EUROPEAN PARLIAMENT

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Committee on Transport and Tourism

2011/0438(COD)

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DRAFT OPINION

of the Committee on Transport and Tourism

for the Committee on the Internal Market and Consumer Protection

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

Rapporteur: Eva Lichtenberger

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SHORT JUSTIFICATION

Public procurement plays an important role in the overall economic performance of the European Union. Public authorities spend around 18% of GDP on supplies, works and services. Given the volume of purchases, public procurement can be used as a powerful lever for achieving a Single Market fostering smart, sustainable and inclusive growth.

Public procurement plays also a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve the objectives of improving the business environment and conditions for business to innovate and of encouraging wider use of green procurement supporting the shift towards a resource efficient and low-carbon economy. At the same time, the Europe 2020 strategy stresses that public procurement policy must ensure the most efficient use of public funds and that procurement markets must be kept open Union-wide.

The Rapporteur welcomes the Commission's proposal to modernise the public procurement directives. The legislative proposal should result in simpler and more flexible procurement procedures for contracting authorities and provide easier access for companies, especially SMEs. The revision of the legislation should strike a balance between simplification of the rules, sound and effective procedures related to innovative and sustainable award criteria, while also securing a wider use of e-procurement.

Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment. These criteria should guarantee that tenders are assessed in conditions of effective competition, also where contracting authorities require high-quality works, supplies and services that are optimally suited to their needs, for instance where the award decision includes factors linked to the production process.

The Rapporteur strongly believes that contracting authorities should use as award criterion the 'most economically advantageous and sustainable tender' (MEAST) and discard the alternative criterion based on the 'lowest cost'. Given that price is also taken into account in the MEAST, contracting authorities will be able to make the most appropriate choices in relation to their specific needs, including the consideration of cost, strategic societal goals, innovative solutions and social and environmental criteria.

Public procurement should be used as a means to foster innovation. Public purchasers must be encouraged to buy innovative products and services in order to achieve the goals of sustainable development. New innovative solutions and ideas are necessary in particular in the filed of transport, and public procurement should be used as a tool to meet such needs.

Life cycle considerations should be upgraded, and the social and environmental effects of the entire production process must be taken into consideration. Contracting authorities should have further possibilities to impose demands on the production process and not only on the product. This will lead to more sustainable procurement, including in the transport sector.

For all procurement intended for use by persons, it is necessary that contracting authorities lay down technical specifications so as to take into account accessibility criteria for people with disabilities or design for all users. This is particularly crucial in the area of public transport and tourism.

The provisions on subcontracting should be strengthened. A tenderer must be required to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors. Furthermore, it has to be possible for the main contractor and all of the subcontractors involved to be made liable in the event of failure to comply with legislation. There is need for a control system which covers all parts of the contractors' chain.

The Rapporteur has tabled a number of amendments to address the issues outlined above. In some cases, it was considered necessary to delete some provisions proposed by the Commission, as the Rapporteur considers that certain issues can be addressed more effective1ly in national legislation, taking into account sectoral and regional specificities, in line with the principles of subsidiarity and better regulation.

Last but not least, the Rapporteur would like to stress the need to ensure legal certainty and consistency of the public procurement directives with current Union legislation in the field of transport and postal services.

AMENDMENTS

The Committee on Transport and Tourism 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
Article 1 – paragraph 2 – subparagraph 1

Text proposed by the Commission	*Amendment*
Procurement within the meaning of this Directive is the ***purchase or other forms of*** acquisition of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose.	***Public procurement*** within the meaning of this Directive is ***a contract concluded for pecuniary interest for*** the acquisition of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose.

Or. en

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

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.	***deleted***

Or. en

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

Text proposed by the Commission	*Amendment*
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.	***deleted***

Or. en

Justification

This issue can be addressed more effectively in national legislation.

Amendment 4
Proposal for a directive
Article 21 – paragraph 3 – subparagraph 1 – point a

Text proposed by the Commission	*Amendment*
(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;	***deleted***

Or. en

Justification

This issue can be addressed more effectively in national legislation.

Amendment 5
Proposal for a directive
Article 21 – paragraph 3 – subparagraph 2

Text proposed by the Commission	*Amendment*
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. Where a conflict of interests cannot be effectively remedied by other means, the candidate or tenderer concerned shall be excluded from the procedure***.	In the event of a conflict of interests, the contracting authority shall take appropriate measures.

Or. en

Justification

The precise nature of such measures should be decided at national level.

Amendment 6
Proposal for a directive
Article 21 – paragraph 4

Text proposed by the Commission	*Amendment*
4. All measures taken pursuant to this Article shall be documented in the individual report referred to in Article 85.	***deleted***

Or. en

Amendment 7
Proposal for a directive
Article 22 – paragraph 1 – introductory part

Text proposed by the Commission	*Amendment*
Candidates shall ***be required at*** the ***beginning*** of the procedure ***to provide a declaration on honour that they have not undertaken*** and ***will not undertake to:***	***Member States*** shall ***provide for*** the ***necessary rules to effectively prevent, identify and punish illicit conduct and distortion*** of ***competition arising during*** the ***procurement*** procedure***, in particular in the drawing up of the procurement documents, the selection of candidates*** and ***the award of the contract.***

Or. en

Justification

Amendments 7 to 10 aim at simplifying Article 22.

Amendment 8
Proposal for a directive
Article 22 – paragraph 1 – point a

Text proposed by the Commission	*Amendment*
(a) unduly influence the decision-making process of the contracting authority or obtain confidential information that may confer upon them undue advantages in the procurement procedure;	***deleted***

Or. en

Amendment 9
Proposal for a directive
Article 22 – paragraph 1 – point b

Text proposed by the Commission	*Amendment*
(b) enter into agreements with other candidates and tenderers aimed at distorting competition;	***deleted***

Or. en

Amendment 10
Proposal for a directive
Article 22 – paragraph 1 – point c

Text proposed by the Commission	*Amendment*
(c) deliberately provide misleading information that may have a material influence on decisions concerning exclusion, selection or award.	***deleted***

Or. en

Amendment 11
Proposal for a directive
Article 24 – paragraph 1 – subparagraph 4 – introductory part

Text proposed by the Commission	*Amendment*
They may also provide that contracting authorities may use a competitive procedure with negotiation or a competitive dialogue in any of the following cases:	They may also provide that contracting authorities may use a competitive procedure with negotiation or a competitive dialogue***, provided that they ensure the equal treatment of all tenderers,*** in any of the following cases:

Or. en

Amendment 12
Proposal for a directive
Article 40 – paragraph 1 – subparagraph 4

Text proposed by the Commission	*Amendment*
For all procurement the subject of which is intended for use by persons, whether general public or staff of the contracting authority, those technical specifications shall, except in duly justified cases, be drawn up so as to take into account	For all procurement the subject of which is intended for use by persons, whether general public or staff of the contracting authority, those technical specifications shall, except in duly justified cases ***that shall be stated in the call for competition***,

accessibility criteria for people with disabilities or design for all users.	be drawn up so as to take into account accessibility criteria for people with disabilities or design for all users.

Or. en

Amendment 13
Proposal for a directive
Article 40 – paragraph 1 a (new)

Text proposed by the Commission	*Amendment*
	1a. 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;
	(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 authority is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve.

Or. en

Amendment 14
Proposal for a directive
Article 53 – 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. en

Amendment 15
Proposal for a directive
Article 54 – paragraph 2

Text proposed by the Commission	*Amendment*
2. Contracting authorities 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 XI.	2. Contracting authorities may not award a contract to the tenderer submitting the best tender where they have established that the tender does not comply with obligations by Union ***or national*** legislation in the field of social***,*** labour***, health, safety*** or environmental law***, collective agreements applicable in the place where the work, service*** or ***supply is to be performed, or by*** the international social and environmental law provisions listed in Annex XI.

Or. en

Amendment 16
Proposal for a directive
Article 55 – paragraph 3 – subparagraph 1 – point a

Text proposed by the Commission	*Amendment*
(a) where it is aware of any violation of obligations established by Union legislation in the field of social ***and*** labour	(a) where it is aware of any violation of obligations established by Union ***or national*** legislation in the field of social***,***

law or environmental law or ***of*** the international social and environmental law provisions listed in Annex XI. Compliance with Union legislation or with international provisions also includes compliance in an equivalent manner.	labour***, health, safety*** or environmental law***, collective agreements applicable in the place where the work, service*** or ***supply is to be performed, or by*** the international social and environmental law provisions listed in Annex XI. Compliance with Union legislation or with international provisions also includes compliance in an equivalent manner.

Or. en

Amendment 17
Proposal for a directive
Article 55 – paragraph 4 – subparagraph 1

Text proposed by the Commission	*Amendment*
Any candidate or tenderer that is in one of the situations referred to in paragraphs 1, 2 and 3 may provide the contracting authority with evidence demonstrating its reliability despite the existence of the relevant ground for exclusion.	Any candidate or tenderer that is in one of the situations referred to in paragraphs 1, 2 and 3 may provide the contracting authority with evidence demonstrating its reliability***, or, as appropriate, the reliability of its sub-contractor,*** despite the existence of the relevant ground for exclusion.

Or. en

Amendment 18
Proposal for a directive
Article 55 – paragraph 6 a (new)

Text proposed by the Commission	*Amendment*
	6a. This Article shall apply to subcontracting procedures and subcontractors.

Or. en

Amendment 19
Proposal for a directive
Article 56 – paragraph 1 – subparagraph 1 – point c a (new)

Text proposed by the Commission	*Amendment*
	(ca) compliance with obligations established by Union or national legislation in the field of social, labour, health, safety or environmental law, collective agreements applicable in the place where the work, service or supply is to be performed, or by the international social and environmental law provisions listed in Annex XI;

Or. en

Amendment 20
Proposal for a directive
Article 56 – paragraph 5 a (new)

Text proposed by the Commission	*Amendment*
	5a. This Article shall apply to subcontracting procedures and subcontractors.

Or. en

Amendment 21
Proposal for a directive
Article 60 – paragraph 2 – subparagraph 1

Text proposed by the Commission	*Amendment*
Proof of the economic operator's economic and financial standing may, as a general rule, be provided by one or more of the references listed in Annex XIV***, part 1***.	Proof of the economic operator's economic and financial standing***, as well as compliance with obligations established by Union or national legislation in the field of social, labour, health, safety or environmental law, collective agreements applicable in the place where the work, service or supply is to be performed,*** may,

	as a general rule, be provided by one or more of the references listed in Annex XIV.

Or. en

Amendment 22
Proposal for a directive
Article 66 – paragraph 1 – subparagraph 1 – introductory part

Text proposed by the Commission	*Amendment*
Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the ***criteria*** on which contracting authorities shall base the award of public contracts shall be ***one of*** the ***following:***	Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the ***criterion*** on which contracting authorities shall base the award of public contracts shall be the ***most economically advantageous and sustainable tender.*** *(This amendment applies throughout the text. Adopting it will necessitate corresponding changes throughout.)*

Or. en

Amendment 23
Proposal for a directive
Article 66 – paragraph 1 – subparagraph 1 – point a

Text proposed by the Commission	*Amendment*
(a) the most economically advantageous tender;	***deleted***

Or. en

Amendment 24
Proposal for a directive
Article 66 – paragraph 1 – subparagraph 1 – point b

Text proposed by the Commission	*Amendment*
(b) the lowest cost.	***deleted***

Or. en

Amendment 25
Proposal for a directive
Article 66 – paragraph 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 authority, 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 may be taken into consideration;

Or. en

Amendment 26
Proposal for a directive
Article 66 – paragraph 3 a (new)

Text proposed by the Commission	*Amendment*
	3a. Award criteria shall ensure effective and fair competition and shall be accompanied by requirements that allow the information provided by the tenderers to be effectively verified by the contracting authority in order to determine whether the tenderers meet the award criteria.

Or. en

Amendment 27
Proposal for a directive
Article 69 – title

Text proposed by the Commission	*Amendment*
Abnormally low tenders	***Price of the tender***

Or. en

Amendment 28
Proposal for a directive
Article 69 – paragraph 1 – introductory part

Text proposed by the Commission	*Amendment*
1. Contracting authorities shall require economic operators to explain the price or costs charged***, where all of the following conditions are fulfilled:***	1. Contracting authorities shall require economic operators to explain ***in a detailed manner*** the price or costs charged ***for their tender.***

Or. en

Amendment 29
Proposal for a directive
Article 69 – 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. en

Justification

This issue can be addressed more effectively in national legislation, taking into account sectoral and regional specificities.

Amendment 30
Proposal for a directive
Article 69 – 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. en

Justification

This issue can be addressed more effectively in national legislation, taking into account sectoral and regional specificities.

Amendment 31
Proposal for a directive
Article 69 – paragraph 1 – point c

Text proposed by the Commission	*Amendment*
(c) at least five tenders have been submitted.	***deleted***

Or. en

Justification

This issue can be addressed more effectively in national legislation, taking into account sectoral and regional specificities.

Amendment 32
Proposal for a directive
Article 69 – paragraph 2

Text proposed by the Commission	*Amendment*
2. Where tenders appear to be abnormally low ***for other reasons***, contracting authorities ***may also*** request ***such*** explanations.	2. Where tenders appear to be abnormally low, contracting authorities ***shall*** request ***additional*** explanations ***before rejecting a tender***.

Or. en

Amendment 33
Proposal for a directive
Article 69 – paragraph 3 – point c a (new)

Text proposed by the Commission	*Amendment*
	(ca) compliance with obligations established by Union or national legislation in the field of social, labour, health, safety or environmental law, collective agreements applicable in the place where the work, service or supply is to be performed, or by the international social and environmental law provisions listed in Annex XI;

Or. en

Amendment 34
Proposal for a directive
Article 69 – paragraph 4 – subparagraph 2

Text proposed by the Commission	*Amendment*
Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with obligations established by Union legislation in the field of social ***and*** labour ***law*** or environmental law or by the international social and environmental law provisions listed in Annex XI.	Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with obligations established by Union ***and national*** legislation in the field of social***,*** labour***, health, safety*** or environmental law***, collective agreements applicable in the place where the work, service*** or ***supply is to be performed, or*** by the international social and environmental law provisions listed in Annex XI.

Or. en

Amendment 35
Proposal for a directive
Article 71 – paragraph 1

Text proposed by the Commission	*Amendment*
1. In the procurement documents, the contracting authority 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.	1. In the procurement documents, the contracting authority may 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. ***Any change in the subcontracting chain and any new subcontractor shall be indicated without delay to the contracting authority.***

Or. en

Amendment 36
Proposal for a directive
Article 71 – 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 authority ***shall*** transfer due payments directly to the subcontractor for services, supplies or works provided to the main contractor***. In such case, Member States shall put in place appropriate mechanisms permitting the main contractor to object to undue payments***. The arrangements concerning that mode of payment shall be set out in the procurement documents.	2. Member States may provide that at the request of the subcontractor and where the nature of the contract so allows, the contracting authority ***may*** transfer***, in duly justified cases,*** due payments directly to the subcontractor for services, supplies or works provided to the main contractor. The arrangements concerning that mode of payment shall be set out in the procurement documents.

Or. en

Justification

Directive 2011/7/EU of the European Parliament and of the Council on combating late payment in commercial transactions shall apply (as of March 2013) to transactions between undertakings and public authorities, and transactions between undertakings (B2B).

Amendment 37
Proposal for a directive
Article 72 – paragraph 2 – point a

Text proposed by the Commission	*Amendment*
(a) the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the selection of other candidates than those initially selected or would have allowed for awarding the contract to another tenderer;	***deleted***

Or. en

Amendment 38
Proposal for a directive
Article 72 – paragraph 4

Text proposed by the Commission	*Amendment*
4. Where the value of a modification can be expressed in monetary terms, the modification shall not be considered to be substantial within the meaning of paragraph 1, where its value does not exceed the thresholds set out in Article 4 and where it is below 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.	***deleted***

Or. en

Amendment 39
Proposal for a directive
Article 84

Text proposed by the Commission	*Amendment*
[...]	***deleted***

Or. en

Amendment 40
Proposal for a directive
Article 89 – paragraph 2

Text proposed by the Commission	*Amendment*
2. The delegation of power referred to in Articles 6, 13, 19, 20, 23, 54, 59, 67 and 86 shall be conferred on the Commission for ***an indeterminate*** period of ***time*** from the [date of entry into force of the present Directive].	2. The delegation of power referred to in Articles 6, 13, 19, 20, 23, 54, 59, 67 and 86 shall be conferred on the Commission for ***a*** period of ***five years*** from the [date of entry into force of the present Directive]. ***The Commission shall draw up a report in respect of the delegation of power not later than nine months before the end of the five-year period. The delegation of power shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension not later than three months before the end of each period.***

Or. en

Amendment 41
Proposal for a directive
Annex 14 – paragraph 1 – point e a (new)

Text proposed by the Commission	*Amendment*
	(ea) appropriate certificates or statements relating to evidence of respect of social, labour, health, safety or environmental rules as defined by Union and national legislation and by collective agreements applicable in the place where the work, service or supply is to be performed;

Or. en