COSLA

Brussels Office

COSLA views on

Draft Public Procurement Directive

COM(2011) 896 final

- The **Convention of Scottish Local Authorities (COSLA)** is the representative voice of 32 Scottish Local Authorities both nationally and internationally and it has long been advocating that the European Union legislation fully respects the local competences and autonomy of Councils to organise and provide local services, including deciding what and how to procure goods and services.

General Comments

I. We note the importance of this Directive, one that will significantly shape the way public authorities can, or cannot, put out for tender or share service among themselves, for at least a decade.

II. Following our earlier engagement before and after the Public Procurement Green Paper and our engagement with Government, MEPs and our counterparts in CEMR we are keen to press for further modifications of the text proposed last December by the Commission.

III. COSLA also believes that EU involvement in local activities should take place not only when it has clear EU Treaty competence (principle of Conferral) , but also *only when* its actions can provide real EU added value;

IV. COSLA strongly defends the subsidiarity principle and the Protocol on services of General Interest as defended in the Treaty of Lisbon. ". Translated to procurement terms we would like the procurement directives to focus on matters that pose a risk to EU wide market.

V. We regret that the thresholds have not been raised. However we note the recognition that has been applied to local authorities in particular regarding a lighter regime to "sub-central" authorities such as Local Authorities.

VI. On sustainable procurement (environmental, social award criteria) we welcome that these have been introduced only as an option so that the more economically advantageous tender can remain the main criteria. We remain concerned that the specific rules on these criteria will be set by the Commission through the new legal instrument of the delegated acts, which reduces Member State and Parliamentary scrutiny.

VII. COSLA welcomes the first ever inclusion in EU legislation of shared services (inter municipal cooperation) as this should reduce the current legal uncertainty for councils, as to date this is being subject to the shifting positions of the European Court of Justice case-law. However as we feared, the Commission is applying only the most restrictive view of such case-law, notably setting very strict rules to create a shared service operation and totally excluding private entities, which is unrealistic.

VIII. We also welcome that progress has been made in more flexible arrangements and the authorisation to include additional, more subjective elements in the award decision such as previous behaviour, quality, and experience of the individual bidders. We of course will be keen to ensure that robust provisions exist at domestic level to prevent abuse. We regret however that no "buying local" provisions have been included.

IX. Equally we recognise the efforts of this Directive to update and consolidate EU Public Procurement legislation. However the Directive does not go as far as preventing separate parts of the Commission continuing issuing procurement related obligations in otherwise unrelated legislation. This is a real challenge that does not allow medium term predictability for local regulatory and purchasing services.

X. The inclusion of a special treatment for social services is also a positive issue. This is however the result of the removal from the existing distinction between "A/B "services. Councils overall can support the change; however there are a range of services currently using the lighter procurement regime that might be negatively affected.

XI. EU Public Procurement legislation should be consolidated and any current or forthcoming current proposals need to be made consistent with each other, ideally only one department within the European Commission should be responsible for all procurement proposals irrespective of the subject to ensure medium term predictability for local regulatory services

XII. Finally we are concerned that the creation of a very overpowering "oversight body" at EU level would affect existing devolution arrangements as Scotland has its own procurement policy. Such new arrangements will bring additional reporting obligations that would at least be challenging to meet.

XIII. Finally we are opposed to the excessive use of delegated acts by the Commission to implement and make changes to this Directive as it would limit the necessary parliamentary and Member State scrutiny.

Detail

- Building on the evidence we gathered for our submission to the Public Procurement Green Paper you will find below the additional views gathered on each key article. Furthermore, we also provide a quite detailed assessment on how this proposal is being regarded by our counterparts across the EU, with whom we work under European umbrella CEMR and in some regard have richer and different views than those emanating from a Scottish or UK context, and which will often be determinant to shape the views of their respective national governments in the forthcoming negotiations.

- COSLA indeed will continue working with the Scottish Government and MEPs in pressing for the changes that are outlined below:

Chapter I, Section I: Subject Matter and definitions

Article 1: Subject matter and scope

Article 1.2 enlarges the scope (reject)

1. **"**Procurement within the meaning of this Directive is the purchase or other forms of acquisition of works, supplies or services by one or more contracting authorities from

economic operators chosen by those contracting authorities, *whether or not the works, supplies or services are intended for a public purpose An entirety of works, supplies and/or services, even if purchased through different contracts, constitutes a single procurement within the meaning of this Directive, if the contracts are a part of one single project."*

CEMR National Associations Local Authorities views:

2. Concerning the first para of Article 1.2 It is the consensus view that this addition on top of the scope of the current Directive should be rejected as it significantly enlarges the scope of the Directive to also cover procurement operations opens a great scope for uncertainty as it can affect mixed procurement activities (private and public purposes).
3. The second para of Article 1.2 is should also be eliminated as significantly enlarges the scope of the Directive. While it is understandable that this is intended to prevent abuse from procurers by "slicing" different parts of the same procurement it is believed that such a blanked extension of the scope this will add unnecessary burden to already complex procurement operations that for technical or capacity reasons should be undertaken separately.

Article 2: Definitions (& Annex I)

4. Although the definition of "central" and "sub central" is very clear as regards to the UK given the very comprehensive list of bodies outlined this is a stark contrast with other MS, including those with devolved /land/regional administrations, where only the central ministries are considered central bodies.
5. Although the thinking behind is a direct translation of WTO doctrine, our exchanges with our opposite number show that there could be issues in the negotiations due to the uneven application of the directive as regards to the distinction of central/sub central per MS. By contrast the definitions of local authorities as such remains quite straightforward.

Article 4: Thresholds amounts

Same thresholds (title 1, chapter I, section 2)**:**

6. The new proposal would apply to public works contracts worth more than €5 million, public services contracts of more than €200,000 and contracts of more than €500,000 for certain sectors. The Commission, in spite of requests from a wide section of stakeholders remains unconvinced that it is necessary to raise thresholds.

COSLA view:

7. In our earlier response we indicated that as a general political point it would be welcome that thresholds were to be raised, while at the same time pointing out that a majority of practitioners find existing thresholds manageable and acting as an encouragement to achieve demonstrable best value.

   A question remains, however, whether they are not only manageable but whether they also proportionate and represent the minimum burden for both contracting authority and supplier. Hence it is argued that rather than a strict adherence to a monetary threshold that it would also be possible for certain contracts above threshold to depart from full application of the directive when the contacting authority could objectively demonstrate that the procurement activity, even with a value above threshold, does not affect cross-border EU trade.

8. **On the other hand our sister organisations and our umbrella CEMR have an** overall disappointment that the thresholds are frozen. Most of our peers from elsewhere in the UK and the EU are of the view that thresholds be raise as this would reduce administrative

burdens and better reflect cross-border economic viability for both contracting authorities and providers. Even the evidence of the Commission itself shows that EU-wide procurement activities of such a low level have very little interest by business hence it adds unnecessary burden.

Article 5: Methods for calculating the estimated value of procurement

9. As outlined above there is a willingness among our counterparts to increase the thresholds to at least double to €400,000 as this would cover most of the procurement activities of public authorities across the EU while it would not affect the actual level of procurement activities undertaken on an EU wide scale.

10. It is recognised that the current thresholds are very much determined to the new WTO procurement rules (click) that the EU has subscribed to, and this might be a barrier to increase thresholds at EU level. However if that were the case it is advocated that the wording of the Directive merely mirrors that of the WTO GPA text rather than this more detailed rules as proposed by the Commission.

SECTION 3 –EXLUSIONS

Relations within Public Authorities (Article 11) – *Incl shared services*

Article 11.4: Shared Services

11. **First ever shared services recognition under EU legislation (article 11):** for the first time ever in a Directive, a definition is given of partnerships between public authorities. Until now the most that the Commission had been able to produce is several guidance notes (most recently last October) providing an interpretation on how to understand the (shifting) EU jurisprudence on shared services (Teckal but also Stadtreinigung Hamburg)

12. . Beyond that, the article is very predictable as it repeats now in legal form the content on this guidance: no private capital involved at all and the need to verify the degree of control that the individual authorities has over the new shared entity

13. Article 11 is groundbreaking for the mere reason that it exists. COSLA welcomes the fact that Article 11, regulates, for the first time in primary EU law, the issue of shared services. We believe this is an opportunity to work upon as to give real legal certainty to local authorities entering shared service arrangements.

Role of private capital in Shared Services (art 11.4.d):

14. However COSLA fundamentally disagrees with the view held in article 11 that a small participation of private capital in shared services is in itself a disqualifying issue from the general exemption. Shared service arrangements with some private sector involvement will become commonplace in the future and therefore, rather than opposing it, the Commission should define the circumstances when that is possible.

15. **Furthermore, the Directive even seems to exclude not-for-profit bodies from shared service arrangements and, even more clearly, shared service arrangements of public bodies when that partnership takes up a non public legal form. This** approach would act as a restraint of that being extended to service procurement and is contrary to

Government's encouragement of community partnership to deliver services with the public institutions.

16. COSLA view is that involvement of private capital, when this has an **ancillary** nature, should be allowed under article 11.4. By this we mean that whenever private capital involvement in a public-public cooperation arrangement is of a supporting nature and the private operator is not in a position of control of the partnership, their participation should be allowed and fully covered by the exemption provided for in Article 11.

17. Reciprocity rule 11.4.a: the requirement of all partners holdings "mutual rights and obligations" should be rejected as it is excessively restrictive as there are many models of shared service arrangements already in place. Furthermore it is inconsistent as it is only required when a brand new shared service body is created but not when the shared service is provided without creating a new entity.

In-house exemption (Article 11.1 - 11.3)

Article 11.1 (exception to a single controlling authority)

18. It is welcome that for the first time the ECJ *Teckal* doctrine and subsequent cases is codified in the Directive for the first time.

Article 11.3 (exception for multiple controlling authorities)

19. Same as above, however it is the consensuated view of our counterparts that the article should be amended so that contracting authorities shall be deemed to jointly control a legal person where the following cumulative conditions are fulfilled:
    - the ***highest level*** decision-making bodies of the controlled legal person are composed of
    - representatives of all participating contracting authorities;

20. COSLA supports the above addition to the proposed text (marked in black italics) as it entirely possible that a Local Authority does not have direct control of the chief executive/board of directors that run the new legal entity.

21. 10% Rule It is equally welcome that 11.1.b and 11.3.b also incorporate the 10% rule established in Teckal whereby only that the entity performing the shared service can only perform activities for the Authorities that control the shared service. Because it translates a well established case-law our discussions show it is unlikely that the percentage could be changed in the discussions.

Article 11.2 (award of contracts to 'parent' controlling entity/entities, or 'sister' entities).

22. The article clarifies that a controlled entity can award contracts to its 'parent' controlling entity, or to a 'sister' entity, under the 'in house' exemption outlined in Article 11.1. This is to be welcome.

CHAPTER II: GENERAL RULES (ARTICLES 15-22)

Article 17: Reserved contracts

23. It is welcome that a fixed percentage of (30%) is defined whereby sheltered workshops and operators having above that percentage of its employees are disabled and disadvantaged may be subject to reserves procurement contracts.

24. However, it should be clarified whether “disadvantaged” is a restrictive or extensive concept. In other words whether “disadvantaged” can apply to structural or long term unemployed.

25. **Question:** *what is your preference, a narrow or a large definition?*

Article 21: Conflicts of interest

26. COSLA welcomes the proposals on conflicts or perceived conflicts of interest so that officials and elected members involved in procurement operations must state any relation with the potential bidders and that no preference is given to participants who have advised the contracting authority in the preparation of a procurement procedure.

27. This is consistent with our existing position that while we are keen for additional flexibility of the EU procurement rules in welcome it should be measured against any risk of undue of illegal interference over what should be a fair and transparent process.

28. **TITLE II: RULES ON PUBLIC CONTRACTS - CHAPTER I: PROCEDURES(ARTICLES 23-30)**

Special provisions for Local Authorities:

Article 24. Choice of Procedures

29. This article proposes a lighter procedural regime for “sub-central” (i.e. local and regional) authorities foreseen in Article 24.2 and 46.2 allows the issuing Prior Information Notices (PIN) or annual PIN as effectively the call for a tender, without need for individual contract notices when used for competitive procedures with negotiation.

30. Feedback received to date by COSLA shows that this possibility is welcome as it will speed up the process.

31. An issue of clarification is that although the Contracting Authority would not publish a contract notice at the beginning of the process whether the publication of the contract award would be required.

Article 26.4: Local Authorities may set time limits in restricted procedure for the receipt of tenders by mutual agreement with the selected candidates.

Article 46: publication of the PIN in the Official Journal and minimum information requirements

Article 52: Contracting Authorities must in writing invite EOs which have previously expressed their interest to confirm their continuing interest

32. COSLA has not received objections to date to the specific steps described above. As regards to practitioners is that the procedures described in Art 24 and related articles are an improvement from current procedures.

33. The new use of a PINs (currently more an information gathering tool) to invite competition is welcome, particularly given the lack of movement in the threshold. However to use them to replace the contract notices can cause confusion among

potential bidders, hence the need for proper clarity in both the domestic implementing legislation (also to provide legal certainty) and of the contracting authority itself. Therefore COSLA seeks assurances from the Scottish Government that the Public Contracts Scotland portal keeps pace with such innovations.

Article 27. Competitive Procedure with Negotiation

34. This proposal aims to allow a greater use than currently of a competitive procedure with negotiation, however at the same time Article 27.1. 2nd and 3rd paras introduce time a 30 day time limit and s 3 and Article rules are stricter than the rules already in place.

35. COSLA believes that a factor in easing the burden to councils would be achieved by allowing the use of the negotiated procedure between councils and potential bidders than it is the case at the moment. This would require, it should be noted, up-skilling of procurement staff to enable them to conduct negotiations.

36. Currently negotiated procedure is used only in some authorities and mostly for type-B contract such as social services.

37. However, however it is our view that during implementation in domestic legislation (article 24.1 outlines it is optional) safeguards are in place to ensure sufficient openness and transparency.

Article 28: Competitive dialogue procedure

38. The existing competitive dialogue procedure will be optional for Member States from now on. On the other hand it looks as a positive step the proposed new ability to negotiate with the preferred bidder after the close of competitive dialogue. One of the current risks of competitive dialogue was the inability to move to a negotiated procedure if the process failed in the last stage to have a submission of at least two bids (wasting time and money for all parties to the tender).

Article 29: Innovation partnership procedure

39. This more flexible regime is broadly welcome by practitioners although some concerns exist among those concerned with transparency of some of these procedures

40. In the discussions held with our counterparts however, there is a deal of scepticism about how feasible such innovation partnership arrangements (whereby the local authority and the potential bidder work together in the technological development of the product) however given the scale of most Councils is likely that only those with a very big scale and engaged in a related R&D programme (perhaps linking with Priority 1 of the EU Structural Funds, or the Smart Cities initiative) would be able to use this new proposal.

TITLE II / CHAPTER II: TECHNIQUES AND INSTRUMENTS FOR ELECTRONIC AND AGGREGATED PROCUREMENT (Articles 31-38)

Article 31: Framework agreements

41. The proposal keeps the original provisions whereby a contracting authority or authorities can enter a framework agreement with a number of providers for a given period of time.

42. While this is something we did not consider to date, our counterparts propose to extend the

limit of which framework agreements to be extended at least exceptionally beyond the standard four year limit to at least six years.

43. Equally it should be possible to amend the Framework Agreement during the period to include other suppliers.

44. By contrast, our practitioners report that this extension would be useful depending on the nature of the market: 6 years may be too long and have a negative impact on competition. Where there is extensive competition and there is likely to be so over an extended timeframe 6 years may be appropriate. The ability to modify frameworks may be appropriate but in limited circumstances only. Appropriate mechanisms would need to be devised to allow this without distorting competition.

Article 32 Dynamic Purchasing Systems

45. There is clear view among our counterparts that DPS are currently not used much in practice, hence simpler rules such as proposed are welcome (i.e. eliminating the requirement to advertise for any additional suppliers to join the bid which now can be run as a restricted procedure).

Articles 33, 35, 51, 59 E-procurement

46. The directive introduces a requirement for all councils to use e-procurement by 30 June 2016: sending and receiving all documents electronically i.e. via web or email, free of charge.

47. Drawing the lessons from the recent e-procurement consultation , the switch to fully electronic communication, in particular e-submission by 30 June 2016, in all procurement procedures will be compulsory within a transition period of two years and a new European Procurement Passport (article 59) is introduced.

48. Crucially, each Member State will need to designate a procurement authority that would mirror for procurement purposes what the national contact points do for the Services Directive, this is something that has devolved implications for Scotland (and indeed other MS with a devolved/federal structure).

49. As regards to the generalisation of full e-procurement by 30 June 2016 it can already be foreseen that this might be challenging for local Authorities (the recent experience with implementing the Services Directive is a good indicator of that, and this one had much lighter requirements) even if those in Scotland/UK are on average 10 times bigger than the average size and resources of other member states.

Article 44: Small lots

50. There is a new requirement that authorities explain why contracts have not been broken down into lots of €500,000 or less.

51. The shared view is that either this requirement need to be deleted this non-disaggregation explanation requirement or, that the Member State provides guidance on how to define this, otherwise this will be subject to legal change.

Article 56: Financial guarantees

52. The proposals limit annual turnover requirements to up to three times contract value to help SMEs and outlaw the asking of excessive financial guarantees from SMEs are seen as a positive development.

53. Concerning 56.3 it has been raised that the maximum yearly turnover (last subparagraph) must certainly be the minimum yearly turnover compared to the one in the second subparagraph.

54. The definition of the minimum yearly turnover is overall welcome by our opposite numbers. However there is the feeling that that the tenderer's solvency should not be calculated with a narrow margin because this can create significant problems during the contract duration.

55. Furthermore a further clarification of the term „specific contracts" (also in the last subparagraph) is needed.

Article 57: SME self-declaration

56. Councils will have to accept self-declarations from SMEs as initial evidence for selection purposes. Our practitioners advise that once one opens the door to use this for SMEs a case can be made to allow this to other businesses for the purposes of equal treatment and in particular attenuate the risk of remedy challenge and equal treatment.

57. The deadline of four years in the second sub paragraph could be an obstacle as well. The contracting authority is obliged to verify whether a candidate had applied in the last four years and if there are still documents available. It would be appropriate that the candidate is obliged to indicate that he had submitted documents within the deadline. For the rest a deadline of two years is more appropriate in this case.

Article 59: electronic EU 'procurement passport'

58. This new passport and one of the landmark proposals of the Directive. SME will not have to resubmit their details over again to the same authority.

59. It is our view that new passport should apply to all sectors of the market (to avoid legal challenges due to non respect of equal treatment). Costs should be borne equally by suppliers and Council's as both should benefit in reduced overheads.

60. We are still discussing with councils there will be a single UK procedure and whether this is acceptable in Scotland and whether Councils are prepared to meet the overhead cost to move to this new requirement.

SECTION 3, ART. 54 - 69, CHOICE OF PARTICIPANTS AND AWARD OF CONTRACTS

61. **Choice of participants**(Title I, Chapter I, and Section 3): responding from demands from a range of stakeholders the timescales are shortened it will be able to modify procedural steps and in a potentially sensitive move the previous knowledge of the bidder is included as an award criteria. Equally the ability to take account of the expertise and experience of staff assigned to performing the contract as an award criterion.

62. The use of past performance, qualification and quality of service as award criteria for potential bidders is therefore welcome. A variety procurement activities, such as consultancy work, social care services, would benefit from applying these additional award criteria.

63. COSLA welcomes this but we also wish to reflect practitioners requests that that provisions need to be in place at national level to ensure that robust provisions exist to prevent abuse. For instance we have received a number of suggestions from practitioners that could be set up during the implementation process. One obvious one would be to include only award criteria based on capability and capacity of the bidder that are demonstrably connected to the quality of the service provision. This should be complemented with the publication by the purchasing body of the scores awarded to each bidder selected to be invited to tender (listed in descending order) and apply these same scores in the tender evaluation.

64. Another separate issue, that of "**buying local"** which is something that it is politically welcome by local representatives (provided it does not result in unfair practices or major alteration of the EU internal market) however we are aware that defining this in the regulation would not be welcome by the Commission nor we presume supported by SG/HMG. COSLA nevertheless believe that citizens expect that public bodies which they fund should be more responsive to the needs of their area and the impact that their spending of public funds has on that local economy. This is not to say that proper and robust safeguards should not be in place. Practitioners would only be keen if an unambiguous criteria were defined in the Directive. For instance defining a maximum geographical distance of the legal seat of the provider from the main population centre of the Council, or an upper percentage of the annual procurement under wich a buy local award criteria could be applicable. Provided that these criteria were uniform, clear and unambiguous, and even if they were very restrictive they would still mean a great improvement to the current situation of total exclusion.

65. Finally it is welcome that procurement timescales can be shortened if the contracting authority and providers so agree .

Article 54: Examination tenders before selection criteria

66. The Open procedure introduces one of the suggestions proposed in the Green Paper, to allow the contracting authorities to examine tenders before verifying the fulfilment of the selection criteria (art 54.3). This is largely considered as an iprovement as it would prevent that all bidders have to provide full documentation. Whether this will be actually mean a departure from current practice remains to be seen.

67. Concerning 54.3 and as to ensure further legal certainty the article should be clarified whether the purchasing body can first check the most economically advantageous tender and secondly check the tender ability to deliver the contract.

68. Finally the compatibility of these provisions with the new shortened PQQ procedures that are currently being considered domestically. While we understand that at UK level central government departments should not use a PQQ for procurements under £100k, in Scotland a new standard PQQ is being introduced with different levels of complexity depending on the value and risk of the procurement activity.

Article 55, 56: Exclusions and Selection criteria

69. The ability of exclude a bidder based on past performance is welcome as it should streamline processes. However it should be stressed that for this provision to be able to be used by practitioners robust provisions need to be set at national level to prevent that

exclusion decisions are subject to legal challenge by excluded bidders.

70. In the same vein, the exclusions on 54.2 argue violations of EU or international law in the field of social, labour or environmental legislation will become legitimate reasons to not award a contract, or to exclude an 'abnormally low' tender could only be applied if domestic implementing legislation are sufficiently robust as to prevent the risk of legal challenge.

Article 66, 67 : Procurement to deliver EU goals, inch Green Procurement (use of life cycle award criteria)

71. As expected the Commission has not backtracked in its aim to use its control of procurement rules to compensate for its limited powers in other of EU areas, and namely the EU budget. This is why over the years it has used procurement to force Member States and local and regional bodies to use procurement to buy the greener, socially responsible objectives.

72. COSLA regards that it remains open to question whether the Commission, using its powers on EU internal market rules can use them for other things than ensuring that there is fair competition in public procurement. More concerning, often these additional criteria are not featured in this Procurement Directive but across a smattering of unrelated EU Directives (most recently the Energy Efficiency Directive).

73. However, Article 66 on Award Criteria is welcome as it keeps the principle that most economically advanced tender, and the additional criteria are thus optional. COSLA believes that this is a realistic and balanced approach, as it shows a direction of travel to introduce additional criteria in the award decision but leaves this to the consideration of the contracting authority.

74. Having said that, Article 66 might be interpreted that awarding contracts on the most economically advantageous tender is optional rather than the general rule. Hence as to make this clear COSLA believes that it would be advisable to move up para 66.3 to the beginning of the article, and substitute "may" with *"will, as a general rule,".*

75. Quality of service and staff as award criteria: the fact that article 66.2 the quality of the staff that would perform the contract can be used as award criteria is welcome, but as with the previous article robust provisions need to be set up domestically as to prevent abuse and reduce the risk of legal challenge.

76. Finally, it is to be noted that art. 66.1 has changed the term "price" that exist in the current directive with "cost". This should be assessed on what it might imply when implementing it domestically.

77. Finally as regards to social award criteria it should be possible that these were also taken (optionally) into account in the award decisions so that the social benefit which a bidder can offer to the community is recognised. Indeed provisions already exist in domestic legislation (Reg 39 of the domestic Public Contracts (Scotland) Regulations 2006) that foresee this in an implicit way.

Article 67: Sustainable Procurement

78. This article is welcome is welcome as for the first time includes common provisions on life cycle costings in the PP directive. Scottish Councils both at practitioner and political level have expressed their keenness to pursue a sustainable procurement agenda. Minimum EU

principles could then ensure a level playing field across the EU.

79. Having said that, it is unclear that this general article in the PP Directive would prevent other pieces of EU legislation to continue adding criteria in the middle of any other EU piece of legislation, in spite of this PP Directive being the root review of the procurement legislation for the next decade or so. In fact there is a high chance that the opposite is true : article 67.3 foresees that the Commission can continue using sector specific legislation (as listed in Annex XV) and , worse still use delegated act to establish new award criteria . Under the current Lisbon Treaty the new legal figure of Commission delegated acts would give ample discretion to the Commission to set up new criteria with (as opposed to the old Comitology) very limited room for influence in it to the Member States.

80. While we have not yet finalised an alternative wording for amending this article, COSLA is keen that SG/HMG presses for clause is included whereby the use of life cycle criteria, would be subject to an amendment to this PP directive rather than being scattered in sector specific legislation. And that whenever the award criteria is not defined in primary legislation that they would be subject to negotiation with Member States rather than decided by delegated act.

Article 71: Sub-contracting :

81. The new rules on sub contracting aims to ensure sub-contractors (typically SMEs) are defined from the outset and be timely able to receive their payments.

82. However COSLA wishes to point out that no specific mention on responsibilities of the contracting authority over liabilities incurred by its sub-contractors (for instance in meeting social and environmental criteria). This is not a minor issue, as in a range of recent EU legislation (notably the Green Vehicles Public Procurement) Councils would be held accountable for the failure of their sub-contractors of failing to meet EU environmental standards, therefore opening up a series of unforeseeable liabilities down the line. Therefore, while it should be expected that during the contract negotiation identify the potential liabilities should be integrated in the contract, the profusion of legislation at EU level with procurement provisions attached opens the scope for unforeseeable liabilities for both contracting authority and sub-contractors so assurances need to be introduced in this article to prevent these liabilities to be transferred up to the contracting authority.

Article 72: Changes to contracts

83. Again this is an useful clarification but unless robust implementing provisions are introduced in domestic la this article would not be a safeguard from legal challenge.

TITLE III - CHAPTER 1 – SOCIAL AND OTHER SPECIFIC SERVICES (ART 74-76)

Article 76: Social Services .

84. The introduction of a new regime for social procurement this is very much welcome and Councils feedback to date shows conformity with 500,000 threshold proposed. (however many of our counterpart organisations feel it is too low for the range of operations they already undertake)

85. However article 76.2 could be reinforced as regards to making more emphasis in the quality and specifically continuity of services, particularly if Part B is removed. In other words

"Member States may also provide that the choice of the service provider shall not be made solely on the basis of the price for the provision of the service. but on the need to provide quality, continuity, accessibility, availability and comprehensiveness of the services, the specific needs of different categories of users, the involvement and empowerment of users and innovation" Finally it is to be noted that we want the "may" to be kept.

86. However, it should be noted (at least this is the view among our counterparts) that this new regime may mean that Local Authorities can no longer enter into agreements for buying different types of social services from each other without meeting the new shared service requirements stated in Article 11.

Distinction of A/B Services erased:

87. The proposal of a special procedure for Social Services outlined above is the direct result of the abolition of distinction between the so-called prioritary and non-prioritary services ('A' and 'B' services).
88. The evidence gathered to date by COSLA it shows that most (three quarters) of services are procured through the "B" list, however some Councils still were in favour of keeping the list. Feedback to date seems happy that A/B distinction is replaced by the special procedure outlined for social services.
89. By contrast most our o counterparts from elsewhere in the UK and the EU are very much in favour with reinstating the A/B service distinction for, even if some LAs already advertise B non priority services in the Official Journal, for many imposing uniform requirements, longer procedure timescales, and extra tendering cost to the current B services is an additional unwelcome burden. If Article 75, 76 on social and education services were to survive a threshold of at least 2m euro would be more appropriate.
90. Finally COSLA requests clarification to the implications for those services that can only be provided in the UK and Scotland in particular – for instance qualified and registered Scots law services. Such services do not have an obvious cross-border nature hence should be exempted from any EU wide obligation.

TITLE IV GOVERNANCE

91. As a general point COSLA believes that the proposals are concerning as they are too detailed. As discussed elsewhere they will have Devolution consequentials and additional reporting burden on sub-central authorities. A lighter regime, with true reflection of devolved arrangements, should be introduced instead.

Article 84: Public Oversight

92. The new requirement of a Public Oversight body per Member State replicates the method first tested with the Services Directive (the national contact point) and is in itself a way of ensuring that the cross-border procurement arrangements are made easier as there at least be an instance in each Member State that has all essential information.
93. However it bears the question whether this will mean a centralization of procurement policy, particular in regionalised or MS with devolved institutions with their own separate procurement policy.

94. The Oversight body will not only accumulate information but it will also have jurisdictional powers. Its powers are thus vast (subsection B):
    - Monitoring application of rules information on the monitoring and follow up of breaches,
    - Centralized data about irregularities
    - Give legal advice
    - Issue opinions
    - Examining complaints
    - Take cases to Court
    - Treat individual cases after reference/delegation from the court (particularly those involving EU funds

95. This is without a doubt a very overpowering institutional setting. Conversely there will be clear and abundant reporting obligations by Local Authorities, including, among other things, contracting authorities shall transmit to the oversight body the full text of all contracts with a value equal or greater than 1 mill euro (supplies and services) 10 mill euro for public works.
96. However there are another reporting requirements for smaller contracts. Success rate of SMEs, implementation of sustainable procurement policies,

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Article 85 : Reporting Obligations by public authorities

97. In addition to the above mentioned reporting obligations, each Local Authority will be subject to very detailed requirements to draw up a written report on procedures for the award of contracts. So that, according to **Article 86** the Member State Oversight body will have detailed implementation of the procurement operation and regime applicable in the Member State.
98. There is no doubt that existing reporting obligations will need to be refashioned and some additional ones will be added. As a compensation to Public Authorities, incl Councils, Article 87 adds the common reassurances that the Commission adds to Directives calling for the Member State to support and guide local authorities in introducing these new procedures. It is nevertheless welcome but a negotiation will need to be undertaken domestically during the legal implementation of the Directive so that these safeguards can mean anything in practice.

TITLE V: DELEGATED POWERS, IMPLEMENTING POWERS AND FINAL PROVISIONS Articles 89-96

99. There are not significant changes here as regards to the context however there is a significant change as regards to the legal form as a result of the Lisbon Treaty replacing comitology for delegated acts. This means that there are large swathes of the Directive[1] including Article 6 on revision of Thresholds to which the Commission can have a larger room of manoeuvre than it was possible through the traditional comitology, in some cases it will be possible for the Commission to act using an urgency procedure (i.e. limiting the

[1] Art 6, 13, 19, 20, 23, 54, 59, 67 and 86

possibility of Council or Parliament to block the measure). As said in the individual articles above, the recurring use of these provisions throughout the directive is abusive and should be curtailed through the legislative negotiations.

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