

23 November 2001

**COMMENTS ON THE REPORT
OF THE COMMITTEE ON LEGAL AFFAIRS AND THE INTERNAL MARKET
OF THE EUROPEAN PARLIAMENT**

[Doc. final A5-0378/2001 – PE 298.409 Par. 1, dated 29 October 2001]

- Rapporteur: Stefano Zappalà-

**ON THE REVISION OF THE EU DIRECTIVES ON THE AWARD OF
PUBLIC SUPPLY, SERVICE AND WORKS CONTRACTS [COM (2000) 275]**

UNICE welcomes the presentation of the report of the Committee on Legal Affairs and the Internal Market on the Commission's proposals for revised directives on public procurement.

In the following comments *UNICE concentrates on items of major importance* for European Business.

Aiming at supporting the Parliament in optimizing future provisions on public procurement, UNICE'S comments are followed by *concrete recommendations* on the relevant amendments. In view of the far-reaching importance of public procurement for European Business, UNICE would be grateful if the European Parliament would take appropriate account of its comments.

Lastly, UNICE has noticed that some of the amendments proposed by the Committee address the same section of the directive but with different proposed changes. UNICE will wish to revisit those areas in case the proposals will be harmonized or revised.

1. Increase of thresholds for the EC directives on public procurement

UNICE is *deeply concerned* about the proposals of the Committee aiming at increasing the thresholds for the EC directives on public procurement. Increasing the thresholds as proposed in amendments 32 and 33 would undermine the Internal Market for public procurement which has been created with a lot of efforts during the recent years. This view is shared both by large as well as small and medium sized enterprises.

The justification for amendment 32 (and 33) does not sufficiently reflect the background for an evaluation of the thresholds. Statistics on actual cross-border exchanges are by no means the only instrument for measuring the impact of the EC rules on public procurement. First, the statistics on cross-border procurement obviously do not cover procurements which are performed by local subsidiaries of enterprises in other EU Member States. Secondly, and even more important, in the area above the thresholds, transparency and non-discrimination are safeguarded to a much higher degree than below the thresholds in practice. The main reason is that above the thresholds the use of efficient legal procedures according to the EC remedies directives for public procurement cannot be circumvented.

Finally, the proposed increase of thresholds about 50 per cent of the current values can not be called “modest”. It would lead to a significant decrease of the number of procurements governed by the EC directives especially in the important area of construction industry. Thus, the proposed increase would in practice lead to an unacceptable weakening of the Internal Market for public procurement. Contrary to the justification, it would not take account of the opening up of the Internal Market, but undermine it. *An increase of the thresholds would definitely be contrary to the common position of European Industry.*

Recommendation:

UNICE urgently recommends the deletion of amendments 32, 33 as well as 105 and 106. Accordingly, amendment 67 should be deleted.

(For the reasons mentioned above all corresponding amendments aiming at increasing the thresholds in Part 2 of the report (Opinions of other Committees) equally have to be rejected.)

2. Electronic Procurement, reverse auctions

From the beginning UNICE has actively supported an efficient implementation of eBusiness in public procurement. UNICE recognizes that the Committee’s report rightly addresses proposals for optimizing the implementation of electronic communication in public procurement with a view to data security and confidentiality (see 2.1). Reverse auctions may be an interesting tool for the procurement of specific goods especially in *private* business. Any implementation in *public* procurement should nevertheless be examined very carefully in order to avoid conflicts with well reflected basic principles of public procurement (see recommendations under 2.2).

2.1 Data security in electronic procurement

UNICE welcomes the proposals in amendments 73, 74, 75, 103 and 104 which aim at safeguarding security and confidentiality of electronic tenders in practice, the latter being of crucial importance for the well-functioning of electronic procurement.

Recommendation:

Adoption of amendments 73, 74, 75, 103, 104.

2.2 Reverse auctions

At all stages of the discussion UNICE has been in favour of implementing innovative and good commercial practices into public procurement – provided that they do not conflict with necessary basic rules for the specific sector of public procurement. This basic position of UNICE is especially valid for innovative tools for electronic procurement. Regarding reverse online auctions, UNICE is concerned that they are not compatible with well reflected core principles of public procurement to a high degree. First they would conflict with the principle of confidentiality comprising the price of a tender. Furthermore they could very easily lead to bargaining. The latter should be avoided both in order to avoid unacceptable price pressure on bidders as well as the deliverence of bad products to contracting authorities. As a result of negative experiences of that kind reverse auctions (which have been applied in some area of Europe in history), they have been abolished in modern procurement. While the instrument of reverse online auctions may be of interest especially for specific products in private business, UNICE advises to examine very carefully how far such auctions could be permitted in public procurement.

After intense industry-wide discussions UNICE urges to *restrict reverse online auctions to the purchase of completely standardised products. Furthermore, UNICE advises to allow electronic auctions only for procurements up to 10.000 € in order to limit the dangers of unacceptable price pressure on bidders which would infringe the good functioning of public procurement markets in a long time perspective. Reverse auctions therefore should exclusively be allowed in the area below the thresholds for procurements up to 10.000 €.*

Recommendation:

Amendments 23 and 54 and 65 should be deleted.

3. Social aspects

UNICE recognizes that social policy plays an important role with a view of reaching a high level of employment and social protection. UNICE is convinced, however that *public procurement law is not the appropriate instrument to pursue social policy.* In the contrary, the inclusion of social aspects into public procurement would destabilize the efficiency of public procurement which is of crucial importance with a view to the important aim of guaranteeing the good functioning of public services and utilities.

Tenders have to be awarded strictly according to quality and price of a product or service. On the contrary, *the social aspects being contemplated would in practice easily favour distortions of competition. They would especially favour local tenders and thereby create new obstacles for the openness of procurement markets and cross border procurement.*

Recommendation:

All amendments in favour of implementing social aspects into the directives on public procurement should be deleted. Especially it has to be safeguarded that social aspects do not serve as award criteria. Also under this aspect amendment 98 must be deleted.

4. Environmental aspects

One of UNICE's priorities as the voice of European business is to ensure that the competitiveness of European industries and the success of the Single Market grow in parallel with a respect for and consideration of the consequences for the environment.

UNICE recognizes the important role of the protection of the environment. UNICE urges however that any consideration of environmental aspects in public procurement must be carried out in a way that does not cause dangers for the principles of transparency and non-discrimination which are of basic importance for the functioning of the European Market for public procurement. On this background UNICE has the following comments on the Committee's report as regards the environmental elements:

4.1 Eco-labels and environment management systems in the context of technical specifications

Eco-labels and environmental management systems may serve different useful purposes. In public procurement however it is necessary to define the concrete specification of a product or service as precise as possible. A considerable part of UNICE members estimates that a reference to eco-labels or environmental management systems is not useful.

Instead, eco-labels or management systems might be used to simplify the proof of the fulfilment of the concrete product related specifications.

Recommendation:

Amendment 45 should omit the references eco-labels and environmental management systems (see first paragraph of the amendments regarding Art. 24 para 3).

4.2 Environmental Management Standards/Certification

In relation to the possibility of requiring suppliers to operate an environmental management scheme the criterion of transparency and non-discrimination should apply as well. As a consequence the use of either ISO 14001 or EMAS certification should be qualified as means of proof of the company's process requirements. In addition to allowing the supplier to furnish his technical capability through certification with these internationally recognised environmental management systems the public sector purchasers should allow other means of documentation attesting compliance of the production with these systems.

Recommendation:

The last part of amendment 97 on environmental management standards, which lays down that contracting authorities shall also accept other evidence of equivalent environmental management measures from economic operators is very important. The last part of the last sentence ("from economic operators...time limits") should be deleted. It would restrict possibilities to use other kinds of evidence of environmental management measures too strongly.

4.3 Award criteria

Procurement decisions should be taken solely according to quality and price factors and the reliability of the supplier, basing decisions either on the economically most advantageous offer or lowest price. *Taking into account environmental considerations in the sense it is suggested in amendment 98 would create opportunities to manipulate the tender, for example to misuse criteria in order to favour specific bidders.*

Recommendation:

Amendment 98 should be deleted, reverting to the Commission's proposal.

5. Complex contracts

The introduction of the procedure in Article 30 – Competitive Dialogue – is very important in allowing public purchasing to manage complex contracts efficiently. UNICE is concerned, however, that some of the proposed amendments attempt to apply restrictions which are inappropriate to complex contracts. In a complex contract, it is axiomatic that the contracting authority cannot know how a potential tenderer will approach the task or what solutions may be offered. It will therefore never be in a position to be *precise* about its requirements but it should be as *clear as possible* about its needs.

By the same token, fixing a specific time limit for submission of best and final offers (Amendment 58, Article 30 para 4) is unnecessary and may well prove impractical in some instances. The length of the time limit is better left, in complex contracts, to the parties.

Procurement, including that by public authorities, is developing fast. It is not possible to know what types of complex contract may be entered into in a few years time. It might

therefore be preferable to place examples (see Amendment 56 – Article 29) of complex contracts within the recitals.

The proposal that the contracting authority should pay the tenderers for their bidding costs is welcome. The contracting authority in effect controls the bidding costs and would, in the end, pay for them anyway in higher contract prices. The proposal to make that payment direct will help to keep costs down and encourage smaller companies to participate. The last sentence of Amendment 58 [Article 30 para 5] limiting the sum to be paid to 15 per cent of the contract value is unclear and its value is questionable. In common with many aspects of complex contracts, it should be left to be arranged between the contracting authority and the tenderers.

Recommendation:

Amendment 56 (Article 29) should be deleted.

Amendment 58 to Article 30 should be deleted with the exception of the amendment to Article 30 para 5 relating to payment of bid costs, although the last sentence “The aggregate sum . . . in the contract notice.” should be deleted. A small amendment to the last sentence of the Commission’s version of Article 30 para 3 to change the concept of detail to one of clarity would be an improvement, for “most detailed manner” read “clearest manner”.

Amendments 57 and 59 through 61 should be retained.