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from:	General Secretariat
to:	Working Party on Public Procurement
on:	3 April 2012
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Subject:	Proposal for a Directive of the European Parliament and of the Council on public procurement - Cluster 6: Aggregation of demand

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In view of the Working Party on Public Procurement on 3 April 2012, delegations will find in the Annex a compromise proposal on the above cluster prepared by the Presidency.

Changes compared to the previous text (6907/12) are underlined, deletions are marked [...].

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Cluster 6

Aggregation of demand

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1. Framework agreements

Revised recital 21:

(21) The instrument of framework agreements has been widely used and is considered as an efficient procurement technique throughout Europe. It should therefore be maintained largely as is. However, certain concepts need to be clarified, in particular that framework agreements should not be used by contracting authorities which are not themselves party to it; for that purpose, the contracting authorities that are parties to the framework agreement from the origin should be clearly indicated, either by name or by other means, such as a reference to a given category of contracting authorities within a clearly delimited geographical area, so that the authorities concerned can be easily and unequivocally identified. It should also be clarified that contracts based on a framework agreement are to be awarded before the end of the term of the framework agreement itself. The needs or the choice of the natural persons concerned should, in the context of framework agreements setting out all the terms and whose subject-matter is intended for use by natural persons, be included among the objective conditions for determining which of the economic operators, party to the framework agreement, should perform a given task. Framework agreements should not be used improperly or in such a way as to prevent, restrict or distort competition.

*Article 31*

*Framework agreements*

*[Directive 2004/18/EC: Articles 1(5), 32]*

1. Contracting authorities may conclude framework agreements, provided that they apply the procedures provided for in this Directive.

A framework agreement means an agreement between one or more contracting authorities and one or more economic operators, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.

The term of a framework agreement shall not exceed four years, save in exceptional cases duly justified, in particular by the subject of the framework agreement.

2. Contracts based on a framework agreement shall be awarded in accordance with the procedures laid down in this paragraph and paragraphs 3 and 4.

Those procedures may be applied only between those contracting authorities clearly identified for this purpose in the call for competition or the invitation to confirm interest and those economic operators initially party to the framework agreement.

Contracts based on a framework agreement may under no circumstances make substantial modifications to the terms laid down in that framework agreement, in particular in the case referred to in paragraph 3.

[...]

3. Where a framework agreement is concluded with a single economic operator, contracts based on that agreement shall be awarded within the limits of the terms laid down in the framework agreement.

For the award of those contracts, contracting authorities may consult the operator party to the framework agreement in writing, requesting it to supplement its tender as necessary.

4. Where a framework agreement is concluded with more than one economic operator, it shall be performed in one of the [...] following ways:
  - (a) following the terms and conditions of the framework agreement, without reopening competition, where it sets out all the terms governing the provision of the works, services and supplies concerned and the objective conditions for determining which of the economic operators, party to the framework agreement, shall perform them; the latter conditions shall be indicated in the procurement documents;

(aa) where the framework agreement sets out all the terms governing the provision of the works, services and supplies concerned, partly without reopening of competition in accordance with point a and partly with reopening of competition amongst the economic operators parties to the framework agreement in accordance with point (b), where this has been stipulated by the contracting authorities in the procurement documents. The choice between which parts of the framework agreement shall be performed with and which parts shall be performed without reopening of competition shall be made pursuant to objective criteria, which shall be set out in the specifications of the framework agreement. The specifications of the framework agreement shall also specify which terms may be subject to reopening of competition.

(b) where not all the terms governing the provision of the works, services and supplies are laid down in the framework agreement, through reopening competition amongst the economic operators parties to the framework agreement.

5. The competitions referred to in points (aa) and (b) of paragraph 4 shall be based on the same terms as applied for the award of the framework agreement and, where necessary, more precisely formulated terms, and, where appropriate, other terms referred to in the specifications of the framework agreement, in accordance with the following procedure:

- (a) for every contract to be awarded, contracting authorities shall consult in writing the economic operators capable of performing the contract;
- (b) contracting authorities shall fix a time limit which is sufficiently long to allow tenders for each specific contract to be submitted, taking into account factors such as the complexity of the subject-matter of the contract and the time needed to send in tenders;
- (c) tenders shall be submitted in writing, and their content shall not be opened until the stipulated time limit for reply has expired;
- (d) contracting authorities shall award each contract to the tenderer that has submitted the best tender on the basis of the award criteria set out in the specifications of the framework agreement.

## 2. Dynamic Purchasing Systems

Revised recital 22:

- (22) In view of the experience acquired, there is also a need to adjust the rules governing dynamic purchasing systems to enable contracting authorities to take full advantage of the possibilities afforded by this instrument. The systems need to be simplified, in particular by operating them in the form of a restricted procedure, hence eliminating the need for indicative tenders, which have been identified as one of the major burdens associated with these systems. Thus any economic operator that submits a request to participate and meets the selection criteria should be allowed to take part in procurement procedures carried out through the dynamic purchasing system. This purchasing technique allows the contracting authority to have a particularly broad range of tenders and hence to ensure optimum use of public funds through broad competition. The examination of these requests to participate should normally be performed within a maximum of 10 working days, given that the evaluation of the selection criteria will take place on the basis of the simplified requirements for documentation that are set out in this Directive. However, when the system is first set up, contracting authorities may, in response to the first publication of the contract notice or the invitation to confirm interest, be faced with such a large number of requests for participation that they may need more time to examine the requests. This should be admissible, provided that no specific procurement is launched as long as the requests have not been examined.

### *Article 32*

#### *Dynamic purchasing systems*

*[Directive 2004/18/EC: Articles 1(6), 33]*

1. For commonly used purchases the characteristics of which, as generally available on the market, meet the requirements of the contracting authorities, contracting authorities may use a dynamic purchasing system. The dynamic purchasing system shall be operated as a completely electronic process, open throughout its validity to any economic operator that satisfies the selection criteria.

2. In order to award contracts under a dynamic purchasing system, contracting authorities shall follow the rules of the restricted procedure. All the candidates satisfying the selection criteria shall be admitted to the system; the number of candidates to be admitted to the system shall not be limited in accordance with Article 64. All communications in the context of a dynamic purchasing system shall only be made with electronic means in accordance with Article 19(2) to (6).
3. For the purposes of awarding contracts under a dynamic purchasing system, contracting authorities shall:
  - (a) publish a call for competition making it clear that a dynamic purchasing system is involved;
  - (b) indicate in the specifications at least the nature and estimated quantity of the purchases envisaged, as well as all the necessary information concerning the purchasing system, the electronic equipment used and the technical connection arrangements and specifications;
  - (c) offer unrestricted and full direct access, as long as the system is valid, to the specifications and to any additional documents in conformity with Article 51.
4. Contracting authorities shall give any economic operator, throughout the entire duration of the dynamic purchasing system, the possibility of requesting to participate in the system under the conditions referred to in paragraph 2. Contracting authorities shall finalise their assessment of such requests according to the selection criteria within 10 working days following their receipt.

Notwithstanding the first subparagraph, as long as the invitation to tender for the first specific procurement under the dynamic purchasing system has not been sent, contracting authorities may extend the evaluation period provided that no invitation to tender is issued in the meantime. In the procurement documents they shall indicate the length of the extended period that they intend to apply.

The contracting authority shall inform the economic operator referred to in the first subparagraph at the earliest possible opportunity of whether or not it has been admitted to the dynamic purchasing system.

5. Contracting authorities shall invite all qualified participants to submit a tender for each specific procurement under the dynamic purchasing system, in accordance with Article 52.

They shall award the contract to the tenderer that submitted the best tender on the basis of the award criteria set out in the contract notice for the dynamic purchasing system or, where a prior information notice is used as a means of calling for competition, in the invitation to confirm interest. Those criteria may, where appropriate, be formulated more precisely in the invitation to tender.

6. Contracting authorities shall indicate the duration of the dynamic purchasing system in the call for competition. They shall notify the Commission of any change in duration, using the following standard forms:
  - (a) where the duration is changed without terminating the system, the form used initially for the call for competition for the dynamic purchasing system;
  - (b) where the system is terminated, a contract award notice referred to in Article 48.

No charges may be billed to the interested economic operators or to parties to the dynamic purchasing system.

### **3. Central purchasing bodies, ancillary purchasing activities and occasional joint procurement**

- (24) Centralised purchasing techniques are increasingly used in most Member States. Central purchasing bodies are responsible for making acquisitions, managing dynamic purchasing systems or awarding public contracts/framework agreements for other contracting authorities. In view of the large volumes purchased, such techniques help increase competition and professionalise public purchasing. Provision should therefore be made for a Union definition of central purchasing bodies dedicated to contracting authorities and it should be clarified that central purchasing bodies operate in two different manners. They should be able to act as wholesalers by buying, stocking and reselling or as intermediaries by awarding contracts, operating dynamic purchasing systems or concluding framework agreements to be used by contracting authorities. Such intermediary role might in some cases be carried out by conducting the relevant award procedures autonomously, without detailed instructions from the contracting authorities concerned; in other cases, by conducting the relevant award procedures under the instructions of the contracting authorities concerned, on their behalf and for their account. *[Moved to new Recital 24b to Article 37]*

Rules should also be laid down for allocating responsibility for the observance of the obligations pursuant to this Directive, [...] among the central purchasing body and the contracting authorities procuring from or through the central purchasing body. Where the latter has sole responsibility for the conduct of the procurement procedures, it should also be solely and directly responsible for the legality of the procedures. Where a contracting authority conducts certain parts of the procedure, for instance the reopening of competition under a framework agreement or the award of individual contracts based on a dynamic purchasing system, it should continue to be responsible for the stages it conducts.

New Recital 24a:

(24a) Contracting authorities should be allowed to award a public service contract for the provision of centralised purchasing activities to a central purchasing body without applying the procedures provided for in this Directive; it should also be allowed that such public service contracts include the provision of ancillary purchasing activities. Public service contracts for the provision of ancillary purchasing activities should, when performed otherwise than by a central purchasing body in connection with its provision of central purchasing activities to the contracting authority concerned, be awarded in accordance with the provisions of this Directive.

*\*[ Provisions listed in Article 2 under cluster 10, but relevant also in this context:*

- (16) ‘centralised purchasing activities’ means activities conducted [...], in one of the following forms:
- (a) the acquisition of supplies and/or services intended for resale to contracting authorities and the subsequent sale thereof,
  - (b) the award of public contracts, the operation of dynamic purchasing systems or the conclusion of framework agreements for works, supplies or services intended for contracting authorities and the subsequent recourse thereto.
- (17) ‘ancillary purchasing activities’ means activities consisting in the provision of support to purchasing activities in the form of:
- (a) technical infrastructure enabling contracting authorities to award public contracts or to conclude framework agreements for works, supplies or services;
  - (b) advice on the conduct or design of public procurement procedures;
  - (c) preparation and management of a procurement procedure on behalf and for the account of the contracting authority concerned and under its instruction; or
  - (d) any other type of provision of support to purchasing activities.

(18) ‘central purchasing body’ means a contracting authority, whose main task it is to provide centralised purchasing activities, whether accompanied or not by ancillary purchasing activities, for an indefinite period.

(19) ‘procurement service provider’ means an economic operator offering ancillary purchasing activities;

*\*Additional remark: The notion of "procurement service provider" is used in Article 21(2)(a).]*

#### *Article 35*

#### *Centralised purchasing activities and central purchasing bodies [Directive 2004/18/EC: Articles 1(10), 11]*

1. Member States may stipulate that contracting authorities may purchase [...] supplies and/or services from [...] a central purchasing body offering the centralised purchasing activity referred to in point a of Article 2(16).

Member States may also stipulate that contracting authorities may purchase works, supplies and services by using contracts awarded by the central purchasing body, by using dynamic purchasing systems operated by the central purchasing body or, to the extent set out in Article 31(2) second subparagraph, by using a framework agreement concluded by the central purchasing body offering the centralised purchasing activity referred to in point b of Article 2(16). Where a dynamic purchasing system which is operated by a central purchasing body may be used by other contracting authorities, this shall be mentioned in the call for competition setting up the system.

When implementing subparagraphs 1 and 2, Member States may stipulate that certain procurements shall be made by having recourse to central purchasing bodies or to a specific central purchasing body.

2. *[Moved to Article 38(2)]*

3. A contracting authority fulfils its obligations pursuant to this Directive when it purchases supplies or services from a central purchasing body offering the centralised purchasing activity referred to in point a of Article 2(16).

Furthermore, a contracting authority also fulfils its obligations pursuant to this Directive where it purchases works, supplies and services by using contracts awarded by the central purchasing body, by using dynamic purchasing systems operated by the central purchasing body or, to the extent set out in Article 31(2) second subparagraph, by using a framework agreement concluded by the central purchasing body offering the centralised purchasing activity referred to in point b of Article 2(16).

However, [...] the contracting authority concerned shall be responsible for fulfilling the obligations pursuant to this Directive in respect of the stages it conducts itself, such as:

- (a) awarding a contract under a dynamic purchasing system, which is operated by a central purchasing body;
- (b) conducting a reopening of competition under a framework agreement that has been concluded by a central purchasing body;
- (c) pursuant to Article 31(4)(a) or (aa), determining which of the economic operators, party to the framework agreement, shall perform a given task under a framework agreement that has been concluded by a central purchasing body.

4. All procurement procedures conducted by a central purchasing body shall be performed using electronic means of communication, in accordance with the requirements of Article 19.

5. Contracting authorities may, without applying the procedures provided for in this Directive, award a public service contract for the provision of centralised purchasing activities to a central purchasing body. Such public service contracts may also include the provision of ancillary purchasing activities.

6. [...]

[...]

(24b) It is appropriate to clarify that strengthening the provisions concerning central purchasing bodies should in no way prevent the current practices of occasional joint procurement, i. e. less institutionalised and systematic common purchasing or the established practice of having recourse to service providers that prepare and manage procurement procedures on behalf and for the account of a contracting authority, under its instructions. On the contrary, certain features of joint procurement should be clarified because of the important role joint procurement may play, not least in connection with innovative projects. Joint procurement may take many different forms, ranging from the preparation of common technical specifications for works, supplies or services that will be procured by a number of contracting authorities, each conducting a separate procurement procedure, to situations where the contracting authorities concerned jointly conduct one single procurement procedure to cases where one contracting authority conducts a procurement procedure on behalf of the others. Where different contracting authorities each conduct its own procurement procedure, albeit on the basis of a common technical specification, each should be responsible for the conformity of its own procurement procedure to the provisions of this Directive. In respect of other forms of joint procurement, the distribution of responsibility should be clarified.

*Article 37*  
*Occasional joint procurement*  
*[New]*

1. Two or more contracting authorities may agree to perform certain specific procurements jointly. [...]
  
2. Where the conduct of a procurement procedure in its entirety is carried out jointly by the contracting authorities concerned, they shall be jointly responsible for fulfilling their obligations pursuant to this Directive. Contracting authorities shall be deemed to conduct an award procedure jointly where one contracting authority manages the procedure on both its own behalf and on that of the other contracting authorities concerned.

Where the conduct of a procurement procedure is not in its entirety carried out jointly by the contracting authorities concerned, each shall be responsible for fulfilling its obligations pursuant to this Directive in respect of the stage or stages it conducts, such as:

- (a) the award of a contract;
- (b) the conclusion of a framework agreement;
- (c) the operation of a dynamic purchasing system;
- (d) the award of a contract under a dynamic purchasing system;
- (e) the conduct of a reopening of competition under a framework agreement;
- (f) the determination pursuant to Article 31(4)(a) or (aa) of which of the economic operators, party to the framework agreement, shall perform a given task.

*Article 38*

*Procurement implicating contracting authorities from different Member States*  
*[New]*

1. Without prejudice to Article 11, contracting authorities from different Member States may act jointly in the award of public contracts by using one of the means described in this Article.
2. Member States shall not prohibit their contracting authorities from using centralised purchasing activities offered by central purchasing bodies established in another Member State.

In respect of centralised purchasing activities offered by a central purchasing body established in another Member State than the contracting authority, Member States may, however, specify whether their contracting authorities may use the centralised purchasing activities as defined in point a or point b of Article 2(16) or all of these. *[Moved from Art. 35(2)]*

A central purchasing body may not, for the sole reason of its origin, prevent that a contracting authority from another Member State purchases from it or prevent that the contracting authority uses contracts awarded by the central purchasing body, dynamic purchasing systems operated by the central purchasing body or, to the extent set out in Article 31(2) second subparagraph, that the contracting authority uses a framework agreement concluded by the central purchasing body.

- 2a. The provision of the centralised purchasing activities as defined in point a and b of Article 2(16) by a central purchasing body located in another Member State [...] shall be conducted in accordance with the national provisions of the Member State where the central purchasing body is located.

The national provisions of the Member State where the central purchasing body is located shall also apply to the following:

- (a) the award of a contract under a dynamic purchasing system;
  - (b) the conduct of a reopening of competition under a framework agreement;
  - (c) the determination pursuant to Article 31(4)(a) or (aa) of which of the economic operators, party to the framework agreement, shall perform a given task.
3. Several contracting authorities from different Member States may jointly award a public contract, conclude a framework agreement or operate a dynamic purchasing system. They may also award contracts based on the framework agreement or on the dynamic purchasing system. Unless the necessary provisions have been regulated by an international agreement concluded in conformity with the Treaty between the Member States concerned, the participating contracting authorities shall conclude an agreement that determines:
- (a) which national provisions shall apply to the procurement procedure.

- (b) the internal organisation of the procurement procedure, including the management of the procedure, the sharing of responsibilities, the distribution of the works, supplies or services to be procured, and the conclusion of contracts.

When determining the applicable national law in accordance with point (a), contracting authorities may choose the national provisions of any Member State in which at least one of the participating authorities is located.

4. Where several contracting authorities from different Member States have set up a joint legal entity, including European Groupings of territorial cooperation under Regulation (EC) N°1082/2006 of the European Parliament and of the Council<sup>1</sup> or other entities established under Union law, the participating contracting authorities shall, by a decision of the competent body of the joint legal entity, agree on the applicable national procurement rules of one of the following Member States:
  - (a) the national provisions of the Member State where the joint legal entity has its registered office;
  - (b) the national provisions of the Member State where the joint legal entity is carrying out its activities.

This agreement may either apply for an undetermined period, when fixed in the constitutive act of the joint legal entity, or may be limited to a certain period of time, certain types of contracts or to one or more individual contract awards.

[...]

8. Decisions on the award of public contracts in cross-border public procurement shall be subject to the ordinary review mechanisms available under the national law which applies to the award procedure pursuant to paragraphs 2a, 3 or 4.

9. [...]

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<sup>1</sup> OJ L 210 of 31.7.2006, p. 19