

Social Services Europe

**On the proposal for a directive on
public procurement (COM)2011/896**

Final



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Social Services Europe brings together nine Europe-wide networks of not-for-profit providers of social and health care services who each have a track record in providing value-driven services for the most vulnerable in our societies. The network aims to strengthen the profile and position of social services, and promote the role of not-for-profit social service providers in Europe. For more info: www.socialserviceseurope.eu

INTRODUCTION

The existing Directive governing public procurement procedures, which includes social services, dates from 2004. Following a Green Paper consultation on “modernizing” the EU’s public procurement rules in early 2011 and a report from the European Parliament the European Commission published a proposal for a new Directive in December 2011.

Social Services Europe members (in March 2012 CEDAG, Eurodiaconia, European Association for Service Providers for People with Disabilities, European Platform for Rehabilitation, FEANTSA, Solidar and Workability Europe) have been discussing and analyzing the impact and implementation of the current directive and has discussed the new proposal. The Commission plans to have the new directive adopted by the end of 2012. Social Services Europe will work with the relevant Members of the European Parliament to ensure the new legislation is suitable for the sector.

This briefing highlights the main changes contained in the proposal as compared to the existing directives, highlights areas that need clarifying and explains concerns that are relevant for social services and social policy. The sections in bold are issues that Social Services Europe has considered and has come to a position on. This position can be found in a separate document.

LIGHTER REQUIREMENTS FOR PROCURING SOCIAL SERVICES

The recognition of the “specific characteristics” of social services of general interest and the application of a “specific regime” to the regular procurement procedures for social services are one of the most important differences in the proposal for a Directive as compared with the existing directive. Members of Social Services Europe have often stressed the specificities of social services as opposed to other “services of general interest” and the negative impact that tendering has been seen to have on the provision of social services¹. The Explanatory Memorandum at the start of the Directive states that “social, health and education services have specific characteristics which make them inappropriate for the application of the regular procedures for the award of public service contracts”. Title III, Chapter I of the proposal Directive, especially dedicated to “social and other specific services” rules how public contracts for social services shall be awarded.

According to this special regime public contracts which satisfy requirements set by this Chapter (articles 74-76) are only subject to certain provisions of the Directive; Title I covering scope, definitions and general principles, and the general principles found in the Treaty on the Functioning of the European Union. Article 76 states that “Members States shall put in place appropriate procedures ensuring the full compliance with the principle of transparency and equal treatment of economic operators and allowing contracting authorities to take into account the specificities of the services in question”. Public authorities can lay down technical specifications at the beginning of the procurement process in the way they consider most appropriate and shall also comply with the article concerning the procedures for the publication of the notice and assure that all the potential interested providers can express their interest in bidding for the contract (Title I).

In addition, Article 74 states that the special regime applies to public contracts for “social and other specific services” listed in Annex XVI and for contracts with a value equal or greater than the threshold indicated in Article 4 (d) – 500,000 euros. Contracts below this amount do not have to apply any of the rules outlined in the directive. The higher threshold² set down in the proposal is justified in recital 11 of the proposal states that “services to the person” “by their very nature” have a limited cross-border dimension since they are strongly linked to the context in which they are provided and that public contracts for such services with a very modest value have no cross-border interest for economic operators situated in other Member States and have no impact on the functioning of EU internal market³. Currently, public authorities have to evaluate case by case the potential cross-border interest of the contracts and if it is the case ensure sufficient advertisement to all the potential tenderers, in compliance with the basic principles of transparency and non-

¹ Requiring a detailed bid for all the activities covered (in terms of description and price) can drive services towards traditional service models, moreover they do not provide room for innovation and do not take enough into account integration, continuity and quality of services.

² Current threshold is 249.000 € as stated by Article 7 of Directive 1044/18/EC.

³ Referred to as “the Guide” paragraph 4.2.2 page 62.

discrimination.

The list of services provided in Annex XVI refers to health and social services, administrative educational, healthcare and cultural services, compulsory social security services, other community, social and personal services, services provided by Trade Unions and religious services. There is no clear difference between “social services” and “other community, social and personal services”. In addition, “social security services” appears to be out of place, social security schemes not currently falling under procurement rules as being non-economic. The definition of what services exactly fall under the special regime is even more confusing if other parts of the text are examined. The explanatory memorandum (p10) refers to “social, health and education services”, whereas recital 11 refers to “services to the person, such as certain social, health and educational services” [our emphasis]. **To change all the references to social services with an open list that refers to only social services and eliminate non economic services (e.g. social security services, religious services, trade union services) would be proposals to rectify this lack of consistency and legal clarity.**

ALTERNATIVES TO PUBLIC PROCUREMENT/SCOPE OF THE DIRECTIVE

The “sensitivity” of the services covered by Title III, Chapter I is used to justify the “wide discretion” allowed to Member States “to organize the choice of the service providers in the way they consider most appropriate” (recital 11). In the proposals, contrary to the current directive, alternatives to public procurement are mentioned: “the mere financing of social services or granting licenses and authorizations” and providing services themselves (“in house”).

The European Commission “Guide to the application of EU rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest”⁴ (the Guide) states that a contract is covered by the definitions of public service contract or concession, rather than being “mere financing” if:

- a) the aim of the contract is to meet needs previously defined by the public authority within the framework of its competences
- b) the nature of the service and the way in which it is to be provided are specified in detail by the public authority
- c) the contract provides for remuneration of the service (payment of a price or granting of the right to operate the service in return for a fee payable by users)
- d) the public authority takes the initiative of finding a provider to whom to entrust the service
- e) the contract lays down penalties for failure to meet contractual obligations, in order to guarantee that the service entrusted to the third party is provided properly in such a way as to meet the public authority's requirements (penalties, compensation for damages, etc.)

This may leave room for interpretation in terms of arrangements that may exhibit some of the above criteria or where they are difficult to evaluate. In addition the guide is not legally binding. **However, given that there is currently no explanation in case law or legislation about when procurement rules must be applied, one option would be to incorporate this text into the legislation as is, or another to propose new wording that ensures contracting authorities have “wide discretion” to decide when to finance a service by a grant or through a procurement procedure.**

⁴ European Commission Guide *ibid*, paragraph 5.2 page 74.

QUALITY IN SOCIAL SERVICES

The increased emphasis on quality through numerous references in the text of the proposal reflects the advocacy work carried out by many organizations, including members of Social Services Europe highlighting the importance of quality in the specific area of social services.

The proposal refers to criteria set out in the Voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee (VQF)⁵, which encourages public authorities to set up tendering procedures that ensure the respect of quality requirements also in those countries where at national or regional level the relevant legislation in force does not refer to any quality criteria. The Explanatory memorandum states that it aims to make sure "that contracting authorities are able to apply specific quality criteria for the choice of service providers, such as the criteria set out in the voluntary European Quality Framework for Social Services of the European Union's Social Protection Committee". This is not different from the Directive in force but an explicit reference to the VQF is welcome as it gives the document a higher profile and it takes into account many of the main elements of quality Social Services Europe see as important.

The criterion of quality in awarding public services contracts has not been made compulsory, as Social Services Europe members had called for, and contracts can still be awarded to the "lowest cost" tender ("lowest price" in the existing Directive). The proposal states: "contracting authorities may take into account the need to ensure quality, continuity, accessibility, availability and comprehensiveness of the services, the specific needs of different categories of users, the involvement and empowerment of users and innovation. Member States may also provide that the choice of the service provider shall not be made solely on the basis of the price for the provision of the service" [our emphasis]. The other option available to contracting authorities is the "Most Economically Advantageous Tender", or MEAT, which would be made up of various criteria, including price. **Another proposal that was not taken on board was to fix a minimum percentage or weighting of independently verified quality criteria in award criteria for social services or all services under MEAT. One or both of these proposals could be made again.**

Recital 37 points out that quality requirements can be set at different stages of a procurement procedure; with the lowest cost authorities are "free to set adequate quality standards by using technical specifications or contract performance conditions." However many stakeholders see this as not strong enough and it is still not mandatory. To strengthen this element in all relevant parts of the directive references to the possibility to award contracts based on price and or cost alone should be removed. **There is also a discussion about the term "Most Economically Advantageous Tender", as it is not clear in the way it sounds that it would include other criteria than cost. The Network for Sustainable Public Procurement (NSPP) is discussing alternative terms, such as using "best value", such as the wording from the Northern Ireland procurement policy "Contracting authorities shall aim for 'best value' in procurement policy. This is achieved through the broadly most advantageous combination of cost, quality and sustainability considerations."**

⁵ See Recital 11 of the proposal for a Directive.

SOCIAL CLAUSES

As stated by the Commission in the guide “Buying Social”, socially responsible public procurement is possible through “social clauses” in the current directive, allowing authorities to take into account social aspects such as, decent work, compliance with labour rights, social inclusion of disadvantaged people including people with disabilities and accessibility⁶, known as “horizontal objectives”. In the Guide the Commission aims to encourage and motivate Member States and public authorities to promote socially responsible public procurement but for some stakeholders this is not enough, and not enough scope in the proposal is given to contracting authorities. Some call for horizontal objectives to have the same value as the functional objective of what is purchased⁷.

The possibility to include environmental production characteristics in the technical specifications is new as compared to the current directive but social “production characteristics” (such as working conditions or the qualification and experience of the staff assigned to performing the contract)⁸ may only be used as contract award criteria. Article 66, paragraph 2, lists criteria that qualify as technical specifications and include quality, technical merit, aesthetic and functional characteristics, accessibility, design for all environmental characteristics and innovative character. **Social Services Europe could join with the NSPP in calling for social production characteristics to be permissible in the technical specifications.**

An important clause has been introduced in Article 40 relating to technical specifications. In the existing directive article 23 states that “whenever possible technical specifications should be defined so as to take into account accessibility criteria for people with disabilities or design for all users”, Article 40 states clearly that “for all procurement intended for use by persons it is necessary that contracting authorities lay down technical specifications so as to take into account accessibility criteria for people with disabilities or design for all users” [our emphases]. In describing a final product’s characteristics (whether works, supplies or services) contracting authorities shall ensure that goods or services allow access for people with disabilities.

The last consideration about social clauses concerns contract performance conditions. While in Article 70 there is only a general reference to “social and environmental considerations”, Recital 43 states that amongst requirements applicable during the performance of the contract may be the recruitment of long- term job-seekers, the involvement of people experiencing particular difficulty in achieving integration, the implementation of training measures for unemployed or young people or the recruitment of more disadvantaged people than required under national legislation.

⁶ European Commission, “Buying Social – A Guide to taking account of social considerations in public procurement”, page 10.

⁷ Network for Sustainable Public Procurement (NSPP)

⁸ See for example article 66 2 b of the proposal for a Directive.

ARTICLES ON SHELTERED WORKSHOPS AND RESERVED CONTRACTS

Article 17 of the proposal permits Member States “to reserve the right to participate in public procurement procedures to sheltered workshop and economic operators whose main aim is the social and professional integration of disabled and disadvantaged workers or provide for such contracts to be performed in the context of sheltered employment provided that more than 30% of the employees are disabled or disadvantaged workers”.

The proposal confirms the importance given to reserved contracts in facilitating the inclusion of people with disabilities into the labour market and introduces two new elements. The first element refers to the extension of reserved contracts to other categories other than people with disabilities, namely disadvantaged people such as people furthest from labour market, people experiencing poverty and social exclusion. The second element concerns the percentage of disabled or disadvantaged workers employees in those workshops, programmes or economic operators. While in the current legislation this percentage is set to 50% in the proposal it has been reduced to 30% permitting a wider field of service providers to participate in reserved contracts. In this way also non-profit organisations employing persons from other disadvantaged groups may benefit from participating in reserved contract schemes. Article 19 of Directive 2004/18/EC refers only to sheltered workshops and employment programmes.

The Guide also mentions reserved markets for non-profit organisations; “national law regulating a particular activity might, in exceptional cases, provide for restricted access to certain services for the benefit of non-profit organisations. In this case public authorities would be authorised to limit participation in a tender procedure to such non-profit organisations, if the national law is compatible with European law. Nevertheless, such a national law would restrict the working of Articles 49 and 56 of the TFEU, on the freedom of establishment and the free movement of services, and would have to be justified on a case-by-case basis. On the basis of the case law of the Court of Justice, such a restriction could be justified, in particular, if it is necessary and proportionate in view of the attainment of certain social objectives pursued by the national social security system”. **A proposal would be to include in the text a specific reference to the possibility to reserve a market to the non-profit sector based on the above text.**

OTHER RELEVANT ISSUES

Grounds for exclusion of providers

Article 55, paragraph 3, provides that economic operators can be excluded from participation in public contracts by contracting authorities due past violations of environmental or social obligations, including rules on accessibility for disabled persons, but this is not binding. If on the one side the exclusion of such economic operators is positive for requiring the compliance with the EU legislation and with UN Convention on the rights for persons with disabilities; on the other side there is a concern. Problems may arise for service providers because relevant government authorities have not implemented EU legislation concerning social and environmental obligations at national or regional level. Even if bidders comply with national law, they might not be completely in compliance with EU legislation and according to the proposal they could be subject to exclusion from a tendering process. The proposal also refers to “grave professional misconduct” as an exclusion criterion but the definition of which situations can lead to it is not clear.

If contracting authorities are allowed to take into account relevant information on the bidders’ past performance, it could be allowed to obtain information on and take into account positive past performance in order to give to such bidders an advantage. An addition to the text could be made to this effect.

Abnormally low bids

As compared to the existing directive, the new proposal (Art 69) requires operators to explain price and costing when the bid is 50% lower than average price, the price or cost charged is more than 20 % lower than the price or costs of the second lowest tender and at least five tenders have been submitted. When it comes to “other reasons” they may request explanations but are not bound in do it. Contracting authorities must reject the tender where they establish that it is abnormally low because it does not comply with specified obligations relating to social and labour or environmental law (Art 69 4 para. 2).

Governance

The proposal provides that Member States set up an independent oversight body to monitor the implementation of public procurement processes and ensuring correct application of the directive. The competent authority should publish an annual report illustrating the implementation and application of rules laid down in the Directive and including among other things, a global overview of the implementation of sustainable procurement policies (Art. 84). **If Social Services Europe wishes to work on this issue it could be useful to call for the involvement of stakeholders in giving feedback on the procedures used. If operators are able to report implementation problems this initiative could be seen as a positive step.**

To develop the role of such an oversight body, the Commission could develop a series of indicators based on targets and objectives for contracting authorities and guidelines in order to facilitate impact assessments of effectiveness of procurement procedures for increasing social inclusion, accessibility for people with disabilities and fostering evidence-based social innovation. They could also be required to provide legal and economic advice, guidance, assistance and training to promote socially cohesive and sustainable policies and the realisation of the Europe 2020 Strategy through public procurement (c.f. Explanatory memorandum 5, “knowledge centres”)