



## EUROCITIES position on the European Commission legislative proposal on public procurement

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## INTRODUCTION

Public procurement rules must ensure that cities achieve best value for taxpayers' money while ensuring open and transparent tendering procedures that promote competition, support service innovation, and prevent corruption. At the same time, public procurement must be able to address issues such as environmental protection, energy efficiency, social inclusion and local economic development.

On 20 December 2011, the European Commission published its legislative proposals for the modernization of public procurement. The proposed draft public procurement directives aim at simplifying tender procedures, facilitating access to SMEs to public procurement, promoting green, social and innovative procurement and achieving better governance in public procurement.

We welcome these efforts but believe that we should go further to make tender procedures simpler and more flexible, while safeguarding the comprehensiveness and fairness of the directives.

The introduction of the new directives must be accompanied by clear guidance from EU level to local authorities in order to avoid potential problems of misapplication, lack of knowledge and misunderstanding of public procurement procedures.

As city governments we know best our local context and how to support the local economy, environment and society. We are very experienced in public procurement and need to be able to use our purchasing effectively as a tool to support sustainability, inclusion and to drive economic growth and innovation. The rules have to work well for us as local governments, with our complex urban systems. We believe therefore that our concerns and comments should be taken into account in the review of the new procurement directives.

We have divided our comments on the draft procurement directives into ten different sections, following the thematic clusters used in the working document of the European Parliament Internal Market and Consumer Protection Committee (IMCO).

### 1. WIDER CHOICE OF PROCEDURES

Lengthy and complicated procedures often impose a disproportionate burden on local authorities and discourage them from starting a tender procedure. The public procurement directives must ensure that contracting authorities are granted the necessary discretion in the choice and shape of the procedures that they use to procure supplies, services and works.

#### Competitive procedure with negotiation (24 & 27)

- We welcome the provision allowing for a greater use of the competitive procedure with negotiation (24), and we support wider opportunities to use this procedure: in our view, the principles of public procurement transparency, equal treatment and non-discrimination can be sustained under this procedure.

#### Competitive dialogue (28)

- We support the new proposal to negotiate with the preferred bidder after the close of the competitive dialogue.

We believe that the use of this procedure should be encouraged. However, its implementation requires considerable time and there is a lack of understanding of how to use it and the legal implications of its use. Therefore:

- Training and guidance on competitive dialogue, providing examples of its application and value, should be provided to encourage uptake.

### **Innovation partnership procedure (29)**

We welcome the introduction of this new procedure for the development and subsequent purchase of new, innovative products, works and services, as an effective way for contracting authorities to facilitate the research and development of new products and services, and to promote innovative procurement. We recommend the following:

- Article 29 should be further developed in order to make its provisions clearer and less complex.
- Care should be taken to ensure the provisions allow for innovative SMEs to participate.
- Provision should be made for training and awareness-raising to promote innovative procurement effectively and develop innovation partnerships.

### **Lighter procurement procedure for sub-central contracting authorities (46.2, 26.4)**

- We welcome the establishment of a lighter regime for sub-central contracting authorities, allowing the use of a prior information notice (PIN) as a means of calling for competition under the restricted or the competitive procedure with negotiation (46.2).
- We support the introduction of further flexibility in tender timings within the restricted procedure, whereby sub-central contracting authorities may set the time limit for the receipt of tenders by mutual agreement between the contracting authority and the selected candidates (26.4).
- Nevertheless, we favour a more flexible approach, and would like to see an even lighter regime for local authorities with, inter alia, higher thresholds, more flexible timescales and greater scope for negotiation.

### **'Citizen choice model' as a new procedure**

- We propose in addition a new 'citizen choice model' of procurement, a procedure offering a solution for tenders where it is important for citizens to be able to choose a specific operator. This is the case, for instance, with tenders for personal services. For example, housekeeping services for elderly people are partly A-services. Under this system, all bidders that meet the quality requirements and agree to a (maximum) price set by the contracting authority are awarded a framework contract. Citizens then choose which operator they would like to deliver the personal service.

## **2. STRATEGIC USE OF PROCUREMENT**

Public procurement is a powerful tool to help cities to realise 'public good' objectives concerning on issues such as sustainability, economic development, environment, social inclusion and innovation. Local contracting authorities require flexibility for the introduction of such objectives within their procurement procedures.

## Most economically advantageous tender award criteria (66)

- It should be possible for contracting authorities to integrate a wider range of social and quality work considerations in the most economically advantageous tender award criteria, e.g. support for local training, local supply chain, social cohesion, fair trade considerations.

## Green procurement

We welcome the possibility for contracting authorities to refer to all factors directly linked to the production or provision process (life-cycle costing), as long as they refer to aspects of the production process that are closely related to the specific provision of the good or service purchased, in the technical specifications (40.1) and in the award criteria (66.2.d).

- We believe that these provisions will help to promote fair trade, social and green procurement.
- We support the fact that the introduction of life-cycle costing remains optional, under an enabling approach, in line with the need for flexible public procurement processes and decision-making for local contracting authorities.
- We highlight the need to ensure coherence in the application of the definition of life-cycle costing approach in line with the draft procurement directives and ISO standards.

## Social considerations

- We welcome the introduction of Article 54.2 whereby non-compliance with EU and international legislation in the field of social, labour or environmental law will be legitimate grounds not to award a contract.
- We note the clearer framework on sheltered workshops provided by Article 17, but we highlight the need for a more precise definition.

The recruitment of target groups, such as long term unemployed people, young people and disabled people should be promoted at EU level in the execution of public procurement contracts.

- Contracting authorities should be able to include an award criterion in the call for tender to earmark a given percentage of the value of the contract for recruitment of these target groups. Currently, and under the draft directives, these can only be included in the contract performance clauses, which is too late in the process.

## Need for further technical support at EU level

Cities still face legal uncertainty when including environmental and social criteria in their public tenders.

- We would welcome the development of a frequently updated database at EU level, with guidelines on environmental, social and fair trade procurement.

Moreover, the draft directives should make provision for the European Commission to:

- Encourage member states to create databases with examples of procurement contracts that include these quality criteria.
- Further support local authorities through awareness-raising seminars and training opportunities.

### 3. REDUCING DOCUMENTATION REQUIREMENTS

#### Self-declarations

We welcome the introduction of the acceptance of self-declarations as preliminary evidence for selection purposes, as this measure will add to the simplification of tender procedures (57). However:

- In order to keep flexibility, the acceptance of self-declarations should remain at the discretion of the contracting authority and should not be mandatory.

#### Selection criteria after award criteria

- The provision allowing contracting authorities to examine tenders before verifying the fulfilment of the selection criteria under the open procedure (54.3) could result in the winning tenderer incurring costs during the procedure, only to find out that they did not fulfil the selection criteria.

### 4. E-PROCUREMENT

The points below require particular attention:

- The two-year transition period (by 30 June 2016) for the switch to fully electronic communication is too short. Given that the current use of e-procurement differs greatly among cities, a longer transition period would ensure that all cities have sufficient time to make the switch, and ensure equal treatment.
- Provision should be made for the funding of technical support programmes for contracting authorities on e-procurement.

### 5. SME ACCESS

#### Division of contracts into lots

We note the proposal of the Commission to invite contracting authorities to divide public contracts into lots of EUR 500,000 or less (44), as an effective means of making public procurement procedures more accessible to SMEs. Particular attention should be given to the following:

- It should remain at the discretion of the contracting authority to determine whether or not to divide a contract into lots, as it might not always be the most economically viable solution.
- Imposing an obligation to explain why contracts have not been broken down into lots would increase the burden on local contracting authorities.

#### Financial requirements

- We welcome the proposal (56) to limit the yearly turnover requirements of economic operators to up to three times the estimated contract value as an effective way of helping SMEs.

## Direct payment of subcontractors

We consider that Article 71.2, allowing member states to provide for subcontractors to request direct payment from the contracting authority for supplies, works and services provided to the main contractor, is contrary to customary contract law and the following should be noted:

- Contractual relationships would become unclear if subcontractors are given the opportunity to request and be reimbursed directly by the contracting authority.
- This provision may also affect the right of the contracting authorities to withhold payments based on valid performance reasons.
- It may also potentially encourage subcontractors to systematically request direct payments from the contracting authority, and the city would risk receiving claims from the main contractor and the subcontractor.
- However, we welcome the fact that this option remains non-mandatory for the contracting authority.

## 6. AGGREGATION OF DEMAND

### EU support for cross-border procurement

- Cross-border procurement is still very rare. EU financial support for cross-border joint procurement initiatives that foster innovation would be very welcome. Future funding programmes to foster competitiveness and innovation could support such processes, for instance for the set up of tenders that would include criteria to foster innovative solutions and products.

### Assistance for the implementation of cross-border procurement

Article 87.3 foresees specific administrative assistance to economic operators intending to participate in procurement procedures in other member state, but we note that it is the responsibility of the member states to provide such assistance.

- We believe that this measure will not be enough to promote cross-border procurement, and we encourage the provision of assistance both at member state level, cross member state and at EU level.
- EU guidelines, training sessions and a helpdesk available throughout the procurement process would be a good way to promote cross-border procurement and to support local authorities in the organisation of joint tender processes.

### Joint cross-border procurement

- We welcome the introduction of Article 38 explicitly allowing cross-border procurement procedures.

### Joint assessment of needs and market consultation

The procurement of innovative solutions starts with a needs assessment. Where other local authorities have similar needs, joining forces can help achieve a critical mass.

- The EU could facilitate needs-assessment by providing financial support for exchanges and secondments of procurement executives between public authorities.

Market consultation and joint market consultation between two or more authorities, helps contracting authorities to meet their procurement needs. It can also help determine whether it is possible to proceed directly to procurement, or whether pre-commercial procurement or other procurement activities may be needed.

- We recommend the European Commission support market consultation by organising training, giving expert advice and organising meetings for local authorities that are interested in the same products.

#### Framework agreements (31)

- More flexible provisions and a longer validity timeframe for framework agreements are needed.
- Framework agreements should be open to new providers to join during their duration.

#### Dynamic purchasing systems (32)

- We welcome the simpler rules proposed by the directives for dynamic purchasing systems, which can now be run through a restricted procedure and allow any candidate satisfying the selection criteria to be admitted to the system.
- However, we recommend to allow for a maximum number of providers that can be admitted to the system.

## 7. OTHER PROCEDURAL REQUIREMENTS (PUBLICATIONS, VARIANTS, DESIGN CONTESTS)

No comments on this point.

## 8. SOUND PROCEDURES

Particular attention should be given to the following:

- We welcome Article 55.3.d allowing contracting authorities to exclude from tendering those contractors who have demonstrated significant or persistent deficiencies in the performance of a substantive requirement of a prior contract with the contracting authority.
- We support Article 66.2.b whereby the quality of the staff assigned to perform the contract can be taken into account as award criteria.

#### More flexible rules for substantial modification of contracts

We welcome the inclusion in the directives of provisions establishing when contract modifications require a new procurement procedure (72). Furthermore, we highlight that:

- More flexibility is needed to allow amendments to contracts, in line with the evolution of procurement procedures and changes that will occur over time.
- Particular attention should be given to multi-year contracts, as by their very nature, they are bound to require modifications and only very substantial changes should require a renewed procedure.
- If a new competition is organised, it should be done through a negotiated procedure without prior notification.

### Termination of contracts

- Further clarification is needed in article 73 so that providers are aware before entering a contract under which conditions it could be terminated.
- Moreover, both the contracting authority and the provider should carry the risk of terminating a contract.

## 9. GOVERNANCE

### Single EU procurement rules web portal

- We support the establishment of a single web portal in which procurement legislation, decisions by the European Commission and European Court of Justice rulings would be published, thereby helping local authorities to find the information they need more easily.

### Review of procurement rules

- Provision should be made for local authorities to be involved regularly in a review process to avoid discrepancies between procurement rules and their use on the ground.

### Oversight body

We welcome the introduction of a body aimed at monitoring the application of public procurement rules by contracting authorities, providing legal advice to contracting authorities on interpretation of public procurement rules and examining complaints from citizens and business (84). However, we believe that particular attention should be given to:

- Member states have different internal structures, and a national body may not be the best solution as it may not be appropriate and/or may duplicate activities already being performed at regional or local level.
- The requirement to report all contracts over certain thresholds to this body would increase the regulatory burden on contracting authorities.
- Other tasks could be assigned to the oversight body, such as gathering information and disseminating knowledge, and providing support to contracting authorities and economic operators in terms of both skills and resources.

## 10. DEFINITIONS AND SCOPE

### Thresholds

We advocate an increase in the thresholds proposed by the Commission in order to reduce the administrative and financial burden on contracting authorities and to make cross border competition viable for both the supplier and the contracting authority.

### Codification of rulings

We are working with a set of complicated rules and decisions due to incomplete implementation of the procurement directives at national and regional levels, European Commission guidance and the

numerous European and national court rulings. As a result, cities spend considerable time and money seeking external legal advice. More coherence between the different rules and decisions would be of great help to local public procurers.

- To ensure coherence, the most important rulings of the European Court of Justice (ECJ) regarding procurement legislation should be codified regularly.

#### Public - public cooperation (11)

- We believe that this section should be simplified to enable public bodies to both use their in-house services and to create new shared services that have mutual benefit and economic impacts.
- We welcome a codification of the Teckal criteria in the directives, and we believe that the directive should make clear that the exemption also includes cooperation between 'sister enterprises', both of which are controlled by the same city.

#### A/B Services

We consider that the current distinction between A/B services should be maintained, as it is essential that member states and cities retain the possibility to choose appropriate procedures for B services. We don't see the rational/benefit of introducing minimum advertising requirements for social and other specific services (as per Annex XVI) over EUR 500,000. Particular attention should be given to the following:

- Social and other specific services are services which focus on people and have little cross-border interest. Therefore, they have a necessary requirement for greater flexibility and the ability to respond quickly.
- It should be noted that the procurement of health and social services and the range of services in Annex XVI are likely to be high value contracts and the contracting authorities will often be country or unitary authorities with corresponding major budgets. This means that the proposed threshold can easily be reached by contracting authorities.
- It may be necessary to include other services under the Annex XVI, e.g., judicial services. (For contracting authorities, it is preferable to have a lawyer nearby. Further, it would be unsuitable having to switch lawyers half-way through a procedure or having to provide sensitive documents to a new law firm every four years).