OPINION

of the Committee on Employment and Social Affairs

for the Committee on the Internal Market and Consumer Protection

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

Rapporteur: Birgit Sippel
SHORT JUSTIFICATION

The Commission proposal for a directive on public procurement plays a key role in the ‘Europe 2020’ strategy for smart, sustainable, and inclusive growth (COM(2010)2020). Public procurement is to be used increasingly to promote a high employment level as well as helping to achieve other goals, especially in the environment and social policy sphere.

By means of the proposal the Commission is seeking on the one hand to ‘Increase the efficiency of public spending to ensure the best possible ... outcomes in terms of value for money’ and, secondly, to enable public procurement to be put to ‘better use ... in support of common societal goals such as protection of the environment, employment and social inclusion and ensuring the best possible conditions for the provision of high[ ... ]quality social services’. This approach is to be welcomed. The Commission proposals do not, however, go far enough and are much too vague, especially where social sustainability is concerned.

Public authorities in the EU spend about 18% of GDP on supply, works, and service contracts; that being the case, reform of the public procurement rules could serve as a powerful lever to bring greater sustainability to society. Given that the money involved is public money, it should not be spent on short-term goals, but should, on the contrary, be viewed as a long-term investment in society; to that extent, the onus on the authorities is all the greater.

If it is to be pursued to useful effect, the above aim requires a broad approach. The following points are particularly important:

- The ‘lowest cost’ criterion must be done away with altogether. The ‘most economically advantageous tender’ is a sufficiently flexible concept to allow for a tender’s price. To make it clear what is meant by ‘most economically advantageous tender’, the name should be changed to ‘most economically advantageous and sustainable tender’ (MEAST).

- Applicable labour and social standards should be mentioned not just in the recitals, but also in the articles. All provisions applicable at the workplace, whether laid down by international conventions or European regulations or by national legislation, arbitration awards, or collective agreements, must be brought to bear – and that includes in cross-border situations.

- In addition, contracting authorities must be given the option of incorporating other types of social criteria in the technical specifications and/or award criteria; among the examples are employment opportunities for disadvantaged groups, access to on-site vocational training, and ethical trade. Even at the beginning of a procedure it has to be possible to assess whether a tenderer can fulfil those criteria. External social costs linked to the subject matter of the contract should be included in this context.

- When tenders are abnormally low, the criteria must be tightened up. If it were either 25% lower than the average for the tenders submitted or 10% lower than the next lowest tender, a tender could quite legitimately be considered so low that certain points would need explaining.
– The provisions on subcontracting in the Commission proposal do not go far enough. A tenderer must be required not only to refer in its tender to the matter of subcontracting, but also to name its subcontractors and enable them to be identified by listing their contact details and legal representatives. 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 social or labour law, provisions on health and safety at work, or working conditions.

– The new chapter on social services is intended to provide a better guarantee of quality in personal services. Given quality criteria accordingly have to be binding. In addition, public contracts must not, under any circumstances, be awarded solely on the basis of the lowest price. To complete the chapter, provisions need to be laid down on exclusion criteria, subcontracting, and compliance with labour and social standards applicable at the workplace.

– To enable the directive to be implemented properly, Title IV (‘Governance’) needs to be expanded. When, for example, contractors have been found to be seriously and persistently at fault in the performance of their contracts, their names should be entered in a register, which must be accessible to contracting authorities; and the fact of appearing in the register must constitute a ground for exclusion. The application of the public procurement rules, and especially of labour and social standards at the workplace, should be monitored by the public oversight bodies.

AMENDMENTS

The Committee on Employment and Social 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 1

Text proposed by the Commission

(1) The award of public contracts by or on behalf of Member States authorities has to comply with the principles of the Treaty on the Functioning of the European Union, and in particular the free movement of goods, freedom of establishment and the freedom to provide services as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and

Amendment

(1) The award of public contracts by or on behalf of Member States authorities has to comply with the principles of the Treaties of the European Union, and in particular the free movement of goods, freedom of establishment and the freedom to provide services as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency and with
transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that these principles are given practical effect and public procurement is opened up to competition.

Amendment 2
Proposal for a directive
Recital 2

Text proposed by the Commission

(2) Public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the current public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts have to be revised and modernised in order to increase the efficiency of public spending, facilitating in particular the participation of small and medium-sized enterprises in public procurement and to enable procurers to make better use of public procurement in support of common societal goals. There is

the distribution of competencies as enshrined in Article 14 (1) TFEU and the Protocol No 26. The European regulation of public procurement should respect the wide discretion of public authorities in carrying out their public service tasks. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that these principles are given practical effect and public procurement is opened up to competition.

(2) Public procurement plays a key role in the Europe 2020 strategy as one of the market-based instruments to be used to achieve a smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. For that purpose, the current public procurement rules adopted pursuant to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts have to be revised and modernised in order to enable procurers to make better use of public procurement in support of sustainable development compliance with social and labour rights, social inclusion, innovation where relevant, and other common societal goals, thereby increasing the efficiency of
also a need to clarify basic notions and concepts to ensure better legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union.

public spending, ensuring best value for money, facilitating in particular the participation of small and medium-sized enterprises in public procurement and to enable procurers to make better use of public procurement in support of common societal goals, leading to creation of new sustainable jobs. There is also a need to simplify Union rules on public procurement, in particular as regards the method used to achieve the sustainability objectives which should be part and parcel of public procurement policy and to clarify basic notions and concepts to ensure better legal certainty and to incorporate certain aspects of related well-established case-law of the Court of Justice of the European Union. This Directive only provides legislation on how to buy.

Amendment 3Proposal 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 authorities 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, environmental protection requirements and social considerations 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 authorities may contribute to the protection of the environment and the promotion of sustainable development and how they can use their discretionary power to select technical specifications and award criteria with the aim of achieving sustainable public procurement, whilst ensuring the link to the subject matter of the contract and obtaining the best value for money for their contracts. Under Article 9 of the Treaty on the Functioning of the European Union, requirements
linked to the guarantee of adequate social protection and the fight against social exclusion in defining and implementing its policies and activities, especially to promote a high level of employment. This directive also specifies how contracting authorities can help promote social criteria and improve employees’ rights whilst ensuring that they can obtain the best social value for money for their contracts by encouraging sustainable public procurement, the respect of social criteria in all stages of the procurement procedure and the respect of obligations established by Union and/or national legislation and/or collective agreements in the field of social and employment protection provisions and working conditions or environmental law or of the international social and environmental law provisions listed in Annex XI, 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.

Justification

The reference to the horizontal social clause, which is a novelty of the Lisbon Treaty, is essential for sustainable procurement and for the inclusion of horizontal social criteria throughout the procurement procedure.

Amendment 4

Proposal for a directive
Recital 5 a (new)

Text proposed by the Commission

(5a) This Directive should not prevent Member States from complying with ILO Convention 94 on Labour Clauses in public contracts and encourages the inclusion of labour clauses in public procurement.
Justification

ILO Convention 94 provides that public contracts shall include labour clauses ensuring equal treatment with local workers. Member States having ratified this Convention should not be hindered to respect its provisions. This clarification is particularly important in the context of the judgement of the Court in case C-346/06 (Rüffert).

Amendment 5

Proposal for a directive

Recital 11

Text proposed by the Commission

(11) Other categories of services continue by their very nature to have a limited cross-border dimension, namely what are known as services to the person, such as certain social, health and educational services. These services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. A specific regime should therefore be established for public contracts for these services, with a higher threshold of EUR 500 000. Services to the person with values below this threshold will typically not be of interest to providers from other Member States, unless there are concrete indications to the contrary, such as Union financing for transborder projects. Contracts for services to the person above this threshold should be subject to Union-wide transparency. Given the importance of the cultural context and the sensitivity of these services, Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate. The rules of this directive take account of that imperative, imposing only observance of basic principles of transparency and equal treatment and making sure that contracting authorities are able to apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services of the

Amendment

(11) Other categories of services continue by their very nature to have a limited cross-border dimension, namely what are known as services to the person, such as certain social, health and educational services. These services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. By their very nature they are in general difficult to reconcile with internal market rules applying to public procurement. Therefore, public authorities should prefer other ways of providing these services and must ensure high quality for the social services provided if they decide nevertheless to apply public procurement procedures. For a better quality of these services in contracts, a specific regime should be established with a higher threshold of EUR 500 000. Services to the person with values below this threshold will typically not be of interest to providers from other Member States, unless there are concrete indications to the contrary, such as Union financing for transborder projects. Contracts for services to the person above this threshold should be subject to Union-wide transparency. Given the importance of the cultural context and the sensitivity of these services, the subsidiarity principle, Protocol 26 on Services of general interest, Article 14 of the Treaty on the Functioning of the European Union and
European Union's Social Protection Committee. Member States and/or public authorities remain free to provide these services themselves or to organise social services in a way that does not entail the conclusion of public contracts, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority, without any limits or quotas, provided such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination.

**Article 36 of the Charter of Fundamental Rights**, Member States have wide discretion to organise the choice of the service providers in the way they consider most appropriate, as closely as possible to the needs of the users, and taking into account the differences in the needs and preferences of users that may result from different geographical, social or cultural situations, and to ensure universal access, continuity and availability of the services in all territories of the Union. The rules of this directive take account of that imperative, imposing only observance of basic principles of transparency and equal treatment and making sure that contracting authorities are able to apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee, which are designed to ensure a high level of quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of different categories of users, including disadvantaged and vulnerable groups, users' satisfaction, social inclusion, the involvement and empowerment of users and, where relevant, innovation. Criteria relating to social and employment conditions, health and safety at the workplace, social security and working conditions should particularly be taken into account. Member States and/or public authorities remain free to provide these services themselves including vertical "in-house" provision or horizontal inter-municipal (public-public) cooperation, or to organise social services in any other way that does not entail the conclusion of public contracts, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority, without any limits or quotas,
provided such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination. **According to case law of the Court, in particular the judgement in case C-70/95 (Sodemare), contracting authorities may be allowed to reserve contracts to non-profit organisation, if such a restriction is provided for by national law and compatible with European law, if it is necessary and proportionate to attain certain societal goals of the national welfare system.**

**Justification**

*The respect of basic principles ensuring the high quality of social services should be binding. The wide discretion of Member States or public authorities in providing public services must be underlined. It must be clear that other ways of providing those services, which do not imply public procurement procedures (i.e. in-house provision or horizontal inter-municipal cooperation, or specific national systems like the 'sozialrechtliches Dreiecksverhältnis' in Germany), do also exist and they are conform with EU-law. The reference to the judgement of the Court in case C-70/95 (Sodemare) is essential for the reservation of contracts to non-profit organisations.*

**Amendment 6**

**Proposal for a directive**

**Recital 19**

*Text proposed by the Commission*  

(19) Electronic means of information and communication can greatly simplify the publication of contracts and increase the efficiency and transparency of procurement processes. They should become the standard means of communication and information exchange in procurement procedures. The use of electronic means also leads to time savings. As a result, provision should be made for reducing the minimum periods where electronic means are used, subject, however, to the condition that they are compatible with the specific mode of transmission envisaged at Union level. Moreover, electronic means of

*Amendment*  

(19) Electronic means of information and communication can greatly simplify the publication of contracts, *reduce administrative burdens such as transaction costs particularly for SMEs*, and increase the efficiency and transparency of procurement processes. They should become the standard means of communication and information exchange in procurement procedures. The use of electronic means also leads to time savings. As a result, provision should be made for reducing the minimum periods where electronic means are used, subject, however, to the condition that they are
information and communication including adequate functionalities can enable contracting authorities to prevent, detect and correct errors that occur during procurement procedures.

Amendment 7
Proposal for a directive
Recital 25 a (new)

Text proposed by the Commission

(25a) Member States should be encouraged to use a service voucher system, which is a new effective tool to arrange public services.

A 'service voucher system' is a system where a contracting authority gives a service voucher to a customer who can then acquire a service from a service provider which is included by the contracting authority to the service voucher system. The contracting authority pays the sum corresponding to the value of the service voucher to the service provider.

It is beneficial to SMEs because it is very easy to get to participate in a service voucher system. A service voucher system gives a freedom of choice to the citizen who may select the service provider from several alternatives. A service voucher system is beneficial to the authority as well, as it is much easier to establish a service voucher system compared to a classic public procurement.

The service voucher system does not fall under the European regime for public procurement or under this Directive.

Amendment 8
Proposal for a directive
Recital 27

Text proposed by the Commission

(27) The technical specifications drawn up by public purchasers need to allow public procurement to be opened up to competition. To that end, it must be possible to submit tenders that reflect the diversity of technical solutions so as to obtain a sufficient level of competition. Consequently, technical specifications should be drafted in such a way to avoid artificially narrowing down competition through requirements that favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator. Drawing up the technical specifications in terms of functional and performance requirements generally allows this objective to be achieved in the best way possible and favours innovation. Where reference is made to a European standard or, in the absence thereof, to a national standard, tenders based on equivalent arrangements must be considered by contracting authorities. To demonstrate equivalence, tenderers can be required to provide third-party verified evidence; however, other appropriate means of proof such as a technical dossier of the manufacturer should also be allowed where the economic operator concerned has no access to such certificates or test reports, or no possibility of obtaining them within the relevant time limits.

Amendment 9

Proposal for a directive
Recital 28

Amendment

(27) The technical specifications drawn up by public purchasers need to allow public procurement to be opened up to competition. To that end, it must be possible to submit tenders that reflect the diversity of technical solutions so as to obtain a sufficient level of competition. Consequently, technical specifications should be drafted and applied in conformity with the principles of transparency and non-discrimination, to avoid artificially narrowing down competition through requirements that favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator. Drawing up the technical specifications in terms of functional and performance requirements generally allows this objective to be achieved in the best way possible and favours innovation. Where reference is made to a European standard or, in the absence thereof, to a national standard, tenders based on equivalent arrangements must be considered by contracting authorities. To demonstrate equivalence, tenderers can be required to provide third-party verified evidence; however, other appropriate means of proof such as a technical dossier of the manufacturer should also be allowed where the economic operator concerned has no access to such certificates or test reports, or no possibility of obtaining them within the relevant time limits.
Text proposed by the Commission

(28) Contracting authorities that wish to purchase works, supplies or services with specific environmental, social or other characteristics should be able to refer to particular labels, such as the European Eco-label, (multi-)national eco-labels or any other label provided that the requirements for the label are linked to the subject-matter of the contract, such as the description of the product and its presentation, including packaging requirements. It is furthermore essential that these requirements are drawn up and adopted on the basis of objectively verifiable criteria, using a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations, can participate, and that the label is accessible and available to all interested parties.

Amendment

Proposal for a directive
Recital 29 a (new)

Text proposed by the Commission

(29a) The importance of training the staff of contracting authorities and individual operators should be underlined, on the one hand, and skills and training requirements should be included in contracting specifications as a long term strategy, on the other; it should be stressed, however, that these latter actions must be directly linked to the subject matter of the contract, be proportionate and economically advantageous.

Amendment

Amendment 10

Amendment 11
Proposal for a directive
Recital 32 a (new)

Text proposed by the Commission

(32a) Job creation depends heavily on small and medium sized enterprises. SMEs have been able to offer new, sustainable jobs even in the times of economic crisis. As public authorities use around 18% of GDP on public procurement, this legislative regime has significant impact on SMEs’ ability to continue creating new jobs. Thus, public contracts should be made as accessible as possible for SMEs, both above and below the thresholds, which are defined in this Directive. In addition to the specific tools, which are tailored to enhance the involvement of SMEs in the public procurement market, Member States and contracting authorities should be strongly encouraged to create SME-friendly public procurement strategies. The Commission has published a staff working document "European code of best practices facilitating access by SMEs to public procurement contracts" (SEC (2008)COM 2193), which aims at helping member states create national strategies, programs and action plans in order to improve SMEs participation in these markets. Efficient public procurement policy has to be coherent. National, regional and local authorities have to rigorously apply the rules set in the Directive and on the other hand, implementing general policies designated to enhance SMEs access to public procurement markets will remain extremely important especially from the perspective of job creation;

Amendment 12

Proposal for a directive
Recital 34
(34) Public contracts should not be awarded to economic operators that have participated in a criminal organisation or have been found guilty of corruption, fraud to the detriment of the Union's financial interests or money laudering. Non-payment of taxes or social security contributions should also be sanctioned by mandatory exclusion at the level of the Union. Furthermore, contracting authorities should be given the possibility to exclude candidates or tenderers for violations of environmental or social obligations, including rules on accessibility for disabled persons or other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights.

(34) Public contracts should not be awarded to economic operators that have participated in a criminal organisation or have been found guilty of corruption, fraud to the detriment of the Union's financial interests or money laudering. Non-payment of taxes or social security contributions should also be sanctioned by mandatory exclusion at the level of the Union. Furthermore, contracting authorities should be given the possibility to exclude candidates or tenderers for violations of environmental, labour or social obligations, including rules on working conditions, collective agreements and accessibility for disabled persons, health and safety at work or other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights.

Amendment 13
Proposal for a directive
Recital 37

(37) 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 chosen award criteria include factors linked to the production process. As a result, contracting authorities should be allowed to adopt as award criteria either 'the most economically advantageous tender' or 'the lowest cost', taking into

(37) Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination, equal treatment, cost-quality-effectiveness and the conscientious application of social standards. 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 chosen award criteria include factors linked to the production process. Accordingly, contracting authorities should adopt as award criteria 'the most
account that in the latter case they are free to set adequate quality standards by using technical specifications or contract performance conditions.

economically advantageous tender in order to assess the contracting authority's sustainability concerns, added to that of basic respect for national, European and international social standards, Contracting authorities are also free to set adequate sustainability and quality standards by using technical specifications or contract performance conditions.

Amendment 14

Proposal for a directive
Recital 38

*Text proposed by the Commission*

(38) Where contracting authorities choose to award a contract to the most economically advantageous tender, they must determine the award criteria on the basis of which they will assess tenders in order to identify which one offers the best value for money. The determination of these criteria depends on the subject-matter of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the subject-matter of the contract, as defined in the technical specifications, and the value for money of each tender to be measured. Furthermore, the chosen award criteria should not confer an unrestricted freedom of choice on the contracting authority and they should ensure the possibility of effective competition and be accompanied by requirements that allow the information provided by the tenderers to be effectively verified.

*Amendment*

(38) Where contracting authorities choose to award a contract to the most economically advantageous tender, they must determine the award criteria on the basis of which they will assess tenders in order to identify which one offers the best value for money, economic and social sustainability. The determination of these criteria depends on the subject-matter of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the subject-matter of the contract, as defined in the technical specifications, and the value for money of each tender to be measured. Furthermore, the chosen award criteria should not confer an unrestricted freedom of choice on the contracting authority and they should ensure the possibility of effective competition and be accompanied by requirements that allow the information provided by the tenderers to be effectively verified.

Amendment 15

Proposal for a directive
Recital 41
(41) Furthermore, in technical specifications and in award criteria, contracting authorities should be allowed to refer to a specific production process, including for example social and environmental aspects, a specific mode of provision of 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 public 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 services 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. For service contracts and for contracts involving the design of works, contracting authorities should also be allowed to use as an award criterion the organisation, qualification and experience of the staff assigned to
performing the contract in question, as this may affect the quality of contract performance and, as a result, the economic value of the tender.

**Amendment 16**

**Proposal for a directive**

**Recital 43**

*Text proposed by the Commission*

(43) Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory, are linked to the subject-matter of the contract and are indicated in the contract notice, the prior information notice used as a means of calling for competition or the procurement documents. They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment, protection of the environment or animal welfare. For instance, mention may be made, amongst other things, of the requirements applicable during performance of the contract - to recruit long-term job-seekers or to implement training measures for the unemployed or young persons, to comply in substance with fundamental International Labour Organisation (ILO) Conventions, even where such Conventions have not been implemented in national law, and to recruit more disadvantaged persons than are required under national legislation.

*Amendment*

(43) Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory, are directly linked to the subject-matter of the contract and are indicated in the contract notice, the prior information notice used as a means of calling for competition or the procurement documents. They may, in particular, be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment, protection of the environment or animal welfare. For instance, mention may be made, amongst other things, of the requirements applicable during performance of the contract - to recruit long-term job-seekers, unemployed young persons, persons with disabilities, women or to implement training measures for the unemployed or young persons, to comply in substance with fundamental International Labour Organisation (ILO) Conventions, while respecting the principle of subsidiarity, even where such Conventions have not been implemented in national law, and to recruit more disadvantaged persons than are required under national legislation.
Amendment 17
Proposal for a directive
Recital 44 a (new)

Text proposed by the Commission

(44a) The provisions of the Directive should respect Member States’ different labour market models, including those where collective agreements apply.

Amendment 18
Proposal for a directive
Recital 44 b (new)

Text proposed by the Commission

(44b) Member States should be able to use contract clauses that contain provisions on compliance with collective agreements, insofar as this is mentioned in the contracting authority’s contract notice or in the tender specifications, so as to comply with the principle of transparency.

Amendment 19
Proposal for a directive
Recital 47

Text proposed by the Commission

(47) In line with the principles of equal treatment and transparency, the successful tenderer should not be replaced by another economic operator without reopening the contract to competition. However, the successful tenderer performing the contract may undergo certain structural changes during the performance of the contract, such as purely internal reorganisations, mergers and acquisitions or insolvency. Such structural changes should not automatically require new procurement

(47) In line with the principles of equal treatment, objectivity and transparency, the successful tenderer should not be replaced by another economic operator without reopening the contract to competition. However, the successful tenderer performing the contract may undergo certain structural changes during the performance of the contract, such as purely internal reorganisations, mergers and acquisitions or insolvency. Such structural changes should not automatically require
procedures for all public contracts
directed by that undertaking.

new procurement procedures for all public
contracts performed by that undertaking.

Amendment 20

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

Text proposed by the Commission

Amendment

2a. This Directive is without prejudice to
the right of public authorities at all levels
to decide whether, how and to what extent
they want to perform public functions
themselves. Public authorities 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
public authorities.

Justification

It is important to clarify that it remains up to the Member States to decide whether and to
what extent they want to perform public functions themselves and how they want to do this.
This freedom is incorporated in the Lisbon Treaty in Article 4 (2) of the TEU which
acknowledges the right to regional and local self-government. Protocol 26 on SGI and Article
14 TFEU reinforce national and local responsibilities in providing, commissioning and
organising services of general economic interest.

Amendment 21

Proposal for a directive
Article 2 – point 22

Text proposed by the Commission

Amendment

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;

22. ‘life cycle’ means all consecutive
and/or interlinked stages, including
production, transport, installation, 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

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

_text proposed by the Commission_

(c) arbitration and conciliation services;

_amendment_

(c) arbitration and conciliation services, including dispute adjudication services;

Amendment 23

Proposal for a directive
Article 11

_text proposed by the Commission_

1. A contract awarded by a contracting authority to another legal person shall fall outside the scope of this Directive where the following cumulative conditions are fulfilled:

(a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;

(b) at least 90% of the activities of that legal person are carried out for the controlling contracting authority or for other legal persons controlled by that contracting authority;

(c) there is no private participation in the controlled legal person.

Amendment

1. A contract awarded by a contracting authority to another legal person shall fall outside the scope of this Directive where the following cumulative conditions are fulfilled:

(a) the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments.

(b) at least 80% of the activities of that legal person are carried out for the controlling contracting authority or for other legal persons controlled by that contracting authority.

(c) there is no private participation in the controlled legal person, with the exception of legally enforced forms of private participation.

A contracting authority shall be deemed to exercise over a legal person a control similar to that which it exercises over its own departments within the meaning of point (a) of the first subparagraph where it exercises a decisive influence over both strategic objectives and significant decisions of the controlled legal person.

2. Paragraph 1 also applies where a controlled entity which is a contracting
authority awards a contract to its controlling entity, or to another legal person controlled by the same contracting authority, provided that there is no private participation in the legal person being awarded the public contract.

3. A contracting authority, which does not exercise over a legal person control within the meaning of paragraph 1, may nevertheless award a public contract without applying this Directive to a legal person which it controls jointly with other contracting authorities, where the following conditions are fulfilled:

(a) the contracting authorities exercise jointly over the legal person a control which is similar to that which they exercise over their own departments;

(b) at least 90% of the activities of that legal person are carried out for the controlling contracting authorities or other legal persons controlled by the same contracting authorities;

(c) there is no private participation in the controlled legal person.

For the purposes of point (a), contracting authorities shall be deemed to jointly control a legal person where the following cumulative conditions are fulfilled:

(a) the decision-making bodies of the controlled legal person are composed of representatives of all participating contracting authorities;

(b) those contracting authorities are able to...
jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person;

(c) the controlled legal person does not pursue any interests which are distinct from that of the public authorities affiliated to it;

(d) the controlled legal person does not draw any gains other than the reimbursement of actual costs from the public contracts with the contracting authorities.

4. An agreement concluded between two or more contracting authorities shall not be deemed to be a public contract within the meaning of Article 2(6) of this Directive where the following cumulative conditions are fulfilled:

(a) the agreement establishes a genuine cooperation between the participating contracting authorities aimed at carrying out jointly their public service tasks and involving mutual rights and obligations of the parties;

(b) the agreement is governed only by considerations relating to the public interest;

(c) the participating contracting authorities do not perform on the open market more than 10% in terms of turnover of the activities which are relevant in the context of the agreement;

(d) the agreement does not involve financial transfers between the participating contracting authorities, other than those corresponding to the reimbursement of actual costs of the works, services or supplies;

(e) there is no private participation in any of the contracting authorities involved.

jointly exert decisive influence over the strategic objectives and significant decisions of the controlled legal person;

(d) the controlled legal person does not draw any gains other than the reimbursement of actual costs from the public contracts with the contracting authorities.

4. An agreement concluded between two or more contracting authorities shall not be deemed to be a public contract within the meaning of Article 2(6) of this Directive and thus fall outside the scope of this Directive where the following cumulative conditions are fulfilled:

(a) the purpose of the partnership is the provision of a public-service task conferred on all participating public authorities;

(b) the agreement is governed only by considerations relating to the public interest;

(c) the participating contracting authorities do not perform on the open market more than 20% in terms of turnover of the activities which are relevant in the context of the agreement;

(d) the agreement does not involve financial transfers between the participating contracting authorities, other than those corresponding to the reimbursement of actual costs of the works, services or supplies;

(e) the task is carried out solely by the public authorities concerned and there is no active private participation in any of the contracting authorities involved with the exception of forms of legally enforced
5. The absence of private participation referred to in paragraphs 1 to 4 shall be verified at the time of the award of the contract or of the conclusion of the agreement.

The exclusions provided for in paragraphs 1 to 4 shall cease to apply from the moment any private participation takes place, with the effect that ongoing contracts need to be opened to competition through regular procurement procedures.

Amendment 24

Proposal for a directive
Article 15

Text proposed by the Commission

Principles of procurement

1. Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate way. The design of the private participation.

5. The absence of active private participation referred to in paragraphs 1 to 4 shall be verified at the time of the award of the contract or of the conclusion of the agreement.

The exclusions provided for in paragraphs 1 to 4 shall cease to apply from the moment any private participation takes place, with the exception of forms of legally enforced private participation, with the effect that ongoing contracts need to be opened to competition through regular procurement procedures.

1. Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate way. The details of
procurement shall not be made with the objective of excluding it from the scope of this Directive or of artificially narrowing competition.

public contracts shall be made public. The design of the procurement shall not be made with the objective of excluding it from the scope of this Directive or of artificially narrowing competition.

1a. Economic operators shall comply with obligations established by Union and/or national legislation and/or collective agreements in the field of social and employment protection provisions and working conditions or environmental law or of the international social and environmental law provisions listed in Annex XI, 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. This Directive does not prevent Member States from complying with ILO Convention 94 on Labour Clauses in public contracts. Contracting authorities shall verify that the contractors are of good reputation not having gravely broken against national or international environmental, social, labour or other relevant laws.

1b. Contracting authorities shall aim for best value in procurement policy. This is achieved through the awarding of the public contract to the most economically advantageous and sustainable tender.

Amendment 25

Proposal for a directive
Article 17 – paragraph 1

Text proposed by the Commission

1. Member States may reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled and disadvantaged workers or provide for such contracts to be performed in the context of sheltered employment

Amendment

1. Member States may reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled and disadvantaged workers or provide for such contracts to be performed in the context of sheltered employment
programmes, provided that more than 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.

Justification

The term ‘disadvantaged persons’ needs to be specified as it is much wider than ‘handicapped persons’ referred to in the current Directives. This definition creates more legal clarity.

Amendment 26

Proposal for a directive
Article 29 – paragraph 3 – subparagraph 3

Text proposed by the Commission

Only those economic operators invited by the contracting authority following its assessment of the requested information may submit research and innovation projects aimed at meeting the needs identified by the contracting authority that cannot be met by existing solutions. The contract shall be awarded on the sole basis of the award criterion of the most economically advantageous tender in accordance with Article 66(1)(a).

Amendment

Only those economic operators invited by the contracting authority following its assessment of the requested information may submit research and innovation projects aimed at meeting the needs identified by the contracting authority that cannot be met by existing solutions. The contract shall be awarded on the sole basis of the award criterion of the most economically advantageous tender in accordance with Article 66(1)(a) and Article 66(2).

Amendment 27

Proposal for a directive
Article 40 – paragraph 2 – subparagraph 2 a (new)

Text proposed by the Commission

The requirements shall be limited to the
subject matter of the contract and the contracting authority must be able to follow up and control that the requirements are fulfilled;

Amendment 28

Proposal for a directive
Article 40 – paragraph 3 – introductory part

Text proposed by the Commission

Without prejudice to mandatory national technical rules, to the extent that they are compatible with Union law, the technical specifications shall be formulated in one of the following ways:

Amendment

Without prejudice to mandatory national technical rules, to the extent that they are compatible with Union law, the technical specifications shall be formulated in the following order of priority:

Amendment 29

Proposal for a directive
Article 40 – paragraph 3 – point -1 (new)

Text proposed by the Commission

(-1) by reference to technical specifications and, in order of priority, to national standards transposing European standards, European technical approvals, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or - when those do not exist - national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies; each reference shall be accompanied by the words 'or equivalent';

Amendment 30
Proposal for a directive
Article 40 – paragraph 3 – point b

Text proposed by the Commission

(b) by reference to technical specifications and, in order of preference, to national standards transposing European standards, European technical approvals, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or - when those do not exist - national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies; each reference shall be accompanied by the words ‘or equivalent’;

Amendment

Amendment 31

Proposal for a directive
Article 40 – paragraph 3 – point c

Text proposed by the Commission

(c) in terms of performance or functional requirements as referred to in point (a), with reference to the technical specifications referred to in point (b) as a means of presuming conformity with such performance or functional requirements;

Amendment

(c) in terms of performance or functional requirements as referred to in point (a), with reference to the technical specifications referred to in point (b) as a means of presuming conformity with such performance or functional requirements;

Amendment 32

Proposal for a directive
Article 40 – paragraph 3 – point d

Text proposed by the Commission

(d) by reference to the technical specifications referred to in point (b) for certain characteristics, and by reference to the performance or functional requirements

Amendment

(d) by reference to the technical specifications referred to in point (b) for certain characteristics, and by reference to the performance or functional requirements
Where contracting authorities lay down environmental, social or other characteristics of a works, service or supply in terms of performance or functional requirements as referred to in point (a) of Article 40(3) they may require that these works, services or supplies bear a specific label, provided that all of the following conditions are fulfilled:

(a) the requirements for the label only concern characteristics which are linked to the subject-matter of the contract and are appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract;

(b) the requirements for the label are drawn up on the basis of scientific information or based on other objectively verifiable and non-discriminatory criteria;

(c) the labels are established in an open and transparent procedure in which all stakeholders, including government bodies, consumers, manufacturers, distributors and environmental organisations, may participate,

(d) the labels are accessible to all interested parties;

(e) the criteria of the label are set by a third party which is independent from the economic operator applying for the label.

Contracting authorities requiring a specific label shall accept all equivalent labels that are compliant with these conditions.

Amendment 33
Proposal for a directive
Article 41

Text proposed by the Commission

Where contracting authorities lay down environmental, social or other characteristics of a works, service or supply in terms of performance or functional requirements as referred to in point (a) of Article 40(3) they may require that these works, services or supplies bear labels, provided that all of the following conditions are fulfilled:

(a) the requirements for the label only concern characteristics which are linked to the subject-matter of the contract or the production of the subject-matter of the contract and are appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract;

(b) the requirements for the label are drawn up on the basis of scientific information or based on other objectively verifiable and non-discriminatory criteria;

(c) the labels are established in an open and transparent procedure in which all stakeholders, including government bodies, consumers, manufacturers, distributors, social partners, environmental and social organisations may participate,

(d) the labels are accessible to all interested parties;

(e) the attribution and verification of the label are undertaken by a third party which is independent from the economic operator applying for the label.

Contracting authorities requiring a label shall accept all equivalent labels that fulfill...
fulfil the requirements of the label indicated by the contracting authorities. For products that do not bear the label, contracting authorities **shall** also accept a technical dossier of the manufacturer or other appropriate means of proof. 

The burden for providing proof of equivalence with a specific label should be placed on the tenderer claiming equivalence.

**Amendment 34**

Proposal for a directive

**Article 54 – paragraph 2**

*Text proposed by the Commission*

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.

*Amendment*

2. Contracting authorities **shall** 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 or **national** legislation and/or **collective agreements** in the field of social and **employment protection provisions and working conditions** or environmental law or of the international social and environmental law provisions listed in Annex XI, **which are in force in the Member State, in the region or locality where the work, service or supply is performed, including in the subcontracting chain and provided they are linked to the subject matter of the contract.**

**Amendment 35**

Proposal for a directive

**Article 55 – paragraph 1 – subparagraph 1 – point e a (new)**
Amendment 36
Proposal for a directive
Article 55 – paragraph 2

2. Any economic operator shall be excluded from participation in a contract where the contracting authority is aware of a decision having the force of res judicata establishing that it has not fulfilled the obligations relating to the payment of taxes or social security contributions in accordance with the legal provisions of the country in which it is established or with those of the Member State of the contracting authority.

Amendment 37
Proposal for a directive
Article 55 – paragraph 3 – subparagraph 1 – point a

(a) where it is aware of any violation of 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. Compliance with Union legislation or with international provisions also includes compliance in an equivalent manner.

Amendment 38

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

Text proposed by the Commission
(c) where the contracting authority can demonstrate by any means that the economic operator is guilty of other grave professional misconduct;

Amendment
(c) where the contracting authority can demonstrate by any means that the economic operator is guilty of other grave professional misconduct, *gravely acting against the national social, environmental or labour laws of its home country or the country of the contracting authority or gravely neglecting workers' health and safety*;

Amendment 39

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

Text proposed by the Commission
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.

Amendment
If a candidate or tenderer that is in one of the situations referred to in paragraph 1, 2 and 3 provides the contracting authority with evidence demonstrating its reliability or, as appropriate, the reliance of its subcontractors, despite the existence of the relevant ground for exclusion the contracting authority may reconsider the exclusion of the tender.

Justification
It is important to reverse the functioning of this Article. The operator should not make a "self-cleaning", but it should be up to the contracting authority to take a decision against the exclusion if evidence is provided.

Amendment 40

Proposal for a directive
Article 60 – paragraph 3 a (new)

Text proposed by the Commission

Amendment

3a. Evidence that the tenderers or
candidates have taken account, when drawing up their tender, of the obligations relating to taxes, environmental protection, social and employment protection provisions and working conditions 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.

Amendment 41
Proposal for a directive
Article 66

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

(a) the most economically advantageous tender;
(b) the lowest cost.

Costs may be assessed, on the choice of the contracting authority, on the basis of the price only or using a cost-effectiveness approach, such as a life-cycle costing approach, under the conditions set out in Article 67.

2. The most economically advantageous tender referred to in point (a) of paragraph 1 from the point of view of the contracting authority shall be identified on the basis of criteria linked to the subject-matter of the public contract in question. 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 public contract.

Amendment
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.

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

2. The most economically advantageous and sustainable tender shall be identified on the basis of criteria linked to the subject-matter of the public contract in question. Those criteria shall include, in addition to the price or costs, including life-cycle costs as referred to in Article 67, other criteria linked to the subject-matter of the public contract in question, such as:
contract in question, such as:

(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, environmental characteristics and innovative character;
(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;

(c) after-sales service and technical assistance, delivery date and delivery period or period of completion;
(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 these processes and characterise the specific process of production or provision of the requested works, supplies or services.

3. Member States may provide that the award of certain types of contracts shall be based on the most economically advantageous tender as referred to in point (a) of paragraph 1 and in paragraph 2.

4. Award criteria shall not confer an unrestricted freedom of choice on the contracting authority. They shall ensure the possibility of effective competition and shall be accompanied by requirements that allow the information provided by the

(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, environmental and social characteristics and innovative character;
(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 as well as the qualification and professional conduct of any subcontractor 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, qualification and experience;

(c) after-sales service and technical assistance, delivery date and delivery period or period of completion;
(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 these processes and characterise the specific process of production or provision of the requested works, supplies or services.

4. Award criteria shall be linked to the subject matter, they shall ensure the possibility of effective and fair competition and shall be accompanied by requirements that allow the information provided by the tenderers to be effectively
Contracting authorities shall verify effectively, on the basis of the information and proof provided by the tenderers, whether the tenders meet the award criteria.

5. In the case referred to in point (a) of paragraph 1 the contracting authority shall specify, in the contract notice, in the invitation to confirm interest, in the procurement documents or, in the case of a competitive dialogue, in the descriptive document, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

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

Where weighting is not possible for objective reasons, the contracting authority shall indicate the criteria in decreasing order of importance.

Amendment 42

Proposal for a directive

Article 67

Text proposed by the Commission

1. Life-cycle costing shall to the extent relevant cover the following costs over the life cycle of a product, service or works as defined in point (22) of Article 2:
(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
(b) external environmental costs directly linked to the life cycle, provided their monetary value can be determined and verified, which may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate

Amendment

1. Life-cycle costing shall to the extent relevant cover the following costs over the life cycle of a product, service or works as defined in point (22) of Article 2:
(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
(b) external costs including social and/or environmental costs directly linked to the life cycle, provided their monetary value can be determined and verified, which may include the impacts of production on the surrounding environment and adjacent
change mitigation costs.

2. Where contracting authorities assess the costs using a life-cycle costing approach, they shall indicate in the procurement documents the methodology used for the calculation of the life-cycle costs. The methodology used must fulfil all of the following conditions:

(a) it has been drawn up on the basis of scientific information or is based on other objectively verifiable and non-discriminatory criteria;

(b) it has been established for repeated or continuous application;

(c) it is accessible to all interested parties.

Contracting authorities shall allow economic operators, including economic operators from third countries, to apply a different methodology for establishing the life-cycle costs of their offer, provided that they prove that this methodology complies with the requirements set out in points a, b and c and is equivalent to the methodology indicated by the contracting authority.

3. 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 66(1).

A list of such legislative and delegated acts is set out in Annex XV. The Commission shall be empowered to adopt delegated acts in accordance with Article 89 concerning the update of this list, when on the basis of communities or the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.

2. Where contracting authorities assess the costs using a life-cycle costing approach, they shall indicate in the procurement documents the methodology used for the calculation of the life-cycle costs and provide the method for the calculation of life-cycle costs to any tenderer. The methodology used must fulfil all of the following conditions and should, if possible, be simplified in order to be accessible for SMEs:

(a) it has been drawn up on scientific information or other objectively verifiable and non-discriminatory criteria;

(c) it is accessible to all interested parties.

Contracting authorities shall allow economic operators, including economic operators from third countries, to apply a different methodology for establishing the life-cycle costs of their offer, provided that they prove that this methodology complies with the requirements set out in points a, b and c and is equivalent to the methodology indicated by the contracting authority.

Contracting authorities may ask for a third party certified document as proof for the fulfilment of the equivalence.

3. Any common methodology for the calculation of life-cycle costs adopted as part of a legislative act of the Union, pursuant to sector specific legislation, or as part of a European technical specification shall be deemed to meet the criteria as set out in paragraph 2 and may be included in the award criteria referred to in Article 66(1).

A list of such legislative and delegated acts is set out in Annex XV. The Commission shall be empowered to adopt delegated acts in accordance with Article 89 concerning the update of this list, when on the basis of
the adoption of new legislation, repeal or modification of such legislation, such amendments prove necessary.

**Amendment 43**

**Proposal for a directive**
**Article 69 – paragraph 3, 4**

*Text proposed by the Commission*

3. The explanations referred to in paragraphs 1 and 2 may in particular relate to:
   (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 XI or, where not applicable, with other provisions ensuring an equivalent level of protection;

   (e) the possibility of the tenderer obtaining state aid.

4. The contracting authority shall verify the information provided by consulting the tenderer. It may only reject the tender where the evidence does not justify the low level of price or costs charged, taking into account the elements referred to in paragraph 3.

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.

*Amendment*

3. The explanations referred to in paragraphs 1 and 2 shall in particular relate to:
   (d) compliance with obligations established by Union or national legislation and/or collective agreements in the field of social and employment protection provisions and working conditions or environmental law or of the international social and environmental law provisions listed in Annex XI or, where not applicable, with other provisions ensuring an equivalent level of protection;

   (e) the possibility of the tenderer obtaining state aid.

4. The contracting authority shall verify the information provided by consulting the tenderer. It shall reject the tender where the evidence does not justify the low level of price or costs charged, taking into account the elements referred to in paragraph 3, or when the received justification is not sufficient.

Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with provisions set out in paragraph 3 (d).
Amendment 44

Proposal for a directive
Article 70

Text proposed by the Commission

Article 70

Conditions for performance of contracts
Contracting authorities 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.

Amendment

Article 70

Conditions for performance of contracts
Contracting authorities 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 and shall include obligations established by Union and/or national legislation and/or collective agreements in the field of social and employment protection provisions and working conditions or environmental law or of the international social and environmental law provisions listed in Annex XI 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. They may also include the requirement that economic operators foresee compensations for risks of price increases that are the result of price fluctuations, using different hedging strategies including price adoption formulas, and that could substantially impact the performance of a contract.

Justification

Obligations regarding social and employment protection and working conditions have to be clearly set out in the contract performance clauses in order to ensure that they are respected.

Amendment 45

Proposal for a directive
Article 71 – paragraph 1
Text proposed by the Commission

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.

1a. In the procurement documents, the contracting authority shall stipulate that the conditions and requirements which apply to the tenderer also apply to any third parties who perform part of the contract as subcontractors.

1b. Any changes in the subcontracting chain shall be proposed by the economic operator and agreed by the contracting authority. In case the proposed change regards also the involvement of a new subcontractor, the main contractor shall indicate his or her name, contact details and legal representatives.

1c. The proposed change shall be rejected if it doesn’t guarantee the respect of point 1a.

7. The contracting authority in its contract with the main contractor, and 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 the second subparagraph, the immediate subcontractor shall take immediate action to remedy the situation, and that, failing this, the contract concerned shall be terminated.

8. If the termination of the contract and the replacement of the concerned subcontractor takes the form of a transfer

Amendment

1. In the procurement documents, the contracting authority shall ask or 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, providing information regarding the subcontractor including names, contact details and legal representatives.

1a. In the procurement documents, the contracting authority shall stipulate that the conditions and requirements which apply to the tenderer also apply to any third parties who perform part of the contract as subcontractors.

1b. Any changes in the subcontracting chain shall be proposed by the economic operator and agreed by the contracting authority. In case the proposed change regards also the involvement of a new subcontractor, the main contractor shall indicate his or her name, contact details and legal representatives.

1c. The proposed change shall be rejected if it doesn’t guarantee the respect of point 1a.
of undertaking, as defined in Directive 2001/23/EC, the provisions of that Directive shall apply.

Amendment 46

Proposal for a directive
Article 72 – paragraph 3 – subparagraph 2

Text proposed by the Commission

However, the first subparagraph shall not apply in the event of universal or partial succession into the position of the initial contractor, following corporate restructuring operations or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Directive.

Amendment

However, the first subparagraph shall not apply in the event of universal or partial succession into the position of the initial contractor, following corporate restructuring operations or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Directive. Neither shall the first subparagraph apply in the event of restructuring of the contracting authority, as the contracting authority has the right to transfer the agreement to a third party, who will be responsible for the duties of the contracting authority.

Amendment 47

Proposal for a directive
Article 73 – paragraph 1 – introductory part

Text proposed by the Commission

Member States shall ensure that contracting authorities have the possibility, under the conditions determined by the applicable national contract law, to terminate a public contract during its term, where one of the following conditions is fulfilled:

Amendment

Member States shall ensure that the national contract law is followed when terminating a public procurement contract. Member States may, when giving contracting authorities the possibility under the conditions determined by the applicable national contract law to terminate a public contract during its term, require that one of the following
conditions is fulfilled:

Amendment 48
Proposal for a directive
Article 73 a (new) within title III – chapter 1

Text proposed by the Commission

Member States have wide discretion to organize the choice of service providers in the way they consider most appropriate and are free to provide social services and other specific services themselves or to organize their provision in any other way that does not entail the conclusion of public contracts. This directive shall not apply to specific national procedures, e.g. procedures that are based on the user’s free choice of service providers, i.e. voucher system, free choice model, triangular relationship, or to the principle that all providers of social or other specific services which are able to comply with the conditions previously laid down by law should, irrespective of their legal form, be permitted to provide those services, provided that the general principles of equal treatment, transparency and non-discrimination are respected.

Amendment 49
Proposal for a directive
Article 76 – paragraph 1

Text proposed by the Commission

1. Member States shall put in place appropriate procedures for the award of contracts subject to this Chapter, ensuring full compliance with the principles of transparency and equal treatment of economic operators and allowing contracting authorities to take into account

Amendment

1. Member States shall put in place appropriate procedures for the award of contracts subject to this Chapter, ensuring full compliance with the principles of transparency, non-discrimination and equal treatment of economic operators and allowing contracting authorities to take into account the specificities of the services in
the specificities of the services in question.

Amendment 50
Proposal for a directive
Article 76 – paragraph 2

Text proposed by the Commission

2. Member States shall ensure that contracting authorities 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 authorities take into account the need to ensure a high level of quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, the specific needs of different categories of users, including disadvantaged and vulnerable groups, users' satisfaction, social inclusion, the involvement and empowerment of users and, where relevant, innovation. Member States shall provide that the choice of the service provider is not made solely on the basis of the price for the provision of the service. When drawing up quality criteria, contracting authorities may refer to the criteria set out in the voluntary European Quality Framework for Social Services.

2a. Contracting authorities may choose to limit the participation in a tender procedure for the provision of social and health services to non profit organisations, provided that a national law that is compatible with European law provides for restricted access to certain services for the benefit on non profit organisations, in line with the ECJ's jurisprudence. The call for competition shall make reference to this provision. The basic principles of transparency and equal treatment should be respected.

Amendment 51
Proposal for a directive
Article 84 – paragraph 8 a (new)
8a. The annual report should also include an annual comparison between the prices submitted and the actual cost of contracts that have already been performed and the potential influence over the number of staff employed by suppliers.

Amendment 52

Proposal for a directive
Article 85 – subparagraph 1 – point (e)

Text proposed by the Commission

(e) the name of the successful tenderer and the reasons why its tender was selected and, where known, the share of the contract or framework agreement which the successful tenderer intends to subcontract to third parties;

Amendment

(e) the name of the successful tenderer and the reasons why its tender was selected and, where known, the share of the contract or framework agreement which the successful tenderer intends to subcontract to third parties and information on their subcontractors including their names, contact details and legal representatives;

Amendment 53

Proposal for a directive
Article 87 – 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

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 employment protection provisions and working conditions, which are in force in the Member State, 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. Member States shall
ensure that contracting authorities state where the information can be found in the contract documents.

Amendment 54

Proposal for a directive
Annex VIII – point 2 – introductory part

Text proposed by the Commission

‘standard’ means a technical specification approved by a recognised standardising body for repeated or continuous application, compliance with which is not compulsory and which falls into one of the following categories:

Amendment

‘standard’ means a technical specification established by consensus and approved by a recognised standardisation organisation for repeated or continuous use, with which compliance is not compulsory, and which falls into one of the following categories:

Amendment 55

Proposal for a directive
Annex XVI – point 6

Text proposed by the Commission

- Services furnished by trade unions

Amendment

deleted

- Emergency medical services
- School and student transport
## PROCEDURE

<table>
<thead>
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<th><strong>Title</strong></th>
<th>Public procurement</th>
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<tr>
<td><strong>References</strong></td>
<td>COM(2011)0896 – C7-0006/2012 – 2011/0438(COD)</td>
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<td><strong>Committee responsible</strong></td>
<td>IMCO 17.1.2012</td>
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<td>Date announced in plenary</td>
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<td><strong>Opinion by</strong></td>
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<td><strong>Rapporteur</strong></td>
<td>Birgit Sippel 16.2.2012</td>
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<tr>
<td>Date appointed</td>
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<td><strong>Date adopted</strong></td>
<td>18.9.2012</td>
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<tr>
<td><strong>Result of final vote</strong></td>
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<td><strong>Members present for the final vote</strong></td>
<td>Edit Bauer, Heinz K. Becker, Phil Bennion, Vilija Blinkevičiūtė, Philippe Boulland, David Casa, Alejandro Cercas, Ole Christensen, Derek Roland Clark, Marije Cornelissen, Emer Costello, Andrea Cozzolino, Frédéric Daerden, Karima Delli, Sari Essayah, Richard Falbr, Thomas Händel, Nadja Hirsch, Stephen Hughes, Danuta Jazłowiecka, Martin Kastler, Ádám Kósa, Veronica Lope Fontagné, Olle Ludvigsson, Thomas Mann, Elisabeth Morin-Chartier, Csaba Őry, Siiri Oviir, Rovana Plumb, Konstantinos Poupakis, Sylvana Rapti, Licia Ronzulli, Elisabeth Schroedter, Nicole Sinclaire, Joanna Katarzyna Skrzypek, Jutta Steinruck</td>
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<td><strong>Substitute(s) present for the final vote</strong></td>
<td>Georges Bach, Sergio Gutiérrez Prieto, Filiz Hakaeva Hyusmenova, Jelko Kacin, Svetoslav Hristov Malinov, Ramona Nicole Mănescu, Emilie Turunen</td>
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