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NOTE

from: General Secretariat
to: Working Party on Public Procurement
on: 21 March 2012
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No Cion prop.: 18966/11 MAP 10 MI 686 + ADD 1 + ADD 2
Subject: Proposal for a Directive of the European Parliament and of the Council on public procurement
- Article 24, first paragraph: Choice of procedures (part of Cluster 1)

Delegations will find attached a Presidency compromise text on the above article.

Modifications of text in respect to the original proposal are in **bold and underlined**.

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Article 24

Choice of procedures

[Directive 2004/18/EC: Art. 28, 30(1)]

1. In awarding their public contracts, contracting authorities shall apply the national procedures adjusted to be in conformity with this Directive, provided that, without prejudice to Article 30, a call for competition has been published in accordance with this Directive.
 - 1 a.** Member States shall provide that contracting authorities may apply open or restricted procedures as regulated in this Directive.
 - 1 b.** Member States may provide that contracting authorities may apply innovation partnerships as regulated in this Directive.
 - 1 c.** Member States may also provide that contracting authorities may use a competitive procedure with negotiation or a competitive dialogue in the following situations:
 - a) **with regard to works, supplies or services fulfilling one of the following criteria:**
 - i) **Where the needs of the contracting authority cannot be met without adaptation of readily available solutions**
 - ii) **they include design or innovative solutions**
 - iii) **the contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, the complexity or the legal and financial make-up or because of the risks attaching to them**
 - iv) **the technical specifications of which cannot be established with sufficient precision by the contracting authority with reference to a standard, European**

**Technical Approval, Common Technical Specification or technical reference
within the meaning of points 2 to 5 of Annex VIII**

- b) with regard to works, supplies or services where, in response to an open or a restricted procedure, only irregular or unacceptable tenders are submitted. In such situations contracting authorities need not publish a contract notice where they include in the negotiated procedure all of, and only, the tenderers which satisfy the criteria set out in Article 55 to 63 and which, during the prior open or restricted procedure, have submitted tenders in accordance with the formal requirements of the procurement procedure;

Modified recital 15

There is a great need for contracting authorities to have additional flexibility to choose a procurement procedure, which provides for negotiations. The Agreement, which allows for negotiation in all procedures is illustrative in this regard. A greater use of these procedures is also likely to increase cross-border trade, as the evaluation has shown that contracts awarded by negotiated procedure with prior publication have a particularly high success rate of cross-border tenders. Member States should be able to provide for the use of the competitive procedure with negotiation or the competitive dialogue, in various situations where open or restricted procedures without negotiations are not likely to lead to satisfactory procurement outcomes.

Recital 15 a)

For works contracts, such situations include works that are not standard buildings or where works includes design or innovative solution. For services or supplies that require adaptation or design efforts, the use of a competitive procedure with negotiation or competitive dialogue is likely to be of value. Such adaptation or design efforts are particularly necessary in the case of complex purchases such as sophisticated products, services of intellectual services or major ICT projects. In these cases, negotiations may be necessary to guarantee that the supply or service in question corresponds to the needs of the contracting authority. In respect of off-the shelf services or supplies that can be

provided by many different operators on the market, the competitive procedure with negotiation and competitive dialogue should not be used.

Recital 15 b)

The competitive procedure with negotiation should also be available in cases where an open or restricted procedure resulted only in irregular or unacceptable tenders. In particular tenders which do not comply with the procurement documents, which were received late, which are the outcome of collusion or which have been found by the contracting authority to be abnormally low, should be considered irregular. In particular tenders submitted by tenderers that do not have the requisite qualification, and tenders whose price exceeds the contracting authority's budget as determined and documented prior to the launching of the procurement procedure should be considered unacceptable.
