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WORKING DOCUMENT

From:	CY Delegation
To:	Working Party on Trade Questions
Subject:	International Procurement Instrument - CY comments

REPUBLIC OF CYPRUS

TREASURY
OF THE REPUBLIC
1441 NICOSIA

The Cyprus Delegation reaffirms its position to provide constructive feedback to the draft legal text and recitals provided by the Presidency with the aim of reaching a compromise solution before the end of the PT Presidency. We want to reinstate our position that the Regulation should be effective, in order to provide sufficient leverage in the negotiations with third countries but at the same time that the Regulation ensures legal certainty, uniformity and transparency.

Article 5 – IPI measures

Following the clarifications provided by the Commission and the Presidency, we could accept

- the threshold levels, given that the level of leverage is achieved, as per the Commission's presentation during the WPTQ meeting dated 08/02/2021
- the nature of IPI measures (exclusion or SAM-Score Adjustment Measure), provided that it will be specifically stated that the exclusion will be imposed exceptionally.

However, we are concerned with the suggested range of SAM (between 20-40%), since this will probably lead to disproportionate increase in prices. Our suggestion is that the level of SAM should be up to 30%.

Article 6 – Additional contractual obligations upon the successful tenderer

We acknowledge that the introduction of additional contractual obligations upon the successful tenderer is necessary to avoid circumvention of the IPI measure. However, we would like to express our concerns regarding the practical implementation of this Article.

More specifically; in accordance with Article 6 (1) (a) and (b), there is a prohibition to subcontract more than 50% of the total contract value from the targeted country and a commitment that the goods / services supplied or provided from the targeted country do not represent more than 50% of the total contract value.

It should be noted, however, that from a practical point of view, the origin of goods and services is disclosed at the tender submission stage. At this stage, tenderers are required to submit details of the manufacturer of the goods or the service provider.

Therefore, the issues that arise are the following;

- Could an SME registered in EU, having "substantive business operations" in EU participate in a tender procedure for goods, even if the origin of the goods is the targeted country? If the answer is no, then such provision could be considered as a kind of "exclusion" criteria.
- If this SME is eligible to participate and is finally awarded the tender, then the contract will include conditions that prohibit or commit the successful tenderer not to

subcontract or source more than 50% of the total contract value from the targeted country.

In our opinion, this is a paradox. From the tender submission stage, the contracting authority is aware of the origin of goods / services, which is the IPI targeted country. Even though the successful tenderer has disclosed the origin, it will have to sign a contract which will state that a severe penalty will be imposed if certain conditions are not met (add-on). Both the contracting authority and the successful tenderer will be aware, from the contract award date, that these conditions will not be met and the penalty will be inevitably imposed.

Due to the reservations listed above, Cyprus favours different thresholds for add-on, which will be substantially higher than the thresholds for IPI measure, listed in Article 5.

With regards to 6 (1) (d), we believe that the suggested penalty of at least 10% is disproportional and extremely high, given that the penalty will be incorporated in the financial offer of the Economic Operators. As a result, the extra cost will be finally incurred by EU citizens.

Article 7 – Exceptions & Recital 28

We suggest that an additional exception reason should be included to take into account crisis situations or urgent conditions.

With regards to 1 (a) and (b), our concerns relate to the fact that economic operators will be invited to participate in a tender procedure without knowing whether the IPI measure will be imposed or not, ie they will participate in a tender procedure which is uncertain and with vague eligibility requirements.

From a practical point of view, please consider the case where an economic operator originating from a targeted country submits a proposal. The EO's financial offer will normally incorporate the penalty that will be imposed due to the "add-on" clause, in case the EO is the successful tenderer. If the IPI measure will not be applied, for any of the reasons listed in Article 7, and this EO is awarded the tender, then the contracting authority will have to pay a higher price due to the penalty but the EO will not have to pay the penalty relating to the breach of add-on conditions.

With regards paragraph 3, it should be clarified that the Commission will be notified before the award of the contract, and then the contracting authority can immediately proceed with the contract award.

Moreover, regarding the term "disproportionate increase in price" and the relevant clarifications in Recital 28; our understanding is that the exemption will apply in case the estimated value is higher than the value of the remaining offers. Does this presumably imply that the exemption will not apply if the value of one offer is higher than the estimated value? We suggest that Recital 28 should include further clarifications regarding this point.

Recital 14 – Origin

We support the clarifications provided regarding the origin of legal persons and the alignment with EU Procurement Directives.

Recital 18 – Least Developed Countries

We support the proposed text since this serves the policy objective of the Union to support the economic growth of LDCs and their integration into global value chains.

Article 6 & Recital 24 - SMEs

We acknowledge that the solution presented aims to facilitate SMEs to participate in the procurement procedures. However, contracting authorities will have increased administrative burden in their effort to collect information whether the SME is autonomous or not. In addition, this exemption should also apply to SMEs that are service providers.

New Article & Recital 27 – Exemption of limited list of sub-central contracting authorities-entities

We support the proposed text since only a small number of MS (5 or 6) whose coverage is above the 75% threshold, will have the option to request an exemption from the Commission. The criteria that will be applied by the Commission to decide whether the exemption will be applied or not, should be disclosed for transparency reasons.

Article 5 (paragraph 3) & Recital 23 - FAs and DPS de minimis provision

We share the view of various MS that the application of IPI measure to framework agreements and dynamic purchasing systems creates significant difficulties and administrative burden. We therefore propose to have different (higher) thresholds for the application of the “add-on” than those proposed in WK 3877/2021 INIT.

Cyprus reserves the right to make new or amend the present comments.