



# Modernising European public procurement to support growth and employment

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Short presentation of the new policy and the profession's reaction

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# PROPOSALS OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

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- COM(2011) 895 final **on procurement by entities operating in the water, energy, transport and postal services**
- COM(2011) 896 final **on public procurement**
- COM(2011) 897 final **on the award of concession contracts**



# Importance of public procurement

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- The revision of the public procurement Directives announced by the Commission in the end of 2011 is part of an overall programme to thoroughly **modernise public tendering** in the European Union. This programme also includes a Directive on **concessions**, which until now have been only partially regulated at European level and present specific features which justify a separate text, while maintaining consistency with the general reform.
- Each year, the **public authorities spend 18% of GDP on goods, services and works**. Given the current budgetary restrictions and economic difficulties in most Member States, public procurement policy must, more than ever, ensure the optimal use of funds in order foster **growth** and **job creation** and thereby help to achieve the objectives of the Europe 2020 Strategy.



# The main goals

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- 1. The main objective is to **simplify** rules and procedures and make them **more flexible**.
- 2. **Encourage access to public procurement for SMEs:** access will be increased and made easier through measures to cut the administrative burden and strong incentives to **divide tenders into lots and limit the financial capacity requirements** for the submission of a tender.
- 3. At the same time, the proposed reform aims to **facilitate a qualitative improvement in the use of public procurement** by ensuring greater consideration for **social and environmental criteria** such as life-cycle costs or the integration of vulnerable and disadvantaged persons
- improvements to the existing guarantees aimed at **combating conflicts of interest, favouritism and corruption** in order to better ensure the integrity of procedures, given the financial implications;



# By what means

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- an **increased possible use of negotiation** through the competitive procedure with negotiation and prior publication (see question 4); simplified procedures for regional and local contracting authorities, who can replace the publication of individual contract notices by the publication of a general notice for their planned procurement for the next year;
- **a reduction of documentation requirements.** This will be achieved in particular through the compulsory acceptance **of self-declarations**, whereby a bidder declares on oath that he fulfils the criteria which are a pre-condition for tendering, e.g. no conviction for corruption etc. Only the winning bidder will then be obliged to supply the documentary evidence to prove the facts that he declared in his self-declaration
- **ambitious measures on electronic procurement** aiming at full electronic communication in public procurement within a period of two-year time after the implementation deadline of the adopted Directive;
- The **shortening of deadlines**,
- The **alleviation of publication requirements.**
- the appointment by the Member States of **a single national authority** responsible for monitoring, performing and checking public contracts to ensure that the rules are properly applied in practice

### ***Thresholds amounts***

- This Directive shall apply to procurements with a value exclusive of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:
- EUR **5 000 000 for public works contracts**;
- EUR **130 000 for public supply and service contracts** awarded by central government authorities and design contests organised by such authorities; where public supply contracts are awarded by contracting authorities operating in the field of defence, that threshold shall apply only to contracts concerning products covered by Annex III;
- EUR 200 000 for public supply and service contracts awarded by sub-central contracting authorities and design contests organised by such authorities.
- EUR 500 000 for public contracts for social and other specific services listed in Annex XVI.



# Essential points

## Article 21

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### ***Conflicts of interests***

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

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

- For the purposes of this Article, '**private interests**' means **any family, emotional life, economic, political or other shared interests** with the candidates or the tenderers, including conflicting professional interests.



## Article 22

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### ***Illicit conduct***

Candidates shall be required at the beginning of the procedure to provide a **declaration on honour** that they have not undertaken and will not undertake to:

- (a) unduly influence the decision-making process of the contracting authority or obtain confidential information that may confer upon them undue advantages in the procurement procedure;
  - (b) enter into agreements with other candidates and tenderers aimed at distorting competition;
  - (c) deliberately provide misleading information that may have a material influence on decisions concerning exclusion, selection or award.
- ... that candidates and tenderers are required to submit at the beginning of the procurement procedure **a declaration on the existence of any privileged links** with the persons referred to in paragraph 2(b), which are likely to place those persons in a situation of conflict of interests;





# Article 61

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- **Quality assurance standards and environmental management standards**
  1. Where they require the production of certificates drawn up by independent bodies attesting that the economic operator **complies with certain quality assurance standards, including on accessibility for disabled persons**, contracting authorities shall refer to quality assurance systems based on the relevant European standards series certified by accredited bodies.
  - 2. Where contracting authorities require the production of certificates drawn up by independent bodies attesting that the economic operator **complies with certain environmental management schemes or standards**, they shall refer to the European Union Eco-Management and Audit Scheme (EMAS) or to other environmental management schemes as recognized in accordance with Article 45 of Regulation (EC) No 1221/2009 of the European Parliament and of the Council<sup>41</sup> or other environmental management standards based on the relevant European or international standards by accredited bodies.



## Article 62

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- ***Reliance on the capacities of other entities***
- 1. With regard to criteria relating to economic and financial standing , an economic operator may, where appropriate and for a particular contract, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them.
- It shall in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect. In the case of economic and financial standing, contracting authorities may require that the economic operator and those entities are jointly liable for the execution of the contract.
- 2. In the case of works contracts, service contracts and siting and installation operations in the context of a supply contract, contracting authorities may require that certain critical tasks be performed directly by the tenderer itself.



## *Contract award criteria Article 66*

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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

- the most economically advantageous tender;
- 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.

- 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.



# Article 66

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- The most economically advantageous 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 ,other criteria linked to the subject-matter of the public contract in question, such as:
- quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users,
- environmental characteristics and innovative character;
- for service contracts and contracts involving the design of works, the organisation, qualification and experience of the staff assigned to performing the contract;
- after-sales service and technical assistance, delivery date and delivery period or period of completion;
- the specific process of production or provision of the requested works, supplies or services or of any other stage of its life cycle.



# *Life-cycle costing*

# *Article 67*

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- Life-cycle costing shall to the extent relevant cover the following costs over the life cycle of a product, service or works:
- 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
- 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 change mitigation costs.
- **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.**



# Article 67

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- 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:
  - it has been drawn up on the basis of scientific information or is based on other objectively verifiable and non-discriminatory criteria;
  - it has been established for repeated or continuous application;
  - 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.



## *Abnormally low tenders Article 69*

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- Contracting authorities shall require economic operators to explain the price or costs charged, where all of the following conditions are fulfilled:
- the price or cost charged is more than 50 % lower than the average price or costs of the remaining tenders
- the price or cost charged is more than 20 % lower than the price or costs of the second lowest tender;
- at least five tenders have been submitted.
- Where tenders appear to be abnormally low for other reasons, contracting authorities may also request such explanations.
- The explanations referred to in paragraphs 1 and 2 may in particular relate to:
- the economics of the construction method, the manufacturing process or the services provided;
- the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the execution of the work or for the supply of the goods or services;



## Article 69

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- the originality of the work, supplies or services proposed by the tenderer;
- 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.
- the possibility of the tenderer obtaining State aid.
- 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.





# The profession's reaction

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- The comments of FIEC on the political agreement on IMCO 5-9-2013
- “From the very beginning of this legislative process, FIEC stressed that there was not sufficient practical experience for a revision, due to the late implementation of the current directives into national law. And now, despite some welcome changes, we end up with lengthy and complicated procedures, which do not solve some key problems that contractors have to face in the real world.”
- **Abnormally Low Tenders (ALT), article 69**
- The major problem of acceptance of ALTs by contracting authorities, which the construction sector faces and which has been raised repeatedly in the debates by FIEC, has not been addressed adequately. Provisions on ALTs have not been made stricter, compared to the current directive (2004/18/EC), but they will remain as weak as they currently are: neither mandatory identification criteria nor mandatory rejection of ALTs, i.e. tenders for which the low price has not been justified.



# The profession's reaction

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- • **Award criteria, article 66**
- The wording of this article has become extremely complicated, while in reality, little has changed. The price and the most economically advantageous tender – which has become the “best price- quality ratio” – remain the two possible award criteria, together with a third criterion – the cost –which includes the life-cycle costing concept.
- It is doubtful that this provision will be sufficient to turn contracting authorities away from their tendency to award contracts to the cheapest offers - to the detriment of quality.
  
- • **Time limits, articles 25/ 26**
- While the Commission announced that the access of SMEs to public procurement markets would be rendered easier, time limits allowing entrepreneurs to respond to calls for tenders have been shortened considerably. This is counter-productive, considering that the drawing up of good quality tenders takes time – especially for complex works contracts above the thresholds. This is likely to cause problems in particular for SME contractors.



# The profession's reaction

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- **Contracts between entities within the public sector, article 11**
- The scope of “in-house” and “public-public cooperation” has been broadened considerably, so that important market shares will be awarded without transparent, competitive procedures.
- Furthermore, such a public entity may undertake 20% of its activities for others, besides the controlling/ awarding authorities, including private clients. Both these items provide unfair advantages to public entities, to the detriment of private enterprises.
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- **“None of these issues is likely to contribute anything to growth and jobs in our sector, or the EU economy”,**
- **It is regrettable that the discussions on such complex and controversial issues, which concern the foundations of the Internal Market have been rushed through these opaque informal trilogue negotiations. Quality is more important than speed!”**



# Proposal for a Directive of the European Parliament and of the Council on the award of Concession Contracts COM(2011)897final

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- Concessions are partnerships between the public sector and mostly private companies, where the latter exclusively operate, maintain and carry out the development of infrastructure (ports, water distribution, parking garages, toll roads) or provide services of general economic interest (energy, water and waste disposal for example). Concessions are the most common form of Public Private Partnership (PPP)
- This type of contracts represent a very considerable part of public procurement. Studies estimate that over 60% of all PPP contracts in Europe are to be qualified as concessions, and 50% of waste management services in the EU are concessions.
- At a time of pressing demands for efficient spending of public money there is an urgency in establishing a clear European legislative framework allowing for delivery of works and services under conditions of sound financial management and at best value for money. This will be ensured through a Union wide competition for high value concessions where the most efficient providers are given a fair chance of winning the contract.



# What are the main elements of the proposal?

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- A clearer and more precise definition of a concession (building on the Court's case law);
- Coverage of award of works and services concessions both in the classic sector (all other sectors not covered by utilities) and in the utilities sector (Directives 2004/18/EC and 2004/17/EC respectively);
- Compulsory publication of concessions in the Official Journal of the EU, when their value is equal to or greater than €5,000,000;
- Pragmatic solution for dealing with changes to concessions contracts during their term notably when justified by unforeseen circumstances;
- Establishment of a minimum deadline of 52 days for the submission of applications for the concession;



# What are the main elements of the proposal?

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- Establishment of certain obligations with respect to the selection and award criteria to be applied by the contracting authorities and contracting entities when awarding concessions. These rules aim at ensuring that such criteria are published in advance, are objective and not discriminatory. In general, they are less rigid than similar provisions currently applicable to public contracts;
- No specific award procedures but instead definition of certain general guaranties aimed at ensuring transparency and equal treatment with particular reference to negotiation;
- Application of the [Remedies Directives](#) (Directives 89/665/EEC and 92/13/EC, as amended by Directive 2007/66/EC) to all concessions above the threshold.



# In soma

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- The proposal is trying to codify existing disparate rules and definitions.
- It is rather a big framework of what the Commission should attempt to clarify in the future.
- The proposal is so general that hardly goes beyond the basic legal provisions of public procurement, that is:
- Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate way.
- 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.
  
- The concession contracts are going to play a very important role in the near future since Commission is trying, with the so called innovative financial instruments, to mobilize private investments for the infrastructures of Europe via public private partnerships
  
- THANK YOU