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In view of the Working Party on Public Procurement on 24 April 2012, delegations will find in the Annex a working document on Cluster 2 submitted by the Presidency.

Changes to doc. 6060/12 are underlined.

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Cluster 2

Strategic use of public procurement

Recitals

- (27) The technical specifications drawn up by public purchasers need to allow public procurement to be opened up to competition. To that end, it must be possible to submit tenders that reflect the diversity of technical solutions so as to obtain a sufficient level of competition. Consequently, technical specifications should be drafted in such a way to avoid artificially narrowing down competition through requirements that favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator. Drawing up the technical specifications in terms of functional and performance requirements generally allows this objective to be achieved in the best way possible. Functional and performance related requirements are also an appropriate means to favour innovation in public procurement and should be used as widely as possible. Furthermore, contracting authorities should also consider indicating in the technical specifications whether and to what extent the transfer of intellectual property rights will be required. Where reference is made to a European standard or, in the absence thereof, to a national standard, tenders based on equivalent arrangements must be considered by contracting authorities. To demonstrate equivalence, tenderers can be required to provide third-party verified evidence; however, other appropriate means of proof such as a technical dossier of the manufacturer should also be allowed where the economic operator concerned has no access to such certificates or test reports, or no possibility of obtaining them within the relevant time limits.

- (37) Contracts should be awarded on the basis of objective criteria that ensure compliance with the principles of transparency, non-discrimination and equal treatment. These criteria should guarantee that tenders are assessed in conditions of effective competition, also where contracting authorities require high-quality works, supplies and services that are optimally suited to their needs [...]. As a result, contracting authorities should be allowed to adopt as award criteria either ‘the most economically advantageous tender’ or ‘the lowest cost’, taking into account that in the latter case they are free to set adequate quality standards by using technical specifications or contract performance conditions. In order to encourage a greater quality orientation of public procurement, the assessment of tenders on the basis of the criterion of the "most economically advantageous tender" may be imposed on contracting authorities by Member States where they deem it appropriate.
- (38) Where contracting authorities choose to award a contract to the most economically advantageous tender, they must determine the award criteria on the basis of which they will assess tenders in order to identify which one offers the best value for money. The determination of these criteria depends on the subject-matter of the contract since they must allow the level of performance offered by each tender to be assessed in the light of the subject-matter of the contract, as defined in the technical specifications, and the value for money of each tender to be measured. In order to guarantee best value for money, the contract award decision ought not be based on non-cost criteria only. The necessary cost element should be accompanied by at least one additional, non-cost criterion which is linked to the subject matter of the contract. A non-exhaustive list of examples of such criteria is set out in this Directive. Furthermore, the chosen award criteria should not confer an unrestricted freedom of choice on the contracting authority and they should ensure the possibility of effective competition and be accompanied by requirements that allow the information provided by the tenderers to be effectively verified.
- (38a) Wherever the quality of the staff employed is relevant to the performance of the contract, contracting authorities should also be allowed to use as an award criterion the organisation, qualification and experience of the staff assigned to performing the contract in question, as this may affect the quality of contract performance and, as a result, the economic value of the tender.

(38b) Contract performance conditions are compatible with this Directive provided that they are not directly or indirectly discriminatory and are linked to the performance of the contract; this excludes requirements concerning general corporate policy. The contract performance conditions are to be indicated in the contract notice, the prior information notice used as a means of calling for competition or the procurement documents. Such conditions may include the obligation for economic operators to foresee compensation mechanisms for risks occurring during the contract performance which could substantially impact the performance, such as price fluctuations. Such compensation mechanisms are potentially beneficial for the contracting authority which would be protected against additional costs triggered by the realisation of the hedged risks.

(39) It is of utmost importance to fully exploit the potential of public procurement to achieve the objectives of the Europe 2020 Strategy for sustainable growth. In view of the important differences between individual sectors and markets, it would however not be appropriate to set general mandatory requirements for environmental, social and innovation procurement. The Union legislature has already set mandatory procurement requirements for obtaining specific goals in the sectors of road transport vehicles (Directive 2009/33/EC of the European Parliament and the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles¹) and office equipment (Regulation (EC) No 106/2008 of the European Parliament and the Council of 15 January 2008 on a Community energy-efficiency labelling programme for office equipment²). In addition, the definition of common methodologies for life cycle costing has significantly advanced. It therefore appears appropriate to continue on that path, leaving it to sector-specific legislation to set mandatory objectives and targets in function of the particular policies and conditions prevailing in the relevant sector and to promote the development and use of European approaches to life-cycle costing as a further underpinning for the use of public procurement in support of sustainable growth.

¹ OJ L 120, 15.5.2009, p. 5.

² OJ L 39, 13.2.2008, p. 1.

- (40) These sector-specific measures must be complemented by an adaptation of the public procurement Directives empowering contracting authorities to pursue the objectives of the Europe 2020 Strategy in their purchasing strategies. It should hence be made clear that contracting authorities can determine the most economically advantageous tender and the lowest cost using a life-cycle costing approach [...]. The notion of life-cycle costing includes all costs over the life cycle of works, supplies or services. This means internal costs, such as development, production, use, maintenance and end-of-life disposal costs but can also include costs imputed to environmental externalities, such as pollution caused by the product itself or its manufacturing, provided they can be monetised and monitored. The methods which contracting authorities use for assessing costs imputed to environmental externalities should be established in an objective and non-discriminatory manner and be accessible to all interested parties. Such methods can be established at national, regional or local level, but they should, to avoid distortions of competition through tailor-made methodologies, remain general in the sense that they are not set up specifically for a particular public procurement procedure. Common methodologies should be developed at the level of the Union for the calculation of life-cycle costs for specific categories of supplies or services [...].
- (41) Furthermore, in view of a better integration of social and environmental considerations in the procurement procedures, contracting authorities should be allowed to refer to a specific production process, a specific mode of provision of services, or a specific process for any other stage of the life cycle of a product or service, provided that they refer to aspects of this process which are directly linked to the subject-matter or, in the case of contract performance clauses, the performance, of the specific contract concerned. Requirements concerning the production or provision process are for example that the purchased goods have not been treated with toxic chemicals, or that the purchased services are provided using energy-efficient machines. However, the condition of a direct link excludes requirements of general corporate policy, which cannot be considered as factors characterising the specific production process of the purchased supply, works or service. Contracting authorities should hence not be allowed to require tenderers to have a certain corporate social or environmental responsibility policy in place.

(41a) It is essential that criteria or requirements concerning social aspects of the production process have a direct link with the subject-matter or the performance, respectively, of the contract. In addition, they should be applied in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, as interpreted by the European Court of justice and should not be chosen or applied in a way that discriminates directly or indirectly against economic operators from other Member States or from third countries parties to the Agreement or to Free Trade Agreements to which the Union is party. Thus, requirements concerning the basic working conditions regulated in Directive 96/71/EC, such as minimum rates of pay, should remain at the level set by national legislation or, where applicable collective agreements which have been declared universally applicable. The laws, regulations and collective agreements, at both national and Union level, that are in force in the areas of employment conditions and safety at work apply during the performance of a public contract, provided that such rules, and their application, comply with Union law. These obligations can hence be mirrored in contract execution clauses. Clauses ensuring compliance with collective agreements can also be included in public contracts. Non-compliance with such obligations set by national legislation or collective agreements may be also considered to be grave misconduct on the part of the economic operator concerned, liable to lead to the exclusion of that economic operator from the procedure for the award of a public contract. Contract performance clauses may also be intended to favour the protection of the environment or animal welfare and, to comply in substance with fundamental International Labour Organisation (ILO) Conventions [...], and to recruit more disadvantaged persons than are required under national legislation.

[...]

(41b) Measures aiming at the protection of health of the staff involved in the production process [...], the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract or training in the skills needed for the contract in question can be the subject of contract execution clauses or award criteria provided that it has a direct link with the subject-matter of the contract. For instance, mention may be made, amongst other things, of the requirements — applicable during performance of the contract — to recruit long-term job-seekers or to implement training measures for the unemployed or young persons. In the technical specifications contracting authorities can require such social criteria which directly characterise the product or service in question, such as accessibility for persons with disabilities or design for all users. [...]

[...]

1. Contract award criteria

Article 66

Contract award criteria

[Directive 2004/18/EC: Art. 53]

1. Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the criteria on which contracting authorities shall base the award of public contracts shall be one of the following:
 - (a) the most economically advantageous tender;
 - (b) the lowest cost.

Costs may be assessed, on the choice of the contracting authority, on the basis of the price only or using a cost-effectiveness approach, such as a life-cycle costing approach, under the conditions set out in Article 67.

2. 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 [...], other criteria linked to the subject-matter of the public contract in question, for instance [...]:

- (a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, environmental characteristics and innovative aspects, after-sales service and technical assistance, delivery conditions (delivery date, delivery process and delivery period or period of completion);

Wherever the quality of the staff employed is relevant to the performance of the contract [...] and, as a result, might have a significant impact on the economic value of the tenders, organisation, qualification and experience of the staff assigned to performing the contract in question may be taken into consideration, on the condition that, following the award of the contract, such staff may only be replaced with the consent of the contracting authority, which must verify that replacements ensure equivalent quality;

- (b) a specific process at the stage of production or at the stage of provision of the tendered works, supplies or services or at any other stage of its life cycle [...], to the extent that those criteria concern factors directly involved in this process and characterise the specific process of production or provision of the requested works, supplies or services.

The contracting authority may also include the necessary price element within the criterion of the economically most advantageous tender by setting a fixed price or cost on the basis of which economic operators will compete on pure quality criteria.

3. Member States may provide that all or certain types of contracts shall be awarded by means of the criterion of the most economically advantageous tender as referred to in point (a) of paragraph 1 and in paragraph 2.

4. Award criteria shall not confer an unrestricted freedom of choice on the contracting authority. They shall ensure the possibility of effective competition and shall be accompanied by requirements that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria. In case of doubt, contracting authorities shall verify effectively the accuracy of the information and proof provided by the tenderers [...].
5. In the case referred to in point (a) of paragraph 1 the contracting authority shall specify in the [...] procurement documents [...] the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender.

Those weightings may be expressed by providing for a range with an appropriate maximum spread.

Where weighting is not possible for objective reasons, the contracting authority shall indicate the criteria in decreasing order of importance.

Life-cycle costing

Article 67

Life-cycle costing

1. Life-cycle costing shall to the extent relevant cover parts or all of the following costs over the life cycle of a product, service or works [...]:
 - (a) costs borne by the contracting authority or other users, such as:
 - (i) costs relating to acquisition [...],
 - (ii) costs of use, such as energy consumption,
 - (iii) maintenance costs,
 - (iv) end of life costs, such as collection and recycling costs;

(b) costs imputed to environmental externalities directly linked to the life cycle, provided their monetary value can be determined and verified; these costs may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.

2. Where contracting authorities assess the costs using a life-cycle costing approach, they shall indicate in the procurement documents the data to be provided by the tenderers and the method which the contracting authority will use to determine the life-cycle costs on the basis of these data.

The method used for the assessment of costs imputed to environmental externalities must fulfil all of the following conditions:

- (a) it [...] is based on [...] objectively verifiable and non-discriminatory criteria;
- (b) it has been established for repeated or continuous application;
- (c) it is accessible to all interested parties;
- (d) the data required can be provided with reasonable effort by normally diligent economic operators, including operators from third countries party to the Agreement or the agreements listed in Annex XV.

[...]

3. Whenever a common method for the calculation of life-cycle costs has been made mandatory by a legislative act of the Union [...], that common method shall be applied where life-cycle costing is included in the award criteria referred to in Article 66(1).

A list of such legislative acts, and where necessary the delegated acts supplementing them, is set out in Annex XV. The Commission shall be empowered to adopt delegated acts in accordance with Article 89 concerning the update of that list, when an update of the list is necessary due to the adoption of new legislation making a common method mandatory or the repeal or modification of existing legislation.

ANNEX XV
LIST OF EU LEGISLATION REFERRED TO IN ARTICLE 67(3)

Directive 2009/33/EC³

2. Contract performance clauses

Article 70

Conditions for performance of contracts

Contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are indicated in the call for competition or in the procurement documents. Those conditions may, in particular, concern social and environmental considerations.

3. Technical specifications

Article 40

Technical specifications

1. The technical specifications [...] shall be set out in the procurement documents. They shall define the characteristics required of a works, service or supply.

These characteristics may also refer to the specific process or method of production or provision of the requested works, supplies or services or of any other stage of its life cycle [...].

For all procurement [...] which is intended for use by natural persons, whether general public or staff of the contracting authority, those technical specifications shall, except in duly justified cases, be drawn up so as to take into account accessibility criteria for persons with disabilities or design for all users;

³ OJ L 120, 15.5.2009, p. 5.

Where mandatory accessibility standards are adopted by a legislative act of the Union, technical specifications shall, as far as accessibility criteria for persons with disabilities or design for all users are concerned, be defined by reference thereto.

2. Technical specifications shall afford equal access of economic operators to the procurement procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.
3. Without prejudice to mandatory national technical rules, to the extent that they are compatible with Union law, the technical specifications shall be formulated in one of the following ways:
 - (a) in terms of performance or functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract;
 - (b) by reference to technical specifications and, in order of preference, to national standards transposing European standards, European Technical Assessments, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or — when any of those do not exist — national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies; each reference shall be accompanied by the words ‘or equivalent’;
 - (c) in terms of performance or functional requirements as referred to in point (a), with reference to the technical specifications referred to in point (b) as a means of presuming conformity with such performance or functional requirements;
 - (d) by reference to the technical specifications referred to in point (b) for certain characteristics, and by reference to the performance or functional requirements referred to in point (a) for other characteristics.

4. Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process which characterises the products or services provided by a specific economic operator, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraph 3 is not possible. Such reference shall be accompanied by the words "or equivalent".
5. Where a contracting authority uses the option of referring to the specifications referred to in point (b) of paragraph 3, it shall not reject a tender on the grounds that the works, supplies or services tendered for do not comply with the specifications to which it has referred, once the tenderer proves in its tender by any appropriate means, including the means of proof referred to in Article 42, that the solutions proposed satisfy in an equivalent manner the requirements defined by the technical specifications.
6. Where a contracting authority uses the option laid down in point (a) of paragraph 3 to formulate technical specifications in terms of performance or functional requirements, it shall not reject a tender for works, supplies or services which comply with a national standard transposing a European standard, a European technical approval, a common technical specification, an international standard or a technical reference system established by a European standardisation body, where those specifications address the performance or functional requirements which it has laid down.

In its tender, the tenderer shall prove by any appropriate means, including those referred to in Article 42, that the work, supply or service in compliance with the standard meets the performance or functional requirements of the contracting authority.

[The question of whether or not definitions are to be moved to Article 2 is to be decided at a later stage with lawyer linguists]

ANNEX VIII
DEFINITION OF CERTAIN TECHNICAL SPECIFICATIONS

For the purposes of this Directive:

- (1) "technical specification" means one of the following:
 - (a) in the case of public works contracts the totality of the technical prescriptions contained in particular in the procurement documents, defining the characteristics required of a material, product or supply, so that it fulfils the use for which it is intended by the contracting authority; those characteristics include levels of environmental and climate performance, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, safety or dimensions, including the procedures concerning quality assurance, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions and production processes and methods at any stage of the life cycle of the works; those characteristics also include rules relating to design and costing, the test, inspection and acceptance conditions for works and methods or techniques of construction and all other technical conditions which the contracting authority is in a position to prescribe, under general or specific regulations, in relation to the finished works and to the materials or parts which they involve;
 - (b) in the case of public supply or service contracts a specification in a document defining the required characteristics of a product or a service, such as quality levels, environmental and climate performance levels, design for all requirements (including accessibility for disabled persons) and conformity assessment, performance, use of the product, safety or dimensions, including requirements relevant to the product as regards the name under which the product is sold, terminology, symbols, testing and test methods, packaging, marking and labelling, user instructions, production processes and methods at any stage of the life cycle of the supply or service and conformity assessment procedures;

- (2) (a) "standard" means a technical specification approved by a recognised standardising body for repeated or continuous application, compliance with which is not compulsory and which falls into one of the following categories:
- (i) international standard means a standard adopted by an international standards organisation and made available to the general public,
 - (ii) European standard means a standard adopted by a European standards organisation and made available to the general public,
 - (iii) national standard means a standard adopted by a national standards organisation and made available to the general public;

[Based on terminology of Directive 98/34/EEC.

If adopted, the Parliament and Council Regulation [XXX] on European standardisation would replace it [...]. As the text of the proposed Regulation is still evolving, it is not yet updated to reflect the latest changes.]

- (2) (a) 'standard' means a technical specification for repeated or continuous application, with which compliance is not compulsory, and which is one of the following:
- (b) 'international standard' means a standard adopted by an international standardisation body;
 - (c) 'European standard' means a standard adopted by one of the European standardisation bodies;
 - (d) 'harmonised standard' means a European standard adopted on the basis of a request made by the Commission for the application of Union harmonisation legislation;
 - (e) 'national standard' means a standard adopted by a national standardisation body;
 - (f) 'ICT standard' means a standard in the field of information and communication technologies.]

- (3) "European Technical Assessment" means the documented assessment of the performance of a construction product, in relation to its essential characteristics, in accordance with the respective European Assessment Document, as defined in Regulation (EU) No 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products [...] ⁴ ;
- (4) "Common technical specification" means a technical specification laid down in accordance with a procedure recognised by the Member States [or in accordance with Articles 9 and 10 [...] Regulation (EU) .../2012 of the European Parliament and the Council on European standardisation [...] which has been published in the *Official Journal of the European Union*;) [only to be kept if standardisation regulation adopted as such]

[...] Regulation (EU) .../2012 on European standardisation.

[As the text of the proposed Regulation is still evolving, it is not yet updated to reflect the latest changes].

"Chapter IV

Standards in the field of ICT

Article 9

Recognition of technical specifications in the field of ICT

Either on proposal from a public authority referred to in Directive 2004/18/EC or on its own initiative the Commission may decide to recognise technical specifications which are not national, European or international standards and meet the requirements set out in Annex II, as ICT standards.

Article 10

Use of ICT standards in public procurement

⁴ OJ L 88, 4.4.2011, p. 5

ICT standards referred to in Article 9 shall constitute common technical specifications referred to in Directives 2004/17/CE and 2004/18/CE, and Regulation (EC) No 2342/2002.

ANNEX II

REQUIREMENTS FOR THE RECOGNITION OF TECHNICAL SPECIFICATIONS IN THE FIELD OF ICT

1. the technical specifications have market acceptance and their implementations do not hamper interoperability with the implementations of existing European or international standards. Market acceptance can be demonstrated by operational examples of compliant implementations from different vendors.

2. the technical specifications were developed by a non-profit making organisation which is a professional society, industry or trade association or any other membership organisation that within its area of expertise develops standards in the field of information and communication technologies and which is not a European, national or international standardisation body, through processes which fulfil the following criteria:

(a) openness:

the technical specifications were developed on the basis of open decision-making accessible to all interested operators in the market or markets affected by the standard.

(b) consensus:

the standardisation process was collaborative and consensus based and did not favour any particular stakeholder. Consensus means a general agreement, characterised by the absence of sustained opposition to substantial issues by any important part of the concerned interests and by a process that involves seeking to take into account the views of all parties concerned and to reconcile any conflicting arguments. Consensus does not imply unanimity.

(c) transparency:

(i) all information concerning technical discussions and decision making was archived and identified.

(ii) information on (new) standardisation activities was widely announced through suitable and accessible means.

(iii) participation of all interested categories of interested stakeholders was sought with a view to achieving balance.

(iv) consideration and response were given to comments by interested parties.

3. the technical specifications reflect the following requirements:

(a) maintenance: Ongoing support and maintenance of published specifications are guaranteed over a long period.

(b) availability: Specifications are publicly available for implementation and use on reasonable terms (including for a reasonable fee or free of charge).

(c) intellectual property rights essential to the implementation of specifications are licensed to applicants on a (fair) reasonable and non-discriminatory basis ((F)RAND), which includes, at the discretion of the intellectual property rightholder, licensing essential intellectual property without compensation.

(d) relevance:

(i) the specifications are effective and relevant;

(ii) specifications need to respond to market needs and regulatory requirements;

(e) neutrality and stability:

(i) specifications whenever possible are performance oriented rather than based on design or descriptive characteristics;

(ii) specifications do not distort the market or limit the possibilities for implementers to develop competition and innovation based upon them.

(iii) specifications are based on advanced scientific and technological developments."

(f) quality:

- (i) the quality and level of detail are sufficient to permit the development of a variety of competing implementations of interoperable products and services;
- (ii) standardised interfaces are not hidden or controlled by anyone other than the organisations that adopted the technical specifications.

- (5) "Technical reference" means any deliverable produced by European standardisation bodies, other than European standards, according to procedures adapted to the development of market needs.

4. Labels and certification

Article 41

Labels

[Article 23(6), Directive 2004/18/EC]

- 1. Where contracting authorities lay down, in the technical specifications, the award criteria or the contract performance clauses, environmental, social or other requirements or criteria, they may require a specific label as means of proof that works, services or supplies correspond to such requirements or criteria, provided that all of the following conditions are fulfilled:
 - (a) the requirements to be met in order to obtain the label only concern criteria which are linked to the subject-matter of the contract and are appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract;
 - (b) the requirements to be met in order to obtain the label are [...] based on [...] objectively verifiable and non-discriminatory criteria;
 - (c) the labels are established in an open and transparent procedure in which all relevant stakeholders, including government bodies, consumers, manufacturers, distributors and [...] non-governmental organisations, may participate,
 - (d) the labels are accessible to all interested parties

- (e) the requirements to be met in order to obtain the label are set by a third party which is independent from the economic operator applying for the label.

Contracting authorities requiring a specific label shall accept all equivalent labels that fulfil the requirements of the specific label indicated by the contracting authorities. Contracting authorities shall accept other appropriate means of proving such requirements, which may include a technical dossier of the manufacturer, where the economic operator concerned has no access to the label, or no possibility of obtaining it within the relevant time limits, provided that the lack of access is not attributable to the economic operator concerned.

2. Where a label fulfils the conditions provided in points (b), (c), (d) and (e) of paragraph 1 but also sets out requirements not linked to the subject-matter of the contract, contracting authorities shall not require the label as such but may define the technical specification by reference to those of the detailed specifications of that label, or, where necessary, parts thereof, that are linked to the subject-matter of the contract and are appropriate to define characteristics of this subject-matter.

[...]

Article 42

Test reports, certification and other means of proof

[Article 23(4),(5),(6)&(7), Directive 2004/18/EC]

1. Contracting authorities may require that economic operators provide a test report from a conformity assessment body or a certificate issued by such a body as means of proof of conformity with requirements or criteria set out in the technical specifications, the award criteria or the contract performance clauses.

Where contracting authorities require the submission of certificates drawn up by a specific conformity assessment body [...], certificates from equivalent other conformity assessment bodies shall also be accepted by the contracting authorities.

For the purpose of this paragraph, a conformity assessment body [...] shall be a body that performs conformity assessment activities including calibration, testing, certification and inspection accredited in accordance with Regulation (EC) No 765/2008 of the European Parliament and of the Council⁵.

2. Contracting authorities shall accept other appropriate means of proof than those referred to in paragraph 1, such as a technical dossier of the manufacturer where the economic operator concerned has no access to the certificates or test reports referred to in paragraph 1, or no possibility of obtaining them within the relevant time limits, provided that the lack of access is not attributable to the economic operator concerned.

3. [Moved to paragraph 1].

[...]

5. Member States shall make available to other Member States, upon request, any information related to the evidence and documents submitted in accordance with Article 40(6), Article 41 and paragraphs 1, 2 and 3 of this Article [...]. The competent authorities of the Member State of establishment of the economic operator shall provide this information in accordance with Article 88.

5. Exclusions for violations of social and environmental obligations [to be considered at a later stage, in the light of the developments in negotiations on the trade instrument]

⁵ OJ L 218, 13.8.2008, p. 30.

Article 54

General principles

2. Contracting authorities may decide not to award a contract to the tenderer submitting the best tender where they have established that the tender does not comply [...]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. For this purpose, 'best tender' means any tender which is better than that submitted by the tenderer to whom the contract is awarded.

Insofar as the tender is not subject to the obligations of 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, contracting authorities may decide not to award a contract to the tenderer submitting the best tender, where the tender does not comply in an equivalent manner with the standards thereof.

Article 55

Exclusion grounds

3. A contracting authority may exclude from participation in a public contract any economic operator if one of the following conditions is fulfilled:
 - (a) where it is aware of any violation of 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; insofar as the economic operator is not subject to the obligations of 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, contracting authorities may exclude economic operators that do not comply with standards equivalent to those set out in these provisions.

Article 69
Abnormally low tenders

1. Contracting authorities shall require economic operators to explain the price or costs charged, where all of the following conditions are fulfilled:

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.

Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with obligations established by Union legislation in the field of social and labour law or environmental law or by the international social and environmental law provisions listed in Annex XI.

ANNEX XI

LIST OF INTERNATIONAL SOCIAL AND ENVIRONMENTAL CONVENTIONS REFERRED
TO IN ARTICLES 54(2), 55(3)(a) AND 69(4)

- Convention 87 on Freedom of Association and the Protection of the Right to Organise;
- Convention 98 on the Right to Organise and Collective Bargaining;
- Convention 29 on Forced Labour;
- Convention 105 on the Abolition of Forced Labour;
- Convention 138 on Minimum Age;
- Convention 111 on Discrimination (Employment and Occupation);
- Convention 100 on Equal Remuneration;
- Convention 182 on Worst Forms of Child Labour;
- Vienna Convention for the protection of the Ozone Layer and its Montreal Protocol on substances that deplete the Ozone Layer;

- Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention);
- Stockholm Convention on Persistent Organic Pollutants (Stockholm POPs Convention);
- Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (UNEP/FAO) (The PIC Convention) Rotterdam, 10/09/1998 and its 3 regional Protocols.]

6. Reserved contracts

New recital (to be inserted after recital (14):

Employment and occupation contribute to integration in society and are key elements in guaranteeing equal opportunities for all [...]. In this context, sheltered workshops can play a significant role. The same is true for other social businesses whose main aim is to support the social and professional integration or reintegration of disabled and disadvantaged persons, such as unemployed, members of disadvantaged minorities or otherwise socially marginalised groups. However, such workshops or businesses might not be able to obtain contracts under normal conditions of competition. Consequently, it is appropriate to provide that Member States should be able to reserve the right to participate in award procedures for public contracts or for certain lots thereof to such workshops or businesses or reserve performance of contracts to the context of sheltered employment programmes.

Article 17

Reserved contracts

[Directive 2004/18/EC: Art. 19]

Member States may reserve the right to participate in public procurement procedures to sheltered workshops and economic operators whose main aim is the social and professional integration of disabled and disadvantaged persons or provide for such contracts to be performed in the context of sheltered employment programmes, provided that at least 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.

The call for competition shall make reference to this provision.

7. Social services

Title III

Particular procurement regimes

**[Provision listed in Article 10 under cluster 10, but relevant also in this context:*

Article 10

Specific exclusions for service contracts

This Directive shall not apply to public service contracts for:

...

...

(c) arbitration and conciliation services;

(c a) any of the following legal services:

- (i) legal representation of a client in judicial proceedings before the national courts, tribunals or public authorities of a Member State by a lawyer within the meaning of Article 1 of Directive 77/249/EEC;
- (ii) document certification services which must be provided by notaries;
- (iii) legal services provided by trustees, appointed guardians or other legal services the providers of which are designated by a court or tribunal in the Member State concerned;
- (iv) other legal services which in the Member State concerned are connected, even occasionally, with the exercise of official authority;

(d) ...]

CHAPTER I

Social and other specific services

Article 4

Thresholds amounts

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:

[...]

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

Article 74

Award of contracts for social and other specific services

Public contracts for social and other specific services, such as hotel and restaurant services, listed in Annex XVI shall be awarded in accordance with this Chapter, where the value of the contracts is equal to or greater than the threshold indicated in Article 4 (d)

Article 75

Publication of notices

1. Contracting authorities intending to award a public contract for the services referred to in Article 74 shall make known their intention by any of the following means:
 - (a) by means of a contract notice, which shall contain the information referred to in Annexes VI Part H, in accordance with the standard forms;

(b) by means of a prior information notice, which shall be published continuously according to Article 49 and contain the information set out in Annex VI part I. The prior information notice shall refer specifically to the services that will be the subject of the contracts to be awarded. It shall indicate that the contracts will be awarded without further publication and invite interested economic operators to express their interest in writing.

[NB: Article 49.4 concerning standing publication of PIN to be adapted accordingly, in particular to ensure availability longer than 12 months]

2. Contracting authorities that have awarded a public contract for the services referred to in Article 74 shall make known the results of the procurement procedure by means of a contract award notice, which shall contain the information referred to in Annexes VI Part J, in accordance with the standard forms.
3. [...] The Commission shall establish the standard forms referred to in paragraphs 1 and 2. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 91.
4. The notices referred to in this Article shall be published in accordance with Article 49.

Article 76

Principles of awarding contracts

1. Member States shall put in place national rules for the award of contracts subject to this Chapter in order to ensure contracting authorities comply with the principles of transparency and equal treatment of economic operators. Member States are free to determine the procedural rules applicable as long as such rules allow contracting authorities to take into account the specificities of the services in question.

2. Member States shall ensure that contracting authorities may take into account the need to ensure quality, continuity, accessibility, availability and comprehensiveness of the services, the specific needs of different categories of users, the involvement and empowerment of users and innovation. Member States may also provide that the choice of the service provider shall not be made solely on the basis of the price for the provision of the service.

ANNEX XVI
SERVICES REFERRED TO IN ARTICLE 74

CPV Code	Description
79611000-0; <u>75200000-8</u> ; <u>75231200-6</u> ; <u>75231240-8</u> ; from 85000000-9 to 85323000-9 (except 85321000-5 and 85322000-2); <u>98133100-5</u> and <u>98200000-5</u>	Health, social <u>and related</u> services
75121000-0, 75122000-7, 75124000-1; from 79995000-5 to 79995200-7; from 80100000- 5 to 80660000-8 (except 80533000-9, 80533100-0, 80533200-1); from 92000000-1 to 92700000-8 (except 92230000-2, 92231000-9, 92232000-6)	Administrative educational, healthcare and cultural services
75300000-9	Compulsory social security services
75310000-2, 75311000-9, 75312000-6, 75313000-3, 75313100-4, 75314000-0, 75320000-5, 75330000-8, 75340000-1	Benefit services
98000000-3; <u>55521100-9</u>	Other community, social and personal services
98120000-0	Services furnished by trade unions
98131000-0	Religious services
<u>55100000-1</u> to <u>55410000-7</u>	<u>Hotel and restaurant services</u>

Recital 11

Other categories of services continue by their very nature to have a limited cross-border dimension, namely what are known as services to the person, such as certain social, health and educational services. These services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. A specific regime should therefore be established for public contracts for these services, with a higher threshold of EUR 500 000.

Services to the person with values below this threshold will typically not be of interest to providers from other Member States, unless there are concrete indications to the contrary, such as Union financing for transborder projects. Contracts for services to the person above this threshold should be subject to Union-wide transparency. Given the importance of the cultural context and the sensitivity of these services, Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate. The rules of this directive take account of that imperative, imposing only observance of basic principles of transparency and equal treatment and making sure that contracting authorities are able to apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee⁶. Member States and/or public authorities remain free to provide these services themselves or to organise social services in a way that does not entail the conclusion of public contracts, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority, without any limits or quotas, provided such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination.

New recital 11a

Likewise, hotel and restaurant services are typically offered only by operators located in the specific place of delivery of these services and have therefore also a limited cross-border dimension. They should therefore only be covered by the particular regime set out for social and other specific services, as from a threshold of EUR 500 000. Large hotel and restaurant service contracts above this threshold may be of interest for various economic operators, such as travel agencies and other intermediaries, also on a cross-border basis.

⁶ SPC/2010/10/8 final, 6.10.2010.

PART H
INFORMATION TO BE INCLUDED IN CONTRACT NOTICES CONCERNING
CONTRACTS FOR SOCIAL AND OTHER SPECIFIC SERVICES
(as referred to in Article 75(1))

1. Name, identification number (where provided for in national legislation), address including NUTS code [...] email and internet address of the contracting authority [...].

[...]
2. NUTS code for the main location of works in case of works or NUTS code for the main place of delivery or performance in case of supplies and services
3. Brief description of the contract in question including the estimated total value of the contract and CPV Nomenclature reference No(s);.
4. Conditions for participation, including
 - where appropriate, indication whether the contract is restricted to sheltered workshops, or whether its execution is restricted to the framework of protected job programmes,
 - where appropriate, indication whether the execution of the service is reserved by law, regulation or administrative provision to a particular profession.
5. Time limit(s) for contacting the contracting authority in view of participation.
6. Brief description of the main features of the award procedure to be applied.

[...]

PART I

INFORMATION TO BE INCLUDED IN PRIOR INFORMATION NOTICES FOR SOCIAL AND OTHER SPECIFIC SERVICES

(as referred to in Article 75(1))

1. Name, identification number (where provided for in national legislation), address including NUTS code, email and internet address of the contracting authority.

2. Brief description of the contract in question including the estimated total value of the contract and CPV Nomenclature reference No(s):.

3. As far as already known:
 - a) NUTS code for the main location of works in case of works or NUTS code for the main place of delivery or performance in case of supplies and services

 - b) time-frame for delivery or provision of goods, works or services and duration of the contract.

 - c) conditions for participation, including:

where appropriate, indication whether the public contract is restricted to sheltered workshops, or whether its execution is restricted to the framework of protected job programmes,

where appropriate, indication whether the execution of the service is reserved by law, regulation or administrative provision to a particular profession,

 - d) brief description of the main features of the award procedure to be applied.

4. A reference to the fact that interested economic operators shall advise the authority of their interest in the contract or contracts and time limits for receipt of expressions of interest and location as to where expressions of interest shall be transmitted.

PART J
INFORMATION TO BE INCLUDED IN CONTRACT AWARD NOTICES CONCERNING
CONTRACTS FOR SOCIAL AND OTHER SPECIFIC SERVICES (as referred to in Article
75(2))

1. Name, identification number (where provided for in national legislation), address including NUTS code [...], email and internet address of the contracting authority [...].

 2. Brief [...] description of the contract in question including CPV Nomenclature reference No(s);.

 3. NUTS code for the main location of works in case of works or NUTS code for the main place of delivery or performance in case of supplies and services ;

 4. Number of tenders received.

 5. Price or range of prices (maximum/minimum) paid.

 6. For each award, name, address including NUTS code [...], email address and internet address of the successful economic operator or operators.

 7. Any other relevant information.
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