

Procedure file

Basic information		
INI - Own-initiative procedure	2011/2048(INI)	Procedure completed
Modernisation of public procurement		
Subject 2.10.02 Public procurement		

Key players			
European Parliament	Committee responsible	Rapporteur	Appointed
	IMCO Internal Market and Consumer Protection		04/03/2011
		Vers/ALE RÜHLE Heide	
		Shadow rapporteur	
		PPE ENGEL Frank	
		S&D VERGNAUD Bernadette	
		ALDE CREUTZMANN Jürgen	
		ECR HARBOUR Malcolm	
		EFD SALVINI Matteo	
	Committee for opinion	Rapporteur for opinion	Appointed
	INTA International Trade		12/04/2011
		S&D ARIF Kader	
	CONT Budgetary Control		03/03/2011
		Vers/ALE STAES Bart	
ECON Economic and Monetary Affairs	The committee decided not to give an opinion.		
EMPL Employment and Social Affairs		17/02/2011	
	ECR GIRLING Julie		
ENVI Environment, Public Health and Food Safety		05/04/2011	
	S&D WESTLUND Åsa		
ITRE Industry, Research and Energy		14/03/2011	
	ECR SZYMAŃSKI Konrad		
REGI Regional Development		22/03/2011	
	ALDE MĂNESCU Ramona Nicole		
JURI Legal Affairs	The committee decided not to give an opinion.		
European Commission	Commission DG	Commissioner	

Key events

27/01/2011	Non-legislative basic document published	COM(2011)0015	Summary
10/03/2011	Committee referral announced in Parliament		
26/09/2011	Vote in committee		Summary
05/10/2011	Committee report tabled for plenary	A7-0326/2011	
24/10/2011	Debate in Parliament		
25/10/2011	Results of vote in Parliament		
25/10/2011	Decision by Parliament	T7-0454/2011	Summary
25/10/2011	End of procedure in Parliament		

Technical information

Procedure reference	2011/2048(INI)
Procedure type	INI - Own-initiative procedure
Procedure subtype	Initiative
Legal basis	Rules of Procedure EP 54
Other legal basis	Rules of Procedure EP 159
Stage reached in procedure	Procedure completed
Committee dossier	IMCO/7/05500

Documentation gateway

For information		COM(2010)0571	18/10/2010	EC	
Non-legislative basic document		COM(2011)0015	27/01/2011	EC	Summary
Committee draft report		PE467.024	29/06/2011	EP	
Committee opinion	REGI	PE464.809	13/07/2011	EP	
Committee opinion	CONT	PE465.055	14/07/2011	EP	
Committee opinion	EMPL	PE466.962	18/07/2011	EP	
Committee opinion	ITRE	PE462.881	19/07/2011	EP	
Committee opinion	ENVI	PE466.971	20/07/2011	EP	
Amendments tabled in committee		PE469.956	26/07/2011	EP	
Committee opinion	INTA	PE467.305	01/09/2011	EP	
Committee report tabled for plenary, single reading		A7-0326/2011	05/10/2011	EP	
Text adopted by Parliament, single reading		T7-0454/2011	25/10/2011	EP	Summary
Commission response to text adopted in plenary		SP(2012)28	22/02/2012	EC	

Modernisation of public procurement

PURPOSE : to launch a consultation on the modernisation of EU public procurement policy (Commission Green Paper).

CONTENT: public procurement plays a key role in the [Europe 2020 strategy](#), calling on public procurement to: (i) improve framework conditions for business to innovate; (ii) support the shift towards a resource efficient and low-carbon economy, e.g. by encouraging wider use of green public procurement, and (iii) improve the business environment, especially for innovative SMEs.

Public procurement policy must also ensure the most efficient use of public funds and procurement markets must be kept open throughout the EU. In the face of these challenges, there is a greater need than ever for a functioning and efficient European Procurement Market.

Many stakeholders have voiced demands for a review of the EU public procurement system to increase its efficiency and effectiveness. The Commission has therefore announced in the [Single Market Act](#) that it will conduct wide consultations in order to make legislative proposals by early 2012 at the latest.

The current generation of public procurement Directives, namely Directives 2004/17/EC and 2004/18/EC, are the latest step in a long evolution that started in 1971. By guaranteeing transparent and non-discriminatory procedures these Directives principally aim to ensure that economic operators benefit fully from the basic freedoms in the field of public procurement. . Given the key role of public procurement, the existing tools and methods should be modernised. Several complementary objectives are to be achieved.

(1) Improve the toolbox for contracting authorities and ensure a more accessible European procurement market: the first objective is to increase the efficiency of public spending, which includes, the search for best possible procurement outcomes (best value for money). To reach this aim, it is vital to generate the strongest possible competition for public contracts awarded in the internal market. Distortions of competition must be avoided.

At the same time, streamlined procurement procedures with targeted simplification measures meeting the specific needs of small contracting authorities could (i) help public procurers to achieve the best possible procurement outcomes for the least possible investment in terms of time and public money; (ii) facilitate the participation of both SMEs and cross-border bidders. In fact, cross border-participation in EU public procurement procedures remains low.

(2) Strategic use of public procurement to meet new challenges: a second objective is to allow procurers to make better use of public procurement in support of common societal goals: These include protection of the environment, higher resource and energy efficiency and combating climate change, promoting innovation and social inclusion, and ensuring the best possible conditions for the provision of high quality public services. Emphasis could be placed on moving focus from lowest initial price to lowest life-cycle cost.

(3) Guarantee the fairness and objectivity of the procedures: developing EU public procurement law could also be envisaged to tackle important issues that are so far not sufficiently addressed, such as preventing and fighting corruption and the question how the access of European undertakings to third country markets can be improved. In addition, the review of the legislative framework will also be an opportunity to examine if certain basic notions and concepts should be refined to ensure better legal certainty for contracting authorities and undertakings. The review may present certain opportunities to increase convergence between the application of the EU public procurement and State aid rules.

The Green Paper reflects a number of ideas as to how the various objectives could be better achieved. It recalls, however, that the scope for possible legislative modifications is not unlimited. Legislative changes will have to be consistent with EU international commitments or may require the opening of appropriate negotiations with all partners concerned on possible requests for compensation.

Concessions are not dealt with in this consultation; they have been the subject of earlier separate consultation exercises and impact assessment. The Commission intends to propose legislation with a view to ensure greater legal certainty for regional and local authorities and economic operators throughout Europe and at facilitating the development of Public-Private partnerships. E-procurement issues are covered by a separate [Green Paper](#) which was published on 18 October 2010

In parallel with the current Green Paper, the Commission is undertaking a comprehensive evaluation of the impact and cost-effectiveness of EU public procurement policy. The evaluation will gather market-based evidence on the functioning of current procurement legislation with a view to providing empirical insights into the areas that need improvement. The results of this new research will be made public in summer 2011.

Together with the results of the evaluation, contributions from stakeholders to this Green Paper will feed the reflection on the future reform of the EU public procurement rules, which will lead to a proposal for legislative reform.

The Commission invites all interested parties to submit their contributions before 18 April 2011.

Modernisation of public procurement

The Committee on the Internal Market and Consumer Protection adopted the own-initiative report by Heide RÜHLE (Greens/EFA, DE) following the Commission Green Paper on modernisation of public procurement in the EU.

Whilst welcoming the Green Paper, Members point out that, although the revision of the EU procurement directives in 2004 led to useful further development of the single market for public procurement, there is a need ?some years after the transposition of Directives 2004/17 and 2004/18 into national law ? to assess whether optimisation and clarification of the directives will be necessary. They make the following recommendations in order to address shortcomings that have become evident in practice:

First task: improving legal clarity: the report asks for clarification of the scope of the directives, and points out that there must be a direct benefit for the contracting authority in order for a procedure to qualify as public procurement. Members recall [Parliament's resolution of May 2010](#) on recent developments in public procurement, which took note of the ECJ case-law and took the view that public-public cooperation was not subject to public procurement rules as long as certain criteria were met. They emphasise the exclusion of service concessions from

the scope of European procurement rules, insisting 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. They point out that such distortions have not hitherto been identified, and that a legal act on service concessions is therefore unnecessary.

The report emphasises that the current classification of A and B service categories should be maintained in so far as 'lighter' provisions for B services have their justification in the characteristics of that category as mainly locally or regionally provided services. It observes, in this context, that the application of procurement law to the provision of personal social services is often not the best way of ensuring optimum results for the users of the services in question. The committee calls for recognition under European law of tried and tested Member State procedures based on the principle that all providers able to comply with the conditions previously laid down by law should, irrespective of their legal form, be permitted to provide services, provided that account is taken of the general principles of equal treatment, transparency and non-discrimination.

The Commission is asked to align the Remedies Directive with the new public procurement framework which will emerge following the current review, and to carry out this exercise in parallel to the main legislative proposal, in order to ensure consistency.

Second task: developing the full potential of public procurement 'best value for money': Members take the view that the criterion of lowest price should no longer be the determining one for the award of contracts, and that it should, in general, be replaced by the criterion of most economically advantageous tender, in terms of economic, social and environmental benefits 'taking into account the entire life-cycle costs of the relevant goods, services or works. They stress that supporting the criterion of 'maximum economic benefit' would foster innovation and efforts to achieve the best quality and value, i.e. to comply with the requirements of the Europe 2020 strategy; stresses that this is particularly relevant in relation to public procurement of goods that have an impact on consumers' health 'in the food sector, for example 'where quality and production methods play an important role.

The Commission is urged, amongst other things, to:

- encourage governments and contracting authorities to increase the use of sustainable public procurement, supporting and promoting high-quality employment;
- propose an adaptation of the relevant procurement or state aid rules as part of the overall revision exercise, in order to boost the take-up of pre-commercial procurement;
- assess, with an eye to the future review of the directives, whether further rules on the award of subcontracts are needed;
- reassess the appropriate level of thresholds for supply and services contracts, and if necessary raise them, so as facilitate access to public procurement by, amongst others, not-for-profit and social-economy operators and SMEs.

Third task: simplifying the rules and allowing more flexible procedures : the report advocates, when European public procurement law is being revised, clear, simple and flexible rules, reducing the level of detail and making procurement procedures simpler, less cumbersome, cheaper, more open to SMEs and more conducive to investment. It asks for more space for negotiation and communication, combined with measures to assure transparency and to prevent abuse and discrimination, and urges that market consultation be explicitly allowed as a possible first step.

Members advocate assessing whether wider use of the negotiated procedure with prior EU-wide publication might be allowed, beyond that provided for in the current directives, so that contracting authorities and economic operators can communicate better, and supply and demand can be coordinated effectively. They reiterate their insistence on the systematic admission of alternative bids (or variants), as they are crucial to promoting and disseminating innovative solutions.

Members consider it regrettable that tenderers have only limited opportunities to rectify omissions in their bids. They also regret the Green Paper's failure to mention shortcomings, the lack of expertise and knowledge about procurement and the inadequacy of public procurement strategies. They recommend setting up a network of centres of excellence within the existing national frameworks, and promoting exchanges of information and good practices between Member States.

Fourth task: improving access for SMEs: the report stresses that simplifying the procedures and administrative formalities, as well as creating SME-friendly strategies and implementing the code of good practice, will facilitate SMEs' access to public contracts and enable them to participate on a more equal and fairer footing. It points out that selection criteria on financial standing, e.g. in relation to company turnover, should be proportional to the character of a given contract.

The Commission is asked to:

- secure the inclusion in the Government Procurement Agreement of a clause allowing the EU to give preference to European producers, especially SMEs, in the award of certain public procurement contracts;
- increase awareness of the importance of splitting contracts into lots, and to consider the implementation of the 'apply or explain' principle, whereby rules on matters such as division into lots must be complied with, or the failure to comply explained;
- investigate all the possibilities for encouraging the temporary or permanent grouping of SMEs and small businesses in order to enable them to take part in invitations to tender that are not split into lots, without having to operate as subcontractors.

Members propose that self-declarations be allowed where feasible, and that original documents be requested only from the short listed candidates or the successful tenderer, whilst avoiding any delays or market distortions caused by incorrect declarations. They ask the Commission to promote the option of an 'electronic procurement passport' accepted by all Member States and proving that the economic operator fulfils the conditions required under EU legislation on public contracts.

Fifth task: ensuring sound procedures and avoiding unfair advantages: Members call on the Commission to promote more efficient reporting practices, including exchanges of information between Member States on the exclusion of unsound bidders, with a view to fighting corruption in public procurement. They also call on the Commission to assess the problems associated with exceptionally low bids and to propose appropriate solutions. Members ask for a common approach on 'self-cleaning' measures to avoid market distortion and ensure legal certainty for economic operators and contracting authorities alike.

Sixth task: expanding the use of e-procurement: the report points out that the e-procurement action plan has failed to achieve its goal and that more political leadership at all levels of government 'including EU level 'is needed in order to maintain and accelerate the transition to e-procurement.

Members want to ensure that at least 50% of both the EU institutions' and the Member States' public procurement operations are carried out electronically, in line with the commitment made by the Member State governments at the ministerial conference on e-government in Manchester in 2005.

Modernisation of public procurement

The European Parliament adopted a resolution following the Commission Green Paper on modernisation of public procurement in the EU.

Whilst welcoming the Green Paper, Parliament pointed out that, although the revision of the EU procurement directives in 2004 led to useful further development of the single market for public procurement, there is a need 'some years after the transposition of Directives 2004/17 and 2004/18 into national law' to assess whether optimisation and clarification of the directives will be necessary. Members make the following recommendations in order to address shortcomings that have become evident in practice:

First task: improving legal clarity: the resolution asks for clarification of the scope of the directives, and points out that there must be a direct benefit for the contracting authority in order for a procedure to qualify as public procurement. Members recall [Parliament's resolution of May 2010](#) on recent developments in public procurement, which took note of the ECJ case-law and took the view that public-public cooperation was not subject to public procurement rules as long as certain criteria were met. They emphasise the exclusion of service concessions from the scope of European procurement rules, insisting 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. They point out that such distortions have not hitherto been identified, and that a legal act on service concessions is therefore unnecessary.

The resolution emphasises that the current classification of A and B service categories should be maintained in so far as 'lighter' provisions for B services have their justification in the characteristics of that category as mainly locally or regionally provided services. It observes, in this context, that the application of procurement law to the provision of personal social services is often not the best way of ensuring optimum results for the users of the services in question. Parliament calls for recognition under European law of tried and tested Member State procedures based on the principle that all providers able to comply with the conditions previously laid down by law should, irrespective of their legal form, be permitted to provide services, provided that account is taken of the general principles of equal treatment, transparency and non-discrimination.

The Commission is asked to align the Remedies Directive with the new public procurement framework which will emerge following the current review, and to carry out this exercise in parallel to the main legislative proposal, in order to ensure consistency.

Second task: developing the full potential of public procurement 'best value for money': Members take the view that the criterion of lowest price should no longer be the determining one for the award of contracts, and that it should, in general, be replaced by the criterion of most economically advantageous tender, in terms of economic, social and environmental benefits 'taking into account the entire life-cycle costs of the relevant goods, services or works'. They stress that supporting the criterion of 'maximum economic benefit' would foster innovation and efforts to achieve the best quality and value, i.e. to comply with the requirements of the Europe 2020 strategy. They stress that this is particularly relevant in relation to public procurement of goods that have an impact on consumers' health 'in the food sector, for example' where quality and production methods play an important role.

The resolution also states that, in response to increased awareness of the environmental and climate impact of goods, works and services, procurement authorities should include environmental costs in their assessment of the 'most economically advantageous offer' and their calculation of life-cycle costs. It considers that the current provisions on subcontracting should be strengthened, as the use of several levels of subcontracting can cause problems in terms of compliance with collective agreements, working conditions and health and safety standards.

The Commission is urged, amongst other things, to:

- encourage governments and contracting authorities to increase the use of sustainable public procurement, supporting and promoting high-quality employment;
- propose an adaptation of the relevant procurement or state aid rules as part of the overall revision exercise, in order to boost the take-up of pre-commercial procurement;
- assess, with an eye to the future review of the directives, whether further rules on the award of subcontracts are needed;
- reassess the appropriate level of thresholds for supply and services contracts, and if necessary raise them, so as facilitate access to public procurement by, amongst others, not-for-profit and social-economy operators and SMEs.

Third task: simplifying the rules and allowing more flexible procedures: the resolution advocates, when European public procurement law is being revised, clear, simple and flexible rules, reducing the level of detail and making procurement procedures simpler, less cumbersome, cheaper, more open to SMEs and more conducive to investment. It asks for more space for negotiation and communication, combined with measures to assure transparency and to prevent abuse and discrimination, and urges that market consultation be explicitly allowed as a possible first step.

Members advocate assessing whether wider use of the negotiated procedure with prior EU-wide publication might be allowed, beyond that provided for in the current directives, so that contracting authorities and economic operators can communicate better, and supply and demand can be coordinated effectively. They reiterate their insistence on the systematic admission of alternative bids (or variants), as they are crucial to promoting and disseminating innovative solutions.

Members consider it regrettable that tenderers have only limited opportunities to rectify omissions in their bids. They also regret the Green Paper's failure to mention shortcomings, the lack of expertise and knowledge about procurement and the inadequacy of public procurement strategies. They recommend setting up a network of centres of excellence within the existing national frameworks, and promoting exchanges of information and good practices between Member States.

Fourth task: improving access for SMEs: the resolution stresses that simplifying the procedures and administrative formalities, as well as creating SME-friendly strategies and implementing the code of good practice, will facilitate SMEs' access to public contracts and enable them to participate on a more equal and fairer footing. It points out that selection criteria on financial standing, e.g. in relation to company turnover, should be proportional to the character of a given contract.

The Commission is asked to:

- improve access to public procurement procedures and improving their transparency, particularly for the benefit of smaller contracting authorities and tenderers, to modernise the Tenders Electronic Daily (TED) website;
- increase awareness of the importance of splitting contracts into lots, and to consider the implementation of the 'apply or explain'

- principle, whereby rules on matters such as division into lots must be complied with, or the failure to comply explained;
- investigate all the possibilities for encouraging the temporary or permanent grouping of SMEs and small businesses in order to enable them to take part in invitations to tender that are not split into lots, without having to operate as subcontractors.

Members propose that self-declarations be allowed where feasible, and that original documents be requested only from the short listed candidates or the successful tenderer, whilst avoiding any delays or market distortions caused by incorrect declarations. They ask the Commission to promote the option of an 'electronic procurement passport' accepted by all Member States and proving that the economic operator fulfils the conditions required under EU legislation on public contracts.

In plenary, Parliament rejected the proposal asking the Commission to secure the inclusion, in the Government Procurement Agreement, of a clause allowing the EU to give preference to European producers in the award of public procurement contracts.

Fifth task: ensuring sound procedures and avoiding unfair advantages: Members call on the Commission to promote more efficient reporting practices, including exchanges of information between Member States on the exclusion of unsound bidders, with a view to fighting corruption in public procurement. They also call on the Commission to assess the problems associated with exceptionally low bids and to propose appropriate solutions. Members ask for a common approach on 'self-cleaning' measures to avoid market distortion and ensure legal certainty for economic operators and contracting authorities alike.

Sixth task: expanding the use of e-procurement: the resolution points out that the e-procurement action plan has failed to achieve its goal and that more political leadership at all levels of government ? including EU level ? is needed in order to maintain and accelerate the transition to e-procurement.

Members want to ensure that at least 50% of both the EU institutions? and the Member States? public procurement operations are carried out electronically, in line with the commitment made by the Member State governments at the ministerial conference on e-government in Manchester in 2005.