

**UNICE GENERAL COMMENTS ON THE RECENT DOCUMENTS OF THE COMMISSION
CONCERNING THE LEGISLATIVE PACKAGE ON PUBLIC PROCUREMENT**

UNICE, the voice of European Industry, welcomes the Commission's efforts to review the EC Directives on public procurement in the framework of the legislative package. The following comments reflect UNICE's basic positions on the recent Commission documents with regard to the legislative package on public procurement.

1. - Competitive Dialogue

UNICE supports the introduction of Competitive Dialogue into the legislative package because there is a real need to facilitate and to frame the dialogue between the parties interested in a public contract whose complexity prevents the smooth application of the existing rules, or demands a cascade of sequential procedures.

As UNICE has already stated, the introduction of Competitive Dialogue as a new (fourth) procedure would cause additional problems concerning the proper use of the different procedures in practice. UNICE therefore welcomes the fact that, in the recent document on Competitive Dialogue (Doc. CC/99/74, dated 30 September 1999), the Commission characterises Competitive Dialogue as a variation on the existing negotiated procedure. This approach, which is clearly expressed in the title of Doc. CC/99/74, should be laid down more explicitly in the text of the document as well.

Doc. CC/99/74 proposes to define complex contracts by describing what they are not. UNICE believes that this is a good way of avoiding the difficulties which would otherwise be raised by a positive definition. It brings clarification and is not limitative. The examples of "non-complex" contracts given in the document should be included in the Directive or, at least, in a Commission Communication.

There are two particular problems in the present draft of Doc. CC/99/74. They concern the protection of the confidentiality of information provided by tenderers and payment for the expenses incurred by tenderers in preparing their submissions. UNICE wishes to make it quite clear that European Industry will not support the introduction of Competitive Dialogue unless the following aspects are safeguarded in a satisfactory way:

- It must strictly be forbidden under any circumstances to divulge solutions proposed by one tenderer to another (see Doc. CC/99/74, point 1.9);
- A combination of solutions presented by different tenderers must be excluded (see Doc. CC/99/74, point 1.10);
- An appropriate financial contribution to the cost of tenderers' proposals must be obligatory (see Doc. CC/99/74 point 1.12);
- All information provided by a tenderer, and not only formal intellectual property in the form of copyright and design rights, must be protected unless the tenderer has given express written consent for particular information to be disclosed to others (see Doc. CC/99/74, point 1,15).

- Negotiations on price alone must be excluded. At the end of the dialogue there should be a call for best and final offer.

Without respect for these principles, the instrument of competitive dialogue will fail in practice. Tenderers - especially SMEs – will abstain to avoid the risk of losing their intellectual input in the course of the procedure.

2. Scope of the Utilities Directive

UNICE supports the exclusion of the telecommunication sector from the scope of Directive 93/38 consequent upon its liberalisation. The other utilities sectors currently covered by that Directive should also be exempted or by revision of article 8 in a general way once these sectors have been fully liberalised.

UNICE would not support any change in the definition of “exclusive or special rights” based on the conditions under which these rights had been granted, or extending without a comprehensive review to other sectors that which was assessed by the Court of Justice in the specific case of the telecommunications sector.

3. Electronic procurement

UNICE is convinced that the review of the Directives on public procurement with a view to enabling electronic communication is one of the most important aspects of the legislative package. Nevertheless UNICE rejects any solution in which electronic procurement is linked to a unilateral reduction of the effective time limits granted for offers and bids. Time saved should be equitably divided between contracting authorities and suppliers.

In practice, the current time limits have already proved to be very short for tenderers. Any reduction would certainly cause severe problems no matter which sort of communication (paper-based or electronic) is used and could therefore prove a barrier for participation in EU-wide tendering, especially for SMEs. In the end this would be no “incentive” but a severe disadvantage, not just for tenderers but also for contracting authorities. UNICE therefore urges the Commission to use the time saving achieved through the use of electronic tendering to benefit bot tenderers and contracting authorities.

The reduction of time limits for the procurement of “off-the-shelf” products may well not respond to practical needs. The term “off-the-shelf” product is much too vague to serve as a reliable definition and a reduced time limit may well prove to be too short even for “off-the-shelf” products. UNICE urges the Commission to enter into further discussion on how that type of procurement may best be managed.

Provisions must be in place – and be seen to be in place – which ensure that the tenders remain in their “envelopes” until the time set for opening, and that all the information contained in them remains properly safeguarded. Contracting authorities which have satisfactory procedures for safeguarding paper-based information will need to review their means of safeguarding similar information held on electronic media.

4. Technical specifications

UNICE generally welcomes the recently issued document CC/99/73 regarding technical specifications in public procurement. Indeed simplification and more flexibility are needed in this area. The present strict obligation to orient tenders on “classical” standards has created obstacles to procurement of innovative goods and hightech products. Products based on “de-facto-standards” as well as not yet

standardised innovative products are playing an increasingly important role and are vital for the competitiveness of European industry on global markets.

On the other hand, the importance of “classical” standards should not be disregarded. In many areas they are still useful for both suppliers and customers. Nevertheless it has to be avoided that the new flexibility creates obstacles to equal treatment of tenderers and to cross-border procurement. UNICE therefore supports that the new approach – as outlined in document CC/99/73 - will clearly be governed by the rules of transparency and non-discrimination.

5. Framework contracts

UNICE welcomes the Commission initiative to introduce into the classical sectors a procedure for framework agreements because, in principle, it should bring more flexibility in public authorities purchasing and addresses a number of existing difficulties.

But UNICE believes that there is confusion over the nature of framework agreements or contracts.

A framework agreement is entered into between a contracting authority and a supplier (or contractor or service provider) to carry out a series of orders of a broadly similar nature over a period of time. It is not possible at the start to be precise as to the amount or exact nature of the work, but all orders placed under the agreement are on the terms agreed at the outset. Only one competition is held, at the beginning; the agreement constitutes one contract under which the series of call-off orders is placed without further need for calls for tender.

Such an arrangement has obvious advantages for both the contracting authority and the supplier, and can be used to aggregate numbers of small orders of a similar nature which are individually below the threshold but are collectively above it and thus subject to the Directives.

Arrangements already exist in the Directives for repetitive calls for tender from among a short-list of tenderers: the Restricted Procedure. Framework agreements should not be confused with the procedure for seeking tenders from an already qualified list of suppliers. No procedure of any kind should ever provide for more than one round of tendering.

Contrary to these requirements, the Commission proposal does not provide for an adequate procedure. It would appear that the Commission envisages a two-step procedure for framework procurements. In a first step, there would be a preselection of bidders where suppliers are chosen on selection criteria and first application award criteria, and in a second step, a new competition would take place among the pre-selected bidders with a new competition on award criteria including price. This would be a new concept which has nothing to do with framework contracting. It would put inadequate double pressure on bidders: already in the first step they would have to calculate their prices in competition and in the second step the best bidders would be set under (price) pressure again. UNICE clearly states that such a procedure would not be attractive for bidders and would consequently lack acceptance in practice.

The framework agreement procedure provided for by the special sectors Directive, now applied for several years, has been very useful for operators in these sectors. We think that the same procedure should be introduced into the classical directive.

6. Sufficient time limits

As expressed in chapter 3 the current time limits are in many cases too short for tenderers. Nevertheless contracting authorities still regard the minimum time limits as the norm. UNICE therefore welcomes the introduction of a general principle for the use of adequate deadlines as proposed in Doc. CC/99/86-EN of 28 October 1999 para 3.2.

7. Weighting of award criteria

UNICE is fully in line with the Commission's proposal in para 2 of Doc. CC/99/90-EN of 28 October 1999. The rules of the game should be clear from the beginning of the award procedure.

Where Competitive Dialogue is used, the weighting should be made known before the request for best and final offer.

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