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Subject:	Proposal for a Directive of the European Parliament and of the Council on public procurement - Cluster 8: Sound procedures

Delegations will find in the Annex a non-paper prepared by the Commission services (DG Internal Market) on Cluster 8 of the above proposal.

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ANNEX

Cluster 8

Sound procedures

Changes to the substance are highlighted in **bold**; minor modifications or purely linguistic adaptations are not highlighted. ***Please note that comments are set out in respect of the Commission's initial proposal of 20th of December 2012. Where changes proposed by the Presidency in subsequent documents would suggest that changes could be envisaged to ensure coherence, these are indicated below.***

1. General rules

Article 15

Principles of procurement [Directive 2004/18/EC: Article 2]

Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent **and proportionate** way.

Administrative burden in procurement procedures can be considerably reduced by making sure that any procedural and substantial requirements are proportionate to the subject-matter of the contract. To emphasize the importance of this objective, the principle of proportionality is now explicitly mentioned amongst the general principles of public procurement (see already before, Article 44.2 of Directive 2004/18/EC).

The design of the procurement shall not be made with the objective of excluding it from the scope of this Directive or of artificially narrowing competition.

Practice has shown that tailor-made procurement design (e.g., an extremely narrow description of the subject-matter or very specific selection criteria which are not justified by the object of the procurement) is a common method of discriminating between economic operators. The second sentence of Article 15 has been added to give a clear signal that these malpractices are unacceptable and to facilitate the fight against them.

Article 16

Economic operators [Directive 2004/18/EC: Article 4]

1. Economic operators that, under the law of the Member State in which they are established, are entitled to provide the relevant service, shall not be rejected solely on the ground that, under the law of the Member State in which the contract is awarded, they would be required to be either natural or legal persons.

   However, in the case of public service and public works contracts as well as public supply contracts covering in addition services or siting and installation operations, legal persons may be required to indicate, in the tender or the request to participate, the names and relevant professional qualifications of the staff to be responsible for the performance of the contract in question.

2. Groups of economic operators may submit tenders or put themselves forward as candidates. **Contracting authorities shall not establish specific conditions for participation of such groups in procurement procedures which are not imposed on individual candidates**. In order to submit a tender or a request to participate, those groups shall not be required by the contracting authorities to assume a specific legal form.

   Contracting authorities may establish specific conditions for the performance of the contract by a group, provided that those conditions are justified by objective reasons and proportionate. Those conditions may require a group to assume a specific legal form once it has been awarded the contract, to the extent that this change is necessary for the satisfactory performance of the contract.

The provision has been completed by an explicit clarification, that groups of economic operators may not be treated less favourably than individual candidates, with regards to conditions for participation as well as conditions for the performance of contracts (this improvement might particularly benefit SME). Where justified by legitimate concerns of the contracting authorities, proportionate measures may however be required in the contract performance clauses, for instance with a view to defining clear responsibility and liability amongst the members of the group.

Article 18
Confidentiality [Directive 2004/18/EC: Article 6]

1. Unless otherwise provided in this Directive or in the national law **concerning access to information**, and without prejudice to the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 48 and 53 of this Directive, the contracting authority shall not disclose information forwarded to it by economic operators which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders.

2. Contracting authorities may impose on economic operators requirements aimed at protecting the confidential nature of information which the contracting authorities make available throughout the procurement procedure.

Clarification in paragraph 1 that the prohibition to disclose confidential information can be overridden by national legislation on access to information. A second paragraph has been added to give contracting authorities an additional instrument for the protection of confidential information, i.e. the right to impose appropriate measures (such as non-disclosure obligations) on the other participants in the procedure. This is inspired by the provisions of the current Article 13(1) of Directive 2004/17/EC.

2. Conflicts of interests

Article 21
Conflicts of interests [new]

The provision set out common minimum standards for preventing and remedying conflicts of interest, including basic elements of definition, the description of the various situations in which conflicts of interests arise and an obligation of Member States to put in place effective measures to address such situations.

1. **Member States shall provide for rules to effectively prevent, identify and immediately remedy conflicts of interests arising in the conduct of procurement procedures that are subject to this Directive, including the design and preparation of the procedure, the drawing-up of the procurement documents, the selection of candidates and tenderers and the award of the contract, so as to avoid any distortion of competition and ensure equal treatment of all tenderers.**

General obligation for Member States to put in place rules for prevention and timely remedying conflicts of interest in procurement procedures. The Directive also highlights certain stages of the procedure which are particularly vulnerable to conflict of interest situations, without this list being exhaustive.

The notion of conflict of interests shall at least cover any situation where the categories of persons referred to in paragraph 2 have, directly or indirectly, a private interest in the outcome of the procurement procedure, which may be perceived to impair the impartial and objective performance of their duties.

For the purposes of this Article, 'private interests' means any family, emotional life, economic, political or other shared interests with the candidates or the tenderers, including conflicting professional interests.

Subparagraphs 2 and 3 provide minimum elements of definition without being exhaustive ("at least") – Member States remain free to include further situations in their definition of conflicts of interests. The elements of definition set out in this provision are inspired by commonly used definitions in other fora, such as the OECD[1] and the Union's own procurement rules as set out in the Financial Regulation[2]. In essence, the definition should cover all situations where a person playing a role in the procurement procedure on the contracting authorities' side is in a situation where conflicting private or professional interests could trigger behaviour not fully and exclusively serving the contracting authorities' interests.

1 See, for instance: http://www.oecd.org/dataoecd/51/44/35365195.pdf

2 See Article 55(2) of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities.

2. The rules referred to in paragraph 1 shall apply to conflicts of interests involving at least the following categories of persons:

(a) staff members of the contracting authority, procurement service providers or staff members of other service providers who are involved in the conduct of the procurement procedure;

(b) the chairperson of the contracting authority and members of decision-making bodies of the contracting authority who, without necessarily being involved in the conduct of the procurement procedure, may nevertheless influence the outcome of that procedure.

Point a would for instance cover the case of a conflict of interest involving key personnel in a consulting engineering company, which assists the contracting authority in the assessment of tenders, whereas an example under point b could be that of a mayor or a deputy mayor.

3. Member States shall ensure in particular:

(a) that staff members referred to in paragraph 2(a) are required to disclose any conflict of interests in relation to any of the candidates or tenderers, as soon as they become aware of such conflicts, in order to enable the contracting authority to take remedial action;

(b) that candidates and tenderers are required to submit at the beginning of the procurement procedure a declaration on the existence of any privileged links with the persons referred to in paragraph 2(b), which are likely to place those persons in a situation of conflict of interests; the contracting authority shall indicate in the individual report referred to in Article 85 whether any candidate or tenderer has submitted a declaration.

In the event of a conflict of interests, the contracting authority shall take appropriate measures. Those measures may include the recusal of the staff member in question from involvement in the affected procurement procedure or the re-assignment of the staff member's duties and responsibilities. Where a conflict of interests cannot be effectively remedied by other means, the candidate or tenderer concerned shall be excluded from the procedure.

Where privileged links are identified, the contracting authority shall immediately inform the oversight body designated in accordance with Article 84 and take appropriate measures to avoid any undue influence on the award process and ensure equal treatment of candidates and tenderers. Where the conflict of interests cannot be effectively remedied by other means, the candidate or tenderer concerned shall be excluded from the procedure.

The most important safeguard in this connection is transparency; hence the obligation to declare the existence of possible conflicts of interests, so that measures can be taken. The proposal clearly favours measures to be taken on the side of the contracting authority and sees exclusion as a last resort measure only.

This paragraph is based on the same approach that the Court of Justice took in its judgment of 3.3.2005 in Joined Cases C-21/03 and C-34/03 ("Fabricom"), i. e. that exclusion must be the last resort to be applied only where so doing is indispensable to meet the principle of equal treatment.

To be noted that any false declarations pursuant to point b of paragraph 3 will entail that the contract cannot be awarded to the economic operator concerned, cf. Article 68, point c, set out below.

The possible new text proposed for cluster 9 by the Presidency would no longer foresee any provisions on the national oversight body; if the new text were to accepted, then the reference to the oversight body in the last subparagraph would have to be removed to ensure coherence with.

4. All measures taken pursuant to this Article shall be documented in the individual report referred to in Article 85.

See point h of Article 85(1).

3. Illicit conduct

Article 22
Illicit conduct

Candidates shall be required at the beginning of the procedure to provide a declaration on honour that they have not undertaken and will not undertake to:

(a) unduly influence the decision-making process of the contracting authority or obtain confidential information that may confer upon them undue advantages in the procurement procedure;

(b) enter into agreements with other candidates and tenderers aimed at distorting competition;

(c) deliberately provide misleading information that may have a material influence on decisions concerning exclusion, selection or award.

Modelled on the concept of "Certificates of independent bid determination" (CIBD) which is used in a number of EU and third countries as an instrument to prevent bid rigging[3]. This concept is extended to other forms of illicit conduct which would lead to unfair advantages in the procedure.

Apart from the pedagogical function, the required declaration will have a deterring function through the double sanction foreseen for false declarations: the prohibition to award the contract to a winning bidder having submitted a false declaration (Article 68.b), but also the criminal sanctions for false solemn declarations provided for by national criminal law.

4. Preliminary market consultation/ Prior involvement of candidates and tenderers

Article 39
Preliminary market consultations

1. **Before launching a procurement procedure, contracting authorities may conduct market consultations in order to assess the structure, capability and capacity of the market and to inform economic operators of their procurement plans and requirements.**

   For this purpose, contracting authorities may seek or accept **advice from administrative support structures or from third parties or market participants**, provided that such advice does not have the effect of precluding competition **and does not result in a violation of the principles of non-discrimination and transparency**.

[3] See for instance: http://www.oecd.org/document/27/0,3746,en_21571361_44258691_44905563_1_1_1_1,00.html

This paragraph sets out explicitly the principle that contracting authorities have the possibility to consult the market and receive advice prior to launching a procurement procedure.

The second subparagraph is based closely on the current Recital 8 of Directive 2004/18/EC ("Before launching a procedure for the award of a contract, contracting authorities may, using a technical dialogue, seek or accept advice which may be used in the preparation of the specifications provided, however, that such advice does not have the effect of precluding competition."). It also echoes – in positive – the provisions of Article X(5)[4] of the GPA.

2. Where a candidate or tenderer or an undertaking related to a candidate or tenderer has advised the contracting authority or has otherwise been involved in the preparation of the procurement procedure, the contracting authority shall take appropriate measures to ensure that competition is not distorted by the participation of that candidate or tenderer.

Such measures shall include the communication to the other candidates and tenderers of any relevant information exchanged in the context of or resulting from the involvement of the candidate or tenderer in the preparation of the procurement procedure and the fixing of adequate time limits for the receipt of tenders. The candidate or tenderer concerned shall only be excluded from the procedure where there are no other means to ensure compliance with the duty to observe the principle of equal treatment.

Prior to any such exclusion, candidates or tenderers shall be given the opportunity to prove that their involvement in preparing the procurement procedure is not capable of distorting competition. The measures taken shall be documented in the individual report required by Article 85.

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4 "A procuring entity shall not seek or accept, in a manner that would have the effect of precluding competition, advice that may be used in the preparation or adoption of any technical specification for a specific procurement from a person that may have a commercial interest in the procurement."

Paragraph 2 deals explicitly with a problem that poses itself frequently in practice, namely the extent to which economic operators, who having advised the contracting authority or has otherwise been involved in the preparation of a procurement procedure, may participate in that same procurement procedure.

It proposes a balance between, on the one hand, the principle of equal treatment – in casu, ensuring that some participants are not unfairly advantaged through their prior involvement – and, on the other hand, the principle of proportionality. It applies the same approach that the Court of Justice took in its judgment of 3.3.2005 in Joined Cases C-21/03 and C-34/03 ("Fabricom"), i. e. that in cases concerning prior technical advice exclusion must be the last resort to be applied only where so doing is indispensable to meet the principle of equal treatment.

In some cases, communication of the relevant information referred to in the second subparagraph may be sufficient in itself, for example where the prior involvement in the preparation of a large-scale works contract s limited to the performance of a geo-technical analysis of the building site. Here, rendering the analysis available to all the other participants can be sufficient to ensure that the principle of equal treatment is observed and competition not distorted. In other cases, further measures may be needed and in yet others it may turn out not to be possible to ensure equal treatment otherwise than through the exclusion of the economic operator concerned.

5. Impediments to award

Article 68
Impediments to award

Contracting authorities shall not award the contract to the tenderer submitting the best tender where one of the following conditions is fulfilled:

(a) the tenderer is not able to provide the certificates and documents required pursuant to Articles 59, 60 and 61;

(b) the declaration provided by the tenderer pursuant to Article 22 is false;

(c) the declaration provided by the tenderer pursuant to Article 21(3)(b) is false.

In order to avoid that the use of self-declarations leads to the attribution of contracts to unqualified tenderers, the provision explicitly prohibits the award of contracts to winning tenderers who cannot provide the required certificates (point a).

It also establishes an unequivocal and immediate sanction for false declarations on illicit conduct – point b – and conflicts of interest – point c – in the concrete procedure.

6. Abnormally low tenders

Article 69
Abnormally low tenders [Directive 2004/18/EC: Article 55]

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.

The former rules on abnormally low tenders are often criticised for not being robust enough to guarantee fair competition and avoid price dumping in public contracts.

To remedy this problem, the rules have been strengthened, through the investigation obligation in paragraph 1.

Where the three conditions set out in points a, b and c are fulfilled, contracting authorities are obliged to require explanations. The obligation is however a pure investigation obligation, contracting authorities are not obliged to reject the tender.

Disproportionate administrative burden for contracting authorities should be avoided; the investigation obligation is therefore limited to situations where the three objective conditions are all fulfilled, indicating a strong probability of the offer being abnormally low.

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

This paragraph clarifies that the possibility to request explanations is not limited to the situations where investigation is mandatory under paragraph 1.

3. The explanations referred to in paragraphs 1 and 2 may in particular relate to:

(a) the economics of the construction method, the manufacturing process or the services provided;

(b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the execution of the work or for the supply of the goods or services;

(c) the originality of the work, supplies or services proposed by the tenderer;

(d) compliance, **at least in an equivalent manner, with obligations established by Union legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XI or, where not applicable, with other provisions ensuring an equivalent level of protection**;

This provision replaces the former formulation in Article 55.1(d) ("compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed), to bring it in line with the rejection ground in paragraph 4, 2nd subparagraph – dealt with in cluster 2.

(e) the possibility of the tenderer obtaining State aid.

4. The contracting authority shall verify the information provided by consulting the tenderer. It may only reject the tender **where the evidence does not justify the low level of price or costs charged**, taking into account the elements referred to in paragraph 3.

The new wording in the last sentence have been added to clarify the notion "abnormally low tenders".

[…] [Rejection for violation of environmental or social standards dealt with in cluster 2]

5. Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was **compatible with the internal market within the meaning of Article 107 of the Treaty.** Where the contracting authority rejects a tender in those circumstances, it shall inform the Commission thereof.

The provision now explicitly indicated the standards for assessing legality of State Aid, by replacing the former notion of "was granted legally" by a reference to the relevant Treaty provisions.

6. Upon request, Member States shall make available to other Member States, in accordance with Article 88, any information relating to the evidence and documents produced in relation to details listed in paragraph 3.

Provision on administrative cooperation, to facilitate assessment of abnormally low tenders in a cross-border context.

7. Modification of contracts

Article 72
Modification of contracts during their term

1. A substantial modification of the provisions of a public contract during its term shall be considered as a new award for the purposes of this Directive and shall require a new procurement procedure in accordance with this Directive.

The provision codifies the case-law of the ECJ (in particular, case C-454/06, Pressetext), according to which substantial modifications during the performance of a contract require a new tender procedure.

The following paragraphs provide a number of additional clarifications to enhance legal certainty. The guiding principle of the various provisions is that wherever the subsequent modifications to a contract change considerably the terms and conditions on which the initial competition took place, the principle of equal treatment requires a reopening to competition. Minor or "daily-life"-adaptations to contracts should be clearly excluded from the scope of this obligation, to give operational certainty to contracting authorities and economic operators.

See also the explanations in recital 45:

"It is necessary to clarify the conditions under which modifications of a contract during its performance require a new procurement procedure, taking into account the relevant case-law of the Court of Justice of the European Union. A new procurement procedure is required in case of material changes to the initial contract, in particular to the scope and content of the mutual rights and obligations of the parties, including the distribution of intellectual property rights. Such changes demonstrate the parties' intention to renegotiate essential terms or conditions of that contract. This is the case in particular if the amended conditions would have had an influence on the outcome of the procedure, had they been part of the initial procedure."

2. A modification of a contract during its term shall be considered substantial within the meaning of paragraph 1, where it renders the contract substantially different from the one initially concluded. In any case, without prejudice to paragraph 3 and 4, a modification shall be considered substantial where one of the following conditions is met:

(a) the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the selection of other candidates than those initially selected or would have allowed for awarding the contract to another tenderer;

(b) the modification changes the economic balance of the contract in favour of the contractor;

(c) the modification extends the scope of the contract considerably to encompass supplies, services or works not initially covered.

This provision codifies the criteria set out by the ECJ to determine the substantial character of a contract modification ("Pressetext" Judgement, paras 35-37:

"An amendment to a public contract during its currency may be regarded as being material when it introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted.

Likewise, an amendment to the initial contract may be regarded as being material when it extends the scope of the contract considerably to encompass services not initially covered. (…)

An amendment may also be regarded as being material when it changes the economic balance of the contract in favour of the contractor in a manner which was not provided for in the terms of the initial contract.")

3. The replacement of the contractual partner shall be considered a substantial modification within the meaning of paragraph 1.

However, the first subparagraph shall not apply in the event of universal or partial succession into the position of the initial contractor, following corporate restructuring operations or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Directive.

In the "Pressetext"-Judgement, the ECJ stated (para 40): "As a rule, the substitution of a new contractual partner for the one to which the contracting authority had initially awarded the contract must be regarded as constituting a change to one of the essential terms of the public contract in question, unless that substitution was provided for in the terms of the initial contract, such as, by way of example, provision for sub-contracting."

This statement has been codified in the present provision. In order to provide further legal certainty to economic operators, it appears appropriate to clearly indicate that this should not cover changes following corporate restructuring such as mergers and aquisitions (and which are not specifically aimed at "passing on" the public contract in question to another economic operator).

See also explanations in recital 47:

"In line with the principles of equal treatment and transparency, the successful tenderer should not be replaced by another economic operator without reopening the contract to competition. However, the successful tenderer performing the contract may undergo certain structural changes during the performance of the contract, such as purely internal reorganisations, mergers and acquisitions or insolvency. Such structural changes should not automatically require new procurement procedures for all public contracts performed by that undertaking."

4. Where the value of a modification can be expressed in monetary terms, the modification shall not be considered to be substantial within the meaning of paragraph 1, where its value does not exceed the thresholds set out in Article 4 and where it is below 5% of the price of the initial contract, provided that the modification does not alter the overall nature of the contract. Where several successive modifications are made, the value shall be assessed on the basis of the cumulative value of the successive modifications.

This provision aims at providing legal certainty for small-scale modifications, by establishing an – irrefutable – presumption that a modification is not substantial (and hence no new tender procedure is required) where the following cumulative conditions are fulfilled:

- the value of the modification…
  - can be monetised
  - is not itself higher than the thresholds of the Directive
  - is below 5% of the price of the initial contract

and

- the modification does not alter the overall nature of the contract.

The latter condition is needed because there can be cases where even a relatively low-value modification turns the initial contract into "something completely different" (examples: the contracting authority decides to buy instead of leasing the fleet of service cars that it ordered or renounces the requirement that food supplies bought for public canteens must be organic food). In this case, other economic operators might have been interested in tendering for the contract had they known this change in content; exempting contracting authorities from the obligation to publish a new call for tender would not be appropriate.

5. Contract modifications shall not be considered substantial within the meaning of paragraph 1 where they have been provided for in the procurement documents in clear, precise and unequivocal review clauses or options. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall not provide for modifications or options that would alter the overall nature of the contract.

See explanations in recital 48:

"Contracting authorities should, in the individual contracts themselves, have the possibility to provide for modifications to a contract by way of review clauses, but such clauses should not give them unlimited discretion. This directive should therefore set out to what extent modifications may be provided for in the initial contract."

A review clause is a clause which foresees that the parties to the contract can amend this contract by common agreement in certain predefined cases. Examples: in the case of a multi-stage project in which the parties can establish the precise conditions, such as obtaining specific results during a previous stage etc.…, that will trigger an extension of the contract to cover performance of the next, pre-determined stage in the project. Another case may be where the contracting authorities expect a specific amount of additional funding to become available during the duration of the contract and stipulate how the contract may be extended when the funding is actually available.

As can be seen, this provision builds in part on the same logic that was at the basis of the provisions of the current Article 31(4)(b) authorising the use of a negotiated procedure without prior publication in certain cases[5].

[5] " for new works or services consisting in the repetition of similar works or services entrusted to the economic operator to whom the same contracting authorities awarded an original contract, provided that such works or services are in conformity with a basic project for which the original contract was awarded according to the open or restricted procedure.

As soon as the first project is put up for tender, the possible use of this procedure shall be disclosed and the total estimated cost of subsequent works or services shall be taken into consideration by the contracting authorities when they apply the provisions of Article 7."

An option allows the contracting authority to request (unilaterally) additional supplies or services from the economic operator (e.g., delivery of 10 additional busses or prolongation of the contract for 2 more years).

In the same way as for paragraph 4, the notion of "not altering the overall nature of the contract" excludes review clauses or options which would turn the contract into "something different". As paragraph 5 does not include any cap in terms of value, the requirement that review clauses or options may not "alter the overall nature of the contract" should also be understood as prohibiting changes which would dramatically change the qualitative scope of the contract (e.g., purchase of 10 busses, with an option for the contracting authority to request delivery of 100 more busses in the future).

6. By way of derogation from paragraph 1, a substantial modification shall not require a new procurement procedure where the following cumulative conditions are fulfilled

(a) the need for modification has been brought about by circumstances **which a diligent contracting authority** could not foresee;

(b) the modification does not alter the overall nature of the contract;

(c) any increase in price is not higher than 50% of the value of the original contract.

Contracting authorities shall publish in the *Official Journal of the European Union* a notice on such modifications. Such notices shall contain the information set out in Annex VI part G and be published in accordance with Article 49.

This provision builds on the rules in Article 31(4)(a) of Directive 2004/18/EC which on substance described a case of contract modifications, allowing for this specific case the use of the negotiated procedure without prior publication

"for additional works or services not included in the project initially considered or in the original contract but which have, through unforeseen circumstances, become necessary for the performance of the works or services described therein, on condition that the award is made to the economic operator performing such works or services:

- when such additional works or services cannot be technically or economically separated from the original contract without major inconvenience to the contracting authorities, or

- when such works or services, although separable from the performance of the original contract, are strictly necessary for its completion.

However, the aggregate value of contracts awarded for additional works or services may not exceed 50 % of the amount of the original contract."

Article 72(6) of the proposal has taken over the principles set out in Article 31(4((a) of Directive 2004/18/EC, but extending it considerably:

- Not only "additional works or services" are covered but any kind of modification;

- The condition that the new works or services must be inseparable from the original contract or strictly necessary for the completion has been deleted and replaced by the less severe condition of "not altering the overall nature of the contract".

For the rest, the substantial requirements remain basically the same as in Article 31.4.a; it has simply been clarified that the circumstances must not have been unforeseen because of a negligence of the contracting authority ("unforeseeable to a diligent contracting authority").

The requirement for an ex-post publication which is now explicitly stated in paragraph 6 is not new on substance, as such publication are already compulsory under Directive 2004/18/EC for negotiated procedures without prior publication.

See also the explanations in recital 46:

"Contracting authorities can be faced with external circumstances that they could not foresee when they awarded the contract. In this case, a certain degree of flexibility is needed to adapt the contract to these circumstances without a new procurement procedure. The notion of unforeseeable circumstances refers to circumstances that could not have been predicted despite reasonably diligent preparation of the initial award by the contracting authority, taking into account its available means, the nature and characteristics of the specific project, good practice in the field in question and the need to ensure an appropriate relationship between the resources spent in preparing the award and its foreseeable value. However, this cannot apply in cases where a modification results in an alteration of the nature of the overall procurement, for instance by replacing the works, supplies or services to be procured by something different or by fundamentally changing the type of procurement since, in such a situation, a hypothetical influence on the outcome may be assumed."

7. Contracting authorities shall not have recourse to modifications of the contract in the following cases:

(a) where the modification would aim at remedying deficiencies in the performance of the contractor or the consequences, which can be remedied through the enforcement of contractual obligations;

(b) where the modification would aim at compensating risks of price increases that have been hedged by the contractor.

This provision ensures that contracting authorities do not use contract modifications in order to remedy problems which can be addressed through other means. For instance, where a works project is not terminated on time because of a defective performance by the economic operator, the contracting authority shall not extend the delivery period (or even pay additional remuneration) in order to get the project properly executed; instead of modifying the contract, proper performance shall be achieved through enforcement of the contractual obligations of the economic operator.

Likewise, contract modifications are not needed where the situation that triggered the alleged need for the modification is in reality solved through a risk hedging mechanism which the economic operator has at his disposal. For instance, an increase in prices for raw materials needed for the works to be performed, following price jumps on raw material markets, should not be remedied through increasing the remuneration paid to the contractor if the contractor has concluded an insurance against such price increases.

8. Termination of contracts

Article 73
Termination of contracts

Member States shall ensure that contracting authorities have the possibility, under the conditions determined by the applicable national contract law, to terminate a public contract during its term, where one of the following conditions is fulfilled:

(a) the exceptions provided for in Article 11 cease to apply following a private participation in the legal person awarded the contract pursuant to Article 11(4);

(b) a modification of the contract constitutes a new award within the meaning of Article 72;

(c) the Court of Justice of the European Union finds, in a procedure pursuant to Article 258 of the Treaty, that a Member State has failed to fulfil its obligations under the Treaties due to the fact that a contracting authority belonging to that Member State has awarded the contract in question without complying with its obligations under the Treaties and this Directive.

In order to prevent conflicts between European law and national civil law, contracting authorities must have the possibility to bring a contract to an end where this is necessary to comply with obligations resulting from the Directive and/or from primary European law.

This applies primarily to the situations referred to in Articles 11**(5)** [the referral in point (a) to Article 11(4) is erroneous and should be corrected] and 72 where the Directive itself requires that an ongoing contract should be (re-)opened to competition by conducting a new procurement procedure under the Directive. This presupposes that the contracting authority has the legal means to terminate the existing contractual relationship.

A similar problem arises where the ECJ finds in an infringement procedure under Article 258 TFEU that a contract has been awarded in breach of European law obligations. In such a case, the Member State is obliged under Article 260 TFEU to "take the necessary measures to comply with the judgment of the Court". This implies an obligation to terminate the contract awarded in breach of European law (see judgment of 18 July 2007 in Case C-503/04, Commission v Germany). If the Member State in question fails to comply with the judgment, it might be condemned to penalty payments. There is therefore an urgent need to provide public authorities with the legal instruments necessary to terminate a contract under such circumstances.

The article provides only that contracting authorities must have the possibility to terminate the contract; the conditions and instruments for such termination are explicitly left to Member States. Depending on national contract law, possible instruments might include ineffectiveness or nullity of the contract or rights of cancellation or rescission. Alternatively, a Member State could also oblige its contracting authorities to provide in all public contracts termination or withdrawal clauses that allow for unilateral termination of the contract under certain conditions.