



Irish Congress of Trade Unions

Response to the Public Consultation on Public Procurement

December 2014

Introduction

The Irish Congress of Trade Unions is the national representative body for workers and their unions on the island of Ireland. There are 47 unions affiliated to Congress representing some 800,000 working people in all sectors of the economy – public and private.

The ICTU welcomes the opportunity to contribute to the public consultation on the three new procurement Directives¹ (Public Procurement, Utilities and Concessions) into national law by 17 April 2016.

1. **Public Procurement:** Directive 2014/24/EU on public procurement, which repeals Directive 2004/18/EC;
2. **Utilities:** Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors, which repeals Directive 2004/17/EC ; and
3. **Concessions:** Directive 2014/23/EU on the award of Concession Contracts, which does not directly replace any previous Directive.

The new public procurement Directives introduce a number of positive developments from the workers perspective. The Directives significantly change the rules on public procurement to require public authorities to use their market power as a contracting entity to promote social and labour standards in order to promote fair competition and avoid downward pressure on wages and working conditions in the tendering process and to ensure that workers hired in contracting companies do not receive less favorable conditions, than those laid down in law and as generally apply in the sector e.g in collective agreements.

Congress wishes to underscore a number of key points that are relevant to the questions posed under the public consultation on the transposition of the Public Procurement Directives.

- 1) **A distinction must be drawn between the mandatory labour rights (social) clause laid down in Art 18.2 and the social considerations in articles 42, 43, 67 70 and Recital 92.**
- 2) **The mandatory labour rights (social) clause applies throughout the public procurement stages. This will require the Regulations establish a clear set of relevant obligations including as a minimum:**
 - a. **compliance with health and safety, equality and employment law;**
 - b. **respect for the industrial relations machinery of the state;**
 - c. **the practice of collective bargaining in the company;**
 - d. **the extent to which the pay, terms and conditions provided are in line with collective agreements in the relevant sector;**
 - e. **prompt payment of awards (made to employees) where there have been minor infringements of employment rights.**

¹ http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0065.01.ENG
http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0243.01.ENG
http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.094.01.0001.01.ENG .

Companies must be required to demonstrate their track record and monitored for continued compliance. Compliance with the relevant obligations above must be mirrored as a condition of the contract. Enforcement mechanisms must be included.

- 3) Congress is calling for mandatory application of Best Price-Quality Ratio (ex MEAT) and for the Regulations to explicitly ban the use of price-only and cost-only assessment, or at the very least restrict it to specific cases such as highly standardised products which do not leave room for quality assessment;
- 4) Congress is calling for public authorities to be required to have regard for, and give appropriate weighting to, the following non-exhaustive list of social criteria when establishing the best price quality ratio:
 - payment of the 'living wage',
 - the impact on local employment,
 - promotion of equality of women and men at work,
 - increased participation of women in the labour market,
 - reconciliation of work and private life,
 - recruitment of disadvantaged persons,
 - employment of long-term job-seekers,
 - implementation of apprenticeships and training measures for unemployed or young persons,
 - accessibility for disabled persons,
 - the quality of staff, including their organisation, qualification and experience, where the quality of staff can have a significant impact on the level of performance of the contract (Art 67.2(b) and Rec 94);

In addition the social criteria agreed as part of the contract must be included as specific term(s) and the contract must include an agreed method to monitor and conform with the social criteria.

- 5) Congress strongly argues for the Regulations to provide for a system of joint and several liability throughout the subcontracting chain as the only effective way to ensure compliance;
- 6) Congress is seeking the exclusion of abnormally low tenders and this must include tenders based on 'inability to pay' orders made under National Minimum Wage or Employment Regulation Orders or Registered Employment Regulation Orders. Companies should not be able to tender on this as it creates a basis of unfair competition when the tender is based on an 'inability to pay' order, this is in line with Article 58;
- 7) Congress is also seeking the exclusion of companies that consistently breach legal obligations including employment rights obligations from tendering for public procurement contracts, in that regard provision for data sharing between those responsible for public procurement contracts and Revenue, Social Protection, the Health and Safety Authority and the Labour Inspectorate (NERA) should be included as part of the transposition process;
- 8) Congress has significant concerns about the proposal to will allow companies to avoid their employment rights obligations, for example to pay the worker their outstanding

national minimum wage entitlement or other employment related awards and instead allow companies to simply “enter into a binding arrangement with a view to paying the taxes or social security contributions due”. This is unacceptable and contrary to the mandatory nature of Article 18.2.

- 9) The transposition of the Directives must not be used a vehicle to privatise public services. The Directives do not oblige Member States to contract out or externalise services that they wish to provide themselves. It is only when an actual decision is made by the public authority to privatise that the EU public procurement rules apply;**
- 10) Where ‘social and other specific services’ are concerned, Article 1.4 expressly states that a number of key principles are not affected by the public procurement Directive. In particular, Member States should organise and finance services of general economic interest (‘SGEIs’) as they see fit. Recital 7 reinforces the freedom of national, regional and local authorities to define the characteristics of the SGEI to be provided, including conditions regarding its quality. Such services are subject to publication requirements and some awarding principles, but are exempted from the rest of the Directive. Article 77 also offers the possibility to reserve certain services to selected organisations;**
- 11) Protecting Community and Voluntary Services: Congress is urging that robust criteria be applied to ensure that ‘Reserved Contracts for Certain Services’ does not create a situation whereby contracts are awarded to inappropriate – effectively for-profit - organisations (article 76).**
- 12) Ratify ILO Convention 94 on Labour Clauses in Public Contracts. Congress urges the Department to use the opportunity created by the transposition of these Directives to ratify ILO Convention No 94 on Labour Clauses in Public Contracts.**

Congress may have further comments on this subject, as our analysis of the measures necessary to transpose the Directives develops. We look forward to further consultations with the Department on the transposition.

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