



FEAD Position Paper on the EC proposal for a Directive on public procurement and a Directive on procurement by entities operating in the water, energy, transport and postal services sectors

5 March 2012

FEAD, the European Federation of Waste Management and Environmental Services, welcomes the European Commission's proposal for a Directive on public procurement and a Directive on procurement by entities operating in the water, energy, transport and postal services sectors, which was presented on 20 December 2011. We have followed with great interest and actively contributed to the initiative of the European Commission to reform the EU public procurement rules, a policy area that is essential to the activities of the private waste management sector. We have therefore called upon the EU institutions to keep the basic principles of this policy in mind, namely to allow for best-value for money and to guarantee that procurement markets are open to fair competition on an EU-wide basis.

FEAD welcomes the fact that the thresholds for the application of public procurement rules were not increased. We consider them to be in line with EU public procurement principles, which stress the importance of fair competition and transparency. Adequate thresholds are crucial to ensure that the scope of the public procurement rules should be as wide as possible in order to provide private sector companies with access to public contracts, notably SMEs and in order to ensure that citizens get the best "value for money". It is only through a wide application of public procurement rules that the EU will be able to achieve the EU 2020 objectives of smart, sustainable and inclusive growth. Moreover, the commitments of the EU within the WTO and notably the thresholds agreed upon in the General Agreement on Public Procurement (GPA) have to be respected.

FEAD also deems the provisions concerning self-declarations and other means of proof including an European Procurement Passport very helpful. It is also very much appreciated, that the competitive procedure with negotiation (article 27) is restricted to certain cases (article 24 para. 1, sub-para. 4). The competitive procedure with negotiation is less transparent than other procedures and should therefore be limited in application.

APOH, Slovakia
ARS, Romania
ASEGRE, Spain
BDE, Germany

CAOH, Czech Republic
ESA, UK
EWMA, Estonia
FEBEM-FEGE, Belgium

FISE, Italy
FLEA, Luxembourg
FNADE, France
IWMA, Ireland

LASUA, Latvia
NORSK INDUSTRI, Norway
PASEPPE, Greece
PIGO, Poland

SRI, Sweden
VA, Netherlands
VÖEB, Austria
YYL, Finland

FEAD considers that price should not be the exclusive, decisive award criterion. As far as waste services are concerned and regarding the best value for money for services expected by citizens and public authorities, we have advocated for a wider approach than merely a price-based award criterion. To our understanding, Art. 66 paragraph 1, sub-paragraph 2 still enables the contracting authorities to choose the lowest price as the sole award criteria. This provision should be abandoned. Although life-cycle costs are brought to light by the proposal of the European Commission (article 2 (22): definition of life cycle, article 67: life-cycle costing), its use remains optional and the proposal can be made even more ambitious in that respect.

FEAD also remains concerned by some points of the proposal, which refer to the articles regulating the application of the procurement legislation to relations between public authorities (article 11 of the Directive on public procurement, article 21 of the Directive on procurement by entities operating in some specific sectors). We believe that the exemptions from the scope of these Directives by the Commission's proposal codify case-law of the Court of Justice of the European Union, which in some cases does not guarantee the proper functioning of the internal market as well as the achievement of a smart, sustainable and inclusive growth, as set out in the Europe-2020 strategy. Exemptions from the scope of the directives must be very narrow, in order to reach the aim and to fulfil the purpose of public procurement law, which is to grant fair and equal access to public contracts for companies and to ensure an efficient spending of public money, i.e. to enable public contracting authorities – and the citizen – to get the best value for money. This can only be achieved by means of open and transparent tendering procedures. The procurement of goods and services by one public contracting authority from another public entity without a tendering procedure prevents the purchasing public entity from comparing prices and qualities; thus, it does not result in best value for money. Moreover, it cannot be ensured that the aims and objectives of the EU 2020-strategy are taken into consideration.

According to article 11 paragraph 2 of the public procurement Directive (as well as article 21 paragraph 2 of the Directive on procurement by entities in specific sectors), when a contracting authority awards a contract to its controlling entity or to another legal person controlled by the same authority, this contract will fall out of the scope of these public procurement (or concessions) Directives. We support that there is no control which could be deemed similar to that which a contracting authority exercises over its own departments, when it comes to relations between in-house entities of the same contracting authority. This also applies when a contracting authority awards a contract to its controlling entity, as the in-house entity cannot exercise control over its controlling entity. In the case of in-house arrangements, there should be an exemption from the public procurement rules only when such similar control exists, which would justify this exemption. Otherwise the scope of the public procurement legislation would be too limited and would as such exclude cases which in our view should be kept within its scope.

Another important point for FEAD is the fact that in cases of joint control exercised by several contracting authorities over an in-house entity the Directives would also not apply, allowing thus for the award of contracts without any tendering procedure (article 11 paragraph 3 of the public procurement Directive, article 21 paragraph 3 of the Directive on procurement by entities in specific sectors). In this

case the European Commission seems to be transposing case law of the Court of Justice of the European Union which in our view is incorrect and should not be further supported (C-295/05 “Asemfo Tragsa” and C-324/07 “Coditel Brabant”). A contracting authority cannot claim to exercise control similar to the one over its own departments in a situation of joint control, as it cannot control itself the decisions of another contracting authority. The control that a public entity exercises over its own departments is never a joint control. These provisions in the Commission’s proposal would trigger situations where public authorities exchange services at will, thereby avoiding participation in the market. This phenomenon can prove problematic for the proper functioning of the market and can hamper innovation and investments from the private sector.

In order for a contract awarded by a public authority to a legal person to fall outside the scope of the Directives, this legal person should carry out at least 90% of its activities for the contracting authority or other legal persons controlled by the same authority (article 11 paragraph 1 point b of the public procurement Directive and article 21 paragraph 1 point b of the Directive on procurement by entities in specific sectors). FEAD advocates for even stricter rules that would allow for an even broader scope of the public procurement Directives and would assure legal certainty. Our position is that for this type of exemption a necessary condition should be for the controlled entity to carry out all of its activities (100%) with the contracting authority, which would better ensure that the contracting authorities really exercise “similar control” in that case. Furthermore, the percentage of the activity carried out by an entity for the contracting authority would have to be assessed individually on a case-by-case basis. FEAD believes that this would be very difficult in practice and might lead to litigation. So this provision does not bring legal certainty and should therefore be abandoned.

The same point also applies to the agreement between two or more contracting authorities, as described in article 11 paragraph 4 of the directive on public procurement (as well as article 21 paragraph 4 of the Directive on procurement by entities in specific sectors). The article states (under c) that the participating contracting authority is allowed to perform on the open market up to 10% in terms of turnover of the activities relevant in the context of the agreement. FEAD agrees with the Commission’s position as declared in the Commission Staff working document¹, according to which “the cooperation agreement should not include activities to be offered on the open market”. There should therefore be no performing on the open market whatsoever, in order to ensure that the cooperation remains only governed by public interest - i.e. non-commercial – considerations. The other criteria given by the Commission for horizontal public-public cooperation in article 11 paragraph 4 are, however, helpful and seem to transpose the jurisprudence of the ECJ on that issue in a sufficient and correct manner. They should therefore be upheld and must not be softened during the legislative procedure.

Another point concerns the provision on abnormally low tenders (article 69 of the public procurement Directive, article 79 of the Directive on procurement by entities in specific sectors). According to these articles, the operator will have to explain the price or costs charged, when three cumulative conditions

¹ Commission staff working document concerning the application of EU public procurement law to relations between contracting authorities (‘public-public cooperation’)

are fulfilled: a) the price or cost charged is 50% lower than the average price or costs of the other tenders, b) the price or cost is more than 20% lower than the price or costs of the second lowest tender, and c) at least five tenders have been submitted. FEAD is concerned that cases fulfilling these conditions, especially the first one, are extremely rare, and therefore the article loses its purpose. We believe that the 50% percentage of the criterion a) should be lowered to 30% and that instead of five tenders, as indicated in criterion c), a minimum of three tenders should be considered sufficient.

Article 72 paragraph 3 of the public procurement Directive (article 82 paragraph 3 of the Directive on procurement by entities in specific sectors) on the replacement of the contractual partner does not in our view guarantee the continuity of a contract, for instance in the case of mergers or divisions by acquisitions. There should therefore be a clear mention of the possibility for the replacing contractual partner to ensure the transfer of assets, in order to continue the contract.

FEAD would also like to stress the importance of the provision of article 84 of the public procurement Directive (and article 93 of the Directive on procurement by entities in specific sectors), which foresees the creation of an independent body responsible for the oversight and coordination of implementation activities. As this body does not presently exist in all Member States, we would like to make sure that this provision stays in the final text of the Directives.

Our final point would be on article 73 of the public procurement Directive (article 83 of the Directive on procurement by entities in specific sectors), on the termination of contracts, which ensures the possibility for the contracting authority to terminate a public contract during its term. This article refers to “conditions determined by the applicable national contract law”. FEAD believes that in the case of the termination of a contract (and in the absence of fault of the contracting entity), the contracting entity should have a right to compensation. However, if the national contract law does not allow for such compensation, the contracting entity has no guarantee that the contract will be respected and the latter loses its value. This is why FEAD would recommend an explicit mention of compensation in the directives, in order to ensure harmonized public procurement in all EU States.

FEAD is the European Federation representing the European waste management industry. Its members are national waste management associations, with an approximate 60% share in the household waste market and handling more than 75% of industrial and commercial waste in Europe (with a collective annual turnover of approximately € 54 billion).

FEAD has 20 members, which represent companies with activities in all forms of waste management. These companies employ over 295 000 people who operate around 1 800 recycling and sorting centres, 1 100 composting sites, 260 waste-to-energy plants and 1 100 controlled landfills and play an important role in the determination of the best environmental option for waste management problems.