



EUROPEAN COMMISSION

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Dear President,

The Commission would like to thank Folketinget for its Opinion on the proposal for a directive on public procurement {COM(2011) 896 final} and apologises for the delay in replying.

As a general remark, it should be emphasized that the proposed procurement reform seeks to strike a balance between different objectives, which are notably the simplification of procedures; improved access, in particular for SMEs; increased possibilities to procure green, social or innovative solutions; and, better governance and oversight at all levels.

The Commission is not convinced that increasing the thresholds would allow further simplification of EU procurement policy. In essence, increasing the thresholds would mean that a larger portion of procurement would no longer be covered by the directives, and therefore, only subject to national rules, which might not always ensure the same level of transparency and non-discrimination as provided for by EU law. In particular, SMEs would have reduced access to public procurement at European level and the scope of the other possibilities provided for by EU public procurement law (e.g. in the field of innovation and environment) would also be reduced.

Furthermore, the EU has to respect its international obligations. In particular, in the framework of the recently negotiated World Trade Organisation agreement on government procurement, the EU has committed itself to ensuring that the procedural guarantees anchored in the proposal would apply to all contracts beyond the same value as the one of the current directives. Increasing the thresholds would therefore be a breach of our international obligations and could lead to potentially significant compensation requests.

As for the enhanced access of SMEs to public procurement, the Commission has proposed several measures aiming at simplifying the rules and procedures (such as the drastic reduction of documentation, in particular through the acceptance of self-declarations by bidders; only the winning bidder must then supply the documentary evidence for selection criteria). However the Commission considers that making the subdivision into lots mandatory would be too burdensome for contracting authorities. Furthermore, it appears from the current discussions in the Council that even the non-mandatory "apply or explain" approach suggested by the Commission to encourage contracting authorities to split contracts into lots is controversial, as many Member States consider it already excessively burdensome.

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With regard to a possible further increase in the use of the negotiated procedure ("competitive procedure with negotiation"), the proposal already broadens considerably the scope for negotiations while accompanying it by adequate safeguard measures. The Commission has tried to strike the right balance between the flexibility which Member States and contracting authorities asked for, and the guarantees of transparency, equal treatment and non-discrimination established in favour of economic operators. On the whole, the discussions in the Council seem to confirm that the approach followed is the appropriate one, although with some further flexibilities introduced.

Concerning the reduction of bureaucracy and the minimum number of tenders required, the proposal requires a minimum of five tenders to be submitted in the restricted procedure only. This number is reduced to three in the competitive procedure with negotiation, in the competitive dialogue procedure and in the innovation partnership. The proposal also provides for the possibility for the contracting authority to continue the procedure without having the minimum number of tenders (cf. Article 64 (2) of the proposed Directive). The Commission considers that a minimum number of tenders is necessary to guarantee competition, and it has to be stressed in this context that these rules are the same as the ones currently in force (Article 44(3) of Directive 2004/18/EC).

As far as the extension of e-procurement is concerned, the Commission fully agrees with an ambitious timetable. In the Council some Member States have indicated reluctance towards the full mandatory use of e-procurement within two years after transposition, but the Commission remains convinced that this transition is possible and would be beneficial in particular to SMEs as more than 99% of them have access to internet.

As for the inclusion of other criteria (such as social or environmental) in the contract award procedure, the Commission would like to stress that the proposal does not hinder the insertion of labour clauses which respect EU law and in particular Directive 96/71/EC on the posting of workers; neither does it create any obligation for contracting authorities. It only enables them to take into account the life-cycle cost concept or criteria linked to the production process of the goods or services to be purchased, such as the insertion of vulnerable or disadvantaged persons.

Finally, the Commission takes note of Folketinget's observation on the shortening of time limits for conducting reviews. The Commission would like here to draw attention to the fact that the present reform is limited to the Directives on public procurement. It does not therefore touch upon the rules on remedies in public procurement laid down by Directives 89/665/EEC and 92/13/EEC, as amended by Directive 2007/66/EC.

I hope that these clarifications address the observations and suggestions made by Folketinget and I look forward to continuing our political dialogue in the future.

Yours faithfully,

*Maroš Šefčovič
Vice-President*