



Rat der Gemeinden und Regionen Europas
Council of European Municipalities and Regions
Europæiske kommuners og regioners råd
Συμβούλιο των Ευρωπαϊκών Δήμων και Περιφερειών
Consejo de municipios y regiones de Europa
Consiglio dei comuni e delle regioni d'Europa
Raad der Europese gemeenten en regio's
Conselho dos municípios e regiões da Europa

Public Procurement Package:

Conciliation procedure Classical Directive 2000/0115(COD)

Article 53, paragraph 1, point (a): Award criteria

Arguments in favour of European Parliament's Second Reading amendment

Accepting the Council's Common position would amount to introducing a strict economic relevance criteria and would thus constitute a big step back in relation to current legislation as regards the possibilities for carrying out green procurement.

The European Parliament's second reading amendment makes it clear that award criteria used by a contracting authority to identify the economically most advantageous tender need not necessarily be of a purely economic nature. It is therefore fully in line with the Helsinki Bus Case Judgement, the most relevant points of which are copied below.

Introducing the words 'for the contracting authority' in this article would significantly diverge from the case-law as criteria to determine the economically most advantageous tender for the contracting authority, would need to be of an 'economic nature'.

Furthermore, the current legislation upon which the case-law is based (Dir. 92/50/EEC 36(1)(a)) does not stipulate that the economically most advantageous tender must be 'for the contracting authority'.

If the Council would like the new legislation to be based on current case-law, CEMR believes that it should accept the Parliament's amendment.

Alternatively, Parliament and Council should reinstate the wording of Article 36(1)(a) of Directive 92/50/EEC (copied below), thus ensuring that the current case-law is maintained.

As a last resort, CEMR believes that the Commission's compromise proposal (which would include the words 'from the point of view of the contracting authority') should only be accepted if it is accompanied by a recital making it clear that the provisions of the directive relating to contract award criteria are to be interpreted in such a way that non-economic criteria may be used for the purpose of determining the economically most advantageous tender and that the case-law (and in particular the Helsinki Bus Case C-513/99) is maintained.

The Parliament should request that the Commission and the Council explain why inserting the words 'for (from the point of view of) the contracting authority' is of such great importance.

Text of the current Directive 92/50/EEC, Article 36(1)(a):

'where the award is made to the economically most advantageous tender, various criteria relating to the contract: for example, quality, technical merit, aesthetic and functional characteristics, technical assistance and after-sales service, delivery date, delivery period or period of completion, price; or"

Relevant points of the Helsinki Bus Case Judgement:

34. [In its order for reference, the Korkein hallinto-oikeus] It refers, finally, to the Commission's communication of 11 March 1988, 'Public Procurement in the European Union' (COM(1998) 143 final), in which the Commission considers that it is legitimate to take environmental considerations into account for the purpose of choosing the economically most advantageous tender overall, if the organiser of the tender procedure itself benefits directly from the ecological qualities of the product.

52. The Commission contends that the criteria for the award of public contracts which may be taken into consideration when assessing the economically most advantageous tender must satisfy four conditions. They must be objective, apply to all the tenders, be strictly linked to the subject-matter of the contract in question, and be of direct economic advantage to the contracting authority.

Findings of the Court:

55. Second, Article 36(1)(a) [of Directive 92/50] cannot be interpreted as meaning that each of the award criteria used by the contracting authority to identify the economically most advantageous tender must necessarily be of a purely economic nature. It cannot be excluded that factors which are not purely economic may influence the value of a tender from the point of view of the contracting authority. That conclusion is also supported by the wording of the provision, which expressly refers to the criterion of the aesthetic characteristics of a tender.

64. It follows from the above considerations that, where the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, in accordance with Article 36(1)(a) of Directive 92/50, it may take criteria relating to the preservation of the environment into consideration, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.