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NOTE

from:	General Secretariat
to:	Working Party on Public Procurement
on:	3-4 May 2012
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No Cion prop.:	18966/11 MAP 10 MI 686
Subject:	Proposal for a Directive of the European Parliament and of the Council on public procurement - Cluster 9: Governance

In view of the Working Party on Public Procurement on 3 and 4 May 2012, delegations will find in the Annex a new compromise text on Cluster 9 of the above proposal, submitted by the Presidency. Due to the profound revision of the previous document (doc. 7396/12), the modifications in the text are not specifically indicated.

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Cluster 9

Governance

- (49) The evaluation has shown that there is still considerable room for improvement in the application of the Union public procurement rules. In view of a more efficient and consistent application of the rules, it is on the one hand essential to get a good overview on possible structural problems and general patterns in national procurement policies, in order to address possible problems in a more targeted way. This overview should be gained through appropriate monitoring, the results of which should be regularly published, in order to allow an informed debate on possible improvements of procurement rules and practice. On the other hand, better guidance and assistance to contracting authorities and economic operators could also greatly contribute to enhancing the efficiency of public procurement, through better knowledge, increased legal certainty and professionalisation of procurement practices; such guidance should be made available to contracting authorities and economic operators wherever it appears necessary, to ensure correct application of the rules.
- (50) [...]
- (51) Citizens, concerned stakeholders, organised or not, and other persons or bodies which do not have access to review procedures pursuant to Council Directive 89/665/EEC do nevertheless have a legitimate interest as taxpayers in sound procurement procedures. They should therefore be given a possibility to signal possible violations of this Directive to a competent authority or structure. So as not to duplicate existing authorities or structures, Member States should be able to provide for recourse to general monitoring authorities or structures, sectoral oversight bodies, municipal oversight authorities, competition authorities, the ombudsman or national auditing authorities.

- (52) Traceability and transparency of decision-making in procurement procedures is essential for ensuring sound procedures, including efficiently fighting corruption and fraud. Contracting authorities should hence keep copies of concluded contracts for high-value contracts, in order to be able to provide access to these documents to interested parties in accordance with applicable rules on access to documents. Furthermore, the essential elements and decisions of individual procurement procedures should be documented in a procurement report. To avoid administrative burden wherever possible, it should be permitted that the procurement report refer to information already contained in the relevant contract award notice. The electronic systems for publication of these notices, managed by the Commission, should also be improved with a view of facilitating the entry of data while making it easier to extract global reports and exchange data between systems.
- (53) [...]

1. Enforcement and oversight

Article 83

Enforcement

[Article 81 Directive 2004/18/EC]

1. In order to effectively ensure correct and efficient implementation, Member States shall make sure that at least the tasks set out in this Article are performed by one or more authorities or structures. They shall indicate to the Commission all authorities or structures competent for these tasks.
2. Member States shall ensure that the application of public procurement rules is monitored including the implementation of projects co-financed by the Union with a view to detecting threats to the financial interests of the Union. This monitoring shall be used to prevent, detect and adequately report possible instances of procurement fraud, corruption, conflict of interest and other serious irregularities.

Where monitoring authorities or structures identify specific violations or systemic problems, they shall be empowered to refer those problems to national auditing authorities, courts or tribunals or other appropriate authorities or structures, such as the ombudsman, national Parliaments or committees thereof.

3. The results of the monitoring activities pursuant to paragraph 2 shall be made available to the public through appropriate means of information. In particular, Member States shall publish, at least biennially, an overview of the most frequent sources of wrong application or of legal uncertainty, including possible structural or recurring problems in the application of the rules, hereunder possible cases of fraud and other illegal behaviours.

Member States shall transmit to the Commission on a biennial basis, a general overview of their national sustainable procurement policies, describing the relevant national action plans and initiatives and, where known, their practical implementation. They shall also indicate the success rate of SMEs in public procurement; where it is lower than 50 % in terms of values of contracts awarded to SMEs, Member States shall indicate whether any initiatives are in place to increase this success rate.

On the basis of the data received, the Commission shall regularly issue a report on the implementation and best practices of such policies in the Internal Market.

4. Any person or body which does not have access to review procedures pursuant to Council Directive 89/665/EEC shall be given the possibility to indicate possible violations of this Directive to a competent authority or structure which shall duly consider any sufficiently substantiated complaint and take appropriate measures subject to powers and competences provided for in national law.
5. Member States shall ensure that guidance on the interpretation and application of the Union public procurement law is available free of charge to assist contracting authorities and economic operators in correctly applying the Union public procurement rules.

6. Member States shall, without prejudice to the general procedures and working methods established by the Commission for its communications and contacts with Member States, designate a contact point for cooperation with the Commission as regards the application of Union law and the implementation of the budget from the Union on the basis of Article 17 of the Treaty on the European Union and Article 317 of the Treaty on the Functioning of the European Union.

7. Contracting authorities shall, at least for the duration of the contract, keep copies of all concluded contracts with a value equal to or greater than
 - (a) 1 000 000 EUR in the case of public supply contracts or public service contracts;
 - (b) 10 000 000 EUR in the case of public works contracts.

They shall grant access to these contracts in accordance with any applicable rules on access to documents and data protection.

Article 84

Public oversight

[...]

2. Individual reports

Article 85

[Article 43 Directive 2004/18/EC]

1. For every contract or framework agreement, and every time a dynamic purchasing system is established, contracting authorities shall draw up a written report which shall include at least the following:

- (a) the name and address of the contracting authority, the subject-matter and value of the contract, framework agreement or dynamic purchasing system;
- (b) where applicable, the results of the qualitative selection and/or reduction of numbers pursuant to Articles 64 and 65, namely:
 - names of the selected candidates or tenderers and the reasons for their selection;
 - the names of the candidates or tenderers rejected and the reasons for their rejection;
- (c) the reasons for the rejection of tenders found to be abnormally low;
- (d) the name of the successful tenderer and the reasons why its tender was selected;
- (e) for competitive procedures with negotiations and competitive dialogues, the circumstances laid down in Article 24 justifying the use of these procedures;
- (f) for negotiated procedures without prior publication, the circumstances referred to in Article 30 which justify the use of this procedure;
- (g) where necessary, the reasons why the contracting authority has decided not to award a contract or framework agreement or to establish a dynamic purchasing system;
- (h) where applicable, conflicts of interests detected and subsequent measures taken.

To the extent that the contract award notice drawn up pursuant to Article 48 contains the information required in this paragraph, contracting authorities may refer to that notice.

2. The contracting authorities shall document the progress of all procurement procedures, whether or not those are conducted by electronic means. To that end, they shall ensure that they dispose of sufficient documentation to justify decisions taken in all stages of the procurement procedure, such as documentation on communications with economic operators and internal deliberations, preparation of the tenders, dialogue or negotiation if any, selection and award of the contract.
3. The report, or its main elements, shall be communicated to the Commission or the national authorities or structures referred to in Article 83 where they so request.

3. National reporting

Article 86

National reporting and lists of contracting authorities

[Article 75 and 76 of Directive 2004/18/EC]

1. Member States shall forward to the Commission a statistical report on each year, based on a standard form, not later than 31 October of the following year.
2. The report referred to in paragraph 1 shall contain at least the following information:
 - (a) a list of all central government authorities, sub-central contracting authorities and bodies governed by public law, which have awarded public contracts or concluded framework agreements during the year concerned, indicating for each authority the unique identification number where such number is provided for in national legislation; this list shall be grouped by type of authority;

- (b) a list of all central purchasing bodies which have awarded public contracts or concluded framework agreements during the year concerned;
 - (c) for all contracts above the thresholds laid down in Article 4 of this Directive, the estimated number and value of contracts awarded during the year concerned, broken down for each type of authority by procedure and by works, supplies and services.
 - (d) for procurement below the thresholds laid down in Article 4 of this Directive, but which would be covered by this Directive if its value exceeded the threshold, an estimation of the aggregated total value of the procurement during the year concerned. This estimation may in particular be based on data available under national publication requirements.
3. The Commission shall be empowered to adopt delegated acts in accordance with Article 89 to amend Annex I, in order to update the list of contracting authorities following notifications from Member States, where such amendments prove necessary to correctly identify contracting authorities;

The Commission may periodically publish the list of bodies governed by public law transmitted according to point (a) of paragraph 2 for information in the *Official Journal of the European Union*.

4. The Commission shall establish the standard form for the annual statistical report referred to in paragraph 1. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 91.

~~4. Assistance to contracting authorities and businesses~~

Article 87 [...]

5. Administrative cooperation

Article 88

Administrative cooperation

1. Member States shall provide mutual assistance to each other, and shall put in place measures for effective cooperation with one another, in order to ensure exchange of information on issues referred to in Articles 40, 41, 42, 55, 57, 59, 60, 61, 63 and 69. They shall ensure the confidentiality of the information which they exchange.

2. The competent authorities of all Member States concerned shall exchange information in compliance with personal data protection legislation provided for in Directives 95/46/EC of the European Parliament and of the Council¹ and 2002/58/EC of the European Parliament and of the Council².

4. The exchange of information shall take place via the Internal Market Information system established pursuant to Regulation (EU) N° XXX/XXXX of the European Parliament and Council³ [proposal for a Regulation of the European Parliament and Council on the administrative cooperation through the Internal Market Information System ('the IMI Regulation') COM(2011) 522]. Member States shall supply information requested by other Member States within the shortest possible period of time.

¹ OJ L 281, 23.11.1995, p. 31.

² OJ L 201, 31.7.2002, p. 37.

³ OJ L [...]