

19 April 2002

**Comments on the amendments of the European Parliament  
(Doc PE 313.802) referring to the Commission's proposals for revised  
directives on public procurement in the Classical and in the Utilities  
sectors  
(COM [2000] 275 Final/2 and COM [2000] 276 Final/2)**

*This paper is in four parts:*

A. <i>General comments and statements of policy</i>	Pages 1 - 2
B. <i>A list of the amendments proposed by the European Parliament ("EP") which should be deleted or changed; the text of these amendments is included for reference in the Appendix</i>	Pages 3 - 4
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UNICE's comments are mainly focussed on the provisions of the proposed classical Directive. Where there are parallel amendments in the Utilities Directive, UNICE's comments are equally valid for this sector. That applies especially to proposals relating to the imposition of social or environmental conditions unrelated to the performance and quality of the object of the purchase. UNICE has included limited comment on the proposed amendments to the Utilities directive. There are references to UNICE papers on Public-Private Partnerships and In-house Services which have been or are shortly to be issued; they are (or, as the case may be, will be) available on request from UNICE.

### **A. General Comments**

UNICE welcomes the efforts of the EP in proposing amendments to the Commission's proposals for the revised procurement directives.

Some of the EP's amendments help to optimise the Commission's proposals. For instance, most of the amendments concerning the provisions for electronic procurement are helpful (see below under D. 9).

But UNICE is **deeply concerned** over several of the EP's proposed amendments which would undermine the basically well-balanced rules on the internal market for public procurement.

**UNICE rejects the EP's proposals for significant increases in the thresholds.** UNICE is convinced that such an increase in the thresholds would open the floodgates to a revival of



national and regional barriers to trade. This would be directly contrary to the central aim of the EU directives on public procurement - to open up public procurement in order to further the development of the single internal market (see below under D.1).

**Also of grave concern is the large number of amendments proposed by the EP aiming to connect public procurement with social, labour and environmental agendas where the matters under consideration are not directly linked with the function of the goods and services.** This arises, for example, in the EP's proposals to include in the evaluation of bidders their observance of international labour standards (see below under D.2). It also arises in the consideration of indirect environmental aspects in the award criteria (see below under D.2).

Contractors, suppliers and service providers are already required to comply with social and labour law quite independently from the directives. It is utterly inappropriate to ask public authorities' buying offices to police a matter which has nothing to do with them; their job is to buy at the best value, transparently and without discrimination. Any attempt to burden public purchasers with such agendas will have the effect of distorting the market, something which the directives have sought strenuously to avoid.

UNICE, however, wishes to make it quite clear that its objections to the inclusion of indirect social – and also environmental – provisions do not in any way mean that UNICE is opposed to social and environmental policies *per se*. Its objections are limited strictly to their inclusion in the public procurement directives. These directives are not suitable for use as a vehicle for the pursuit of other agendas; indeed, to use them so would imperil their very purpose. The public purchasing directives are too important to the European economy as a whole to be put at risk in such a way.

Throughout the directives it is vitally important to keep constantly in mind that the provisions should be clear and simple, avoiding any imposition of excessive costs or bureaucratic procedures affecting either contracting authorities or tenderers.

## B. List of amendments recommended by UNICE for deletion or modification

The amendments for deletion are listed in the order of the topics discussed in Section D and in Article (not amendment) order within a particular topic. The Appendix carries the text of the Parliament's amendments in this same order for ease of reference.

	<u>Recital</u>	<u>Article</u>	<u>Annexe</u>	<u>Paragraph</u>	<u>Amendment</u>
<b>D1 Increase in the thresholds</b>					
		8		a to c	32
<b>D2 Incorporation of social and environmental aspects</b>					
	31a				15
		26		1a (new)	49
		27		1a & 1b (new)	51
		46		1cc	82
		46		2d	86
		46		2 ea (new)	87
		53		1 b	176
			IX	b (new)	116
<b>D3 Central procurement agencies</b>					
	13			a (new)	5
	13			b (new)	168
		1		5 – 3a (new)	21
		6		a (new)	175
<b>D4 In-house procurement</b>					
	7			a (new)	4
		19			38
		19		b (new)	40
<b>D5 Concessions and project financing</b>					
	34			a (new)	17
		33		Title & 1	66
<b>D6 Technical specifications</b>					
		24		3	45
<b>D7 Subcontracting</b>					
		26			159
<b>D8 Competitive dialogue</b>					
		30			137

List of amendments recommended by UNICE for deletion or modification *continued*

	<u>Recital</u>	<u>Article</u>	<u>Annexe</u>	<u>Paragraph</u>	<u>Amendment</u>
<b>D9.2 Reverse auctions</b>					
		32		a (new)	65
<b>D10 Equal treatment of the award; cancellation</b>					
		41		a (new)	72
<b>D11 New control mechanisms</b>					
		81		a (new)	108
<b>D12 Framework agreements</b>					
		1		7	24
<b>D13 UNICE Comments on the EP's amendments on the Utilities directive – recommendations for deletion or modification -</b>					
		49		a	55
		29			31
		37			120
		47		1 subpara 1	49
		48		3	52
		62		1 subpara 1	73

**C. List of amendments welcomed by UNICE**

	<u>Recital</u>	<u>Article</u>	<u>Annexe</u>	<u>Paragraph</u>	<u>Amendment</u>
<b>D6 Technical Specifications</b>					
		24		3 last sent.	45
		24		5	46
<b>D9 Electronic Procurement</b>					
		42		1 – 2a (new)	63
		42		2	74
		42		4a (new)	75
		61		1a (new)	103
		61		2	104
<b>D10 Equal treatment of the award and cancellation of a procurement procedure</b>					
		41		a (new)	72
<b>D12 Framework Agreements</b>					
		1		7	24
<b>Confidentiality</b>					
		44		6	77, 132

D. Comments on specific items of importance

D1. Increase of the thresholds

**Article 8a-c – amendment 32**

*UNICE urges that this amendment as well as any other amendment aiming at increasing the thresholds should be deleted.*

UNICE, representing industry throughout Europe, is firmly of opinion that increasing the thresholds would lead to a resurrection of national and regional barriers to trade. This would be completely counter to the central goals of European procurement law aiming at opening up markets throughout Europe.

In addition to developing the pan-European single market, the EU procurement directives are promoting a new culture in public procurement. There is a growing professionalism in public purchasing coupled with improvements in fair procedures, transparency and non-discrimination throughout Europe. Increasing the thresholds would wantonly risk the loss of these improvements as a substantial part of public procurement became no longer subject to the directives. Finally, increasing the thresholds would conflict with the provisions of the Government Procurement Agreement (“GPA”) which has been signed by the EU. To have two sets of thresholds, one for EU suppliers and a different one for external suppliers, would be most unsatisfactory.

D2. Incorporation of social and environmental aspects into the directives on public procurement

*UNICE, whilst generally supporting initiatives in social and environmental fields, is utterly opposed to adding such provisions into the public purchasing directives. They have no place there and risk damaging fatally the vital purpose of those directives.*

**Recital 31a – amendment 15**

This amendment should be deleted. The amendment confuses two factors: abnormally low tenders and observation of social requirements.

**Article 26 para 1a [new] – amendment 49**

This amendment should be deleted. The award of public contracts, and their subcontracts, should not be subject to assessment of the social capacities of bidders but should be strictly based on the value and quality of the goods, works or services. Certainly, no such consideration should reach through to a subcontractor. The purchaser’s interest in a subcontractor should only extend to matters which are of crucial importance to the purchaser; all other responsibility for subcontractors falls on the prime contractor. The provision proposed by the EP would in any case primarily disadvantage small and medium sized enterprises which would often have problems in demonstrating social capacities.

**Article 27 para 1a and 1b [new] – amendment 51**

This amendment should be deleted. Such a provision is unnecessary, confused and potentially damaging.

#### **Article 46 para 1cc – amendment 82**

This amendment should be deleted; exclusion from contracts should not be based on observance or otherwise of collective bargaining.

#### **Article 46 para 2d – amendment 86**

The amendment should be deleted. The existing wording is quite sufficient for the purpose. The introduction of specific wording relating to employment protection and working conditions is unnecessary and inappropriate. The far - reaching catalogue of provisions under Annex IX b (see below) is quite unsuited to incorporation into public procurement legislation.

#### **Article 46 para 2 (ea) [new] – amendment 87**

This amendment should also be deleted (see the comments above).

#### **Article 53 para 1 (b) - compromise amendment 176**

This amendment should be deleted.

The proposed introduction of provisions relating to the tenderer's production methods and "equal treatment policy" is inappropriate. Only in very rare circumstances are a tenderer's production processes of concern to the purchaser, and then only where they involve mission-critical aspects. Otherwise, a purchaser who attempts to interfere with or influence a tenderer's production methods is taking on responsibilities into which no purchaser should enter lightly.

The amendment would appear to seek to introduce the possibility that a tender could be awarded on the basis that it was "economically advantageous" for **someone other than the awarding contracting authority!** Such a possibility would be dangerous and should never be permitted.

In practice, the proposals would open the door to manipulation of the tendering process in a discriminatory manner.

#### **Annex IX b [new] – amendment 116**

As already discussed, provisions on labour law – international or otherwise - should not be incorporated into the directives on public procurement; annex IX b should therefore be deleted.

UNICE is specially concerned about the last paragraph of amendment 116 which stipulates that enterprises should be evaluated according to the degree to which they observe international labour law provisions and standards. Conventions – some of which may even have not been adopted as law - should not be introduced into the directives. The evaluation of the best bidder should be strictly based on the quality and value of products and services offered.

### **D3. Central procurement agencies**

#### **Recital 13a [new] – amendment 5**

This recital should be deleted, at least in part. Some such agencies already exist but it is too early to promote their use widely. It could, however, be appropriate to include a definition whilst remaining absolutely neutral on the desirability of central procurement agencies.

While at present recital 13 a just refers to potential benefits of central procurement agencies, on the other hand it has to be realised that centralisation of procurement can lead to monopolies on the purchaser's side which would especially disadvantage SMEs.

**Recital 13b [new] – amendment 168;**

**Article 1 para 5 subpara 3a [new] – amendment 21**

**Article 6a [new] – amendment 175**

The comments on Recital 13a apply equally to these three items.

#### **D4. In-house procurement**

*Article 43 of the existing Services directive (92/50) provides that "[The Commission] shall evaluate . . . . the effects of in-house procurement of services on the effective opening-up of procurement . . . [and] shall . . . adapt the directive accordingly". As far as UNICE is aware neither the evaluation nor the adaptation has yet been done. UNICE is preparing (April 2002) a position paper on In-house Procurement and is keen to assist in developing a text which is satisfactory to public authorities and to industry.*

**Recital 7a [new] amendment 4**

The amendment is not necessary and should be deleted. The provision on contract awards to separate entities as proposed in article 19b will be sufficient to cover the item. The proposed new recital 7a, however, could lead to uncertainties caused by its vague wording.

**Article 19 – amendment 38**

The amendment should be deleted. Extension beyond services of the exclusion of contracts awarded to other authorities which enjoy exclusive rights would have the effect of closing a significant section of the market.

**Article 19b (new) – amendment 40**

In general, this proposal which is derived from case-law of the European Court is a welcome attempt towards clarifying the rules. More work is, however, unquestionably needed before the text provides a truly satisfactory regulation. UNICE is keen to assist in this work.

#### **D5. Concessions and Project Financing**

**Article 30a para 1 (new) – amendment 138**

UNICE recommends that the first paragraph of Article 30 should be deleted. It seems unnecessary as PPPs will almost inevitably be conducted by competitive dialogue, but it does leave open the undesirable possibility that the procedure could be used artificially in circumstances which are abusive or, at the very least, inappropriate.

**Recital 34a (new) – amendment 17**

This recital should be deleted. The public procurement directives are not the place for the indication of potential future EU-directives. The latter could only cause confusion.

This topic is more properly described as Public-Private Partnerships ("PPPs"). The subject is a complex one and UNICE has developed a separate paper devoted to it.

**Article 33 title and para 1 – amendment 66**

The amendment should be deleted. Rules on PPPs are premature.

## **D6. Technical Specifications**

### **Article 24 para 3 – amendment 45**

In amendment 45 the proposed new reference to European eco-labels should be deleted. Specifications of goods and services purchased should be formulated according to the specific needs of the contracting authority regarding the function and quality of the envisaged goods and services. Such specifications may also contain concrete descriptions of environmental characteristics of the products or services needed. By contrast, the reference to general European eco-labels is not useful.

UNICE, however, welcomes the proposed new last paragraph of Article 24.

## **D7. Subcontracting**

### **Article 26 – amendment 159**

The amendment should be deleted.

There are two aspects to this amendment which are unsatisfactory. Firstly, the contracting authority should not be compelled to ask the prime contractor to nominate its subcontractors; that is a matter for individual purchasers. Secondly, neither the directive nor the contracting authority should, other than in particular circumstances, seek to control or prohibit the prime contractor from subcontracting any aspect which seems to it to be appropriate. In particular, a prohibition on subcontracting intellectual services would be seriously prejudicial to SMEs which often depend on specialists for technical advice and work; only large firms would be able to maintain a full range of specialised resources.

## **D8. Competitive Dialogue**

### **Article 30 – amendment 137**

UNICE recommends that amendment 137 should be reviewed because, whilst several aspects of the amendment improve upon the Commission's proposal, the text of Article 30 still needs some re-working. Neither this amendment nor the original text proposed by the Commission entirely succeeds in giving a clear explanation of the process, or ensures that contracting authorities and bidders will have the ability to manage complex procurements in conformity with best modern practice.

UNICE is keen to participate in the discussions leading to a satisfactory conclusion of Article 30.

Meanwhile, UNICE particularly welcomes the text of para 5 of amendment 137 which provides explicitly for payment of participants' costs. The cost incurred in tendering for a complex contract is substantial and it is sensible that it should be paid at the time.

## **D9. Electronic procurement**

### **9.1 General provisions**

#### **Article 42 para 1 subpara 2a (new) – amendment 73**

UNICE welcomes this amendment. It leads to an important clarification of the rules of electronic tendering and contributes to an adequate safeguarding of data security for electronic bids.

#### **Article 42 para 2 – amendment 74**

UNICE also welcomes this amendment. It allows for the necessary extension of data security from the process of communication to other important area like data storage.

#### **Article 42 para 4a (new) – amendment 75**

UNICE welcomes this amendment as it helps to strengthen data security.

#### **Art. 61 para 1a (new) – amendment 103 and**

#### **Art. 61 para 2 – amendment 104**

UNICE welcomes both these amendments for the reasons stated above on Article 42.

### **9.2 Reverse auctions**

#### **Article 32a (new) – amendment 65**

While from the beginning UNICE has actively supported the introduction of electronic procurement, it is doubtful about the value of electronic auctions for public procurement. UNICE's position results from negative experiences with reverse auctions ("licitationes") which have taken place in the past in public procurement and which have been abolished in consequence.

If the European legislator nevertheless intends to allow the use of reverse electronic auctions in public procurement, these auctions should only be allowed for procurement of entirely standardized products or services ("commodities"). They should not be allowed for procurement of works.

That being said, the proposal in Amendment 65 is preferable to the proposals discussed in the Commission and the Council; but nonetheless some details would have to be changed:

First, it should be explicitly stated that electronic auctions are not applicable to Works. Secondly, electronic auctions should be exclusively on price rather than the economically most advantageous tender; to do otherwise would lead to confusion. This should be clarified in Art. 32a para. 4 (new).

Secondly, para 3 phrase 1 should be modified to state that the reverse auction should not last longer than one day.

## **D10. Equal treatment of the award and cancellation of a procurement procedure**

#### **Article 41a (new) – amendment 72**

UNICE welcomes this amendment.

The proposed provision helps to restrict the possibilities of abusing the cancellation of a procurement procedure. However, the amendment should provide for reasonable prior notice of cancellation.

**D11. New control mechanisms alongside existing legal review procedures**

**Article 81a (new) – amendment 108**

This amendment should be deleted.

The present EU remedies directives for public procurement provide adequate tools for controlling and reviewing public procurement. The role of the new mechanism and its relation to the traditional control and review tools are not clear. This would cause unnecessary confusion.

**D12. Framework agreements**

**Article 1 para 7 – amendment 24**

The amendment is to be welcomed.

The proposed text revision is preferable because it reflects the nature of framework contracts better than the original proposal from the Commission.

**D13. Comment on the EP's amendments on the Utilities directive**

**13.1 Legitimisation of employees and employees' representatives in procurement review procedures**

**Article 49a (new) – amendment 55**

UNICE urges deletion of amendment 55.

Firstly, the Utilities directive is not the appropriate place to incorporate a provision on aspects of legal remedies. Secondly, and even more important, it would be absolutely unacceptable that third parties such as employees or their representatives could intervene in legal relations between the contracting authority and the bidder. Contractual rights and responsibilities must be restricted to the parties involved.

**13.2 Exclusion from the Utilities directive**

**Article 29 – amendment 31**

This amendment should be deleted. Although complex, the exclusion procedure proposed by the Commission provides for exclusion from the directive of sectors which are exposed to genuine competition on the basis of objective criteria even though there may be no general Community legislation liberalising the sector.

### **13.3 Subcontracting**

#### **Article 37 – amendment 120**

The last paragraph (“Intellectual services . . . contracted out”) should be deleted for the same reasons as in the Classical directive (see D7 above).

A prohibition on subcontracting intellectual services would be seriously prejudicial to SMEs which often depend on specialists for technical advice and work; only large firms would be able to maintain a full range of specialised resources.

### **13.4 Qualification systems**

#### **Article 48 para 3 – amendment 52**

This amendment should be deleted. The time needed to qualify an applicant will depend on the nature of the contracts which are being contemplated. The requirement for the period to be “reasonable” affords a proper basis for the Article.

### **13.5 Means of communication**

#### **Article 47 para 1 subpara 1 – amendment 49 and**

#### **Article 62 para 1 subpara 1 – amendment 73**

This amendment should be deleted.

As is normal in commercial relationships, the choice of the means of communication should lie with the purchaser.

## Appendix – References

### The Classical sector directive

#### D1 Increase in the thresholds

Amendment 32

Article 8, points (a) to (c)

(a) **EUR 130 000** for public supply and service contracts awarded by contracting authorities which are listed as central government authorities in Annex IV; in the case of public supply contracts awarded by contracting authorities operating in the field of defence, this shall apply only to contracts involving products covered by Annex V;

(b) **EUR 200 000**  
- for public supply and service contracts awarded by contracting authorities other than those listed in Annex IV;  
- for public supply contracts awarded by contracting authorities which are listed in Annex IV and operate in the field of defence, where these contracts involve products not covered by Annex V;

(c) **EUR 5 300 000** for public works contracts awarded by all contracting authorities.

(a) **EUR 200 000** for public supply and service contracts awarded by contracting authorities which are listed as central government authorities in Annex IV; in the case of public supply contracts awarded by contracting authorities operating in the field of defence, this shall apply only to contracts involving products covered by Annex V;

(b) **EUR 300 000**  
- for public supply and service contracts awarded by contracting authorities other than those listed in Annex IV;  
- for public supply contracts awarded by contracting authorities which are listed in Annex IV and operate in the field of defence, where these contracts involve products not covered by Annex V;

(c) **EUR 7 000 000** for public works contracts awarded by all contracting authorities.

#### D2 Incorporation of social and environmental aspects

Amendment 15

Recital 31 a (new)

***(31a) Contracting authorities may reject tenders that are abnormally low owing to non-compliance with minimum social requirements.***

Amendment 49

Article 26, paragraph 1 a (new)

***All requirements regarding the***

***economic, financial and social performance of an economic operator shall apply to firms which carry out subcontracting.***

Amendment 51

Article 27, paragraphs 1 a and 1 b (new)

*1a. Contractors shall be obliged to respect as a minimum standard the employment protection obligations, working conditions and labour law obligations, including collective as well as individual rights, arising from applicable labour legislation, judicial decisions and collective agreements which are deemed to be generally binding, provided that these are compatible with existing Community legislation and the general rules and principles of Community law, in particular the principle of equal treatment and non-discrimination.*

*1b. The provisions under paragraph 1a shall not prevent application of employment protection provisions and working conditions which are more favourable to workers provided that these are compatible with Community law.*

Amendment 82

Article 46, paragraph 1, point (cc) (new)

*(cc) following non-compliance with rules and legislation on collective agreements and other employment-related and social aspects in the country in which they are established or in another relevant country (e.g. that of the previous client);*

Amendment 86

Article 46, paragraph 2, point (d)

(d) has been guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate;

(d) has been guilty of grave professional misconduct, *including the violation of international core labour standards as defined in Annex IX b and infringement*

*of fundamental European legislation relating to employment protection and working conditions*, proven by any means which the contracting authorities can demonstrate;

Amendment 87

Article 46, paragraph 2, point (ea) (new)

*(ea) has not fulfilled employment protection obligations towards workers and labour law obligations towards their representatives in accordance with the applicable legal provisions, including those in legislation, collective agreements and contracts; in order to justify exclusion from tender procedures, such non-compliance must have been established by a final judgment handed down by an ordinary court; such exclusion, and the duration thereof, may not be disproportionate to the importance of the offence;*

Compromise amendment 176

Article 53, paragraph 1, point (b)

(b) when award is made to the most economically advantageous tender **for the contracting authorities**, various criteria **directly** linked to the subject of the public contract in question: for example, quality, price, technical merit, aesthetic and functional characteristics, **environmental characteristics**, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion.

(b) when award is made to the most economically advantageous tender, various criteria linked to the subject of the public contract in question: for example, quality, price, technical merit, aesthetic and functional characteristics, running costs, environmental characteristics, **including those relating to production methods**, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion, **the tenderer's equal treatment policy**.

Amendment 116

Annex IX b (new)

**Annex IX b**

**Core international labour standards within the meaning of**

**Article 54(ca) are the following ILO Conventions:**

**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 in Employment and Occupation;**

**Convention 100 on Equal Remuneration;**

**Convention 182 on Worst Forms of Child**

**Labour.**

***In addition companies should be evaluated according to a common methodology for reporting on and recording compliance with internationally agreed core labour standards. This information could be included in the company's annual report and would allow a proper and fair assessment of compliance with internationally agreed social and environmental standards.***

***Companies that comply with and therefore promote international standards effectively and consistently should be favoured above those showing less regard for core labour standards.***

**D3 Central procurement agencies**

Amendment 5

Recital 13a (new)

***(13a) Certain techniques for centralising purchases have been developed in Member States. Several entities, in charge of procurement for other contracting authorities, have been created for this purpose. These techniques allow, owing to***

***the size of the volumes purchased, broadened competition and improved efficiency of public procurement. It is necessary, therefore, to establish a Community definition for purchasing groups dedicated to contracting authorities and to define the procedures applicable to them, and the manner in which contracting authorities may freely have recourse to purchasing groups, provided that the latter are themselves contracting authorities.***

Amendment 168

Recital 13 b (new)

***(13b) The provisions of this Directive shall be fully applicable to contracts whereby purchasing groups mentioned under Article 1(5) procure supplies or services. Contracting authorities directly acquiring supplies or services from or through such a purchasing group shall be deemed to have complied with the provisions of this Directive, provided that the purchasing group has complied with those provisions.***

Amendment 21

Article 1, paragraph 5, subparagraph 3 a (new)

*A "purchasing group" means a contracting authority created in order to acquire supplies or services intended for other contracting authorities, or to determine the conditions of procurement thereof. Member States shall notify to the Commission the purchasing groups meeting this definition.*

Amendment 175  
Article 6 a (new)

**Article 6a**  
**Contracts with purchasing groups**

*The provisions of this Directive shall be fully applicable to contracts whereby purchasing groups mentioned under Article 1(5) procure supplies or services. Contracting authorities acquiring supplies or services directly from a purchasing group or through the intermediary of a third party shall be deemed to have complied with the provisions of this Directive, provided that the purchasing group has complied with those provisions.*

**D4 In-house procurement**

Amendment 4  
Recital 7 a (new)

*(7a) Certain contracting authorities, particularly regional or local authorities, may, in the course of exercising their powers, award contracts to entities which are formally separate legal entities but which, in view of the particular relationship between the contracting authorities and the entities in question, constitute a mere emanation of the contracting authorities with no autonomous decision-making powers and may, accordingly, be regarded as forming part of those contracting authorities. Under certain conditions, contracts awarded to such entities by contracting authorities should not be subject to the provisions of this Directive.*

Amendment 38  
Article 19

<i>Service</i> contracts awarded on the basis of an exclusive right	Contracts awarded on the basis of an exclusive right
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This Directive shall not apply to public *service* contracts awarded *to an entity which is itself a contracting authority* on the basis of an exclusive right which *it enjoys* pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.

This Directive shall not apply to public contracts awarded *by a contracting authority to another contracting authority or to an association of contracting authorities* on the basis of an exclusive right which *they enjoy* pursuant to a published law, regulation or administrative provision which is compatible with the Treaty.

Amendment 40  
Article 19 b (new)

**Article 19b**

**Contracts awarded to entities formed by contracting authorities**

***This Directive shall not apply to contracts awarded by a contracting authority to:***

***(a) a legally distinct entity, if the contracting authority exercises over that entity a control which is similar to that which it exercises over its own departments and if that entity carries out the essential part of its activities with the controlling contracting authority;***

***(b) a joint venture formed by that contracting authority with other contracting authorities, if that contracting authority exercises over the joint venture a control which is similar to that which it exercises over its own departments and if the joint venture carries out the essential part of its activities with the controlling contracting authority or authorities.***

**D5 Concessions and project financing**

Amendment 17  
Recital 34 a (new)

***(34a) The Commission should examine the possibility of adopting a proposal for a Directive to regulate systematically the concessions sector and so-called 'project***

***financing'.***

Amendment 66  
Article 33, title and paragraph 1

Public works contracts: particular rules *on subsidised housing schemes*  
***In the case of contracts relating to the design and construction of a subsidised housing scheme whose size and complexity, and the estimated duration of the work involved, require that planning be based***

Public works contracts: particular rules *for public-private cooperation*  
***In the case of public works which, for reasons of size, complexity, duration and/or financing, require collaborative project planning by a team comprising representatives of the contracting authorities,***

*from the outset on close collaboration within* a team comprising representatives of the contracting authorities, experts and the contractor to be responsible for carrying out the works, a special award procedure may be adopted for selecting the contractor most suitable for integration into the team.

experts and the contractor to be responsible for carrying out the works, a special award procedure may be adopted for selecting the contractor most suitable for integration into the team.

## **D6 Technical specifications**

Amendment 45

Article 24, paragraph 3

3. Technical specifications shall be formulated by referring to national standards implementing European standards, European technical approvals, common technical specifications, international standards or when these do not exist national standards or national technical approvals, or any other technical reference produced by European standardisation bodies as defined in Annex VI, provided that the reference is accompanied by the words 'or equivalent'.

They may also be formulated in terms *either* of performance *or* of functional requirements. They shall, however, be sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract.

3. Technical specifications shall be formulated by referring to national standards implementing European standards, European technical approvals, ***European eco-labels***, common technical specifications, international standards or when these do not exist national standards or national technical approvals, or any other technical reference produced by European standardisation bodies as defined in Annex VI, provided that the reference is accompanied by the words 'or equivalent'.

They may also be formulated in terms of performance ***requirements, of functional or of requirements with regard to the environmental impact of the product throughout its lifetime***. They shall, however, be sufficiently precise to allow tenderers to determine the subject-matter of the contract and

to allow contracting authorities to award the contract.

## **D7 Subcontracting**

Amendment 159

Article 26

In the contract documents, the contracting authority *may* ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties and any designated sub-contractors. This indication shall be without prejudice to the question of the principal economic operator's liability.

In the contract documents, the contracting authority ***may not place any quantitative restrictions on the exercise, by the undertakings, of freedom of organisation of their own inputs***. ***It shall*** ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties and any designated sub-contractors. This indication shall be without prejudice to the question of the principal economic operator's liability. ***The contracting authority shall prohibit any***

*subcontracting to undertakings which are in the situation referred to in Article 46 and/or undertakings which do not meet the requirements laid down in Articles 47, 48 and 49.*

*Intellectual services, with the exception of translation and interpretation services and management and related services, may not be contracted out.*

## **D8 Competitive dialogue**

Amendment 137

Article 30

**1. In the cases referred to in point (b) of Article 29(1), the contracting authorities shall publish a contract notice, *choose the candidates and negotiate with them the means and the solutions best suited to meeting their needs. They shall then draw up the contract documents, check that the candidates' capacity is appropriate to the retained technical solution and invite all the candidates or a restricted number thereof to submit a tender and they shall assess the tenders, without negotiation, on the basis of the criteria established to determine the most economically advantageous tender.***

**2. The contracting authorities shall state in the contract notice all the conditions which the economic operators must fulfil in order to be admitted to the award procedure.**

***These conditions shall consist***

***(a) either of only the information specified in accordance with the provisions of Article 44 and those on qualitative selection criteria referred to in Articles 46 to 52,***

***(b) or of this information and the obligation to present an outline solution and, if necessary, an estimate of the costs of its implementation.***

***The qualitative selection criteria defined in the contract notice shall remain unchanged throughout the award procedure.***

Under Article 45(2) the contracting authorities may decide to invite a restricted number of *candidates meeting the selection criteria to negotiate*. In this case, they shall

**1. In the case of particularly complex contracts within the meaning of Article I(5a) the contracting authorities shall publish a contract notice. This shall contain in particular:**

***(a) as precise a description as possible of their requirements in respect of the work to be performed,***

***(b) the estimated value of the contract,***

***(c) the conditions which the economic operators must fulfil in order to be admitted to the award procedure in accordance with Article 44 and the selection criteria referred to in Articles 46 to 52,***

***(d) the award criteria and their respective weighting,***

***(e) an invitation to submit an outline solution.***

**2. The outline solution shall be submitted within the time limit laid down in the second sentence of point (a) of Article 37(3).**

Under Article 45(2) the contracting authorities may decide to invite a restricted number of *participants in the award procedure to take part in a competitive dialogue*. In this case, they shall announce

announce this in the contract notice and reduce the number of *invited candidates* objectively on the basis of *the selection criteria* set out in the same notice.

*dialogue*. In this case, they shall announce this in the contract notice and reduce the number of *participants* objectively on the basis of *factors relating to the competences and expertise* set out in the same notice *in accordance with the provisions of Article 44(2), (4) and (6)*. *The number of candidates invited to participate in the award procedure must be at least three, provided that sufficient candidates possess the necessary qualifications in terms of competence and expertise. The award criteria and their respective importance must be set out in the contract notice in*

*accordance with point (b) of Article 53(1) and may not be altered in the course of the award procedure, subject to the provisions of paragraph 3.*

*When an outline solution is requested, the contracting authorities may define their requirements concerning the economic operators' financial and economic standing, as provided for in Article 48, in terms of percentages of the estimated value of the outline solutions to be presented by the various candidates, and the requirements concerning their technical capability and experience, as provided for in Article 49, according to the skills and experience required to compile the outline solutions.*

*3. Contracting authorities shall set out their needs and requirements in terms of objectives to be achieved and, if necessary, in terms of performance or functional requirements. These needs shall be set out in the most detailed manner possible.*

*3. The contracting authorities shall discuss, in a separate technical dialogue with each of the selected candidates, the technical means, designs and solutions best suited to meeting their needs. The contracting authorities may not disclose the proposed solutions and confidential information provided by candidates to other candidates or to third parties either during, or after the completion of, the procedure. If, in the course of the negotiations, the contracting authority deems it necessary to change the original requirements for the work in question specified in the contract notice, it must inform simultaneously and in writing all participants in the technical dialogue of any such change. The award criteria and their relative importance may not be amended unless they are no longer appropriate to the subject matter of the contract as established in the light of the*

*technical dialogue. Any proposed solutions submitted by candidates after that time shall be final. Any candidates who had submitted their proposed solutions before*

*any such change was made must be given the opportunity to revise their position and draw up a fresh outline proposal if they wish.*

*The requirements thus defined shall serve as a basis for the formulation of the outline solutions and the cost estimates, where requested, and for the negotiation.*

*4. The award criteria shall be established in accordance with point (b) of Article 29(1) and with Article 53, and may not be amended in the course of the procedure unless they are no longer appropriate to the subject-matter of the contract as defined in the contract documents after the negotiation phase. Article 54 concerning abnormally low tenders shall be applicable.*

*4. The contracting authority shall declare the technical dialogue closed after consulting all candidates. All proposed solutions submitted thereafter shall be final. Candidates shall be invited simultaneously, and in writing, to state the cost of their definitive outline proposal within ten days. The contracting authority shall assess the tenders, without negotiation, on the basis of the criteria established to determine the most economically advantageous tender.*

*The conditions shall be set out in the contract notice or in the document specifying the authority's requirements; however, if an outline solution is not required, they may be specified in the invitations to participate in the negotiation phase.*

*5. Contracting authorities which have not required the request to participate to be accompanied by an outline solution may, in the invitations to be negotiated, ask that an outline solution be submitted. The time-limit for this submission shall be appropriate to the complexity of the needs which outline solutions are invited to meet and, in any case, may not be less than 25 days from the date of dispatch of the invitations.*

*5. The contracting authority must make provision in the contract notice for participants to receive a monetary payment to compensate for any costs incurred. It shall be payable to all candidates whose outline proposals constitute feasible solutions. The amount of the monetary payment shall be indicated when candidates are invited to take part in the competitive dialogue, and must be such as to cover the average cost involved in preparing for and participating in the technical dialogue. If the contracting authority amends its requirements with regard to the work in question in the course of*

*the technical dialogue, the compensatory payment shall be raised to take account of the additional work therefore incurred for candidates. The aggregate sum to be paid by way of compensation to all candidates shall be taken into account for the purpose*

*of calculating the threshold values pursuant to Article 8 and must not exceed 15% of the estimated contract value set out in the contract notice.*

*6. The purpose of negotiation with the selected candidates shall be solely to discuss and define the means best suited to meeting the needs of the contracting authority. During negotiation, the contracting authorities may not disclose to the other participants the solutions proposed or any other confidential information given by a participant.*

*7. After announcing the end of negotiations and informing all the participants thereof, the contracting authorities shall check, by applying the selection criteria already set in accordance with paragraph 2, whether the candidates' economic, financial and technical capacity is appropriate to the technical solution specified in the final contract documents. Where the economic, financial or technical capacity of one or more candidates, as proven at the request to participate in negotiations, is not appropriate to the technical solution, contracting authorities shall make a written request to the candidates concerned to present the necessary documentation to allow a check to be carried out, on the basis of the above mentioned criteria, as to whether they have the capacity adapted to the retained technical solution. Article 44(5) shall apply. The invitations to submit a tender shall be drawn up in accordance with Article 40 and sent in writing. They shall be accompanied by the definitive contract documents setting out the technical specifications in accordance with Article 24. In accordance with Article 45(2),*

*the number of candidates invited to submit bids may not be less than three, provided that there is a sufficient number of suitable candidates meeting the selection criteria specified by the contracting authority.*

*8. Time periods for receipt of tenders shall be fixed in accordance with Article 37.*

*9. The contracting authorities may specify*

*prices and payments to the participants. Such prices and payments shall be taken into consideration for the application of Article 8.*

## **D9 Electronic procurement**

### **9.1 General provisions**

Amendment 73

Article 42, paragraph 1, subparagraph 2a (new)

***A tender may be submitted by electronic means only if an advanced electronic signature within the meaning of Directive 1999/93/EC and a reliable means of encrypting the contents are used.***

Amendment 74

Article 42, paragraph 2

2. Communication and information exchange shall be carried out in such a way as to ensure that the integrity of data and the confidentiality of tenders and of all information supplied by economic operators are preserved, and that the contracting authorities only examine the content of tenders after the time-limit set for submitting them has expired.

2. Communication and information exchange ***and the storage, holding and processing of information*** shall be carried out in such a way as to ensure that the integrity of data and the confidentiality of tenders and of all information supplied by economic operators are preserved, and that the contracting authorities only examine the content of tenders after the time-limit set for submitting them has expired.

Amendment 75

Article 42, paragraph 4 a (new)

***4a. Contracting authorities shall provide to tenderers on request a certificate from an accredited third party certifying that they have in place adequate measures to safeguard the confidentiality of tenderers' information during transmission and after receipt.***

Amendment 103

Article 61, paragraph 1 a (new)

***1a. A tender may be submitted by electronic means only if an advanced electronic signature within the meaning of Directive 1999/93/EC and a reliable means of encrypting the contents are used.***

Amendment 104

Article 61, paragraph 2

2. The communication and information exchange covered by this Title shall be carried out in such a way as to ensure that the integrity and confidentiality of all information supplied by service providers are preserved, and that the contracting

2. The communication and information exchange ***and the storage, holding and processing of information*** covered by this Title shall be carried out in such a way as to ensure that the integrity and confidentiality of all information supplied

authorities may only examine the content of plans and projects after the time-limit set for submitting these has expired.

by service providers are preserved, and that the contracting authorities may only examine the content of plans and projects after the time-limit set for submitting these has expired.

## 9.2 Reverse auctions

Amendment 65  
Article 32 a (new)

### *Article 32a*

#### *Electronic auction*

*1. In cases where it is possible for the qualitative and quantitative characteristics of the object or service to be procured to be described so precisely that the only item still to be agreed is the price, the contracting authority may award the*

*contract electronically by means of an auction using the open procedure. The contracting authority shall set a maximum price as the starting price, which tenderers may underbid. If the lowest offer is below the relevant threshold, this shall not affect the application of this Directive, provided that the starting price was above the threshold.*

*2. The auction must be announced at least 15 days beforehand in the Official Journal of the European Communities. In addition, the provisions of Articles 34 to 36 shall apply.*

*3. The auction shall continue for a minimum of seven days. Offers may be submitted throughout that period. The steps to be taken by tenderers shall be established by the contracting authority ex aequo et bono, by the beginning of the auction at the latest.*

*4. The contract will be awarded to the tenderer who has submitted the most advantageous offer while complying with the conditions laid down in Articles 46 to 50. If the tenderer submitting the most favourable offer is disqualified, the tenderer offering the next most advantageous offer shall be selected, subject to the provisions of this paragraph.*

*5. If no bids are received, Article 28 shall apply.*

**D10 Equal treatment of the award and cancellation of a procurement procedure**

Amendment 72  
Article 41 a (new)

**Article 41a**

**Completion of award procedure**

***Award procedures shall be completed by the award of the contract or cancellation. Award procedures may be cancelled only if***  
***(a) no tender has been received which fulfils the terms and conditions of the contract notice, or***  
***(b) there are other serious grounds which lie outside the powers of the contracting authority.***

**D11 New control mechanism alongside existing legal review procedures**

Amendment 108  
Article 81 a (new)

**Article 81a**

**Monitoring Mechanisms**

***Member States shall be required to establish effective, open and transparent mechanisms to ensure implementation of this Directive by contracting authorities operating within their jurisdiction.***  
***These mechanisms may include, inter alia, the establishment of an independent Public Procurement Agency with the powers to monitor contracting processes, to ensure that all stages of a contract award are properly completed and to intervene, as appropriate, where the procedures required by this Directive are not being followed.***  
***The independent agency should be given powers to enforce compliance, including, inter alia, the setting aside of contract awards or the re-opening of a contracting process. These powers should be subject to an independent appeals procedure open to contracting authorities and potential suppliers and should not preclude the right of contracting parties to take legal action.***

**D12 Framework agreements**

Amendment 24  
Article 1, paragraph 7

7. A 'framework agreement' means an agreement between ***several economic operators and a contracting authority under which the contracting authority, after following the procedures laid down***

7. A 'framework agreement' means an agreement between ***a contracting authority within the meaning of paragraph 5 and one or more economic operators the aim of which is to lay down***

by this Directive up to the award phase,

*the terms for contracts to be awarded during a particular period, in*

*selects the parties to the agreement on the basis of the tenders they have submitted on the basis of objective criteria, such as quality, quantity, technical merit, delivery period or period of completion and price; under this agreement the economic operators undertake, under certain terms laid down by the contracting authority, to fulfill contracts awarded under the agreement.*

*particular with regard to the prospective price and, where appropriate, the prospective quantity.*

### D13 The Utilities directive

#### 13.1 Legitimation of employees and their representatives in procurement review procedures

Amendment 55  
Article 49 a (new)

##### *Article 49a* *Review procedures*

*The Member States shall take the measures necessary to ensure that decisions taken by the contracting entity may be reviewed effectively and, in particular, as rapidly as possible in accordance with Council Directive 89/665/EEC(1 ).*

*Member States shall ensure that adequate procedures are available to workers and their representatives for the enforcement of obligations under the present Directive.*

#### 13.2 Exclusion from the Utilities directive

Amendment 31  
Article 29

1. Where they are awarded by contracting entities other than public authorities within the meaning of point (a) of Article 2(1) contracts intended to permit the performance of a service mentioned in Articles 3 to 6 shall not be subject to this Directive if, in the Member State in which the activity is to be performed, *it is directly exposed to competition on markets to which access is not restricted.*

2. *For the purposes of paragraph 1, the question of whether an activity is directly exposed to competition shall be decided on*

1. Where they are awarded by contracting entities other than public authorities within the meaning of point (a) of Article 2(1) contracts intended to permit the performance of a service mentioned in Articles 3 to 6 shall not be subject to this Directive if *access to the activity is not restricted* in the Member State in which the activity is to be performed.

2. *Access to the activity shall be deemed not to be restricted if the Member State has transposed and implemented the provisions*

*the basis of criteria such as the characteristics of the goods or services concerned, the existence of alternative goods or services, prices and the actual or potential presence of more than one supplier of the goods or services in question.*

*3. For the purposes of paragraph 1, access to a market shall be deemed not to be restricted if the Member State has implemented and applied the provisions of Community legislation mentioned in Annex X.*

*of Community legislation liberalising that activity.*

### **13.3 Subcontracting**

Amendment 120

Article 37

In the specifications, the contracting entity may ask the tenderer to indicate in his tender any share of the contract *which* he may intend to subcontract to third parties and any designated sub-contractors. This indication shall be without prejudice to the question of the principal economic operator's liability.

In the specifications, the contracting entity may ***not place any quantitative restrictions on the exercise, by the undertakings, of freedom of organisation of their own inputs.***

***It shall*** ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties and any designated sub-contractors. This indication shall be without prejudice to the question of the principal economic operator's liability. ***The contracting entity shall prohibit any subcontracting to undertakings which are in the situation referred to in Article 46 of Directive .../.../EC [on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts] and/or undertakings which do not meet the requirements laid down in Articles 47, 48 and 49 of that Directive.***

***Intellectual services, with the exception of translation and interpretation services and management and related services, may not be contracted out.***

### 13.4 Qualification systems

Amendment 52

Article 48, paragraph 3

3. Contracting entities who establish and operate a system of qualification shall inform applicants of their decision as to qualification within a *reasonable* period. If the decision will take longer than six months from the presentation of an application, the contracting entity shall inform the applicant, within two months of the application, of the reasons justifying the longer period and of the date by which his application will be accepted or refused.

3. Contracting entities who establish and operate a system of qualification shall inform applicants of their decision as to qualification within a *maximum* period of *two months*. If the decision will take longer than six months from the presentation of an application, the contracting entity shall inform the applicant, within two months of the application, of the reasons justifying the longer period and of the date by which his application will be accepted or refused.

### 13.5 Means of communication

Amendment 49

Article 47 para 1 subpara 1

and

Amendment 73

Article 62, paragraph 1, subparagraph 1

1. All communications and exchanges of information mentioned in this Directive may be effected by letter, by fax or by electronic means, *at the option of the contracting entity*.

1. All communications and exchanges of information mentioned in this Directive may be effected by letter, by fax or by electronic means.