Parliament of Romania

The Chamber of Deputies

No 1/1777/V8

10.10.2012

OPINION

on the package of proposals concerning the legislative framework for public procurement

COM(2011) 895, COM(2011) 896, COM(2011) 897

Having regard to the Treaty of Lisbon, and in particular Articles 5 and 12 TEU and Protocols 1 and 2 annexed to the Treaty,

Having regard to the Constitution of Romania, as republished, in particular Article 148 thereof,

Having regard to Decision No 11/2011 of the Chamber of Deputies,

Considering the draft opinion expressed by the Committee for Industry and Services at its meeting of 19 June 2012,

Considering the point of view of the Government of Romania, expressed in the letter from the Ministry of European Affairs of 27 January 2012,

Considering the draft opinion adopted by the Committee for European Affairs at its meeting of 25 September 2012,

Having regard to the approval given by the Permanent Office of the Chamber of Deputies on 1 October 2012,

The Chamber of Deputies, acting in accordance with Article 40 of Decision No 11/2011 of the Chamber of Deputies of 27 April 2011, hereby adopts this Opinion:

A. 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 sector – COM(2011) 895

Article 3(2) 'Mixed procurement and procurement covering several activities' states the following: 'A contract which is intended to cover several activities shall be subject to the rules applicable to the activity for which it is principally intended.'

Paragraph 3 of the same Article acknowledges the difficulty in establishing the principal activity: 'If one of the activities for which the contract is intended is subject to this Directive and the other to the abovementioned [2004/18] and if it is objectively impossible to determine for which activity the contract is principally intended, the contract shall be awarded in accordance with the abovementioned Directive [2004/18].'

Other acknowledged practical implementation difficulties relate to the method for calculating the thresholds from which the Directive proposed applies. These are cited in Article 13 'Methods for calculating the estimated value of procurement' and in Article 22 'Contracts awarded to an affiliated undertaking'.

The Proposal seeks to resolve these implementation difficulties by setting precise thresholds and by laying down general principles, according to each case and the specific nature of the difficulty encountered.

However, given that the practical implementation of the methods mentioned above depends largely on the approach taken by the contracting authority, of which there are many different kinds (such as in the case of Romania), and also on a range of external factors, such as the exchange rate for Member States that are not part of the eurozone (such as Romania), we recommend that the Commission re-examine within a reasonable time limit (possibly five years from the date of adoption) the transposition and implementation of the Directive in the Member States and accordingly relax or reinforce the obligatory nature of the provisions on the basis of practical experience. An analysis of this kind could use as its source material questionnaires or discussions with Member States, or be based on the case-law in the field in question at that date.

B. Proposal for a Directive of the European Parliament and of the Council on public procurement – COM(2011) 896

1. Article 4 of the Directive states the following:

'This Directive shall apply to procurements with a value exclusive of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:

(a) EUR 5 000 000 for public works contracts;

(b) EUR 130 000 for public supply and service contracts awarded by central government authorities and design contests organised by such authorities; where public supply contracts are awarded by contracting authorities operating in the field of defence, that threshold shall apply only to contracts concerning products covered by Annex III;

(c) EUR 200 000 for public supply and service contracts awarded by regional and local government authorities and design contests organised by such authorities;

(d) EUR 500 000 for public contracts for social and other specific services listed in Annex XVI.'

Although there is a legal basis and factual justification (related to the harmonised functioning of the internal market) for EU intervention in public procurement rules, the setting of application thresholds would be likely to affect both (i) the day-to-day functioning of public procurement and (ii) the efficient working of the principle of local autonomy.

It should be noted that Article 4(2) TEU explicitly recognises the right to self-government at the sub-national level.

Analysis of the contradictory relationship between the article cited above and Article 4(c) of Proposal for a Directive COM(2011)896 does not suggest any reason why the right of local and regional authorities to dispose freely of their own budget should be limited. By nature such authorities act on a local market where conditions of free competition must be guaranteed, preferably though cross-cutting policies that are specific to the place in question, rather than by means of imperative provisions that are identical to those imposed on the central contracting authorities.

Raising the threshold for application of the Directive to EUR 200 000 for local and regional authorities would not completely remove the suspicion that such an intervention would be disproportionate to the objectives of the Union.

However, it cannot be denied that there is a need to harmonise the public procurement rules for local and regional authorities, given that entities from Member States other than

the one in which the local or regional authority is located are able to participate in public procurement procedures organised by these authorities. In practical terms, a situation of this nature can be predicted only on the basis of the estimated value of the contract.

In its analysis of the compliance with the principle of subsidiarity, the Chamber of Deputies concluded that, given the similarity in the aims and economic situation, the threshold for applying the Directive to procedures organised by local and regional public authorities should be the same as that indicated in paragraph (d) of the Proposal for a Directive, namely EUR 500 000. Analysing this possibility when the thresholds laid down in Article 4 of the Directive are reviewed for the first time would be sufficient to allay the concerns relating to compliance with the principle of proportionality in the case of public procurement procedures organised by regional and local public authorities.

Nevertheless, whatever thresholds may be established, whether they will have any significance in practical terms in situations where goods or works are sub-divided into distinct activities (batches) remains to be seen. Moreover, public procurement procedures organised by batch require specific detailed procedures, starting with the memorandum explaining the need to organise the procedure in batches.

Considering the specific nature of this type of procedure (i.e. procurement by batches), the Chamber of Deputies invites the European Commission to set up an expert working party or to put in place any other procedure under which information could be obtained at Union level, such as an exchange of experience or identification of best practices.

2. The Proposal provides for the establishment of knowledge centres, justifying the provision in the following terms:

'In many cases, contracting authorities do not have the internal expertise to deal with complex procurement projects. Appropriate and independent professional support by administrative structures could considerably improve procurement outcomes by expanding the knowledge base and the professionalism of public procurers and delivering assistance to businesses, notably SMEs.' The proposal therefore obliges Member States to provide support structures offering legal and economic advice, guidance, training and assistance in preparing and conducting procurement procedures.

This approach is based on an unquantified generalisation ('in many cases') and defines its target exclusively in qualitative terms: 'complex procurement projects'.

We recognise that there is a need for this kind of approach in certain cases, and acknowledge its putatively positive effect given the need for external support for public procurement bodies.

On the basis of Romania's experience and following a minimal risk analysis, the Chamber of Deputies has identified a number of possible negative effects that this kind of institutionalised consultation could generate:

a) the introduction of an additional layer of administration, with the requisite operating costs and an increased risk of corruption; the claim that there would be no financial impact because the potential additional costs would be cancelled out by the decrease in costs relating to court cases is not convincing because it is not based on statistics and economic calculations;

b) the removal of responsibility from the contracting authorities and the creation of a disincentive with regard to training and development for staff involved in public procurements;

c) negative impact on competition on the private market for legal and technical services relating to the preparation and performance of public procurement procedures;

d) decoupling of the public procurement process from its technical and practical basis, as a result of the involvement of external technical assistance of a general nature; it is hard to believe that external technical assistance would have extensive knowledge of individual markets;

e) the granting of excessive *de facto* power to the knowledge centres and the distancing of the public procurement process from civic control, in particular in the case of local or regional contracting authorities.

Therefore, the recommendation of the Chamber of Deputies is that the European Commission suggest that Member States monitor these risks. Implementation would likely be improved if the European Commission were to carry out an evaluation of the likelihood of these risks occurring on the basis of data sent by the Member States once the Directive has been in force for some time. In the interests of the proper management of EU funds during this time of crisis and given that the analysis itself would be simple enough to be performed by Commission officials, it would be better that the analysis is done by the European Commission itself rather than through the hiring of external technical assistance.

3. Article 66 'Contract award criteria' states that: 'The most economically advantageous tender referred to in point (a) of paragraph 1 from the point of view of the contracting authority shall be identified on the basis of criteria linked to the subject-matter of the public contract in question. Those criteria shall include, in addition to the price or costs referred to in point (b) of paragraph 1, other criteria linked to the subject-matter of the public contract in question, such as:

quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, environmental characteristics and innovative character; [...]."

This approach is confirmed by the experience of the Member States and is justified by the 'value for money principle'. It can be also be considered appropriate from the point of view of the European public interest.

However, evaluation factors other than price are hard to quantify, particularly in the case of services or in cases where quantification is impossible owing to the intrinsic nature of the factor in question. A case in point in this respect would be the factor relating to 'aesthetic aspects'. Such factors should be acceptable for evaluation in the context of objective scoring by a committee, as in our opinion the subjective nature of these factor is sufficiently counter-balanced by the number of scores awarded by such a committee.

In consequence, the Chamber of Deputies recommends that the European Commission clarify, either procedurally or by means of guidelines, the aspects relating to the evaluation of factors that by their nature are either impossible to quantify or which can only be evaluated in a subjective manner.

4. Article 69 'Abnormally low tenders' states that:

„1. Contracting authorities shall require economic operators to explain the price or costs charged, where all of the following conditions are fulfilled: (a) the price or cost charged is more than 50 % lower than the average price or costs of the remaining tenders (b) the price or cost charged is more than 20 % lower than the price or costs of the second lowest tender; (c) at least five tenders have been submitted.

2. Where tenders appear to be abnormally low for other reasons, contracting authorities may also request such explanations.'

This method of establishing an 'abnormally low price' uses thresholds for which the justification is uncertain. In other words, it is hard to comprehend why a tender 51 %

lower than the average costs would be abnormal, whereas a tender 49 % lower than the average is acceptable.

Moreover, it is by no means rare (at least in Romania) for the estimate of the contract value to prove to have been unrealistic, for a number of reasons such as: inherent technical progress, changes to the legislative framework, the identification of solutions that are cheaper than those presumed to be minimal at the time of the estimate, errors of calculation or interpretation of the subject-matter of the contract, etc.

The fact that the average tender is taken into consideration does not cover all cases where such risks could occur, not least because the tenderer's decision to take part in the procedure and subsequently the decision to set a price is influenced by a multitude of factors, such as market conditions and the individual availability of each entity in the field.

The tenderer's right to explain the price (or not) would not reduce the risks related to the situations referred to above [sic]:

- the artificial prolongation of the procedure;

- the rejection of economically advantageous tenders owing to a failure to understand the specific character of each tender;

- uncertainty caused by the small number of tenders or a single 'abnormally low' tender.

In consequence, the Chamber of Deputies recommends that the European Commission take the first opportunity to re-examine the procedure for abnormally low prices, which is possibly too inflexible.

C. Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts – COM(2011) 897

The practice of the European Court of Justice indicates that concession contracts are governed by primary European law principles (i.e. non-discrimination, transparency, the internal market, competition). In the past, the Court has adequately stated the rules applicable to the award of concession contracts and has defined the legal concepts applicable at European level. As such, the legislative void referred to by the Commission does not exist, at least from this perspective.

Concerns with regard to this regulation at EU level were also expressed in the European Parliament Report on new developments in public procurement, which was adopted with a large majority on 18 May 2011.

Article 21 'Research and development services' states the following: 'This Directive shall apply to service concessions for research and development services with CPV reference numbers 73000000-2 to 73436000-7, except 73200000-4, 73210000-7 or 73220000-0, provided that the following conditions are both fulfilled: (a) the benefits accrue exclusively to the contracting authority or contracting entity for use in the conduct of its own affairs, (b) the service provided is wholly remunerated by the contracting authority or contracting entity.'

The CPV Nomenclature is chiefly intended to ensure as much transparency as possible in public procurements at Union level. However, the text of the proposal invokes the CPV in order to make the scope of the proposal more detailed. From this point of view, the imposition of the CPV exceeds its remit and would create a dangerous precedent.

The Chamber of Deputies invites the European Commission to examine the possibility of applying an alternative means of defining the scope that no longer makes reference to the CPV.

This Opinion is addressed to the Presidents of the European Parliament, the Council and the European Commission.

PRESIDENT

Valeriu Ştefan Zgonea