

# The new public procurement directive

## Assessment based on EASPD recommendations

### INTRODUCTION

In 2009 – 2010 EASPD and its members made an evaluation of the impact of the last public procurement directive on Social Services of General Interest, and in particular on services for persons with disabilities. We formulated, therefore, some recommendations for the new directive. An assessment of which of these recommendations were taken on board and what could be improved is following.

**RECOMMENDATION 1:** *The implementation of the UN Convention on the Rights of Persons with Disabilities is everyone's responsibility. The principles outlined therein should guide the work of social services for people with disabilities but this is only possible if an adequate legislative framework is in place.*

This was taken on board. Recital 2a talks about the need to implement the UNCRPD.

**RECOMMENDATION 2:** *Recognise the specificities of the sector and include them in all tendering exercises. These entail long-term commitment, partnership between authorities, providers and consumers, social added value and social cohesion.*

The specificity of social services is recognised, they are entitled to a special regime and they have a higher threshold allows freedom in contracting services under 750.000. Member States have **wide discretion to organise the choice of the service providers in the way they consider most appropriate**. However, long-term commitment is not mentioned as 3 years is the maximum duration of a contract. Nothing is mentioned about social cohesion and partnership between authorities, providers and consumers.

**RECOMMENDATION 3:** *Develop good standards involving service users and service providers before the tender procedure, to ensure that their needs are understood and taken into consideration and that joint decision-making is respected, Using indicators and service delivery standards based on quality principles, to support quality in social services, rather than awarding decisions on the basis of costs.*

Recital 11 specifies that 'contracting authorities should be 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'. References are made to Protocol (No 26) on Services of General Interest and Article 14 TFEU in the awarding of the contract.

In terms of privileging quality rather than cost in the award criteria there is more ambiguity. Article 76.2 talks about quality, continuity, accessibility, affordability, availability and comprehensiveness of the services, but using the expression 'Member States shall ensure that contracting authorities may', gives no obligation to member states. The same goes for the quality requirements in the tendering process: as 'States may also provide that the choice of the service provider shall be made on the basis of the most economically advantageous tender, taking into account quality and sustainability criteria for social services.'

**RECOMMENDATION 4:** *Develop a system that facilitates innovation and modernization of services through contracts allowing services to adapt according to needs and technological advancements.*

Recital 17 talks about the need of spurring innovation, including social innovation. Recital 17a institutes a specific tool to boost innovation: innovation partnerships for the development and subsequent purchase of a new, innovative products, services or works; regulated by Article 29.

**RECOMMENDATION 5:** *Consider the overall costs incurred to set up procurement exercises and ensure that they will be offset by long term benefits and savings to be achieved as a result of the tendering procedure, Consider the cost implications of tendering and re-tendering exercises not only in budgetary terms but also in terms of distress caused to service users who are liable of changing their support service and of staff members who face redundancy or transfer as a result of the procedure.*

Recital 11 talks about simplification and alleviating the administrative burden for contracting authorities and economic operators. However, Article 76a states that the awarded 'organisation shall not have been awarded a contract for the services concerned by the contracting authority within the past three years'. And that 'The maximum duration of the contract shall not be longer than three years.' This is clearly contradicting the continuity principle and the EASPD recommendations.

**RECOMMENDATION 6:** *Promote the know-how of contracting authorities on quality services based on users' needs. Good service provision is based on personalised services that put the individual at the centre, and in a position to decide what happens to their lives and support systems.*

Article 76 states that 'Member States shall ensure that contracting authorities may take into account the need to ensure (...) specific needs of different categories of users, including disadvantaged and vulnerable groups, the involvement and empowerment of users and innovation.' Again, the principle is included, but there is no obligation for Member States.

**RECOMMENDATION 7:** *Value the local context and seek to promote services that are rooted in society and linked to local communities, respecting their values and traditions.*

This was included by recital 11, saying that certain kinds of social, health and education services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. This is the reason why they have a higher threshold and a special regime.

## GENERAL CONCLUSIONS:

The overall approach of the new directive is welcomed by EASPD, as it is recognising the specificities of SSGI, ensuring them a higher threshold and giving them specific award criteria including quality, affordability, accessibility, availability and comprehensiveness of the services, with specific references to the European Voluntary Quality Framework. We also welcome the fact that it is clearly stated that Member States are free to provide these services themselves or to organise social services in a way that does not entail the conclusion of public contracts.

Coming to disability specific issues, we welcome the reference to UNCRPD, the users' involvement principle and the fact that the accessibility criteria for persons with disabilities and reference to design for all are present in many of the Articles of the directive.

We also support the possibility of reserved contracts, in particular for sheltered workshops, but we find that conditions are ambiguous as they do not mention the need for the organisation to have a social objective. They include the possibility for the organisation to redistribute profit on a vague 'basis of participatory considerations'.

We regret it is not compulsory for Member States to follow the quality criteria, the users' involvement principle or to award contracts on the basis of mostly economic advantageous tender. This implicitly leaves open the possibility for public authorities to award social services only on a cost-basis. We also regret that for reserved contracts the maximum duration is of three years, this being against the principle of continuity of services.

We ask to the European Commission to work with Member States towards a correct implementation of this directive, in line with its overall approach and to the importance given to quality of SSGI.

# Annex I: extract from the public procurement directive consolidated text

## ARTICLES WHICH INCLUDE REFERENCES TO DISABILITY

### *Preamble*

(2a) When implementing this Directive, the **United Nations Convention on the Rights of Persons with Disabilities** should be taken into account, in particular in the connection with the choice of means of communications, technical specifications, award criteria and contract performance conditions.

(14b) Employment and occupation contribute to integration in society and are key elements in guaranteeing equal opportunities for all. In this context, **sheltered workshops** can play a significant role. The same is true for other social businesses whose main aim is to support the social and professional integration or reintegration of disabled and disadvantaged persons, such as unemployed, members of disadvantaged minorities or otherwise socially marginalised groups. However, such workshops or businesses might not be able to obtain contracts under normal conditions of competition. Consequently, it is appropriate to provide that Member States should be able to **reserve** the right to participate in award procedures for public contracts or for certain lots thereof to such workshops or businesses or reserve performance of contracts to the context of sheltered employment programmes.

(19a) Contracting authorities should, except in certain specific situations, use electronic means of communication which are non-discriminatory, generally available and interoperable with the information and communication technology products in general use and do not restrict economic operators' access to the procurement procedure. Such means of communication should also take **accessibility for persons with disabilities** into due account.

(27a) For all procurement intended for use by persons, whether general public or staff of the contracting authority, 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, except in duly justified cases.

(41b) Measures aiming at the protection of health of the staff involved in the production process, the favouring of social integration of disadvantaged persons or members of vulnerable groups amongst the persons assigned to performing the contract or training in the skills needed for the contract in question can also be **the subject of award criteria** or contract performance conditions provided that they relate to the works, supplies or services to be provided under the contract. For instance, such criteria or conditions may refer, amongst other things, to the employment of long-term job-seekers, the implementation of training measures for the unemployed or young persons in the course of the performance of the contract to be awarded. In technical specifications contracting authorities can provide such **social requirements which directly characterise the product or service in question**, such as **accessibility for persons with disabilities** or **design for all** users.

(43a) Contracting authorities should further be given the possibility to **exclude** economic operators which have proven unreliable, for instance because of **violations of** environmental or social obligations, including **rules on accessibility for disabled persons** or other forms of grave professional misconduct, such as violations of competition rules or of intellectual property rights. It should be clarified that grave professional misconduct may render an economic operator's integrity questionable and thus render the economic operator unsuitable to receive the award of a public contract irrespective of whether the economic operator would otherwise possess the technical and economical capacity to perform the contract.

### *Article 17 - Reserved contracts*

1. Member States may reserve the right to participate in public procurement procedures to **sheltered workshops** and economic operators whose main aim is the social and professional integration of disabled and disadvantaged persons or provide for such contracts to be performed in the context of sheltered employment programmes, provided that at least 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.

### *Article 40 - Technical specifications*

1. (...)For all procurement which is intended for use by natural persons, whether general public or staff of the contracting authority, those **technical specifications** shall, except in duly justified cases, be drawn up so as to **take into account accessibility criteria for persons with disabilities or design for all users**.

Where mandatory accessibility standards are adopted by a legislative act of the Union, technical specifications shall, as far as accessibility criteria for persons with disabilities or design for all users are concerned, be defined by reference thereto.

### **Article 61 - Quality assurance standards and environmental management standards**

1. Contracting authorities shall, where they require the production of certificates drawn up by independent bodies attesting that the economic operator complies with certain quality assurance standards, **including on accessibility for disabled persons**, refer to **quality assurance systems** based on the relevant **European standards series** certified by accredited bodies. They shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other **evidence of equivalent quality assurance measures** where the economic operator concerned has no possibility of obtaining such certificates within the relevant time limits for reasons that are not attributable to that economic operator provided that the economic operator proves that the proposed quality assurance measures comply with the required quality assurance standards.

### **(6) Annex VIII - DEFINITION OF CERTAIN TECHNICAL SPECIFICATIONS**

(1) "technical specification" means one of the following:

(a) in the case of public works contracts the totality of the technical prescriptions contained in particular in the procurement documents, defining the characteristics required of a material, product or supply, so that it fulfils the use for which it is intended by the contracting authority; those characteristics include levels of environmental and climate performance, **design for all requirements (including accessibility for disabled persons)** and conformity assessment, performance, safety or dimensions, including the procedures concerning quality assurance, (...);

(b) in the case of public supply or service contracts a specification in a document defining the required characteristics of a product or a service, such as **quality levels**, environmental and climate performance levels, **design for all requirements (including accessibility for disabled persons)** and conformity assessment, performance, use of the product, safety or dimensions, (...);

## **ARTICLES RELATED TO SSGI**

### **Preamble**

(10) The results of the Evaluation on the Impact and Effectiveness of EU Public Procurement Legislation suggested that the **exclusion of certain services from the full application of the Directive should be reviewed**. As a result, the full application of this directive is extended to a number of services.

(11) Certain categories of services continue by their very nature to have a **limited cross-border dimension**, namely such services that are known as **services to the person**, such as **certain social, health and educational services**. These services are provided within a particular context that varies widely amongst Member States, due to different cultural traditions. A specific regime should therefore be established for public contracts for these services, with a higher **threshold of EUR 750 000**.

Services to the person with values below this threshold will typically not be of interest to providers from other Member States, unless there are concrete indications to the contrary, such as Union financing for transborder projects.

Contracts for services to the person above this threshold should be subject to Union-wide transparency. Given the importance of the cultural context and the sensitivity of these services, **Member States should be given wide discretion to organise the choice of the service providers in the way they consider most appropriate**. The rules of this directive take account of that imperative, **imposing only observance of basic principles of transparency and equal treatment** and making 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. When determining the procedures to be used for the award of contracts for services to the person, Member States should keep Protocol (No 26) on Services of General Interest and Article 14 TFEU in mind. In so doing, Member States should also pursue the objectives of **simplification** and alleviating the administrative burden for contracting authorities and economic operators; it should be clarified that so doing might also entail relying on rules applicable to service contracts not subject to the specific regime. Member States and/or public authorities **remain free to provide these services themselves or to organise social services in a way that does not entail the conclusion of public contracts**, for example through the mere financing of such services or by granting licences or authorisations to all economic operators meeting the conditions established beforehand by the contracting authority, without any limits or

quotas, provided such a system ensures sufficient advertising and complies with the principles of transparency and non-discrimination.

(11ca) In order to ensure continuity of public services this Directive should allow that **participation in procurement procedures for certain services in the fields of health, social and cultural services could be reserved** for organisations based on employee ownership or active participation in the governance and for existing organisations such as cooperatives to participate in delivering these services to end users. This provision is limited in scope exclusively to certain health, social and related services, certain education and training services, library, archives, museums and other cultural services, sporting services, and services for private households, and is not intended to cover any of the exclusions otherwise provided for by this Directive. Such procurement procedures shall be subject to the rules on publicity applicable to services in the light regime.

(17) Research and innovation, including eco-innovation and **social innovation**, are among the main drivers of future growth and have been put at the centre of the Europe 2020 strategy for smart, sustainable and inclusive growth. Public authorities should make the best strategic use of public procurement to spur innovation. Buying innovative goods, works and services plays a key role in improving the efficiency and quality of public services while addressing major societal challenges.

(17a) Where a need for the development of an innovative product or service or innovative works and the subsequent purchase of the resulting supplies, services or works cannot be met by solutions already available on the market, contracting authorities should have access to a specific procurement procedure in respect of contracts falling within the scope of this Directive. This specific procedure should allow contracting authorities to establish a **longterm innovation partnership for the development and subsequent purchase of a new, innovative product, service or works provided that such innovative product or service or innovative works can be delivered to agreed performance levels and costs, without the need for a separate procurement procedure for the purchase**. The Innovation partnership should be based on the procedural rules that apply to the competitive procedure with negotiation and contracts should be awarded on the sole basis of the best price quality ratio, which is most suitable for comparing tenders for innovative solutions. Whether in respect of very large projects or smaller innovative projects, the innovation partnership should be structured in such a way that it can provide the necessary 'market-pull', incentivising the development of an innovative solution without foreclosing the market.

#### *Article 1 - Subject-matter and scope*

4. This Directive does not affect the freedom of Member States to define, in conformity with Union law, what they consider to be **services of general economic interest, how those services should be organised and financed**, in compliance with the State aid rules, and what specific obligations they should be subject to. Equally, this Directive does not affect the decision of public authorities whether, how and to what extent they want to perform public functions themselves pursuant to Protocol (No 26) on Services of General Interest and Article 14 TFEU.

5. This Directive does not affect the way in which the Member States organise their social security systems.

#### *Article 4 - Thresholds amounts*

(d) EUR 750 000 for public contracts for social and other specific services listed in Annex XVI.

#### *Article 29 - Innovation partnership*

1. In innovation partnerships, any economic operator may submit a request to participate in response to a contract notice by providing the information for qualitative selection that is requested by the contracting authority. In the procurement documents, the contracting authority shall identify the need for an innovative product, service or works that cannot be met by purchasing products, services or works already available on the market. It shall indicate which elements of this description define the minimum requirements to be met by all tenders. The information provided shall be sufficiently precise to enable economic operators to identify the nature and scope of the required solution and decide whether to request to participate in the procedure. The contracting authority may decide to set up the innovation partnership with one partner or with several partners conducting separate research and development activities.

#### *Article 66 - Contract award criteria*

1. Without prejudice to national laws, regulations or administrative provisions concerning the price of certain supplies or the remuneration of certain services, **contracting authorities shall base the award of public contracts on the most economically advantageous tender**.

2. The most economically advantageous tender from the point of view of the contracting authority shall **be identified on the basis of the price or cost**, using a cost-effectiveness approach, such as life-cycle costing in accordance with Article 67, and **may include the best price-quality ratio**, which shall be assessed on the basis of -criteria including **qualitative, environmental and/or social aspects** linked to the subject-matter of the public contract in question.

Such -criteria may comprise, for instance:

- **quality**, including technical merit, aesthetic and functional characteristics, **accessibility, design for all users, social, environmental and innovative characteristics**, trading and its conditions,
- **organisation, qualification and experience of staff** assigned to performing the contract, where the quality of the staff employed can significantly impact the level of performance of the contract,
- **after-sales service and technical assistance, delivery conditions such as delivery date, delivery process and delivery period or period of completion.**

5. The contracting authority shall specify, in the procurement documents the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender, **except where this is identified on the basis of price alone.**

Particular procurement regimes I. CHAPTER I Social and other specific services

#### **Article 76 - Principles of awarding contracts**

1. Member States shall put in place **national rules** for the award of contracts subject to this Chapter in order to ensure contracting authorities comply with the principles of **transparency** and **equal treatment of economic operators**. Member States are free to determine the procedural rules applicable as long as such rules allow contracting authorities to take into account the specificities of the services in question.

2. Member States shall ensure that contracting authorities may take into account the need to ensure **quality, continuity, accessibility, affordability, availability and comprehensiveness of the services**, the **specific needs of different categories of users**, including disadvantaged and vulnerable groups, the **involvement and empowerment of users and innovation**. Member States may also provide that the choice of the service provider **shall be made on the basis of the most economically advantageous tender, taking into account quality and sustainability criteria for social services.**

#### **Article 76a - Reserved contracts for certain services**

1. Member States may provide that contracting authorities may reserve the right for organisations to participate in procedures for the award of public contracts exclusively for those health, social and cultural services referred to in Article 74 (...)

2. The organisation referred to in paragraph 1 must fulfil the following cumulative **conditions**:

- (a) its objective is the pursuit of a public service mission linked to the delivery of the services referred to in Paragraph 1;
- (b) **profits are reinvested** with a view to achieving the organisation's objective. **Where profits are distributed or redistributed, this should be based on participatory considerations;**
- (c) the structures of management or ownership of the organisation performing the contract shall be based on **employee ownership or participatory principles**, or shall require the active participation of employees, users or stakeholders;
- (d) the organisation shall not have been awarded a contract for the services concerned by the contracting authority concerned pursuant to this Article within the past three years.

3. The **maximum duration** of the contract shall **not be longer than three years.**

public authorities of the spirit of this directive, which we are sure is in line with our concerns.