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NOTE

from:	General Secretariat
to:	Working Party on Public Procurement
on:	3 April 2012
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No Cion prop.:	18966/11 MAP 10 MI 686
Subject:	Proposal for a Directive of the European Parliament and of the Council on public procurement - Cluster 5: SME Access

In view of the Working Party on Public Procurement on 3 April 2012, delegations will find in the Annex a compromise proposal on the above cluster prepared by the Presidency.

Changes compared to the previous text (6706/12) are underlined, deletions are marked [...].

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Cluster 5**SME access****1. Division into lots**

Revised recital 30

(30) In order to foster the involvement of small and medium-sized enterprises (SMEs) in the public procurement market, contracting authorities should be encouraged to divide large contracts – above EUR 500 000 for supplies and service contracts and above the threshold set out in Article 4(a) in the case of works contracts - into lots. These lots may be homogenous meaning that all lots have the same subject-matter and/or heterogenous, meaning that the lots have different subject-matters, for instance in the case of a work which is divided into lots according to trades). The size and subject-matter of each individual lot should be determined freely by the contracting authority, which, in accordance with the relevant rules on the calculation of the estimated value of procurement, should also be allowed to award some of the lots without applying the procedures of this Directive. The contracting authority should have a duty to consider the appropriateness of dividing large contracts into lots while remaining free to base its assessment on any reason it deems pertinent. Consequently, where, in the view of the contracting authority, it would not be appropriate to divide the contract into lots, the contract notice or the invitation to confirm interest should contain information setting out why the contracting authority so concludes. The contracting authority should remain free to base its assesment of whether a division into lots is appropriate on any reason it deems pertinent. Such reasons might for instance be that the contracting authority finds that such division could risk restricting competition, or risk rendering the execution of the contract excessively technically difficult or expensive, or that the need to coordinate the different contractors for the lots could seriously risk undermining the proper execution of the contract.

In their efforts to foster the involvement of SMEs in the public procurement market, Member States should remain free to go further by extending the scope of the obligation to consider the appropriateness of dividing contracts into lots to smaller contracts, by requiring contracting authorities to provide a legal justification for a decision not to divide contracts into lots or by rendering a division into lots obligatory under certain conditions. With the same purpose, Member States should also be free to provide mechanisms for direct payments to subcontractors.

(30a) Where contracts are divided into lots, contracting authorities should, for instance in order to preserve competition or to ensure security of supply, be allowed to limit the number of lots for which an economic operator may tender; they should also be allowed to limit the number of lots that may be awarded to any one tenderer. Furthermore, contracting authorities should be allowed to require that all contractors coordinate their performance of the contract under the direction of the economic operator to whom a lot involving the coordination of the entire project or its relevant parts has been awarded.

Article 44

Division of contracts into lots

1. [...]

For contracts with a value equal to or greater than the thresholds provided for in Article 4 but not less than EUR 500 000, determined in accordance with Article 5, where the contracting authority does not deem it appropriate to split the contract into lots, the contract notice or the invitation to confirm interest shall include information setting out why the contracting authority finds that a division into lots would not be appropriate.

Contracting authorities shall indicate, in the contract notice or in the invitation to confirm interest, whether tenders are limited to one or more lots only.

2. Contracting authorities may, even where the possibility to tender for all lots has been indicated, limit the number of lots that may be awarded to a tenderer, provided that the maximum number is stated in the contract notice or in the invitation to confirm interest. Contracting authorities shall determine and indicate in the procurement documents the objective and non-discriminatory criteria or rules for awarding the different lots where the application of the chosen award criteria would result in the award to one tenderer of more lots than the maximum number.
3. Member States may provide that, where more than one lot may be awarded to the same tenderer, contracting authorities may stipulate that they will either award one contract per lot or one or more contracts covering several or all lots.
Contracting authorities shall specify in the procurement documents whether they reserve the right to make such a choice and, if so, which lots may be grouped together under one contract.

Contracting authorities shall first determine the tenders fulfilling best the award criteria set out pursuant to Article 66 for each individual lot. They may award a contract for more than one lot to a tenderer that is not ranked first in respect of all individual lots covered by this contract, provided that the award criteria set out pursuant to Article 66 are better fulfilled as a whole with regard to all the lots covered by that contract. Contracting authorities shall specify the methods they intend to use for such comparison in the procurement documents. Such methods shall be transparent, objective and non-discriminatory.

4. [...]

2. Direct payments for subcontractors

Article 71

Subcontracting

[Directive 2004/18/EC: Article 25]

1. In the procurement documents, the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors. Such an indication shall be without prejudice to the question of the principal economic operator's liability.

2. [...]

3. Turnover cap

Revised recital 31:

- (31) Overly demanding requirements concerning economic and financial capacity frequently constitute an unjustified obstacle to the involvement of SMEs in public procurement. Any such requirements should be related and proportionate to the subject-matter of the contract. In particular, contracting authorities should not be allowed to require economic operators to have a minimum turnover that would be disproportionate to the subject-matter of the contract; in any event the requirement should not exceed at the most three times the estimated contract value. However, in duly justified circumstances, higher requirements may be applied. Such circumstances may relate to the high risks attached to the performance of the contract or the fact that its timely and correct performance is critical, for instance because it constitutes a necessary preliminary for the performance of other contracts.

Article 56

Selection criteria

3. With regard to sufficient economic and financial standing, contracting authorities may require economic operators to have adequate financial and economic capacity. For that purpose, they may require that economic operators have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract and an adequate professional risk indemnity insurance. [Discussed in cluster 3]

The minimum yearly turnover that economic operators are required to have shall not exceed at the most three times the estimated contract value, except in duly justified circumstances relating to the special risks attached to the nature of the works, services or supplies. The contracting authority shall indicate such exceptional circumstances in the procurement documents.

**Provisions listed under cluster 3, but relevant also in this context:* [Where a contract is divided into lots this Article shall apply in relation to each individual lot. However, the contracting authority may set the minimum yearly turnover that economic operators are required to have by reference to groups of lots for the event that the successful tenderer is awarded several lots to be executed at the same time.

Where contracts based on a framework agreement are to be awarded following a reopening of competition, the maximum yearly turnover requirement referred to in the second subparagraph of this paragraph shall be calculated on the basis of the expected maximum size of specific contracts that will be performed at the same time, or, where it is not known, on the basis of the estimated value of the framework agreement. In the case of dynamic purchasing systems, the maximum yearly turnover requirement referred to in the second subparagraph of this paragraph shall be calculated on the basis of the expected maximum size of specific procurements to be awarded under the system.]
