the meaning of Article 39(2) shall be published in full in an official language of the Union as chosen by the contracting entity. That language version shall constitute the sole authentic text. *A summary of the important elements of each notice shall be published in the other official languages.*

Amendment

3. Calls for competition within the meaning of Article 39(2) shall be published in full in an official language of the Union as chosen by the contracting entity. That language version shall constitute the sole authentic text.

Or. it

Justification

The requirement to publish a summary of the important elements of each notice in all the official languages of the EU is unsustainable owing to time constraints, costs and legal certainty.

Amendment 9

Proposal for a directive

Article 69 - paragraph 2 - point (d)

Text proposed by the Commission

Amendment

d) any tenderer that has made an admissible tender of the conduct and progress of negotiations and dialogue with tenderers.

deleted

Or. it

Justification

- The obligation to inform economic operators of the conduct and progress of negotiations with tenderers, if so requested by an economic operator, is too burdensome for contracting entities and infringes the tenderers' right to confidentiality.

Amendment 10

Proposal for a directive

Article 73 – paragraph 1

Text proposed by the Commission

Amendment

1. Where the objective rules and criteria for the exclusion and selection of economic operators requesting qualification in a qualification system include requirements relating to the economic and financial capacity of the economic operator, or to its technical and professional abilities, the economic operator may where necessary rely on the capacity of other entities, ***whatever*** the legal nature of the link between itself and those entities. In this case the economic operator shall prove to the contracting entity that those resources will be available to it throughout the period of the validity of the qualification system, for example by producing an undertaking by those entities to that effect. ***In the case of economic and financial standing,***

1. Where the objective rules and criteria for the exclusion and selection of economic operators requesting qualification in a qualification system include requirements relating to the economic and financial capacity of the economic operator, or to its technical and professional abilities, the economic operator may where necessary rely ***only*** on the ***material*** capacity of other entities, ***with due regard for*** the legal nature of the link between itself and those entities. In this case the economic operator shall prove to the contracting entity that those resources will be available to it throughout the period of the validity of the qualification system, for example by producing an undertaking by those entities to that effect. Contracting entities ***shall***

contracting entities **may** require that the economic operator and those entities are jointly liable for the execution of the contract.

require that the economic operator and those entities are jointly liable for the execution of the contract.

Or. it

Justification

To ensure legal and economic certainty in the award and performance of contracts, the use of the opportunity to rely on the capacities of other entities should be restricted to the acquisition of only material requirements; joint liability should also be strengthened between economic operators and those on whom they rely for performance of the contract, by making it mandatory. This can only be achieved if there is a legal relationship between the two parties.

Amendment 11

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 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. Member States ***shall*** provide that, 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.

Or. it

Justification

To promote greater legal certainty, avoid legal disputes and reduce the risk of non-payment of services provided, direct payment to subcontractors needs to become mandatory where the nature of the contract so allows.

Amendment 12

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 12 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 12 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. it

Justification

The proposal limits to 5% of the value of the contract any modifications that might be made during the performance of the contract. This limitation is too restrictive. The limit should therefore be raised, so that it may not exceed 10% of the overall price.

Amendment 13

Proposal for a directive Article 93 – paragraph 3 – point b

Text proposed by the Commission

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

Amendment

deleted

Or. it

Justification

Legal services have always been based upon a relationship of trust with the professional in question, underpinned by the latter's professional skills and governed by stringent professional ethical codes. They cannot therefore be assigned to a public oversight body and neither should they fall within the scope of this directive.

Amendment 14

Proposal for a directive

Article 93 – paragraph 3 – point c

Text proposed by the Commission

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;

Amendment

c) *drawing up 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 wording proposed is more relevant to the remit of the body, which is to monitor the implementation and application of the rules.

Amendment 15

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 authorities in preparing and carrying out procurement procedures. Member States shall also ensure that each contracting*

Amendment

deleted

*authority can obtain competent assistance
and advice on individual questions.*

Or. it

Justification

Legal services have always been based upon a relationship of trust with the professional in question, underpinned by the latter's professional skills and governed by stringent professional ethical codes. They cannot therefore be assigned to a public oversight body and neither should they fall within the scope of this directive.