

COM-6/023

Brussels, 4 January 2001

OPINION

of the

Committee of the Regions

of 13 December 2000

on the

Proposal for a Directive of the European Parliament and of the Council

on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts

and the

Proposal for a Directive of the European Parliament and of the Council

coordinating the procurement procedures of entities

operating in the water, energy and transport sectors

(COM(2000) 275 final - 2000/0115 (COD) and COM(2000) 276 final - 2000/0117 (COD))

The Committee of the Regions

HAVING REGARD TO Proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts and the Proposal for a Directive of the European Parliament and of the Council coordinating the procurement procedures of entities operating in the water, energy and transport sectors (COM(2000) 275 final - 2000/0115 (COD) and COM (2000) 276 final - 2000/0117 (COD));

HAVING REGARD TO the decision of the Council on 8 September 2000, under the first paragraph of Article 265 of the Treaty establishing the European Community, to consult it on this matter;

HAVING REGARD TO the decision taken by its Bureau on 2 June 1999, to draw up an opinion on this matter and to instruct Commission 6 for Employment, Economic Policy, Single Market, Industry and SMEs to undertake the preparatory work;

HAVING REGARD TO the Commission's Communication on Public Procurement in the European Union, COM(98) 143 final;

HAVING REGARD TO its opinion on the Commission's Communication on Public Procurement in the European Union, CdR 108/1998 fin¹;

HAVING REGARD TO the Commission's Green Paper on Public Procurement in the European Union: Exploring the Way Forward, COM(96) 583 final;

HAVING REGARD TO its opinion on the Green Paper on public procurement in the European Union: Exploring the way forward, CdR 81/1997 fin²;

HAVING REGARD TO the decision of its President of 26 October 2000 to appoint Ms Segersten-Larsson as rapporteur general to draw up an opinion on this subject, in accordance with Rule 40.2 of the Rules of Procedure of the Committee of the Regions;

HAVING REGARD TO a number of relevant European Court of Justice rulings, such as the judgment of the Court of Justice of 26 September 2000 in case C-225/98, the Commission versus France, for failure to fulfil its obligations under Council Directive 71/305/EEC of 26 July 1971, as amended by Council Directive 89/440/EEC of 18 July 1989 and Council Directive 93/37/EEC of 14 June 1993, concerning various procedures for the award of public works contracts for the construction and maintenance of school buildings;

HAVING REGARD TO the draft opinion CdR 312/2000 rev. 1, drawn up by the general rapporteur Ms Segersten-Larsson, S - EPP;

adopted the following opinion at its 36th plenary session, held on 13-14 December 2000 (meeting of 13 December):

1. Views of the Committee of the Regions

1. The Committee of the Regions (COR) welcomes the fact that the Commission has taken on board the criticism of the unnecessarily bureaucratic nature and application of the procurement rules, and the Commission's intentions to emphasise increased flexibility, modernisation and simplification.
2. The COR endorses the idea of merging the three standard directives into a single directive. The readability of the Directive has been simplified considerably by introducing contents pages and intermediate headings in the texts. This is a positive development.
3. It is also positive that the proposal would increase opportunities for electronic trade, and this is entirely in line with what the COR has proposed in the past.
4. It quite rightly includes measures to discourage organised crime in public procurement.
5. The COR also welcomes the fact that the telecommunications sector is exempted from the Utilities Directive.

6. However, the COR feels that the Commission has sometimes lost its way in its proposals and that, as presented, they lack certain elements. Unfortunately, the COR also thinks that some of the proposals would be counter-productive.
7. The COR considers that the Commission's plans to address a number of important topics including environmental and social considerations in procurement in non-binding interpretative documents are not appropriate and wishes to see these important topics properly addressed in the directives.

1.8 The COR considers that the proposed Directive must state explicitly that it is possible for contracting bodies to use social or environmental considerations as award criteria, and that these must be mentioned expressly in the invitation to tender. Purely economic criteria should not be the only ones to determine the best and most advantageous tender.

2. The Committee of the Regions' recommendations on the proposed directive

1. Electronic procurement

1. While the COR generally welcomes the new provisions on electronic procurement and the reduction in time limits there are areas in which the COR wishes to see the directive go further. The Committee feels that it is particularly important to address all aspects of electronic procurement as this is a fast changing field and the situation in 2002 when the directive is implemented will be very different to today.
2. Specifically, the COR urges the Commission to include provisions explaining how the placing of orders through electronic catalogues (online "marketplaces" or "shopping malls") should be treated under the directive. This should be closely linked to the provisions on framework agreements, which should be revised in accordance with the COR's suggestions below.

2. New rules on particularly complex procurement contracts

1. The COR earlier warmly welcomed the Commission's proposal to introduce more flexible forms of procurement, particularly procurement of complicated equipment and similar contracts. In its Opinion on the Green Paper (point 2.2.13) the COR said that "provisions on negotiated procedures similar to those of those of the Utilities Directive should be incorporated into other directives".
2. The COR understands that the new procedure meets the specific requirements of some Member States whose contracting authorities are engaged in public-private partnerships (PPP) projects on a large scale. However the COR takes the view that the Commission's proposals are not sufficiently far reaching because the procedure is neither sufficiently flexible nor generally accessible. Procurement of services is a field which generally requires much contact between buyers and sellers throughout the procurement process. This is not an exceptional requirement, and the present rules are far too rigid in this area.
3. The term "objectively" in the grounds for using the procedure needs to be explained, and an additional ground needs to be added to reflect the reality of PPPs, namely:

" Cannot effectively allocate risks and rewards under the contract without negotiation with economic operators."

4. The COR is particularly concerned about the provision concerning "outline solutions". Economic operators will consider that they have intellectual property rights in any such outline solutions and may demand payment for such solutions whether or not they are used. As local authorities will have no budget to pay for outline solutions this will effectively prevent them using the new procedure. As an alternative the COR proposes that the term "outline solution" is substituted. This would not represent a technical solution but describe the economic operators' approach to carrying out the contract and would help the contracting authority to better define its requirements in the specifications which form the basis of the subsequent negotiations.
5. In its Opinion on the Green Paper, the COR said that "it cannot be considered necessary to suspend the procurement procedure because the price offered is higher than the contracting entity can afford, when negotiation could have produced a lower price acceptable to both purchaser and seller". This problem is not solved by the current proposals.
6. The COR urges the Commission to amend the directive so that the contracting entity has the possibility to use a negotiated procedure characterised by great flexibility, and to make it possible to hold a wide-ranging dialogue with suppliers before, during and after the procurement process. The Commission ought here to take the provisions of the Utilities Directive as a model.

3. Framework agreements

1. In its earlier opinion, the COR expressed the view that framework agreements ought to be expressly permitted in all the directives, and it is to be welcomed that the Commission proposes the regulation of framework agreements. However, the COR takes the view that the proposed regulations are unsatisfactory and do not provide the necessary flexibility.
2. In its explanatory statement, the Commission distinguishes between framework contracts and framework agreements. Framework agreements are not regarded as contracts within the meaning of the directive, since they do not include all the necessary elements for them to be used as the basis for a delivery.
3. However, framework contracts are covered by the directive's definition of public contracts. The explanatory statement gives a contract with an order form as an example of such a contract. In some Member States "framework contracts" of this kind are considered non-binding and hence referred to as "framework arrangements" or "framework agreements" in those Member States. By using the term "framework agreement" in the directive to describe what is essentially a new procedure, the Commission is adding to the confusion rather than bringing clarity.
4. The Commission's proposals cover only framework agreements in the special sense accorded to this term in the directive, but in the COR's view this is not stated with sufficient clarity. The definition must be clearer. In particular, it should be clear to those Member States who regularly award non-binding framework contracts (which they call framework arrangements or agreements)

that these are to be treated in the same way as any other public contracts and not as framework agreements in the special sense of the draft directive.

5. The COR sets great store by this, so that doubts will not arise later as to whether agreements now regarded as framework contracts are covered by the new rules or not. For example, this covers the customer choice models used in a number of member countries, where a contracting authority enters into a contract with a number of suppliers, and the individual citizen later chooses the supplier, along with the municipal or regional contracting authority's contract.
6. Nor is the procedure which would apply to a framework agreement sufficiently flexible. This particularly applies to the fact that competition has to be reopened every time the agreement is used, which generates more work for the contracting entity and defeats the purpose of a framework agreement. It also applies to the requirement for at least three suppliers and the time-limit on the duration of the agreement. This procedure may have a use but it is so different from the normal way in which framework agreements are used in some Member States that it really should be called by another name.
7. The Commission seems to have assumed above all that the provisions of the framework agreements will be used mainly for procurement of computer equipment and similar procurement contracts. However, procurement under the framework agreements is also used for other types of procurement in order to satisfy an individual requirement, for example facilities for the handicapped: in that respect the proposed method is not realistic.
8. If the Commission is intent on expressly covering framework agreements in the classical directive, the COR takes the view that the text proposed for the Utilities Directive describes much better the wide range of different techniques which Member States regard as framework agreements and provides the necessary flexibility.

4. **Modifications to threshold values**

1. The Commission proposes that the number of threshold values be reduced and that they be given in euro. It is good in itself for the number of threshold values to be reduced, but expressing them in euro must not mean in practice that any value is reduced from its present level. However, the proposal does in practice mean a reduction in most cases - something which the COR cannot accept.
2. The COR has stated in earlier opinions that the threshold values are set far too low and ought to be raised. The COR holds to this view and calls upon the Commission to take steps to renegotiate the Government Procurement Agreement (GPA) on this point.
3. The low threshold values are particularly problematic in the procurement of services, since transaction costs are often relatively high in relation to the value of the contract, as the COR has already pointed out at an earlier stage. Part of the problem with the low threshold values could therefore be solved if a provision were included in the directive to the effect that negotiated procurement with prior announcement would always be permitted for minor service procurement contracts, e.g. for contracts below a value of EUR 400,000. This should enhance flexibility.

5. Criteria for quality selection

1. The COR welcomes the fact that the Commission proposes some tightening up with regard to breaches of law by suppliers. It is the COR's view that dishonest suppliers should not be allowed to take part in public procurement.
2. However, the COR takes the view that the Commission must clarify which situations are covered by Article 46 (1) which states that an economic operator shall be excluded from a procurement contract if he has been convicted of corruption in the previous five years. In countries where a legal person cannot be convicted of corruption, would the provision apply to all the supplier's employees? In the affirmative, are penalties to be imposed - and if so, which penalties - if the economic operator has, for example, introduced appropriate preventive measures in his enterprise or has dismissed without notice the manager who committed the criminal offences without the knowledge of the economic operator? What would then happen if such an employee were to move to another employer or start a new firm? What happens in a case where only a supplier who has been convicted of corruption can deliver certain goods, or where it would be very costly to change supplier? The COR thinks that these questions must be discussed further. It should also be borne in mind here that the penalties would be imposed in accordance with national practice since there is, as yet, no European criminal law.
3. The proposed wording would most definitely cause problems for the contracting entities and for citizens in the area of pharmaceutical procurement, in cases involving a unique, life-sustaining drug which cannot be obtained from any other supplier. The Commission must consider a different wording for this very special and unusual case.
4. The COR regards it as most important that the contracting entities should be able to require suppliers to comply with national social sector regulations in the Member State concerned. A contracting entity should not have to accept suppliers which, for instance, violate rules on job protection, the working environment, minimum pay or child labour. Such requirements should be clearly stated in the invitation to tender, and not be discriminatory. These key aspects are dealt with by the European Court of Justice in the "Beentjes" case (31/87) and, most recently, in case C-225/98. The COR feels that it is essential for the principles established in case law to be spelt out clearly in the directive.
5. The COR feels strongly that contracting authorities should be able to ask for additional categories of information at the qualitative selection stage. Specifically, authorities should be permitted to seek information, e.g. on economic operators' policy regarding environmental management.

6. Contract award criteria

1. The Commission proposes that the criteria for awarding contracts, where it is not just a matter of the lowest price, should be directly linked with the nature of the contract: this is a new departure. The consequence of this is that environmental requirements cannot be imposed on production processes. The COR, in its Opinion on the Communication on public procurement (point 3.1.2), stated: "The COR considers it crucial in public procurement to be able, in addition to laying down certain conditions with regard to a product's properties (e.g. the PVC content of plastic), to impose objective requirements concerning

the overall environmental impact of a product and of a company, including the production process". The COR reaffirms that view.

2. However, the COR welcomes the fact that the environment is mentioned among the criteria to be taken into account in awarding contracts. Although this is not a substantive change - since the adjustment is only by way of example - it is an important signal and a reminder to contracting entities that it is right to consider environmental impact in public procurement. However, the COR takes the view that the word "environmental impact" should be used in the text of the directive instead of "environmental characteristics", since the latter wording reduces the scope to impose environmental requirements than exist at present.
3. The Commission also proposes that the contracting authority should specify the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.
4. The Commission's intention is to ensure greater openness in procurement procedures and equal treatment for suppliers. The COR does not think that the rule is likely to have this effect. The rule is based on an unrealistic idea that the value of each of the criteria can be determined when the procurement procedure begins. However, this presupposes that the contracting authorities have complete information at their disposal in advance; this would probably only apply in exceptional cases.
5. The Commission proposal implies that the scheme would be set up when various parameters have been established and that, with the help of the weighting, it could later be established with mathematical exactitude which tender is economically most advantageous. In practice this is an almost impossible task and, if it also involves "soft" parameters such as aesthetic profile, it becomes meaningless.
6. It would be completely impossible to weight the criteria in procurement contracts where a large number of different articles are bought in one and the same contract, e.g. foodstuffs, medical equipment or medicines. In procurement of medicines for hospital use, a county council in Sweden normally buys all the various medicines it needs in one procurement contract. If the criteria were to be weighted, a different weighting would be needed for each group of products. The criteria of "taste" naturally carries more weight when the medicines are for small children than when they are for adults. This means that the procurement contracts would have to be divided up so that the same weighting applied within each group; this would lead to a situation where a large procurement contract exceeding the threshold value would have to be divided up into many small procurement contracts, many of which would certainly fall below the threshold value.
7. Professional buyers who have seen the proposal do not think it will work in practice. The COR does not think that impracticable rules should be included in the directive. There is also a high risk that the rule might lead to a large number of unnecessary court cases relating to the weighting.

2.6.8 The contracting authorities should be able to include objective social criteria which are not discriminatory and which guarantee equality of treatment and free competition.

7. **Special contract provisions**

1. The Commission proposes a new rule on the possibility of imposing special requirements on the execution of the contract, the aim of which is to codify existing law on the subject. However, the wording is restrictive in relation to the case law which it is intended to codify, since it introduces a requirement for the condition to be related to the performance of the contract.
2. The COR thinks it important that the wording which provides the possibility of imposing special conditions on performance of the contract should not prejudice the contracting authorities' right to decide themselves on what shall be procured; for example, this applies to the possibility of imposing environmental requirements on production processes, and to social requirements which must of course be non-discriminatory so that the requirement can be met by suppliers of all Member States.

8. **The common procurement vocabulary (CPV)**

1. The COR thinks there is a clear advantage in employing only one system. The problem is that the existing CPV nomenclature gives rise to many problems because of its heterogeneous structure and its ambiguity in many areas.
2. The practitioners in this field point out that it is difficult to find one's way in the CPV (for example, parking meters are listed with medical apparatus and pharmaceutical products), that it is difficult to know which number is relevant in an individual case (e.g. is a given implant surgical or orthopaedic?); in addition, certain headings are missing in some groups (in the health and nursing services group, urban cleansing services are listed while child health care is missing). The deficiencies in the nomenclature also cause problems for suppliers. They say that it is difficult to find relevant notices and that they lack basic data on procurement contracts because the nomenclature has misled them to think that the contract concerned a certain product or service, whereas in reality something quite different is involved. These problems also constitute an obstacle to the extension of electronic commerce.
3. The COR therefore urges the Commission to improve the CPV nomenclature as soon as possible so as to make it an effective instrument for the future.
4. An improved CPV could also be a tool enabling the Commission to obtain correct procurement statistics directly from the Tenders Electronic Daily (TED), thereby reducing the administrative burden on contracting entities.

9. **Exclusive rights**

1. The proposal on exclusive rights granted to a body other than a contracting authority (in Article 55) is unclear. The wording is far too broad, as it could perhaps be interpreted as covering all the contracting authority's contracts with private suppliers: from a strictly logical viewpoint, any contract can be said to contain an element of exclusive right. It ought to be made clear, too, that the provision concerns only contracts related to the exclusive right itself.

10. **Deadlines in negotiated procurement**

1. The Commission proposes a tightening of the rules on deadlines in negotiated

procurement: a time-limit of 40 days for receipt of a tender is proposed, whereas in the existing directive no deadline is laid down for this.

2. The COR thinks that the proposal would mean less flexibility, and that the proposed change should not be introduced.
3. **The Committee of the Regions' recommendations on questions not covered in the draft directives**

1. **Procurement compatible with the environment**

1. In its earlier opinions, the COR devoted special attention to the possibility of imposing environmental requirements on procurement contracts. The current proposals for directives are unsatisfactory on this point, since some of the proposals apparently tighten the rules. The COR takes the view that it is essential for regional and local authorities to have the right to decide for themselves what is to be procured. The procurement directive should simply ensure openness and equal treatment in the procurement process. For example, a contracting entity which wishes to buy organic vegetables, or hormone-free meat, should have the right to do so and to refer to relevant environmental markings and certification systems. These requirements are to be set out in the specifications.
2. Since the Commission, in its draft explanatory communication on environment-friendly procurement, and by tightening up the draft directives, appears to some extent to question this right to buy what one wishes, the COR feels it important for the Commission to include in the directive provisions making it possible to impose requirements for environmental marking and certification on production processes and delivery of services.

2. **Inter-municipal cooperation**

1. In its opinions on the Green Paper and on the Communication on public procurement, the COR referred to the problems which the procurement directive raises for inter-municipal cooperation.
2. In the opinion on the Green Paper (point 2.4.3), the COR stated that "it must be established that procurement by regional and local authorities from their own independent legal entities does not fall within the scope of the directives and must be regarded as production carried out under their own management." The Commission was also urged to clarify that the transfer of tasks from e.g. a municipality to an inter-municipal cooperative enterprise (e.g. a waste disposal consortium) will not be covered by the directive.
3. These problems have also been dealt with by the Court of Justice in the Teckal case (Case C-107/98) and in the Arnhem case (Case C-360/96) and by national courts.
4. The COR calls upon the Commission to clarify these questions in the procurement directive.

3. **Privatisation**

1. The COR has also drawn the Commission's attention in the past to the problems

which can arise with the privatisation of public enterprises and in cases where employees are given the opportunity to set up their own business which, under contract, takes over tasks from local and regional authorities.

2. The COR takes the view that the rules on service procurement should not hinder these processes. On the contrary, it should be possible, as a transitional solution and for a limited period, to purchase without a procurement procedure; this means that the competition would increase in the long run.

4. **Definition of service contract and the division into 'A' and 'B' services**

1. The Commission should consider moving certain services from the 'A' to the 'B' category. Certain financial services, for example, are not suitable for procurement under the very formal rules in category 'A', since, among other things, the provisions on time-limits make it difficult to act in a businesslike manner.
2. Public service contracts are defined in the proposal as mutually binding agreements between one or more service providers and a contracting authority, which exclusively or principally should cover the services listed in Annex 1. There has been some confusion as to the meaning of "exclusively or principally", and the phrase ought to be replaced.

5. **Qualification systems**

1. The COR urges the Commission to include provisions concerning "qualification systems" in the classic directive which parallel those in the new Utilities Directive. Such arrangements are used in several Member States and their use is now severely constrained by the procurement directives. The Committee does not see why the use of systems by the utilities concerned is considered to be consistent with Community law while other contracting authorities are prevented from using them.

6. **Representation of local and regional authorities**

1. The COR wishes to draw the Commission's attention once again to the fact that, despite the central role played by local and regional authorities in the application of procurement rules, they are represented only to a very limited extent in the bodies which the Commission regularly consults.
2. The COR therefore urges the Commission to ensure that the local and regional levels are represented in these bodies; this would enable the Commission to make better use of the experience accumulated by the local and regional contracting authorities.

Brussels, 13 December 2000

The President

The Secretary-General

of the

of the

Committee of the Regions

Committee of the Regions

Jos Chabert

Vincenzo Falcone

¹ OJ C 373 of 2.12.1998, p. 13

² OJ C 244 of 11.8.1997, p. 28

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