

Public procurement, service and works contracts: coordination of procedures for the award, classical directive

2000/0115(COD) - 06/05/2002 - Modified legislative proposal

Of the 103 amendments proposed by Parliament the European Commission is able to accept 63 in full or in part. The rest are rejected. The more substantive amendments accepted in full include inter alia, those: - laying down rules relating to the method used for calculating the price/real cost of a tender. - the addition of services provided by engineers. - requiring contracting authorities to use EMAS certificates, certificates attesting to compliance with international standards, as well as any other equivalent means of proof, when requesting environmental data. The more substantive amendments accepted in part or in spirit by the Commission include, in summary: - the integration of environmental policies in public procurement contracts. - the definition of a "purchasing group", to include works, supplies and/or services. - concerning a new "competitive dialogue" procedure, the Commission has incorporated Parliamentary changes with some modifications. New provisions include, for example, allowing contracting authorities the discretion to specify prices and payments to those who submit a proposal - and not 15% of the contract's estimated value, as originally proposed by Parliament. - contract performance conditions and compliance with social protection provisions have been incorporated into the revised text. - most changes to the text on "abnormally low tenders" have been incorporated since they add clarification to the legal text. - criminals found guilty of corruption and/or of fraud are to be excluded from participation in contracts. - reverse auctions for electronic tendering should not rely solely on the lowest price tendered as originally proposed by Parliament. Rather, the Commission has adopted the Council's approach, whereby the scope of the auctions has to be widened to include variables other than price. Further, Parliamentary proposals to award a contract by electronic auction through a separate procedure is rejected by the Commission since it runs against the underlying principles of the revised Directive, namely a simplification of legal procedures. - the definition of a framework contract is to be aligned to those set out in the "Utilities Directive". - the Commission has accepted stricter guidelines on the issue of confidentiality clauses whilst taking into account the need to balance provisions on transparency and competition. - on the question of "threshold limits", the Commission suggests that it would be wrong to limit this principle to "public service" contracts only, as Parliamentary amendments propose. Nor would it be appropriate to implement the obligation of transparency solely to the "relevant provisions of the Directive" again as Parliamentary amendments imply. This would create too much legal uncertainty and go beyond compliance with the rules of the Treaty. Hence the Commission has changed the recital by including that "These principles shall apply whatever the value of the contracts". - on the related matter of estimating the value of service contracts, the Commission incorporates Parliamentary amendments by means of a reformulation. The Commission aims to simplify the text by merging the four articles relating to calculation methods. Thus there would be new articles for "framework agreements", a new article for "supplies", a new article for "services" and a new article for "works". - a provision on the harmonisation of language versions has been added to the text in line with Parliamentary wishes. The Commission has, however, aligned this provision to conform with the principle of the free movement of goods. - the Commission has incorporated an amendment relating to service contracts awarded on the basis of an exclusive right. This it has done in order to bring it in line with current case law, namely the "Teckel" judgement. Reformulation is necessary so as to take up the elements covered by the judgment, adapt them to the situation of a group of contract authorities and accommodate them in the appropriate place in the Directive. - the Commission accepts an amendment to allow contracting authorities the right to negotiate a contract without prior publication in cases such as unforeseen circumstances or, for example, where additional works cannot be technically or economically separated from the main work without major inconvenience. - the Commission has taken on board changes which clarify requirements relating to the selection of participants in that they must be proportionate to the subject matter of the contract. - accepted, subject to some changes, are amendments

proposing compulsory exclusions for money laundering. - the Commission has not accepted in full Parliamentary proposals to exclude economic operators found guilty of violating international core labour standards or infringements of "fundamental" European legislation. This is already covered in existing legislation and thus considered superfluous. - the Commission has clarified the provisions relating to various types of electronic submissions. Not accepted by the Commission are amendments which relate, in summary, to: - obliging contracting authorities, in the absence of European specification, to lay down precise national criteria in advance. - the regulation in framework agreement of translation and interpretation provisions. - modifications to the definition of "design contests". - provisions to increase the thresholds indicated in the Commission's proposal by around 50%. The thresholds in the Directives in force are such that Community Regulations cover only the biggest contracts in value terms. Raising the thresholds of the Directive would lead to an unjustified reduction in the guarantees concerning the opening-up of public contracts currently offered to economic operators in the European Union. Furthermore, a unilateral raising of the thresholds by the EU would be incompatible with its obligations under WTO agreements. - an exclusion concerning transactions enabling the contracting authority to contract borrowing intended for investments and cash flow requirements. - obliging contract authorities to ask the tenderer to indicate the share of the contract he may intend to subcontract to third parties and any designated subcontractors. - obliging contracting authorities to prohibit any subcontracting to undertakings. - prohibit the contracting out of "intellectual services". - prohibiting the use of framework agreements for works contracts. Since this include "standard" works such as road surfacing or repairs this amendment is deemed unacceptable. - an extension of procedures relating to "public housing" to include all "public works which, for reasons of size, complexity and duration and/or financing, require collaborative project planning". This amendment is considered wholly unacceptable in that it may allow for very vague contract negotiations. - the provision that tenders submitted by electronic means should be rejected unless an advanced electronic signature within the meaning of Directive 199/93/EC and reliable means of encrypting contents are used. - prohibiting any economic operators who are bankrupt from applying for contracts has been rejected on the grounds that certain companies would not be given any chance to apply. Such a policy could automatically condemn them to closure. Rather the Commission, finds it more appropriate to make the exclusion of operators in this situation an option for purchasers and not an obligation. - provisions for the setting up of an independent Public Procurement Agency vested with broad powers, including the power to set aside contract awards and to reopen contract award procedures. The Commission argues that the obligations introduced by this amendments is already the subject of Community legislation in force and need not be reiterated here.