



*European Economic and Social Committee*

**INT/624-625-626**  
**Public procurement and**  
**concession contracts**

Brussels, 26 April 2012

**OPINION**

of the

European Economic and Social Committee

on the

**Proposal for a Directive of the European Parliament and of the Council on procurement by  
entities operating in the water, energy, transport and postal services sectors**

COM(2011) 895 final – 2011/0439 (COD)

**Proposal for a Directive of the European Parliament and of the Council on public procurement**

COM(2011) 896 final – 2011/0438 (COD)

**Proposal for a Directive of the European Parliament and of the Council on the award of  
concession contracts**

COM(2011) 897 final – 2011/0437 (COD)

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Rapporteur: **Mr Cabra de Luna**

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On 19 January 2012 the European Parliament, and on 10 February 2012 the Council, decided to consult the European Economic and Social Committee, under Articles 53(1), 62 and 114 of the Treaty on the Functioning of the European Union, on the

*Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors*

COM(2011) 895 final – 2011/0439 (COD).

On 17 January 2012 the European Parliament, and on 10 February 2012 the Council, decided to consult the European Economic and Social Committee, under Articles 53(1), 62 and 114 of the Treaty on the Functioning of the European Union, on the

*Proposal for a Directive of the European Parliament and of the Council on public procurement*

COM(2011) 896 final – 2011/0438 (COD).

On 17 January 2012 the European Parliament, and on 10 February 2012 the Council, decided to consult the European Economic and Social Committee, under Articles 53(1), 62 and 114 of the Treaty on the Functioning of the European Union, on the

*Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts*

COM(2011) 897 final – 2011/0437 (COD).

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 17 April 2012.

At its 480th plenary session, held on 25 and 26 April 2012 (meeting of 26 April), the European Economic and Social Committee adopted the following opinion by 179 votes to 33 with 12 abstentions.

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## **1. Conclusions and recommendations**

- 1.1 The review of the directives on public procurement comes as part of an overall programme whose purpose is an extensive modernisation of the procurement system in the European Union, concerning both public procurement in general and procurement by entities operating in the water, energy, transport and postal services sectors. Also included is a new proposal for

a directive on the award of concession contracts, which so far have been only partially regulated at European level.

- 1.2 The support for EESC opinion INT/570 on the *Green Paper on the modernisation of EU public procurement policy - Towards a more efficient European Procurement Market* was almost total, as is shown by the outcome of the vote, as a result of which the Committee must uphold the same principles and views in the present opinion. This has not precluded the present opinion from taking this broad-based consensus as a basis to develop principles and points of view tailored to these specific and concrete legislative proposals.
- 1.3 The EESC emphasises the importance of taking account of the innovative environmental and social aspects of the Europe 2020 Strategy with regard to public procurement.
- 1.4 More specifically, it advocates *inter alia* promoting quality and innovation in public procurement, reducing unnecessary bureaucracy, including environmental and social aspects (protecting jobs and working conditions as well as persons with disabilities and other disadvantaged groups), encouraging selection of the most economically advantageous offer rather than the one with the lowest price, which should be the exception rather than the rule, in order to encourage smarter and more efficient public procurement, highlighting the need for greater professionalisation, increasing the participation of SMEs, including social enterprises, combating favouritism, fraud and corruption, and promoting European cross-border contracts in public procurement. The EESC supports the application of the lifecycle costs principle in view of the need to promote sustainable development.
- 1.5 The EESC believes that having common European procurement procedures would ensure greater transparency and objectivity. In any case, the proposals would allow each Member State considerable administrative flexibility to adjust procedures and tools to their own specific situations. All these parameters, combined with those of quality and professionalism, are unquestionably of benefit to the public and the general interest.
- 1.6 After lengthy discussions on Services of General Interest (SGIs), it was concluded that these are not procurement as such but services provided by or on behalf of authorities. The EESC reiterates that contracting authorities are free to carry out all or some of their functions themselves or to outsource those tasks which they deem appropriate.
- 1.7 The EESC reconfirms its support for the award of reserved contracts to sheltered workshops for disabled people and to social enterprises that employ other disadvantaged groups, in order to ensure equal opportunities for the benefit of all citizens and in the interests of social integration.
- 1.8 The rules on the confidentiality of the information contained in companies' offers must be strengthened.

- 1.9 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.
- 1.10 Again with regard to technical specifications, the EESC takes a highly positive view of the requirement that these specifications shall, except in duly justified cases, be drawn up so as to take into account accessibility criteria for persons with disabilities and design for all users.
- 1.11 Regarding the grounds for exclusion in Article 55(3) of the proposal on public procurement, the EESC welcomes the fact that the contracting authorities may exclude tenderers who fail to comply with obligations established by Union legislation in the field of social, labour or environmental law or with international provisions of social and environmental law listed in Annex XI. It is also, however, self-evident that it should be explicitly stated that they may also be excluded when they fail to comply with the national legislation of the relevant Member State in the social, labour or environmental fields, and collective agreements in force in the place where the work, service or supply is performed. At all events the EESC considers that exclusion for these reasons should be mandatory.
- 1.12 As argued in the earlier EESC opinion INT/570, it would be necessary for Article 57 of the proposal on public procurement to explicitly require bidders to state that "they have complied with the applicable legislation 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". This would not of course be necessary in countries where no such obligation exists.
- 1.13 Opinion INT/570 also noted that ILO Convention C94 on Labour Clauses in public contracts adopted in 1949 is currently binding in ten 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.
- 1.14 The EESC believes that excessive use continues to be made of the "lowest cost" or "lowest price" award criterion. This excessive use inhibits innovation and the pursuit of better quality and value, responding to the requirements of the Europe 2020 Strategy, and does not necessarily lead to more value. Use of the lowest price criterion should therefore always be the exception rather than the rule.
- 1.15 The EESC considers that the provisions on subcontracting must be strengthened. Multiple layers of subcontracting pose difficulties in applying collective agreements, rules on working conditions and procedures on health and safety. Public authorities should be given more leeway to enable them to influence contracts as regards achieving social, environmental and

quality objectives. The details of the main subcontractors should have to be declared before the contract is awarded, and the public authority should specify the responsibilities and duties of all concerned to enable effective supervision and monitoring of the contract. Machinery should be set up so that public authorities can veto and reject certain subcontractors if there is any cause for concern.

- 1.16 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. In the previous opinion INT/570 it was recommended that there should be 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. The EESC is in any case concerned about the various public service contracts previously included on the list of B Services, which has now been removed from Annexes XVI or XVII, as appropriate, of the proposals. These annexes list the services to which the procedure governed by Articles 74 to 76, or 84 to 86, of the two proposals is applicable. On the other hand, the EESC considers that the reference to religious services and services furnished by trade unions currently included in Annexes XVI and XVII of the proposals must be removed.
- 1.17 The EESC notes that considerable doubt persists regarding the need for a EU directive on the award of concession contracts and recalls the European Parliament's resolution of 25 October 2011 on modernisation of public procurement (2011/2048(INI)) in which it considered that "any proposal for a legal act dealing with service concessions would be justified only with a view to remedying distortions in the functioning of the internal market; points out that such distortions have not hitherto been identified". The EESC calls for a further and full impact assessment to be carried out before these proposals are allowed to progress.
- 1.18 The EESC considers that services of general economic interest are often subject to specific EU and national regulations aimed at ensuring their accessibility, affordability and quality, ensuring equal treatment and universal access, and user safety and rights, which should be recalled and guaranteed by the proposal. In line with the Protocol on services of general interest of the Lisbon Treaty, national, regional and local authorities must retain their wide margin of discretion to decide on the modes of organising and providing those services and to define their characteristics in order to pursue their general interest objectives.
- 1.19 Public authorities can rightly choose to carry out public contracts in-house or to cooperate with other public authorities as recognised in the European Treaties and the case-law of the Court of Justice of the EU and in keeping with the principles of transparency.
- 1.20 The EESC advocates the setting up of national oversight mechanisms in the Member States in charge of the implementation and monitoring of public procurement.

## 2. Overall view of the European Commission's proposals

- 2.1 Each year, the public authorities spend some 18% of GDP on goods, services and works. Given the current budgetary restrictions, public procurement policy must ensure the optimal use of funds in order to foster growth and job creation and thereby help to achieve the objectives of the Europe 2020 Strategy.
- 2.2 The current generation of public procurement directives are the product of a long evolution that started in 1971 with the adoption of Directive 71/305/EEC<sup>1</sup>. A comprehensive economic evaluation has shown that the procurement directives have achieved their objectives to a considerable extent. However, major advances are still required to achieve the objectives of social and environmental sustainability. It is true that they have resulted in greater transparency, higher levels of competition and lower prices but attention must also be paid to jobs, wages and working conditions so that the objectives of growth and job creation in the Europe 2020 Strategy and the cross-sector social and environmental requirements set by the Treaty of Lisbon are not compromised.
- 2.3 The EESC would also like to draw attention to the possibility of analysing the potential or importance of economically dependent self-employed workers<sup>2</sup>.
- 2.4 Stakeholders have called for a review of the public procurement directives to simplify the rules, increase their efficiency and effectiveness and make them better suited to deal with the evolving political, social and economic context.
- 2.5 The review of the directives on public procurement comes as part of an overall programme whose purpose is an extensive modernisation of the procurement system in the European Union, concerning both public procurement in general and procurement by entities operating in the water, energy, transport and postal services sectors. Reform of public procurement legislation is one of the twelve planned measures in the Communication from the Commission on the *Single Market Act – Twelve levers to boost growth and strengthen confidence*, adopted in April 2011.
- 2.6 Also included is a new proposal for a directive on the award of concession contracts, which so far have been only partially regulated by secondary law at European level. However, various organisations, both from industry and the trade unions, together with a number of political actors and public authorities, have already been expressing clear opposition to the proposal, because they doubt that it can bring greater legal security and duly respect the role of public authorities in making decisions in accordance with their own prerogatives as conferred upon them by the European Treaties.

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<sup>1</sup> OJ L 185, 16.8.1971, p. 5, ESC opinion OJ 63, 13.4.1965, p. 929.

<sup>2</sup> [OJ C 18, 19.1.2011, pp. 44-52.](#)

- 2.7 In general, as far as both public procurement and concession contracts are concerned, the EESC is pleased that the Commission has taken into account the specific nature of social services and is proposing a simplified procedure. However, there is still no precise demarcation of "procurement" and "concession" from other ways of perceiving public and especially social tasks. The EESC therefore proposes that both the directives include additions to the effect that Member State procedures under which all service providers meeting pre-determined legal conditions, regardless of their legal form and in accordance with the principles of transparency and non-discrimination, are eligible to provide services shall not be considered as service concessions or award of contracts.

3. **EESC Opinion INT/570 *Towards a more efficient European Procurement Market***

- 3.1 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.
- 3.2 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.
- 3.3 At its plenary session meeting of 13 July 2011, the European Economic and Social Committee adopted opinion INT/570 on the Green Paper by 164 votes to 1, with 4 abstentions.
- 3.4 The support for this opinion was almost total, as is shown by the outcome of the vote, as a result of which the Committee must uphold the same principles and views in the present opinion, firstly because nothing has happened in the meantime to require them to be changed, and secondly because the same majority and spirit of cooperation that prompted the entire European Economic and Social Committee to agree on the previous opinion should be maintained. Taking this broad-based consensus as a basis does not, however, preclude the development of principles and points of view tailored to these specific and concrete legislative proposals.
- 3.5 In opinion INT/570, the EESC welcomed the debate initiated by the Commission in its green paper with a view to modernising EU public procurement policy with a higher degree of efficiency in the context of a better functioning Single Market that was more innovative, greener, and more social.
- 3.6 The opinion also advocated *inter alia* promoting quality and innovation in public procurement, reducing unnecessary bureaucracy, including environmental and social aspects (protecting jobs and working conditions as well as persons with disabilities and other disadvantaged groups), encouraging selection of the most economically advantageous offer rather than the one with the lowest price, in order to encourage smarter and more efficient

public procurement, highlighting the need for greater professionalisation, increasing the participation of SMEs, including social enterprises, combating favouritism, fraud and corruption, and promoting European cross-border contracts in public procurement.

4. **Proposal for a Directive on public procurement – COM(2011) 896 final – and Proposal for a Directive on procurement by entities operating in the water, energy, transport and postal services sectors – COM(2011) 895 final**

4.1 The proposed reform aims to thoroughly modernise the existing tools and instruments to fit in better with the changing political, social and economic context. For this reason it was considered necessary, on the basis of the EU Treaties, to draw up a distinct directive for public procurement and another for procurement by entities operating in the water, energy, transport and postal services sectors.

4.2 The European Commission's reform has two complementary objectives:

- to increase the efficiency of public spending so as to ensure the best possible procurement outcomes in terms of value for money. This implies in particular simplification of the existing public procurement rules. Streamlined, more efficient procedures will benefit all economic operators and facilitate the participation of SMEs and cross-border bidders; and
- to allow procurers to make better use of procurement in support of common societal goals such as protection of the environment, higher resource and energy efficiency, combating climate change, promoting innovation, employment and social inclusion and ensuring the best possible conditions for the provision of high-quality social services.

4.3 The EESC believes that having common European procurement procedures would ensure greater transparency and objectivity, in turn making it more difficult for favouritism to affect awards. In any case, the proposals would allow each Member State considerable administrative flexibility to adjust procedures and tools to their own specific situations. All these parameters, combined with those of quality and professionalism, are unquestionably of benefit to the public and the general interest.

4.4 The concept of bodies governed by public law is unclear. The concept of a public body as contained in Article 2 of the two proposals for directives (public procurement and procurement by entities operating in the water, energy, transport and postal services sectors) requires further clarification.

4.5 The EESC considers the thresholds for the application of both directives laid down in Articles 4 and 12 of the proposals to be appropriate.

4.6 After a long debate on services of general interest (SGI), it was concluded that these are not public contracts in the true sense of the term, but services provided by authorities or on their



behalf. The EESC reiterates that contracting authorities are free to carry out all or some of their functions themselves or to outsource those tasks which they deem appropriate. Account must also be taken of the systems of the Member States which respect the principles of equal treatment, non-discrimination and transparency laid down in EU primary law and which provide a general right of access to the provision of services. SGIs<sup>3</sup> themselves should not, therefore, come within the scope of the directive, although any outsourcing or contract related thereto awarded by the contracting authorities or on their behalf should be clearly subject to the directive.

Article 14 and Protocol. No 26 of the TFEU on services of general interest recognise the specific nature and importance of public services and the wide-ranging discretion of national, regional and local authorities to decide how to provide, allocate responsibility for and organise these services. This includes the provision of services by the authority itself or via public-public collaboration. It is essential to ensure a high level of quality, safety and affordability, equal treatment and the promotion of universal access and user rights. These principles must be applied in all the proposals for directives concerning public procurement.

- 4.7 The directives should not prescribe what a contracting authority should or should not acquire or outsource but should be limited to establishing procedures for acquisition or outsourcing. The EESC believes that this freedom of action should not be restricted. Whatever happens, it should be carried out in a transparent and proportionate way, without giving rise to any abuse or fraudulent activities.
- 4.8 Public authorities can rightly choose to carry out certain public contracts in-house or to cooperate with other public authorities as recognised in the European Treaties and the case-law of the Court of Justice of the EU and in keeping with the principles of transparency.
- 4.9 The general rules governing economic operators in Articles 16 and 30 of the two proposals for directives are correct insofar as they facilitate participation by SMEs, which must always comply with social and environmental standards.
- 4.10 The EESC reconfirms its support, as expressed in opinion INT/570, for the award of reserved contracts to sheltered workshops for disabled people in order to ensure equal opportunities for the benefit of all citizens and in the interests of social integration. The EESC notes that Articles 17 and 31 of the proposals have extended the scope of Recital 28 and Article 19 of Directive 2004/18/EC, so as now to include disadvantaged people. The EESC therefore suggests that the proposals separate these two aspects as follows: "Member States may reserve the right to participate in public procurement procedures for:
  - a) sheltered workshops, or provide for such contracts to be performed in the context of sheltered employment programmes, provided that the majority of the employees

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See Articles 14 and 106 of the TFEU and Protocol No 26 of the TFEU.

concerned are disabled persons who, by reason of the nature or the seriousness of their disabilities, cannot carry on occupations under normal conditions or easily find employment on the ordinary market;

- b) social enterprises or programmes whose main aim is the social and professional integration of disadvantaged workers, provided that more than 30% of the employees of those economic operators or programmes are disabled or disadvantaged workers. The call for tenders shall make reference to this provision".

Moreover, the EESC believes the proposals should explicitly provide for the mandatory award of a certain number or percentage of such contracts in those Member States where circumstances warrant it, for example, if there are a significant number of people with disabilities who can work but are inactive.

- 4.11 At any event, the EESC considers that the proposals should include a provision, as regards reserved contracts, to the effect that the sheltered workshops and economic operators whose main aim is the social and professional integration of disabled or disadvantaged workers "should be promoted and controlled primarily by non-profit entities" which would further justify such privileged preferential access to government support.
- 4.12 The rules in Articles 18 and 32 of the two proposals on the confidentiality of the information contained in companies' offers must be strengthened, especially in cases where the competitive dialogue procedure is used. The EESC considers it essential that the contracting authorities not disclose information designated as confidential provided by economic operators, but neither should they disclose other information provided unless there is good reason to do so. Likewise, contracting authorities should not use such information from economic operators in other competitive procedures.
- 4.13 The rules on the competitive procedure with negotiation in Article 27 of the public procurement proposal are unclear, and there is a risk that other, unwanted practices may gain a foothold under the cover of such negotiations. It might therefore be better if this procedure were dropped from the proposal for a directive or, if this is not possible, at least for clear criteria to be established to limit its use in order to prevent it being misused in any way.
- 4.14 In all tenders, but especially the competitive dialogue procedure, the intellectual property of the tenderers must under all circumstances be protected.
- 4.15 The EESC considers that, given the complexity and length of time that is usually associated with the competitive dialogue procedure covered in Article 28 of the public procurement proposal, its possible use should be restricted to cases where it is really appropriate, i.e. as indicated in Article 29 of the current Directive 2004/18/EC, in the case of particularly complex contracts where contracting authorities consider that the use of the open or restricted

procedure will not allow the award of the contract; consideration could also be given to setting a maximum time limit for the award of a contract.

- 4.16 The EESC agrees with the regulation of the innovation partnership procedure by Articles 29 and 43 in the two proposals, as excessively tight regulation would in practice hamper its use. For the same reason, this procedure should be flexible with regard to the rules on state aid.
- 4.17 The use of framework agreements (Articles 31 and 45 of the two proposals) must not lead to unwarranted price reductions that could be to the detriment of the quality of works, products or services. In any case, it is also recognised that an appropriate regulation of framework agreements could also encourage consideration of the objectives of sustainability and improved quality by provisions ensuring the security of investment.
- 4.18 The rules on electronic auctions in Articles 33 and 47 of the proposals favour the lowest price in an exaggerated manner. Their general use would go against the relevant proposals made by the EESC in both this and its previous opinion INT/570. This may also be seriously detrimental to European companies compared with third-country companies with much lower costs. They should therefore be used with the requisite caution.
- 4.19 As previously argued in opinion INT/570, 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. Green electricity is a clear example of how and why production characteristics should be included as technical specifications and not relegated to performance conditions only (see the judgment of 4 December 2003, EVN and Wienstrom, C-448/01, ECR I-14527).
- 4.20 Again with regard to technical specifications, the EESC takes a highly positive view of the requirement set out in Articles 40(1) and 54(1) of the two proposals that these specifications shall, except in duly justified cases, be drawn up so as to take into account accessibility criteria for persons with disabilities and design for all users. The expression "except in duly justified cases" replaces the term used in Directive 2004/18/EC "whenever possible", suggesting to the EESC that greater emphasis is now quite rightly being placed on the obligatory nature of the requirement for technical specifications to take into account accessibility criteria for people with disabilities and design for all users. However, the EESC considers that in order to give explicit strength to the obligation, it should be stated that even these justified cases must be exceptional, and therefore proposes that Articles 40 and 54 of the proposals read "other than, by way of exception, in duly justified cases".
- 4.21 As regards the labels referred to in Articles 41 and 55 and Recitals 28 and 36 of the two proposals, the rules are not entirely consistent as Recitals 28 and 36 refer to "contracting authorities that wish to purchase works, supplies or services with specific environmental,

social or other characteristics (...)” but further on, among the stakeholders, only environmental organisations are mentioned, and not social organisations; these should be included too. The same applies to the text of Articles 41(1)(c) and 55(1)(c), where social organisations have again been left out.

- 4.22 A new paragraph could also be included in Articles 41 and 55 of the proposals where, given these labels' own special features and their declared aim, it would be noted that "contracting authorities may require or look favourably upon labels which certify compliance with across-the-board award criteria of a social or environmental nature, although they may not necessarily be directly related to the subject-matter of the contract".
- 4.23 As regards the variants covered in Articles 43 and 58 of the two proposals, the EESC believes that rather than allowing variants only when it is expressly stated, it would be more appropriate to always allow the submission of variants in tenders unless it is expressly prohibited, as this would lead to greater promotion and improved innovation in procurement.
- 4.24 As noted in the opinion INT/570, the EESC favours public procurement on a level playing field, enabling SMEs "to secure a 'fair share' of public contracts," but is not in favour of measures of positive discrimination in relation to SMEs, among other things because they could lead to artificial constructions and, consequently, possible corruption. However, the possible division of contracts into lots, where practical, as provided for in Articles 44 and 59 of the two proposals, is a positive move, as this will make opportunities for SMEs more visible and, thus, more accessible.
- 4.25 However, the rules governing the division of contracts into lots should be clear in order to guarantee that all the successful tenderers of the various lots respect social and environmental standards and to avoid unfair competition between businesses. The EESC considers that the requirement that contracting authorities must justify their decision not to divide contracts into lots is impractical and inconsistent with the aim of streamlining procurement procedures. Similarly, the EESC believes that the rule limiting the number of lots that may be offered or awarded is unnecessarily complicated and should preferably be dropped from the proposal.
- 4.26 Regarding the grounds for exclusion in Article 55(3) of the proposal on public procurement, the EESC welcomes the fact that the contracting authorities may exclude tenderers who fail to comply with obligations established by Union legislation in the field of social, labour or environmental law or of international provisions of social and environmental law listed in Annex XI. It is also, however, self-evident that it should be explicitly stated that they may also be excluded when they fail to comply with the national legislation of the relevant Member State in the social, labour or environmental fields, and collective agreements in force in the place where the work, service or supply is performed. In any event, the EESC considers that these exclusions for such reasons should be mandatory.

- 4.27 Otherwise, the obligations regarding which non-compliance may lead to exclusion could remain within over-general and insufficiently specific parameters, such as those set out in the provisions of Annex XI of the proposal, or in the Union's existing legislation.
- 4.28 As the EESC previously noted in opinion INT/570, ILO Convention C94 on Labour Clauses in public contracts adopted in 1949 is currently binding in ten 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.
- 4.29 With regard to the verification of compliance with social and environmental obligations, it would be necessary for Article 57(1) of the proposal on public procurement to require a declaration by the interested parties that they have fulfilled the said social and environmental obligations as preliminary evidence of compliance. The aim would be to make it easier for companies (SMEs in particular) to comply with this requirements without increasing their administrative burden.
- 4.30 For this purpose, as argued in the earlier EESC opinion INT/570, it would be necessary for Article 57 of the proposal on public procurement to explicitly require bidders to state that "they have complied with the applicable legislation 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." This would not of course be necessary in countries where no such obligation exists.
- 4.31 That opinion also pointed out that it would be against the European and national rules for the public authorities to contract with entities which do not comply with the legislation. To do otherwise, moreover, would constitute discriminatory and unfair treatment of companies that do comply with this legal obligation, and would confer an arbitrary advantage on those that do not, possibly even generating unfair competition by non-compliant companies with regard to compliant ones.
- 4.32 The EESC welcomes the fact that the criteria for selecting the most economically advantageous tender remain linked to the subject-matter of the contract, although this link should be made somewhat more flexible so as to include more effective social and environmental criteria under the auspices of the Europe 2020 Strategy and commitments to more sustainable growth.
- 4.33 The EESC believes that both the proposals for directives (Articles 66 and 76) continue to make excessive use of the "lowest cost" or "lowest price" award criterion. In its earlier opinion, the EESC argued that this excessive use inhibits innovation and the pursuit of better quality and value, responding to the requirements of the Europe 2020 Strategy, and does not necessarily lead to more value. Use of the lowest price criterion should therefore always be the exception rather than the rule.

- 4.34 Use of the "most economically advantageous" criterion must therefore be increased, to assess the sustainably most advantageous tender, in economic as well as in environmental and social terms. In this way, the award criteria can also take account of these aspects in a broad, imaginative and non-restrictive way, by means of a broader acceptance of this criterion's linkage to the subject-matter of the contract and a weighted valuation in relation to the other criteria.
- 4.35 More specifically, the criteria linked to the subject-matter of the contract that may be used for determining the economically most advantageous tender must explicitly include (Articles 66(2) and 76(2) in the two proposals) "those characteristics of the working conditions intended to protect workers' health or promote the social integration of disadvantaged or disabled persons amongst the persons assigned to performing the contract," given that this is included among the Recitals (41 and 47 respectively) of the proposals for directives, but not subsequently in the text.
- 4.36 The concept of life-cycle costing of products, services or works set out in the directive is also appropriate. In any case, these costs within the life cycle defined in Articles 67 and 77 of the proposals should also include the social costs involved. The calculation method of life-cycle costs has to be provided by the contracting authority and has to be SME compatible.
- 4.37 Contracting authorities must take special care with bids that appear abnormally low in relation to the works, supplies or services and investigate such cases properly. The EESC noted earlier that contracting entities should be obliged to ask for an explanation of the price charged where a tender significantly undercuts the prices demanded by other tenderers. If the tenderer cannot provide a sufficient explanation, the contracting authority should be entitled to reject the tender. The EESC welcomes the fact that under Articles 69(4) and 79(4) of the proposals, the contracting authorities must reject the tender when it does not comply with obligations established by social, labour or environmental law, but considers that such legislation should not be limited to that of the Union or the list in Annexes XI and XIV, depending on the proposal, but should include national legislation in these areas.
- 4.38 The EESC considers that the provisions on subcontracting must be strengthened. Multiple layers of subcontracting pose difficulties in applying collective agreements, rules on working conditions and procedures on health and safety. Public authorities should be given more leeway to enable them to influence contracts as regards achieving social, environmental and quality objectives. The details of the main subcontractors should have to be declared before the contract is awarded, and the public authority should specify the responsibilities and duties of all concerned to enable effective supervision and monitoring of the contract. Machinery should be set up so that public authorities can veto and reject certain subcontractors if there is any cause for concern. In turn, care must be taken with regard to the subcontracting rules, since the option for the contracting authority to transfer due payments directly to the

subcontractors could lead to an increase in problems between companies and with the contracting authorities themselves.

- 4.39 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. Already in the opinion INT/570 it was recommended that there should be 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. The EESC is in any case concerned about the various public service contracts previously included on the list of B Services, which have now been removed from Annexes XVI or XVII, as appropriate, of the proposals. These annexes list the services to which the procedure governed by Articles 74 to 76, or 84 to 86, of the two proposals is applicable.
- 4.40 The reference to religious services and those furnished by trade unions currently included in Annexes XVI and XVII of the proposals must be removed.
- 4.41 Quite apart from this, the EESC welcomes the application of a simplified procedure for social services and other special services, the higher thresholds and the broader discretion granted to the Member States in introducing the relevant procedures, since it is primarily in the area of personal services that the applicable procedural law must attempt to strike a balance between the principles of competition enshrined in primary law, and the requirements of social law.
- 4.42 With regard to the governance rules set out in the directive, the EESC considers that too many measures that are difficult to apply in practice are envisaged, which could render the evident good intentions ineffective.
- 4.43 In any case, with regard to public oversight as referred to in Articles 84 and 93 of the two proposals and the related annual report, it is important that this report should also include an annual comparison between the prices submitted and the actual cost of contracts that have already been performed, and also an indication of the penetration of foreign suppliers in the European zone as regards the procurement contracts awarded each year by contracting authorities.
- 4.44 The EESC is concerned that the European Commission has dropped Article 27 of the current Directive concerning the protection of jobs, working conditions and the environment. Articles 87 and 96 in the two proposals include a provision that is much watered down on this important point. The current text of Article 27 should be re-instated in full. It should also apply to subcontractors and the entire supply chain.

## **5. Proposal for a Directive on the award of concession contracts – COM(2011) 897 final**

- 5.1 The proposal for a directive on the award of concession contracts governs partnership agreements between an entity that is usually public and an often private company in which the

latter assumes the operating risk with regard to the maintenance and development of infrastructure (ports, water supply, parking, toll roads, etc.) or the provision of services of general economic interest (energy, health, water distribution and treatment, waste disposal, etc.). The proposal covers all concession contracts, for both works and services, but fails to distinguish between them adequately. It only addresses works and public service concessions in general, but does not reflect the specific nature of concessions for services of general interest which are neither "tenders" nor "procurement" but a way of delegating the management of services of general interest and frequently an additional means of funding new services of general interest decided by the public authorities.

- 5.2 The EESC notes that considerable doubt persists regarding the need for a EU directive on the award of concession contracts and recalls the European Parliament's resolution of 25 October 2011 on modernisation of public procurement (2011/2048(INI)) in which it considered that "any proposal for a legal act dealing with service concessions would be justified only with a view to remedying distortions in the functioning of the internal market; points out that such distortions have not hitherto been identified". The EESC calls for a further and full impact assessment to be carried out before these proposals are allowed to progress. The EESC takes the view that the case-law of the Court of Justice of the European Union has largely clarified the application of the Treaty principles of equal treatment, non-discrimination and transparency to the award of concession contracts. As it was made clear by the Court, these principles apply to the award of concession concerning all types of services with a cross-border interest including services of general economic interest.
- 5.3 Notwithstanding the fact that concessions are defined in Directive 2004/18/EC as a contract of the same type as a public contracts except for the fact that the consideration for the works or services to be carried out consists either solely in the right to exploit the work or service or in this right together with payment, the EESC notes that concessions are substantially different from public contracts as the concessionaire is deemed to assume a substantial operating risk of the service to be provided and to be exposed to the vagaries of the market. This is also the case of certain concessions like "shadow tolls" where the concessionaire is paid by the contracting authority based on usage of the services by consumers. Hence, rules specifically designed for the award of public contracts are not suitable for the award of concessions and may even dissuade public authorities and economic operators from entering into those arrangements.



- 5.4 The EESC recalls Article 14 of Treaty on the Functioning of the European Union on services of general economic interest which lays down that "Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions".
- 5.5 The EESC considers that services of general economic interest are often subject to specific EU and national regulations aimed at ensuring their accessibility, affordability and quality, ensuring equal treatment and universal access, and user safety and rights, which should be recalled and guaranteed by the present proposal. In line with the Protocol on services of general economic interest of the Lisbon Treaty, national, regional and local authorities must retain their wide margin of discretion to decide on the modes of organising and providing those services and to define their characteristics, including any conditions regarding the quality or price of the services, in order to pursue their general interest objectives. Those authorities should also be able to freely establish the social, environmental and quality award criteria which they find to be the most appropriate with regard to the subject-matter of the contract. In no case should public authorities be forced to liberalise or externalise the provision of services of general economic interest against their own will or best judgement. The EESC calls for a clear reminder that the rules of competition and the internal market are to be applied to companies responsible for managing services of general interest in keeping with Article 106 TFEU, i.e. insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.
- 5.6 Public authorities should be able to cooperate in order to perform the public interest tasks conferred on them by using their own administrative, technical and other resources, without being obliged to call on outside entities not forming part of its own structure. Such arrangements do not qualify as concessions and therefore the proposal for a directive on concessions should provide for their clear exclusion from its scope in line with the case law of the Court. Likewise, certain concessions awarded to undertakings affiliated to contracting entities and having as their principal activity the provision of services to the group of which they are part, or concessions awarded by a contracting entity to a joint venture which is formed by a number of contracting entities for the purpose of carrying out activities covered by this Directive (such as water or port services) and of which that entity is part should not be covered by the proposed rules.
- 5.7 Public authorities can rightly choose to carry out public contracts in-house or to cooperate with other public authorities as recognised in the European Treaties and the case-law of the Court of Justice of the EU and in keeping with the principles of transparency.

- 5.8 Strict rules should be consequently applied to concessions awarded to associated companies in order to prevent this system from being abused and to ensure that the award procedure is transparent.
- 5.9 According to the relevant EU Court of Justice case-law, imperative requirements relating to the general interest in the gambling sector, entailing the introduction by Member States of measures to protect public policy or consumers, may justify restrictions on the Treaty principles governing the award of concessions. It would therefore be appropriate to exclude from the scope of this directive concessions of gambling activities granted to an operator based on an exclusive right enjoyed by this operator under the national law in force or an administrative act in accordance with the Treaty and the case-law of the Court of Justice, since an exclusive right of this kind would make it impossible to pursue a competitive procedure for the concession. For this reason, the EESC believes that Article 8(5) of the proposal, concerning the exclusion from the application of the directive of concessions for certain services, should include "gambling activities that entail wagering a stake with monetary value in games of chance, including lotteries and betting transactions".
- 5.10 In the proposal for a directive, aspects such as the definition of concessions, the transfer of risk to private operators, the modification of concessions during their term, or their termination must be defined in such a way that they do not become obstacles to the funding and development of this type of contract. In the light of current plans for adjustment and curtailment of public investment in the Member States, they are set to play a major role as ways of relaunching activity and creating jobs.
- 5.11 The methods provided for calculating the value of concession contracts should be streamlined and made simpler in order to increase legal certainty. Notwithstanding the fact that the method of calculating the value of works concessions is a well-established and familiar one, the EESC considers that only one method should apply to estimate the value of all types of concessions. In this context, the EESC calls for a method based on the estimated turnover of the concessionaire (free of taxes) for the whole duration of the particular concession in question, taking account of both the cost of the works and the estimated value of the supplies necessary for executing the works at the time of the tender.

- 5.12 In order to strengthen confidentiality for tenderers, it is proposed that the directive provide that contracting authorities shall be liable for any failure to comply with these obligations.

Brussels, 26 April 2012.

The President  
of the  
European Economic and Social Committee

Staffan Nilsson

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**N.B.:** Appendix overleaf.

**APPENDIX**  
to the  
**OPINION**  
of the European Economic and Social Committee

I. The following amendments, which received at least a quarter of the votes cast, were rejected during the discussions (Rule 39(2) of the Rules of Procedure):

a) **Point 4.21**

Replace as follows:

*~~4.21 As regards the labels referred to in Articles 41 and 55 and Recitals 28 and 36 of the two proposals, the rules are not entirely consistent as Recitals 28 and 36 refer to "contracting authorities that wish to purchase works, supplies or services with specific environmental, social or other characteristics (...)" but further on, among the stakeholders, only environmental organisations are mentioned, and not social organisations; these should be included too. The same applies to the text of Articles 41(1)(c) and 55(1)(c), where social organisations have again been left out~~ We believe that if the directives offer the possibility to require specific environmental, social or other labels, despite the preconditions for their use, this could present significant obstacles for public procurement by limiting competition and adding to companies' burdens and costs.*

**Reason**

Self-explanatory.

**Result of the vote:**

For: 77  
Against: 99  
Abstentions: 20

b) **Point 4.26**

Amend as follows:

*4.26 Regarding the grounds for exclusion in Article 55(3) of the proposal on public procurement, the EESC welcomes the fact that the contracting authorities may exclude tenderers who fail to comply with obligations established by Union legislation in the field of social, labour or environmental law or of international provisions of social and environmental law listed in Annex XI. It is also, however, self-evident that it should be explicitly stated that they may also be excluded when they fail to comply with the national*

*legislation of the relevant Member State in the social, labour or environmental fields, ~~and collective agreements in force in the place where the work, service or supply is performed.~~ In any event, the EESC considers that these exclusions for such reasons should be mandatory.*

### **Reason**

The compliance with the national legislation of the relevant Member State in social, labour or environmental fields is sufficient guarantee for fairness of procedure since it includes the valid general collective agreements. The formula "collective agreements in force in the place where the work, service or supply is performed" is ambiguous and can be explained in a very extensive way. The collective agreements concluded between employers and employees in one enterprise concern these two partners and are not enforceable on outside subjects.

The opinion is also not consistent in this point. In the INT section the notion about the collective agreements was proposed as several amendment and was not accepted in point 4.38 but was accepted in point 4.26 and consequently in 1.11.

### **Result of the vote:**

For: 78  
Against: 110  
Abstentions: 16

### **c) Point 4.32**

Amend as follows:

*4.32 The EESC welcomes the fact that the criteria for selecting the most economically advantageous tender remain linked to the subject-matter of the contract, ~~although this link should be made somewhat more flexible so as to include more effective social and environmental criteria under the auspices of the Europe 2020 Strategy and commitments to more sustainable growth~~ Social or environmental criteria can only be included if there is a direct link with the subject-matter of the contract, and in this context a contribution can be made to achieving the objectives set out in the Europe 2020 Strategy.*

### **Reason**

It is crucial to maintain the direct link between the criteria for evaluating the bid and the subject-matter of the contract, in order to ensure transparency and avoid arbitrary decisions.

**Result of the vote:**

For: 78  
Against: 116  
Abstentions: 13

d) **Point 4.35**

Delete:

~~4.35 — More specifically, the criteria linked to the subject matter of the contract that may be used for determining the economically most advantageous tender must explicitly include (Articles 66(2) and 76(2) in the two proposals) "those characteristics of the working conditions intended to protect workers' health or promote the social integration of disadvantaged or disabled persons amongst the persons assigned to performing the contract," given that this is included among the Recitals (41 and 47 respectively) of the proposals for directives, but not subsequently in the text.~~

**Reason**

Since current legislation on health and safety and the social integration of disabled persons is applicable to and mandatory for companies, there is no need to include these factors as award criteria.

**Result of the vote:**

For: 81  
Against: 119  
Abstentions: 7

e) **Point 4.38**

Replace as follows:

~~4.38 The EESC considers that the provisions on subcontracting must be strengthened. Multiple layers of subcontracting pose difficulties in applying collective agreements, rules on working conditions and procedures on health and safety. Public authorities should be given more leeway to enable them to influence contracts as regards achieving social, environmental and quality objectives. The details of the main subcontractors should have to be declared before the contract is awarded, and the public authority should specify the responsibilities and duties of all concerned to enable effective supervision and monitoring of the contract. Machinery should be set up so that public authorities can veto and reject certain subcontractors if there is any cause for concern. In turn, care must be taken with regard to the subcontracting rules, since the option for the contracting authority to transfer due~~

~~payments directly to the subcontractors could lead to an increase in problems between companies and with the contracting authorities themselves. EU legislation on public procurement should not be used to regulate matters concerning the performance of contracts.~~

#### **Reason**

EU legislation on public procurement should not be used to regulate matters concerning the performance of contracts, given that they should be dealt with at the national level. Furthermore, it is not appropriate for legislation on public procurement to be used to establish rules on subcontracting.

#### **Result of the vote:**

For: 80  
Against: 114  
Abstentions: 21

#### **f) Point 1.15**

Replace as follows:

~~1.15 The EESC considers that the provisions on subcontracting must be strengthened. Multiple layers of subcontracting pose difficulties in applying collective agreements, rules on working conditions and procedures on health and safety. Public authorities should be given more leeway to enable them to influence contracts as regards achieving social, environmental and quality objectives. The details of the main subcontractors should have to be declared before the contract is awarded, and the public authority should specify the responsibilities and duties of all concerned to enable effective supervision and monitoring of the contract. Machinery should be set up so that public authorities can veto and reject certain subcontractors if there is any cause for concern. EU legislation on public procurement should not be used to regulate matters concerning the performance of contracts.~~

#### **Reason**

EU legislation on public procurement should not be used to regulate matters concerning the performance of contracts, given that they should be dealt with at the national level. Furthermore, it is not appropriate for legislation on public procurement to be used to establish rules on subcontracting.

#### **Result of vote:**

For: 80  
Against: 114  
Abstentions: 21

II. The following Section Opinion point was modified in favour of the amendment adopted by the assembly but obtained at least one-quarter of the votes cast (Rule 54(5) of the Rules of Procedure):

a) **Point 5.8**

*5.8 Strict rules should be consequently applied to concessions awarded to associated companies in order to prevent this system from being abused, thus excluding from the market concession contracts which should be awarded entirely competitively.*

**Result of the vote:**

For:	126
Against:	71
Abstentions:	22

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