

Public procurement directives

No hint of compromise during first three-way talks

By Sophie Mosca | Friday 19 April 2013

The first three sessions of three-way talks on the future directives on public works contracts have not resulted in any significant compromise. Certainly, the parties have discussed details of the terms to be maintained or clarified, but no political decisions have resulted from these discussions, and some of the subjects addressed have revealed differences over key elements of the proposal currently under discussion, such as the European passport.

On 21 December 2011, the European Commission proposed the modernisation of the current directives ⁽¹⁾ (see *Europolitics*4328 and 4333).

Three-way talks, on 21 March, confirmed that parties held different positions regarding the obligation to publish public calls for tender online. The Commission, backed by the European Parliament, wants to set this obligation at two years after the transposition of the directive, while the Council is “applying the brakes”.

THREE KEY POINTS DISPUTED

There is also disagreement over the establishment of a European passport for public works contracts, which Parliament and Commission support as a tool for promoting greater participation of SMEs in European public procurement. However, the Presidency argues that this would introduce an unnecessary administrative burden for a tool that is not particularly practically useful - since such tools already exist at the national level. Therefore it is calling for self-declaration. According to Marc Tarabella (S&D, Belgium), Parliament’s rapporteur, it is essential that databases in the different systems are at least interoperable between member states.

Regarding procedures, there seems to be a greater convergence of views. The limitation of the length of the competitive dialogue that Parliament wants should be merely indicative, according to the Council, and at the end of the first session of three-way talks, measures were clarified to adapt the competitive procedure to the new innovation partnership aimed at promoting inventiveness.

During the three-way talks of 8 April, differences were more marked. Firstly, over the obligation to divide public works contracts of over €500,000 into batches, unless the non-application of this obligation - proposed by the Commission to encourage SMEs’ access to public procurement - is duly justified. Parliament has deleted the need to be “duly justified” **and several member states share this position. The Presidency says that during the transposition of the directive, member states should be free to decide whether or not this principle should be obligatory.**

Another stumbling block on the subject of promoting SMEs’ access to public procurement is the minimum business figure required for a tenderer to apply for a public works contract. The EU executive has set this figure at three times that of the market concerned, while Parliament

hopes to reduce this to two times. The Council supports the original threshold, but certain member states are backing Parliament, and the Commission must show flexibility.

COMMISSION FLEXIBLE

The question of excluding abnormally low offers has also created dissent, with Parliament calling for this to be accompanied by explanations from the adjudicative power - which the Council does not accept, emphasising that the burden of proof for such an offer is difficult to obtain and could be legally contestable. Here also the Commission seems inclined to greater flexibility.

Concerning the fight against social and environmental dumping, a real red flag for Parliament, the Council is showing more flexibility, pushed by several states, such as Austria, France, Italy, and Sweden - and the Commission. MEPs hope for binding rules on respect for social and environmental criteria. The rapporteur expects to reach a compromise on this.

⁽¹⁾ *“Classic” Directives 2004/18 and Directive 2004/17 on “special sectors”*