



*European Economic and Social Committee*

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**European Procurement**  
**Market**

Brussels, 13 July 2011

**OPINION**

of the  
European Economic and Social Committee  
on the  
**Green Paper on the modernisation of EU public procurement policy - Towards a more efficient**  
**European Procurement Market**  
COM(2011) 15 final

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On 27 January 2011, the European Commission decided to consult the European Economic and Social Committee, under Article 304 of the Treaty on the Functioning of the European Union, on the

*Green Paper on the modernisation of EU public procurement policy - Towards a more efficient European Procurement Market*  
COM(2011) 15 final.

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 23 June 2011.

At its 473<sup>rd</sup> plenary session, held on 13 and 14 July 2011 (meeting of 13 July), the European Economic and Social Committee adopted the following opinion by 164 votes to 1 with 4 abstentions.

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## **Definitions**

Directive	Directive 2004/18/EC – procedures for award of public contracts
Authorities	Contracting authorities as defined in Article 1.9 of the Directive and subject to the Directive
Utilities	Contracting entities subject to directive 2004/17/E
Gold Plating	Made more onerous when implementing directives into national law <sup>1</sup>

## **1. Conclusions and recommendations**

- 1.1 The EESC welcomes the debate initiated by the Commission in its Green Paper in view of a modernisation of EU public procurement policy with a higher degree of efficiency in the context of a better functioning Single Market that is more innovative, greener, and more social. The Committee envisages drafting an additional opinion after the Commission's evaluation of the effects of Directive 2004/18/EC so far in order to complete the present opinion in the light of this evaluation.

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See EESC Opinions OJ C93/25, 27.4.2007, p. 25 and OJ C 24, 31.1.2006, p. 52.

- 1.2 The public procurement directives<sup>2</sup> seek inter alia to promote quality in public procurement. The last overall revision of the Directives took place in 2004. The EESC insists that any further revision should be prepared with the same care and precision as in 2004.
- 1.3 An overall analysis of the effects of the Directive and how it is implemented in Member States as well as of the judgments of the ECJ since 2004 is crucial for any revision. It should also be taken into account that a broad experience with the Directive across Europe is rather recent.
- 1.4 Unnecessary bureaucracy has to be reduced for the best results for everybody. Complicated legislation and widespread Gold Plating in Member States as a consequence of incorrect implementation of the Directive must be avoided. Europe 2020 implies a larger monitoring role of the Commission.
- 1.5 The EESC emphasises that the principles of openness and transparency as well as efficiency, legal certainty, value for money, competition, accessibility to the market for SMEs and liberal professions, proportionality, increasing cross-border contracts, avoidance of discrimination and corruption, and the need for professionalism remain as valid as before.
- 1.6 The EESC underlines the impact and importance of innovative, environmental and social aspects of Europe 2020 also for public procurement.
- 1.7 In order to increase engagement of the Member States to implement correctly the Directive as well as to incorporate Europe 2020 objectives in public procurement contracts, the EESC insists on special attention for this issue that should be discussed annually in the (Competitiveness) Council.
- 1.8 Intensified interest is shown in Member States concerning the role of public procurement in a smart economy. National authorities formulate, in varying degrees, environmental and social criteria to be taken into account by the purchaser. The special requirements of public procurement for non describable services<sup>3</sup> must be taken into account. Best practices and experiences should be part of the annual debate in the Council.
- 1.9 The EESC considers it a significant shortcoming that the Green Paper discusses neither the need for satisfactory professionalism nor the risk-aversion of public authorities. Professionalisation is key to promote innovation. Training programmes for purchasers in Member States should be drawn up. The Committee advocates benchmarking and exchange of good practices.

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<sup>2</sup> See the classic Directive 2004/18/EU and the Utilities Directive 2004/17/EU. This Opinion discusses in particular the classic Directive, hereafter the Directive.

<sup>3</sup> Independent professional activity whose subject matter is a task that cannot be described beforehand in clear and exhaustive terms.

- 1.10 The purchaser must take full responsibility for the economic, social and financial consequences in defining the characteristics of the works, products or services. This can imply to require a self-certificate or statement of compliance from the bidder concerning relevant national legislative provisions, e.g. regarding social aspects, restricting official certificates to the winner.
- 1.11 Especially in large projects the EESC is, given the need of promoting sustainable development, in favour of the application, wherever appropriate, of the principle of life-cycle costs.
- 1.12 The EESC is in favour of maintaining the difference between A and B Services under the condition of legal certainty and the possible extension of cross-border contracts of B Services. It recommends a periodic review of the list of B Services by the Commission to examine whether some B Services could, with advantage, be shifted to A Services.
- 1.13 Participation of SMEs, including social enterprises, must increase. Given diverging opinions among stakeholders the EESC is not in favour of changing the thresholds. Improvements must be achieved by using properly the principle of "proportionality", adjustment of publication methods, proper application of e-tendering, and, if practically applicable, splitting up contracts. The EESC recommends also programmes to support expertise of SMEs.
- 1.14 One of the objectives of the Directives is to combat favouritism, fraud and corruption. In modernising the Directives, anything which dilutes their rigour should be avoided. The Committee considers that advertising all public contracts through an e-Tendering process in advance would help to prevent abuses.
- 1.15 Since 1971, a main objective of the Directives was to promote European cross-border contracts in public procurement. The record is poor. The EESC recommends an analysis of (best) practices and examples in Member States followed by measures to open up markets<sup>4</sup>.
- 1.16 The EESC recommends that a decision concerning jurisdiction in cross-border contracts should form part of the contract from the outset.

## 2. **Introduction**

- 2.1 The Commission presents Public procurement as one of twelve initiatives as a lever for a Single Market which is greener, more social and more supportive to innovation<sup>5</sup>. In its Green Paper the Commission also underlines the need for efficiency and simplification, easier access for SMEs, and promotion of cross-border contracts.

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<sup>4</sup> See Recital 2 of the Directive: "... and to guarantee the opening-up of public procurement to competition".

<sup>5</sup> "Communication of the Commission on the Single Market Act, Twelve levers to boost growth and strengthen confidence", COM(2011) 206 final, section 2.12 Public procurement.

- 2.2 Public procurement in the EU has a long history. It embraces the ways and means by which Public Authorities and Utilities<sup>6</sup> meet their needs through procuring Works, Supplies and Services. A main goal was and is a European level playing field. However, the number of cross-border contracts remains very poor. This Opinion concentrates on the directive<sup>7</sup> where, as implied in the Green Paper, improvements should yield the greatest relative benefit.
- 2.3 Essentially the Directive is procedural, with specific legal provisions and guarantees, governing the process of inviting tenders and awarding contracts. The content of a contract awarded under the Directive is entirely a matter for the awarding Authority.
- 2.4 Following the original Public Purchasing (1972) and the Utilities (1993) directives, the 2004 versions of the directives introduced substantial modernisations, especially in the Authorities directive (2004/18/EC), as well as minor changes to the more up-to-date Utilities directive (2004/17/EC). The revision was the outcome of long and deep discussions between stakeholders. Implementation differs from country to country because of various cultural backgrounds, different legal traditions, and "gold-plating".
- 2.5 Many issues were taken into account in order to create an open, pan-European and transparent market including legal certainty, cost-awareness, value for money, quality, better competition, access to the market for SMEs, proportionality, innovation, sustainability – now Europe2020 – life-cycle costs, avoidance of discrimination and fraud, a level playing field and cross-border contracts.
3. **Developments since 2004**
- 3.1 In the time since the directives were first introduced many changes have taken place in procurement generally, and that process continues. The Green Paper contemplates whether some of the aspects which are commonplace in the commercial world and the Utilities should be introduced, enabled or enhanced.
- 3.2 The major techniques are innovation, negotiation and market awareness. Always used in the Utilities, and with some limitations, possible under the Directive they have not been widely practiced. Where such techniques are not practised and a significant level of experience is lacking, there is no pool of expertise and thus no realistic prospect of their becoming normal.
- 3.3 In an effort to be consistent with modern techniques, the Directive includes other techniques such as e-procurement and reverse auctions. Whilst the former has fairly wide application, the latter is really only suitable where price and delivery are the only criteria. The EESC draws attention to the need to improve cross-border electronic interoperability.

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<sup>6</sup> Entities in the water, energy, transport and post sectors.

<sup>7</sup> 2004/18/EC (public purchasing directive).

- 3.4 In long discussions on Services of General Interest (SGIs), it was concluded that these are not procurements as such but services provided by or on behalf of Authorities. The EESC reconfirms that Authorities are entirely free to carry out by themselves all or any of their functions, or to outsource those that they choose. National systems reflecting the principles enshrined in primary law of equal treatment, non-discrimination and transparency and providing for a general right to provide services should also be taken into account. The SGI<sup>8</sup> itself is thus not in principle covered by the directive but any outsourcing or procurement by or on behalf of the Authority in connection therewith would indeed be subject to the Directive.

Article 14 and the Protocol N. 26 on Services of General Interest of the TFEU recognise the specific nature and importance of public services, and the wide discretion of national, regional and local authorities to decide on how they are provided, commissioned and organised. This includes in-house and public-public co-operation. Ensuring a high level of quality, safety, affordability, equal treatment and the promotion of universal access and user rights is paramount.

- 3.5 The Directive does not in any way dictate what an Authority should or should not procure or outsource; it only sets out the procedures for that procurement or outsourcing. The EESC believes that this freedom must not be impaired.

### 3.6 **Negotiation**

- 3.6.1 The EESC urges the Commission to clarify in the Directive the circumstances in which an Authority may award a contract directly to an entity over which it exercises a control analogous to that exercised over its own internal departments. The EESC asks that the Directive should be amended to set out the relevant conditions for exemption from its requirements.

- 3.6.2 With the increased emphasis on innovative proposals and "outcome-based" specifications, discussion between purchasers and tenderers during the tender procedure is essential. For that reason a general negotiated procedure similar to that in the Utilities directive, or to Competitive Dialogue but without the "exceptionally complex" restriction, is needed. This includes already existing rules for public procurement of non describable services.

- 3.6.3 It is said that such a procedure could enable the various tenderers to put forward their proposals and that the purchaser could then pick the best elements from them ("cherry-picking") and issue the resulting hybrid specification as a new call for tenders, to be carried out without "negotiation". Such a concept is false. Tenderers must be able to protect their intellectual property – whether patented or not – at all times, and thus their ideas should not

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See Art. 14 and 106 TFEU and protocol nr. 26 TFEU.

be offered to other suppliers to exploit, even in a limited fashion, without their express consent.

- 3.6.4 Negotiation of contracts – especially complex ones - obviously requires substantial skill on the part of the purchaser. The introduction of a general Negotiated procedure must be accompanied by measures to ensure availability of people on the purchasing side with the necessary skill and experience.

### 3.7 **Innovation**

- 3.7.1 Innovation in public contracts is discussed in the Green Paper. In procurement there are three main levels:

- the willingness to accept a novel solution to a traditional requirement;
- participation in the development of a solution; and
- sponsorship of a development project.

- 3.7.2 The easiest and probably most productive aspect is willingness to accept a novel solution. The EESC recommends that openness by the purchaser who should dispose of sufficient competences, to proposals for a novel solution must be promoted. Therefore the purchaser should be willing to consider alternatives unless it expressly states otherwise. But public officials are often reluctant to do so because of risk aversion rather than through any administrative or legal impediment.

- 3.7.3 There are barriers even to the concept of alternative proposals. The ability to offer innovative proposals is made much more practical if the purchaser states its requirements in terms of the problem to be solved rather than in terms of the solution. Such an approach enables the tenderer to use its proper skills to propose the best solution, either traditional or innovative.

- 3.7.4 Where an Authority participates in an innovative solution, as for example in the development of a major database system, participation and support by the Authority at all levels is essential. Without it, the risk of failure is high.

- 3.7.5 In the concept of Pre-Commercial Procurement<sup>9</sup> it is proposed that Authorities should sponsor new developments and act as early adopters. Potential failure makes this a risky affair. Experience shows that few Authorities are by their constitution, organisation or experience well suited to that activity, which should only be embarked upon with caution.

- 3.7.6 Sustainability of production and consumption is high on the agendas. It is widely recognised that innovation in sustainable development is of huge significance in relation to the scope for promoting good jobs and companies within the EU as part of the EU 2020 Strategy. Properly

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<sup>9</sup> "Pre-Commercial Procurement – driving innovation to ensure sustainable high quality" - COM(2007) 799.

achieved, it provides strong economic benefits. In many procurements, life cycle costs need to be taken into account. They include quality, the original price, maintenance, operation and final disposal, as may be applicable. An approach based on quality will encourage innovation and good working practices and conditions, which lead to greater efficiency and cost savings in the long run. The techniques for making such assessments are well established. The EESC recommends that steps should be taken to encourage public purchasers to adopt and use such techniques.

#### **4. Reasons for further modernisation**

##### **4.1 Legal aspects**

- 4.1.1 Good transposition into national law is essential, but it remains a thorny issue. It should have been given explicit attention in the Green Paper. Too few Member States tend to transpose well. Correct implementation serves the interests of all stakeholders. Gold Plating leading to enhanced administrative burdens and bureaucracy creates unnecessary obstacles, in particular for SMEs - the concept of SMEs and the reference to businesses must include all forms of actors, be they profit or non-profit, under fair competition in compliance with the rules- as well as rising costs for the Authority. The Directive is clear and not very complicated. Despite differences in legal systems and approaches, additional requirements and formalities should be avoided. According to the EESC, the Commission should monitor more actively the implementation process, endeavouring to encourage simplicity and clarity in national legislation.
- 4.1.2 There is a systemic problem in the application of the Remedies directive in cross-border contracts. In cross-border contracts it is not clear which jurisdiction should apply, that of the purchaser or that of the supplier. The EESC suggests that such a decision should form part of the contract at the outset.
- 4.1.3 In some contracts, especially those of long duration, circumstances arise requiring changes to some part of the contract provisions. Whilst those situations are sometimes unavoidable, the opportunity for corruption is increased. The Directive restricts the changes which may be permissible in framework contracts (Article 32) but is otherwise silent. In the EESC's view, the risk of corruption and/or a lack of contractual certainty if the rules were relaxed to afford generally more flexibility, has damaging effects. Therefore the Directive should remain in that aspect unchanged.
- 4.1.4 In the Directive, Services are divided in two categories, A and B. A services must comply whilst B services have, generally, a lighter regime. The Green Paper asks whether, in view of the increasingly cross-border nature of many types of service, the division is any longer appropriate. The EESC is in favour of maintaining the difference between the two categories subject to legal certainty and the possible transfer of cross-border B services to the A list. It

recommends a periodic review of the list of B services by the Commission to examine whether some could, with advantage, be moved to A services.

## 4.2 Practices

- 4.2.1 A significant barrier to progress in well functioning public procurement is a lack of satisfactory professionalism and expertise of public Authorities. It is a shortcoming that the Green Paper does not discuss this basic condition for any public purchasing. There are too few incentives to improve. The EESC strongly recommends campaigns of training of officials – in particular at local and regional level - in negotiating and putting viable contracts<sup>10</sup> on track.
- 4.2.2 Furthermore the culture of public procurement needs to change. Procurement is not simply a clerical exercise, and all levels and branches of management need to be involved as may be appropriate to the contract as is the case in many commercial companies. Only commitment to modern procurement practices, in particular risk management, from the very top to the bottom of an Authority can ensure success. Practices in the Utilities provide positive examples.
- 4.2.3 Professionalisation of the procurement function within the public sector must be fostered through internal development and the recruitment of professionals, thereby raising the role and the profile of the function. In a number of cases two additional measures have been successful: the recruitment of experienced purchasing executives from other industries, and the establishment of purchasing agencies providing expertise to the Authority for the duration of the tendering process. The quality of purchasers differs from country to country. The EESC advocates benchmarking and exchange of good practices.
- 4.2.4 During the pre-tender period an Authority's senior buyers or project managers should inform themselves about what is currently available in the market before preparing the tender documentation. Such research typically includes technical magazines, trade exhibitions and talking to suppliers in the relevant field.
- 4.2.5 There is also a need for increased professionalism in SMEs. Special courses and people experienced in tendering can help to upgrade qualifications and knowledge.
- 4.2.6 One aspect of risk-aversion is the excessive use of the "lowest price" award criterion. Whilst some procurements have no realistic criteria except price – and perhaps delivery – the majority have other valuable characteristics contributing to a better outcome. Lowest price criterion inhibits innovation and the pursuit of better quality and value, responding to the requirements of Europe2020 and does not necessarily lead to more value.

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An illustrative example is the Dutch foundation PIANNO. In the same vein, the Confederation of Dutch industries and the Association of Dutch Municipalities are planning a broad common campaign among civil servants responsible for public purchasing across the country.

- 4.2.6.1 Use of the lowest price criterion should therefore be made an exception rather than the rule. By extending the “most economically advantageous” criterion to assess the sustainably most advantageous tender, Authorities can achieve the optimum sustainable environmental and social as well as economic value. The EESC encourages Authorities to use life-cycle costing wherever possible and appropriate.
- 4.2.7 Given the multitude of medium-sized and, notably, small municipalities, these should be recommended, if not obliged, to cooperate in projects with a critical scale for reasons of professionalism, efficiency and financial aspects. The EESC asks special attention for this aspect and it recommends exchange of best practices anyway, and clarification on the public purchasing rules in this context.
- 4.2.8 Statistical analysis shows that in particular SMEs are underrepresented in public procurement above the EU-thresholds. The EESC is in favour of creating a level playing field in public procurement enabling SMEs "to secure a ‘fair share’ of public contracts". The EESC is not in favour of measures of positive discrimination in relation to SMEs, amongst others because of artificial constructions and, consequently, possible corruption. Notwithstanding this, where practical, Authorities should be encouraged to subdivide contracts into lots to make opportunities for SMEs more visible and, thus, more accessible.
- 4.2.9 There are conflicting views over thresholds. They were established after extensive discussion and careful consideration, are consistent with those in the GPA and have been adjusted periodically in the light of inflation and exchange rate variances. There have been calls for the thresholds to be raised and also for them to be lowered. None of those arguments is strongly convincing and the EESC recommends that the present practical levels should be maintained. Below the thresholds, national procedures apply, subject to Treaty obligations. It is desirable that they should be as nearly consistent with the Directive procedures as possible, for the avoidance of doubt and confusion and so that the purchasers only have to use effectively one set of procedures.
- 4.2.10 To encourage transparency and reduce malpractice the EESC recommends that all public contracts, without exception, should be advertised in advance. Notices of contracts below the thresholds and for B-services should be in a very simple form on an EEA-wide e-Tender website<sup>11</sup>.
- 4.2.11 The drive for more professionalism can also help to simplify national procedures which at present often lead to disproportionate costs. Concrete situations vary greatly, confusion and fights over interpretation should be avoided. More straightforward national approaches should act as examples for others.

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<sup>11</sup> See for e-Procurement INT/554.

- 4.2.12 A tendency for Authorities to require financial guarantees, insurances and performance bonds presents a further barrier to SMEs. Moreover, financial resources tend to be less accessible today and it is wasteful to use limited funds of SMEs to support such guarantees. Authorities need to be reminded of their obligation to avoid disproportionate qualification and financial requirements, rather than relying on guarantees.
- 4.2.13 Initiatives in these fields are being taken in order to improve the situation in the Member States. The EESC advocates strongly a list of best practices and, in line with practices in some Member States, regular panels with purchasing authorities and experienced experts at EU-level.
- 4.2.14 As an aid to SMEs, Authorities could set up electronic portals to:
- widen access on information on public procurement opportunities below the EU threshold;
  - allow SMEs to register an interest in partnering opportunities with other interested SMEs, and
  - develop a secure section on a central e-Tender website where SMEs could upload and edit/update administrative information to be used by contracting authorities.

## **5. Interaction between procurement and other agendas**

- 5.1 In addition to the objective of increasing the efficiency of public spending<sup>12</sup>, the Green Paper asks for views on enhanced interaction between public procurement and other agendas, notably innovation, environmental and social.
- 5.2 Since 2004 sustainable development and inclusive growth have been alongside enhanced competitiveness priorities and confirmed again by Europe 2020. These aspects should also be taken into account in public procurement contracts.
- 5.3 The EESC agrees that national and regional authorities should be encouraged to take societal aspects into account which means that in preparing contracts there should be free room for such elements.
- 5.4 ILO Convention C94 on Labour Clauses in public contracts adopted in 1949 is currently binding in 10 EU Member States, though others including Ireland, apply the Convention voluntarily in public contracting. The EESC takes note of the principles contained in the Convention and suggests that Member States should be encouraged to ratify the convention and follow its principles.

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<sup>12</sup> Green Paper, page 4, 3rd paragraph.

- 5.5 The EESC underlines that the Directive gives shape to a set of procedural rules which establish the relationship between contracting parties in public procurement. In earlier documents the Commission concluded on the basis of extensive consultations the way in which innovative products/services/processes, and environmental and social goals can be considered by purchasing Authorities in preparing contracts<sup>13</sup> or in using pre-commercial procurement.
- 5.6 Concerning innovation and public procurement the pioneering Aho Report and "A Lead Market Initiative"<sup>14</sup> are worth mentioning. Innovation can concern a very wide range of issues: high-tech, low-carbon, low-energy, new and alternative methods for health care and social services, construction, transport, infrastructure and others. The EESC underlines that demand can have a critical role as driver of innovation<sup>15</sup> which has been neglected or downplayed for many years. It can indirectly promote engagement of universities and R&D Centres together with the continued innovation of, for example, SMEs and actors in the social economy.
- 5.7 In response to questions in the Green Paper the EESC underlines that the primary public procurement responsibility is with national, regional, local and European authorities who have on a case-by-case basis to consider the right mix between societal requirements of any kind – innovation, environment, social<sup>16</sup> (including social regulations in relation with disabilities) aspects and efficiency, production periods, costs, number of suppliers, possible outcome of contracts, etc. within the framework of the directives.
- 5.8 Authorities are free to define specific requirements, including environmental and social ones. In a number of cases they will do so because EU- and/or national legislation requires them to do so, for example in case of general or sector-bound environmental standards. In other cases such requirements can be linked to the realisation of concrete projects, such as large infrastructure works.
- 5.9 Technical specifications should where appropriate be broadened to include production/process characteristics. This would simplify and make more transparent the scope for contracting authorities to be able to make important choices in promoting sustainable objectives including environmental sustainability, enforcement of collective agreements, labour standards, working conditions and equal pay for equal work. The green electricity case

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13 See the notes in the Green Paper on page 34. See also the guide "Build for All", November 2006, for including accessibility criteria into public procurement procedures.

14 See the Aho Group Report "Creating an Innovative Europe", 2006 and of "A Lead market Initiative", EC - October 2010.

15 See amongst others: Public procurement and innovation – Resurrecting the demand side, Jakob Edler, Luke Georghiu, [www.sciencedirect.com](http://www.sciencedirect.com), Research Policy (2007) 949-963.

16 See the handbook Buying Social – A Guide to taking account of social considerations in public procurement – SEC(2010) 1258, elaborated by the European Commission on October 2010.

is a clear case example of how and why production characteristics should be included as technical specifications and not relegated to performance conditions only<sup>17</sup>.

- 5.10 The EESC recommends that the Commission should provide, as necessary, a consolidated document, incorporating the Directive and relevant ECJ jurisprudence. Such a document will enhance accessibility and be of great help in providing a single source to aid legal certainty.
- 5.11 In line with the general debate on the need for a smart European economy, intensified discussions are taking place in Member States on the role of public procurement in this process<sup>18</sup>. In varying degrees Member States are formulating environmental, and to a lesser degree, social criteria that have to be taken into account by purchasers. Labour agreements and national legislation differ considerably in the various Member States. It is the responsibility of each country to ensure compliance with its own relevant laws.
- 5.12 The EESC recommends that this ongoing process should be discussed annually in the (Competitiveness) Council. Best practices and experiences should be highlighted. Increasing convergence of practices will also improve the conditions for cross-border contracts.
- 5.13 Whatever social or environmental requirements are put forward as award criteria, it must be possible to evaluate them and give them a weighting relative to other criteria.
- 5.14 A condition would be, within the procurement competence, for awarding bodies to make sure that bidders meet, in addition to the criteria set out in the articles 44 to 51 of the Directive<sup>19</sup>, the social regulations (among others, in relation with the integration of disabled persons<sup>20</sup>), as it would be against the European and national regulation for the public authorities to contract with entities which do not comply with the legislation.
- 5.15 Member States should require a self-certification or statement of compliance from the bidder, stating that the applicable legislation is complied with in each State in terms of labour integration of disabled persons, such as the obligation to recruit a specific number or percentage of disabled persons, in the countries where such obligation legally exists.
- 5.16 Another social measure must, where appropriate, clearly be for technical specifications to be defined in a way to consider accessibility criteria for persons with disabilities and design for all users.

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<sup>17</sup> See case C-448/01 EVN AG v Austria (2003) ECRI – 14527 (EVN – Wienstrom)

<sup>18</sup> See a broad overview in "Corporate Social Responsibility, National Public Policies in the European Union", November 2010.

<sup>19</sup> Art 44: Verification of suitability; Arts 45-51: Criteria for qualitative selection.

<sup>20</sup> "European Disability Strategy 2010-2020" - COM (2010) 636 final.

- 5.17 Another aspect that must be born in mind, to ensure equal opportunities for the benefit of all and for social insertion, refers to the adjudication of contracts reserved for sheltered workshops of disabled persons. This possibility is explicitly foreseen in recital 28 and Article 19 of Directive 2004/18. The EESC is of the opinion that the Commission should expressly recommend that a percentage or number of such contracts be made enforceable in those Member States where this is justified, for example if there were substantial numbers of disabled people capable of working who remained inactive.
- 5.18 One specific issue which needs to be addressed is the complexity of public procurement regulations in relation to social services of general interest. The Green Paper (section 4.4) puts the question whether the applicable thresholds for such services should be raised, in order to take better account of the specificities of social services. The Committee looks forward to closely following the ongoing work in this area, notably through Communication (COM)2011 206 final, being aware of the undesirability of selective changes in the thresholds.
- 5.19 Under the Europe 2020 strategy the Commission should be given the competence to monitor closely this modernisation process in the Member States. Publication on a website of all Contract Award Notices, regardless of value, to include the type of company was awarded the contract (micro, SME or large) and the contract value of contract would aid that activity.
6. **Unsatisfactory practices**
- 6.1 One of the objectives of the Directive is to combat favouritism, fraud and corruption. These practices are not unique to public procurement but the absence of commercial disciplines, as noted in the Green Paper, provides an additional dimension, as the State may well not always police such practices conducted by its own agencies. The Directive is not a substitute for corruption or competition law but, by their rigorous procedural discipline, they provide an additional line of defence.
- 6.2 The EESC believes that provisions in terms of subcontracting need strengthening. Multiple layers of subcontracting may create difficulties in enforcing collective agreements, working conditions and health and safety procedures. Public authorities should be given more scope to influence the contract to meet quality, social and environmental objectives. Details relating to principal subcontractors should be declared before the contract is awarded, and the public authority should be clear on the responsibilities and liabilities to enable its effective monitoring of the contract. There should be mechanisms in place for public authorities to vet and reject subcontractors where they have concerns
- 6.3 A contract is normally placed with a prime contractor skilled and experienced in the performance of the work, supply or service required. The prime contractor takes responsibility for the entire contract and is answerable to the purchasing Authority for performance thereof. That responsibility includes inter alia management of the acquisition of

materiel and of any subcontracts which it enters into. The procedures for penalising and excluding bidders under the abnormally low tender article should be less complex, particularly in relation to compliance with employment protection and working conditions in force. Currently there is a mandatory and complicated procedure of requests in writing before a tender can be rejected. Provisions for information on the economics of the construction method, the manufacturing process or the services provided, also need revisiting. Mandatory requirements should be established for bidders to provide information to the contracting authority rather than the authority having to seek this information. The Directives should be amended to include these changes in the interests of promoting decent work, equal treatment of workers, and wider sustainability objectives.

- 6.4 Anecdotal evidence indicates that the main unsatisfactory practice is favouritism, where the contracting authority places contracts, sometimes without even advertising the intention, with a favoured supplier. Such covert activities are difficult to identify as they do not become apparent until after the event. The EESC considers that through an e-Tendering process advertising all public contracts in advance would help to prevent this abuse without putting an undue burden on public authorities.
- 6.5 The EESC points out that more must be done to support the monitoring of compliance with the terms of the contract post award, including contract performance clauses. Authorities are currently under increasing financial and resource pressure as a result of the financial crisis and, simultaneously, agencies monitoring health and safety, labour standards and environmental protection are also seeing cut-backs. As cancelling a tender and re-tendering can be very expensive, Authorities can seem powerless when faced with a non-compliant or defaulting supplier. Costs of ensuring compliance should be factored in to procurement budgets, and a range of other penalties for failing to comply with the terms of the contract should also be considered.
- 6.6 Strict precautionary measures are needed within businesses to prevent corruption. This should be promoted by supporting businesses in taking internal remedial measures after misconduct has occurred. Businesses that follow best practice should be allowed to re-enter the market once they have concluded such a process. The strict requirements applicable to such cases should be laid down in the directives, in order to avoid the current variability in practices between the Member States.

## 7. **External dimension**

- 7.1 The external dimension of EU public procurement cannot ignore the EU's obligations to promoting decent work, equality, respect for fundamental rights, freedoms and labour standards and environmental protection and energy efficiency in third countries. These are not principles we leave behind when we move outside our borders. Any revision of public procurement rules must reinforce these principles externally as well as internally. More has to be done at EU level to improve social and environmental standards in supply chains, and

needs to be addressed simultaneously in trade policy. The EU Commission has to seriously engage with the key actors involved such as trade unions and NGOs to developing workable strategies and structures.

- 7.2 The Agreement on Government Procurement (GPA) is the framework and the platform to create a world level playing field for public procurement. As many countries as possible should be encouraged to join as members.
- 7.3 Open international public procurement markets are advantageous for European tenderers as many European companies, including SMEs, are global leaders in construction, public works, alternative energy and environmental protection<sup>21</sup>. The EESC insists that the EU must aim at improving access to third countries' public markets. Reciprocity must be ensured<sup>22</sup>.
- 7.4 The EESC considers it of high interest that third country (State-owned) companies respect the same public purchasing rules as European-based companies, particularly as regards prohibited direct or indirect state aid, price calculation and precautionary consideration of costs and risks, when they apply for public contracts in the EU. Enforcement of compliance is not easy. This issue has to be satisfactorily arranged in reviewing the 2004 Directive<sup>23</sup>.

Brussels, 13 July 2011.

The President  
of the  
European Economic and Social Committee

Staffan Nilsson

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<sup>21</sup> See EESC opinions "International public procurement" (OJ C 224 of 30.8.2008, p.32). and "Third country state-owned enterprises in EU public procurement markets" (CESE 807/2011 - CCMI/082) (not yet published in the Official Journal).

<sup>22</sup> Concerning social aspects see the recently adopted Opinion on Industrial policy in a globalised era, points 6.29 and 6.30, on ILO-norms and Corporate Social Responsibility, (CESE 808/2011 - CCMI/083, not yet published in the Official Journal).

<sup>23</sup> See CESE 807/2011 (CCMI/082), which amply deals with this particular issue (not yet published in the Official Journal).