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Committee on Transport and Tourism

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AMENDMENTS 37 - 65

Draft opinion
Eva Lichtenberger
(PE491.261v01-00)

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 sector

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

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Amendment 37
Antonio Cancian

Proposal for a directive
Recital 8

Text proposed by the Commission

(8) The notion of special or exclusive rights is central to the definition of the scope of this Directive, since entities which are ***neither contracting authorities nor public undertakings*** within the meaning of this Directive are subject to its provisions only to the extent that they exercise one of the activities covered on the basis of such rights. It is therefore appropriate to clarify that rights which have been granted by means of a procedure based on objective criteria, notably pursuant to Union legislation, and for which adequate publicity has been ensured do not constitute special or exclusive rights for the purposes of this Directive. This legislation should include Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas, Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, Directive 94/22/EC of the European Parliament and of the Council of 20 May 1994 on the conditions for granting and using authorisations for the prospection, exploration and production of hydrocarbons and Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council

Amendment

(8) The notion of special or exclusive rights is central to the definition of the scope of this Directive, since entities which are ***not*** within the meaning of this Directive are subject to its provisions only to the extent that they exercise one of the activities covered on the basis of such rights. It is therefore appropriate to clarify that rights which have been granted by means of a procedure based on objective criteria, notably pursuant to Union legislation, and for which adequate publicity has been ensured do not constitute special or exclusive rights for the purposes of this Directive. This legislation should include Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas, Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service, Directive 94/22/EC of the European Parliament and of the Council of 20 May 1994 on the conditions for granting and using authorisations for the prospection, exploration and production of hydrocarbons and Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and

Regulations (EEC) Nos 1191/69 and
1107/70.

1107/70.

Or. en

Amendment 38
Jim Higgins

Proposal for a directive
Recital 8 a (new)

Text proposed by the Commission

Amendment

(8a) Whereas care needs to be taken to ensure that the social aspect of postal services in rural areas is not neglected when opening this market up to competition.

Or. en

Amendment 39
Gesine Meissner

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

Text proposed by the Commission

Amendment

An entirety of works, supplies ***and/or*** services, even if purchased through different contracts, constitutes a single procurement within the meaning of this Directive, if the contracts are part of one single project.

An entirety of works, supplies ***or*** services ***which are uniform in character by their economic and technical functions***, even if purchased through different contracts, constitutes a single procurement within the meaning of this Directive, if the contracts are part of one single project.

Or. en

Amendment 40
Roberts Zile

Proposal for a directive
Article 2 – paragraph 1 – point 22

Text proposed by the Commission

(22) ‘life cycle’ means ***all consecutive and/or interlinked stages***, including ***production, transport, use and maintenance, throughout the existence of a product or a works or the provision of a service, from raw material acquisition or generation of resources to disposal, clearance and finalisation;***

Amendment

(22) ‘life cycle’ means ***monetising, wherever possible, the full costs associated to the public procurement, including maintenance and resource (including energy) efficiency costs, end-of- life recycling costs, and social impact costs where these relate to performance of the contract. Efficient design, planning and use of electronic means can also be included in life cycle monetisation. For the purposes of public procurement, the life cycle runs from the point of purchase throughout the lifetime of the works, supplies or services and forms an integral and in-dissociable part of the calculation of what constitutes the Most Economically Advantageous Tender.***

Or. en

Justification

While contracting authorities shall, in the interest of the taxpayer, be responsible for ensuring that value for money is secured as regards whatever solution is selected through public procurement, and that this does not end up costing more to society or the environment overall on the long run, this responsibility can only reasonably run from the point of purchase.

Amendment 41
Philippe De Backer

Proposal for a directive
Article 10 – paragraph 2 – point b

Text proposed by the Commission

(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***

Amendment

(b) ‘postal services’ means services consisting of the clearance, sorting, routing and delivery of ***domestic*** postal items ***and services*** falling within the scope of the universal service set up in conformity with

universal service set up in conformity with
Directive 97/67/EC;

Directive 97/67/EC;

Or. nl

Justification

Seeks to exempt postal services that do not form part of the universal service from the obligations under this directive. Given that those services are offered on a competitive market, an obligation to carry out tendering would lead to a competitive disadvantage as compared with market competitors.

Amendment 42
Gesine Meissner

Proposal for a directive
Article 27 – paragraph 1

Text proposed by the Commission

1. Contracts intended to enable an activity mentioned in Articles 5 to 11 to be carried out shall not be subject to this Directive if the Member State or the contracting entities having introduced the request pursuant to Article 28 can demonstrate that, in the Member State in which it is performed, the activity is directly exposed to competition on markets to which access is not restricted; nor shall design contests that are organised for the pursuit of such an activity in that geographic area be subject to this Directive. Such competition assessment, which will be made in the light of the information available to the Commission and for the purposes of this Directive, is without prejudice to the application of competition law.

Amendment

1. Contracts intended to enable an activity mentioned in Articles 5 to 11 to be carried out shall not be subject to this Directive if the Member State or the contracting entities having introduced the request pursuant to Article 28 can demonstrate that, in the Member State in which it is performed, the activity, **or its specific sectors or segments**, is directly exposed to competition on markets to which access is not restricted; nor shall design contests that are organised for the pursuit of such an activity in that geographic area be subject to this Directive. Such competition assessment, which will be made in the light of the information available to the Commission and for the purposes of this Directive, is without prejudice to the application of competition law.

Or. en

Justification

Some sectors of the railway market are already directly exposed to competition and freely

accessible, and for this reason should not fall within the scope of Directive 2004/17.

Amendment 43
Gesine Meissner

Proposal for a directive
Article 27 – paragraph 3 – first subparagraph

Text proposed by the Commission

For the purposes of paragraph 1, access to a market shall be deemed not to be restricted if the Member State has implemented and applied the Union legislation listed in Annex III.

Amendment

For the purposes of paragraph 1, access to a market shall be deemed not to be restricted if the Member State has implemented and applied the Union legislation listed in Annex III ***or if the Member State has extended to the market in question the application of principles established by this legislation.***

Or. en

Amendment 44
Gesine Meissner

Proposal for a directive
Article 28 – paragraph 1 – first subparagraph

Text proposed by the Commission

Where a Member State or, where the legislation of the Member State concerned provides for it, a contracting entity considers that, on the basis of the criteria set out in Article 27(2) and (3), a given activity is directly exposed to competition on markets to which access is not restricted, it may submit a request to establish that this Directive does not apply to the award of contracts or the organisation of design contests for the pursuit of that activity.

Amendment

Where a Member State or, where the legislation of the Member State concerned provides for it, a contracting entity considers that, on the basis of the criteria set out in Article 27(2) and (3), a given activity is ***completely or partially, even with regard to single sectors or segments of it,*** directly exposed to competition on markets to which access is not restricted, it may submit a request to establish that this Directive does not apply to the award of contracts or the organisation of design contests for the pursuit of that activity ***or of a single sector or segment of it.***

Justification

Some sectors of the railway market are already directly exposed to competition and freely accessible, and for this reason should not fall within the scope of Directive 2004/17.

Amendment 45
Gesine Meissner

Proposal for a directive
Article 28 – paragraph 1 – second subparagraph

Text proposed by the Commission

Requests shall be accompanied by a reasoned and substantiated position adopted by an independent national authority that is competent in relation to the activity concerned. This position shall thoroughly analyse the conditions for the possible applicability of Article 27(1) to the activity concerned in accordance with its paragraphs 2 and 3.

Amendment

Requests shall be accompanied by a reasoned and substantiated position adopted by an independent national authority that is competent in relation to the activity concerned ***or a single sector or segment of it***. This position shall thoroughly analyse the conditions for the possible applicability of Article 27(1) to the activity concerned in accordance with its paragraphs 2 and 3.

Justification

Some sectors of the railway market are already directly exposed to competition and freely accessible, and for this reason should not fall within the scope of Directive 2004/17.

Amendment 46
Gesine Meissner

Proposal for a directive
Article 28 – paragraph 2 – first subparagraph 1

Text proposed by the Commission

Upon request submitted in accordance with paragraph 1 of this Article, the

Amendment

Upon request submitted in accordance with paragraph 1 of this Article, the

Commission may, by way of an implementing decision adopted within the periods set out in paragraph 4 of this Article, establish whether an activity referred to in Articles 5 to 11 is directly exposed to competition on the basis of the criteria set out in Article 27. Those implementing decisions shall be adopted in accordance with the advisory procedure referred to in Article 100(2).

Commission may, by way of an implementing decision adopted within the periods set out in paragraph 4 of this Article, establish whether an activity, **or a single sector or segment of it**, referred to in Articles 5 to 11 is directly exposed to competition on the basis of the criteria set out in Article 27. Those implementing decisions shall be adopted in accordance with the advisory procedure referred to in Article 100(2).

Or. en

Justification

Some sectors of the railway market are already directly exposed to competition and freely accessible, and for this reason should not fall within the scope of Directive 2004/17.

Amendment 47 **Gesine Meissner**

Proposal for a directive **Article 28 – paragraph 2 – second subparagraph – introductory part**

Text proposed by the Commission

Contracts intended to enable the activity concerned to be carried out and design contests that are organised for the pursuit of such an activity shall cease to be subject to this Directive in any of the following cases:

Amendment

Contracts intended to enable the activity concerned, **or a single sector or segment of it**, to be carried out and design contests that are organised for the pursuit of such an activity, **or a single sector or segment of it**, shall cease to be subject to this Directive in any of the following cases:

Or. en

Justification

Some sectors of the railway market are already directly exposed to competition and freely accessible, and for this reason should not fall within the scope of Directive 2004/17.

Amendment 48
Roberts Zile

Proposal for a directive
Article 34 – paragraph 1

Text proposed by the Commission

Member States shall ensure that, ***at the latest 2 years after the date provided for in Article 101(1), all*** procurement procedures under this Directive are performed using electronic means of communication, in particular e-submission, in accordance with the requirements of this Article.

Amendment

Member States shall ensure that, ***by 1 January 2017, at least 70% of*** procurement procedures under this Directive are performed using electronic means of communication, in particular e-submission, in accordance with the requirements of this Article.

Member States shall ensure that, by 1 January 2020, all procurement procedures under this Directive are performed using electronic means of communication, in particular e-submission, in accordance with the requirements of this Article.

Or. en

Justification

This two-step approach is considered as more realistic and achievable target setting, and allows contracting authorities sufficient planning and implementation time.

Amendment 49
Bogdan Kazimierz Marcinkiewicz

Proposal for a directive
Article 36

Text proposed by the Commission

Article 36

Conflicts of interests

1. Member States shall, in respect of contracting authorities within the meaning of point 1 of Article 2, provide for rules to effectively prevent, identify

Amendment

deleted

and immediately remedy conflicts of interests arising in the conduct of procurement procedures that are subject to this Directive, including the design and preparation of the procedure, the drawing-up of the procurement documents, the selection of candidates and tenderers and the award of the contract, so as to avoid any distortion of competition and ensure equal treatment of all tenderers.

The notion of conflict of interests shall at least cover any situation where the categories of persons referred to in paragraph 2 have, directly or indirectly, a private interest in the outcome of the procurement procedure, which may be perceived to impair the impartial and objective performance of their duties.

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.

2. The rules referred to in paragraph 1 shall apply to conflicts of interests involving at least the following categories of persons:

a) staff members of the contracting authority, procurement service providers or staff members of other service providers who are involved in the conduct of the procurement procedure;

b) the chairperson of the contracting authority and members of decision-making bodies of the contracting authority who, without necessarily being involved in the conduct of the procurement procedure, may nevertheless influence the outcome of that procedure.

3. Member States shall ensure in particular:

a) that staff members referred to in paragraph 2(a) are required to disclose

any conflict of interests in relation to any of the candidates or tenderers, as soon as they become aware of such conflicts, in order to enable the contracting authority to take remedial action,

b) that candidates and tenderers are required to submit at the beginning of the procurement procedure a declaration on the existence of any privileged links with the persons referred to in paragraph 2(b), which are likely to place those persons in a situation of conflict of interests; the contracting authority shall indicate in the individual report referred to in Article 94 whether any candidate or tenderer has submitted a declaration.

In the event of a conflict of interests, the contracting authority shall take appropriate measures. Those measures may include the recusal of the staff member in question from involvement in the affected procurement procedure or the re-assignment of the staff member's duties and responsibilities. If the conflict of interests cannot be effectively remedied by other means, the candidate or tenderer concerned shall be excluded from the procedure.

Where privileged links are identified, the contracting authority shall immediately inform the oversight body designated in accordance with Article 93 and take appropriate measures to avoid any undue influence on the award process and ensure equal treatment of candidates and tenderers. If the conflict of interests cannot be effectively remedied by other means, the candidate or tenderer concerned shall be excluded from the procedure.

4. All measures taken pursuant to this Article shall be documented in the individual report referred to in Article 94.

Or. pl

Amendment 50
Roberts Zile

Proposal for a directive
Article 43 – paragraph 1 – first subparagraph

Text proposed by the Commission

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

Amendment

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

Or. en

Justification

The promotion of innovation partnerships is a key priority in this modernisation exercise. Therefore, the transposition of the procedure should not be optional but uniform across all Member States to ensure a level playing field.

Amendment 51
Gesine Meissner

Proposal for a directive
Article 45 – paragraph 1 – third subparagraph

Text proposed by the Commission

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

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. en

Amendment 52
Gesine Meissner

Proposal for a directive
Article 45 – paragraph 4

Text proposed by the Commission

Amendment

4. Where a framework agreement is concluded with more than one economic operator, it may be performed in one of the two following ways: **deleted**

(a) following the terms and conditions of the framework agreement, without reopening competition, where it sets out all the terms governing the provision of the works, services and supplies concerned and the objective conditions for determining which of the economic operators, party to the framework agreement, shall perform them; the latter conditions shall be indicated in the procurement documents;

(b) where not all the terms governing the provision of the works, services and supplies are laid down in the framework agreement, through reopening competition amongst the economic operators parties to the framework agreement.

Or. en

Amendment 53
Gesine Meissner

Proposal for a directive
Article 45 – paragraph 5

Text proposed by the Commission

Amendment

5. The competition referred to in paragraph (4)(b) shall be based on the same terms as applied for the award of the framework agreement and, where necessary, more precisely formulated terms, and, where appropriate, other terms referred to in the specifications of **deleted**

the framework agreement, in accordance with the following procedure:

(a) for every contract to be awarded, contracting entities shall consult in writing the economic operators capable of performing the contract;

(b) contracting entities shall fix a time limit which is sufficiently long to allow tenders for each specific contract to be submitted, taking into account factors such as the complexity of the subject-matter of the contract and the time needed to send in tenders;

(c) tenders shall be submitted in writing, and their content shall not be opened until the stipulated time limit for reply has expired;

(d) contracting entities shall award each contract to the tenderer that has submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement.

Or. en

Amendment 54 **Roberts Zile**

Proposal for a directive **Article 76 – paragraph 2 – first subparagraph**

Text proposed by the Commission

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.

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 **public** contract in question **and, wherever possible, on the basis of the monetisation of the life cycle as defined in Article 2, point 22.**

Or. en

Amendment 55
Roberts Zile

Proposal for a directive
Article 76 – paragraph 2 – second subparagraph – point d

Text proposed by the Commission

Amendment

(d) 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, to the extent that those criteria are specified in accordance with paragraph 4 and they concern factors directly involved in those processes and characterise the specific process of production or provision of the requested works, supplies or services.

deleted

Or. en

Amendment 56
Roberts Zile

Proposal for a directive
Article 77 – paragraph 1 – point a

Text proposed by the Commission

Amendment

(a) internal costs, *including costs* relating to *acquisition*, such as *production* costs, *use, such as* energy *consumption*, maintenance costs and *end of life, such as* collection and recycling costs *and*

(a) internal costs relating to *use*, such as maintenance *and resource efficiency* costs (*including* energy *efficiency*), *end-of-life* recycling and collection costs, and *social impact costs where these relate to performance of the contract. Internal costs also include considerations of efficient design, planning and process costs such as the use of electronic means.*

Or. en

Amendment 57
Bogdan Kazimierz Marcinkiewicz

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

Text proposed by the Commission

Amendment

1a. The criterion of an abnormally low tender shall be applied in the aforementioned situations where one or more of the following conditions are fulfilled:

Or. pl

Amendment 58
Roberts Zile

Proposal for a directive
Article 80

Text proposed by the Commission

Amendment

Contracting entities may lay down special conditions relating to the performance of a contract, provided that they are indicated in the call for competition or in the specifications. Those conditions may, ***in particular, concern*** social ***and*** environmental considerations. They may also include the requirement that economic operators foresee compensations for risks of price increases that are the result of price fluctuations (hedging) and that could substantially impact the performance of a contract.

Contracting entities may lay down special conditions relating to the performance of a contract, provided that they are indicated in the call for competition or in the specifications. Those conditions may ***include economic, innovative,*** environmental ***or*** social considerations. They may also include the requirement that economic operators foresee compensations for risks of price increases that are the result of price fluctuations (hedging) and that could substantially impact the performance of a contract. ***However, none of those special conditions shall result in loosing the link to the subject matter of the contract.***

Or. en

Amendment 59
Dominique Riquet, Michel Dantin

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 **15%** 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. fr

Justification

Greater flexibility seems necessary to make it possible to take account of new factors that arise during the performance of the contract.

Amendment 60
Gesine Meissner

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

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 **15%** 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.

modification does not alter the overall nature of the contract. Where several successive modifications are made, the value shall be assessed on the basis of the cumulative value of the successive modifications.

Or. en

Justification

In order to make it easier to amend contracts during their execution, for instance in the light of new elements meanwhile occurred that must be taken into consideration for the purposes of the contract execution.

Amendment 61 **Gesine Meissner**

Proposal for a directive **Article 94 – paragraph 1 – second subparagraph**

Text proposed by the Commission

Contracting entities shall document the progress of all procurement procedures, whether or not the procedures are conducted by electronic means. To that end, they shall document all stages in the procurement procedure, including all communications with economic operators **and internal deliberations**, preparation of the tenders, dialogue or negotiation if any, selection and award of the contract.

Amendment

Contracting entities shall document the progress of all procurement procedures, whether or not the procedures are conducted by electronic means. To that end, they shall document all stages in the procurement procedure, including all communications with economic operators, preparation of the tenders, dialogue or negotiation if any, selection and award of the contract.

Or. en

Amendment 62 **Antonio Cancian**

Proposal for a directive **Annex III – point D – point 1**

Text proposed by the Commission

Amendment

Rail ***Freight*** transport

Rail transport

Or. en

Amendment 63
Gesine Meissner

Proposal for a directive
Annex III – point D – point 1

Text proposed by the Commission

Amendment

Rail ***Freight*** transport

Rail transport

Or. en

Justification

Not only rail freight market but also part of the rail passenger market has been opened to competition.

Amendment 64
Antonio Cancian

Proposal for a directive
Annex III – point D – point 2

Text proposed by the Commission

Amendment

Rail passenger transport

deleted

None

Or. en

Amendment 65
Gesine Meissner

Proposal for a directive
Annex III – point D – point 2

Text proposed by the Commission

Amendment

Rail passenger transport

deleted

None

Or. en