

**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**

(COM(2011)895 final)

**and**

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

(COM(2011)896 final)

**FINAL DOCUMENT APPROVED BY THE COMMITTEE**

(Doc. XVIII, No. 66)

The Committee on Environment, Territory and Public Works of the Chamber of Deputies,

having examined, pursuant to Rule 127 of the Rules of Procedure of the Chamber of Deputies:

- 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 (COM(2011)895 final) (the so-called “special sectors”);
- the Proposal for a Directive of the European Parliament and of the Council on public procurement COM(2011)896 final (the so-called “ordinary sectors”);

also taking into consideration the Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts (COM(2011)897 final);

whereas in 2011 a public consultation was held on the Green Paper on the modernisation of European Union policy relating to public procurement. Pursuant to Article 127 of the Rules of the Chamber of Deputies, the Environment Committee examined the Green Paper and on 14 April 2011 adopted a Final Document, in which it made a number of observations to which the European Commission responded;

recalling that a revised and modernised public procurement legislative framework is one of the twelve “levers” of the Single Market Act COM(2011)206 for reinvigorating the internal market so as to boost growth, development and employment;

considering that:

Italy's public procurement rules are closer aligned to EU legislation than those of other EU states and, in some cases, are ahead of EU legislation and provide more robust guarantees; and that it is therefore worth preserving the positive aspects of the Italian experience in this area, such as the stricter enforcement of exclusions from participation in public tenders or the important role played by the Public Procurement Authority in monitoring the entire stock of public procurements;

the two proposed Directives relating to public procurements both in the ordinary and in the special sectors should both be adopted along with and at the same time as the Proposal for a Directive on the award of concession contracts, the examination of which has been greatly delayed as a result of strong misgivings on the part of some Member States. The simultaneous adoption of all the proposed Directives would avoid the danger of unsynchronised implementation, which might undo the European Commission's efforts to create a single market in the sector of public procurements and concessions;

the transposition of the new Directives provides a valuable opportunity for the national legislator to consolidate and streamline the body of law in this area and thereby avoid duplications and overlaps, guarantee greater judicial certainty and reduce the occurrence of litigation;

in view of the fact that the Cypriot Presidency of the Council of the European Union has presented generally acceptable compromise proposals that incorporate some of the observations made by the Italian government;

taking into account the important information and points of consideration acquired by the Committee in the course of the extensive hearings it conducted as part of the preliminary evaluation of the proposals in question;

acknowledging, moreover, that the present Final Document, along with the opinion of the Committee on EU Policies) issued on 28 November 2012, need to be transmitted promptly to the European Commission as part of the political dialogue, as well as to European Parliament and the Council;

**DOES HEREBY EXPRESS ITS FAVOURABLE ASSESSMENT**

*and adds the following observations, which are in part already contained in the proposals of the Cypriot Presidency:*

- a) considering that legal services by their very nature have very limited cross-border relevance and are based on a relationship of trust with the professional providing them, the Cypriot Presidency's suggestion that they should be excluded from the scope of future Directives is to be supported;
- b) the following should be optional and non-binding:
  - the measure allowing for a more extensive use of negotiated procedures which, in the absence of adequate safeguards to counterbalance the enhanced discretion of contracting entities in setting the terms of a contract, could aggravate the risk of abuse and favouritism, distort competition and occlude transparency;
  - the measure allowing contracts to be subdivided into separate lots to avoid the risk of higher costs, lengthier execution times and increased litigation;
- c) exceptions to the mandatory use of electronic procedures in procurement bids should be available in light of the potential impact of electronic procedures on the contracting entities and stakeholders;
- d) with regard to the rules that allow contracting entities to examine award criteria before selection criteria, appropriate precautions need to be introduced to ensure that deficiencies in bids do not emerge at too late a stage, as this would necessitate restarting the bidding process, thereby undermining the original purpose of accelerating procedures;
- e) with regard to the grounds for exclusion, it should be left to Member States to set their own conditions, which shall not affect the principle that the exclusion of a bidder for the non-payment of taxes may be justified with reference to the seriousness of the violation;
- f) it must be ensured that the principle of awarding contracts to the cheapest bidder does not lead to excessively low and objectively unsustainable offers;
- g) leverage should be made of the positive experiences of the Member States, including Italy, that make use of qualified entities that carry out centralised procurements on behalf of several administrations in order to reduce unit costs;
- h) the Cypriot Presidency's suggestions regarding the making of payments directly to subcontractors should be espoused;
- i) to prevent an increase in barriers to eligibility and the excessive prolonging of execution times, the price discrepancy deemed acceptable before a fresh bidding procedure becomes necessary should be increased from 5% to 15%;

*to which the Committee adds the following observations:*

- a) With respect to the so-called “self-cleaning” mechanism by which contracting authorities may accept bids from tenderers that should have been excluded but have taken appropriate measures to remedy their failings, the risks as well as the potential advantages need to be thoroughly verified, given that this mechanism is familiar to only some Member States, beyond which it may not achieve the same results. As regards the Italian legal system, a mechanism of this sort might conflict with the principle of the finality of motivated exclusion from participation in bids, and result in increased litigation.
- b) In the economic terms set out in the tender, it should be made clear that the minimum annual turnover of the bidding party may also be lower than three times the estimated contract value, except in duly justified circumstances connected with risks specific to the nature of the work, so as to avoid imposing excessively high barriers to entry, which is especially important in the current period of economic crisis and falling business.
- c) Uniform standards regarding the reputation of contracting entities need to be enforced to prevent disparities at an operational level and the distortion of competition.
- d) It should be specified that the provision according contracting authorities the right to demand that certain tasks they consider essential be carried out directly by the contractor does not preclude the use of subcontracting, it being understood that the contractor shall remain fully liable for the work assigned to the subcontractor. It should also be made clear that the provision shall apply in all cases in which a party taking part in a public tender demonstrates that it fulfils the requirements for participation by referring to the resources and capabilities of another economic operator (“qualification leasing”). This option, however, should be excluded in the case of purely subjective requirements, such as educational qualifications, professional experience or the possession of quality certification, so that the work or services are provided by the contractor selected by the awarding party and no-one else.
- e) The provisions relating to compliance with European and international environmental, labour and social security laws need to be confirmed to prevent a Member State from setting standards and safeguards that are less stringent than those envisaged in the proposed Directives.
- f) The use of the new methodology for determining costs with reference to the "life cycle" of the goods or services being procured should be discretionary, given that some of the criteria (such as those relating to the environmental, economic and social sustainability of constructions or environmental externalities) are still in the process of definition at the EU level.

- g)* Given the peculiarities of the Italian system, in which most procurements are awarded by local governments, constraints need to be imposed on the ability of regional or local authorities to apply less stringent rules lest their generalised use, without appropriate precautions, lead to the distortion of competition or the nullification of the safeguards put in place by national law.
- h)* The measure providing for the establishment in each Member State of a single independent body responsible for monitoring and coordinating implementation activities must be retained, also in light of the positive experience of the Italian Public Procurement Authority.