

PROCUREMENT LAWYERS' ASSOCIATION

**RESPONSE TO EC COMMISSION PROPOSALS TO MODERNISE THE
EUROPEAN PUBLIC PROCUREMENT MARKET**

CLUSTER TWO: STRATEGIC USE OF PUBLIC PROCUREMENT

16 MARCH 2012

ABOUT THIS PAPER

The Procurement Lawyers' Association (PLA) is an organisation which exists to bring together all procurement lawyers, whether in private practice or in-house, public or private sector and including solicitors, barristers and academics based in the UK and elsewhere.

The PLA has established a working group to consider the proposals for the reform of the EU public procurement regime. This working group will be submitting a series of papers on all aspects of the proposals to the Cabinet Office to assist it in the ongoing negotiation of the reforms at EU level. In light of the tight timescales that are applicable, the PLA will be submitting separate reports on the following subjects:

- Cluster one.
- Cluster two.
- Cluster three.
- Clusters four and five.
- Utilities.
- Concessions.

This paper focuses on **Cluster two: Strategic Use of Public Procurement**

KEY POINTS TO HIGHLIGHT FOR UK GOVERNMENT NEGOTIATIONS

We wish to draw the Cabinet Office's attention to the following key issues with the current status of the proposed reforms:

1 KEY ISSUES

- The proposals are intended to adopt an 'enabling approach' to help contracting authorities achieve the Europe 2020 strategic goals. Reference is also made to greater flexibility adopting a 'toolbox approach'. However, for the reasons expressed below in relation to the changes included in the Cluster two discussions, there is risk that the proposals may actually have the opposite effect, **limiting flexibility and leading to greater complication** rather than simplification.
- Replacing 'lowest price' with '**lowest cost**' is unnecessary and may lead to confusion in practice.
- The new 'Lianakis provision' on **evaluating experience of staff at award stage** appears to be over-worked.
- Similarly, the new '**production processes**' and '**life-cycle costing**' provisions appears **over-worked** and may be difficult to apply in practice without the risk of challenge.
- The revised provision for '**contract performance conditions**' should not include the specific provision on '**price fluctuations**'. It is out of place and confusing.
- As regards **technical specifications**, the inversion the current Article 23(3)(a) and (b) is unlikely to have a significant impact on fostering innovation (by leading with the preference for performance or functional requirements rather than existing standards or other instruments). No such hierarchy or preference exists in the current or proposed provisions.
- We generally welcome the proposals to expand the use of **labels** to include social and other characteristics but question whether it will have any significant impact in practice. There is also a risk that the requirement to accept alternative 'equivalent labels', and to accept 'technical dossiers of the manufacturer or other appropriate means of proof', does not significantly change the substantive position under the current rules.
- We have concerns with the new provisions on **abnormally low tenders**, and specifically the introduction of a duty to request explanations (Article 69(1)).
- Finally, we have concerns with the proposal to remove the distinction **between Part A and Part B services** and the introduction of specific new rules on **social services**.

2 MORE DETAILED COMMENTS

2.1 Contract Award Criteria

We do not believe that the current 'lowest price' award criterion restricts contracting authorities evaluating cost and that the introduction of '**lowest cost**' is unlikely to be considered significantly to enlarge the toolbox of contracting authorities. On the contrary we believe the change may result in uncertainty and confusion.

We generally welcome the clarification in Recital 37 that when using 'lowest cost' (though preferably keeping 'lowest price') contracting authorities are free to set quality standards by using technical specifications or contract performance conditions.

We also generally welcome the clarification in Article 66(2)(b) around the ability to include contract award criteria relating to the **experience of staff** who are to be assigned to perform the contract. This is presumably intended to address the issues raised by the *Lianakis case*. However we do not consider it necessary or appropriate to include the further 'consequence' that such staff should only be replaced with the consent of the contracting authority and are of equivalent quality. The issue of post award changes should be left to determined by *Presstext case-law* and the new Article 72 (modification of contracts during their term). Finally, we also question the rationale for introducing such a specific provision for 'staff' and feel it would be more appropriate to broaden this out, possibly replacing 'staff' with 'economic operator'.

Article 66(2)(d) allows 'the specific process of production or provision' of works, supplies or services to be evaluated as award criteria. We do not believe this is a major innovation to the current rules and may require further clarification and guidance if it is to be applied with confidence in practice. Specifically, guidance would be required as regards what processes would be considered '**directly linked**' to the production or provision of different kinds of works, supplies and services.

In relation to Article 66(4), there is a risk of uncertainty around the scope of the **verification** exercise contracting authorities are required to conduct to ensure compliance with the contract award criteria. In particular, in relation to Article 66(2)(d) there is concern that there will be additional uncertainty around how contracting authorities can effectively comply with the requirement to verify compliance with production process award criteria and what forms of proof/verification will be required especially, for instance, where a tenderer is committing to comply with specific production processes for the first time.

3 Life-Cycle Costing (LCC)

The introduction of LCC as a basis for contract award (Article 67) is promising but we have concerns as to whether the proposed provision will actually encourage contracting authorities to adopt it.

In relation to Article 67(1) will it always be clear to contracting authorities when they are applying an LCC approach, and if they are that they are complying with the **mandatory requirements** of Article 67(1)?

When using LCC Article 67(2) requires contracting authorities to set the **methodology** out in the tender documents and requires it to meet three conditions. We believe the first two conditions **may be difficult to apply in practice**, at least not without more clarification and/or specific guidance. Contracting authorities' reluctance to use LCC in contract award is often because of the ambiguity in the methodology to be adopted as well as other complexities; for example, calculation and verification of carbon footprints. This uncertainty increases the risks of challenge following the contract award and the proposed provision does not appear to give contracting authorities much more in the way of legal certainty beyond the current case-law. However, even more concerning is the requirement to 'allow economic operators, including economic operators from third countries to apply a different methodology' to the one set out by the contracting authority. We see the **potential for significant confusion** here.

4 **Contract Performance Clauses**

Article 70 and Recital 43 are largely consistent with the current provisions on contract conditions. However, a clear difference is the decision to remove the express requirement that the conditions are **compatible with Community law**. This change seems only to increase uncertainty, particularly when read in conjunction with the Recital, which does not refer generally to EU law, but which refers to conditions that are not directly or indirectly discriminatory. Similarly, a requirement that the contract performance conditions be **linked to the subject matter of the contract** is included in the Recital, but not reflected in the Article. There is a lack of consistency here.

It is unclear why a specific provision on **price fluctuations** needs to be inserted here. The 'conditions for performance of contracts' provision is generally understood as referring to 'special conditions' such as "Community Benefits" clauses including social and environmental commitments into contracts. In that context, it is unclear what is special about a price fluctuation clause such that it requires to be specifically addressed in this provision of the Directive. Are price fluctuation clauses not simply part of what would be the commercial terms and conditions of contract? Furthermore, including reference to price fluctuations clauses here may create confusion with new Article 72 and the codification of the *Presstext* case law.

5 **Technical Specifications**

We do not believe that the inversion of (a) and (b) will have a significant impact on fostering innovation by leading with the preference for performance or functional requirements rather than existing standards or other instruments. Neither the current Article 23(3) nor the proposed new Article 40(3) apply any hierarchy or preference.

Triggered by discussion on the proposals to make 'social services' fully subject to the OJEU rules we would like to raise the general question in relation to Article 40 (2) and (3) as to whether it should be possible explicitly to require tenderers to have obtained accreditation at a satisfactory national minimum level (such as Quality Assessment Frameworks, Ofsted or the like). Would these be 'mandatory national technical rules' that would be compatible with EU law even without permitting some form of equivalent rule in another EU member state? Equivalents from other countries would not be sufficient in this respect of provision of social services.

6 Labels and Certification

The proposed new Article 41 extends the scope of reliance on labels from eco-labels (in the current Article 23(6)) to 'environmental, social or other characteristics'. While this is generally welcomed, there is a risk that the requirement to accept alternative 'equivalent labels', and to accept 'technical dossiers of the manufacturer or other appropriate means of proof', does not significantly change the substantive position under the current rules.

There is also a clear confusion between wording that permits the authority to 'require' a specific label, but then also requires them to accept a technical dossier. This catch all provision potentially negates the simplification that the Commission seems to have been seeking to achieve. We suggest that the requirement to allow such alternatives equivalent could be limited to instances in which an economic operator is able to demonstrate that it has no access to the required or equivalent labels or no possibility of obtaining them within the relevant time limits.

We welcome an express provision allowing authorities to seek a test report.

7 Exclusions for violations of social and environmental obligations

We can see merit in the proposed new Article 54 (**general principle** that contracting authorities can exclude a winning bid if it is considered not to comply with basic social and environmental laws).

While the test in the proposed new Article 55(4) for demonstrating reliability (despite the existence of ground for exclusion) seems sensible, there remains a lack of clarity around the timeframe.

Included in this section of the Cluster Two paper is the proposed new provision on **Abnormally Low Tenders** (proposed new Article 69). This is a **fundamental change** from the current provision in Article 55 of the Classic Directive. We believe the new duty in the proposed Article 69(1) to require tenderers to explain their pricing may be taken from national procurement law applicable in some other EU Member States but see no reason for harmonising the position for all 27 EU Member States. Over the past few years there have been a number of cases in the UK where the issue of duty has arisen, and there seems to be

a general preference to leave it to contracting authorities to have discretion to request explanations and ultimately to exclude abnormally low tenders.

8 Reserved Contracts

The extension of the reserved contracts exemption is welcomed. Many of the proposed amendments are already captured in the UK Regulations.

9 Social Services

As a general comment, we question the justification for removing the distinction between **Part A and Part B services**, and believe there is a limited cross-border dimension to many of the Part B services.

More specifically as regards the proposed inclusion of specific provisions on social services we question the rationale for setting a threshold of **€500,000** for social and other specific services (listed in Annex XVI of the Directive). We believe the threshold **may be too low** given the nature of such contracts i.e. health service contracts.

Contracting authorities intending to procure the services referred to in Annex XVI of the Directive must publish a contract notice and contract award notice in the OJEU. This change could place a significant administrative burden on contracting authorities. It also places an increased need for contracting authorities to ensure that contracting authorities (i.e. NHS organisations) have (where they may not have had until now) the appropriate knowledge and skills to comply with the rules.

Such social and specified services contracts may potentially be scrutinised more fully against the requirements of the EU Remedies Directive (i.e. requiring a more rigorous application of the new rules to avoid any challenge of contract validity). However, this could have the advantage of giving greater clarity to potential bidders, providing objective guidance on the likelihood of cross-border interest for such contracts.

Appendix - Articles

1. Contract award Procedures

Article 66

Contract award criteria

1. Without prejudice to national laws, regulations or administrative provisions concerning the remuneration of certain services, the criteria on which contracting authorities shall base the award of public contracts shall be one of the following:

(a) the most economically advantageous tender; or

(b) the lowest ~~price~~~~cost~~.

Price/Costs may be assessed, on the choice of the contracting authority, on the basis of the price only or using a cost-effectiveness approach, such as a life-cycle costing approach, under the conditions set out in Article 67.

2. The most economically advantageous tender referred to in point (a) of paragraph 1 from the point of view of the contracting authority shall be identified on the basis of criteria linked to the subject-matter of the public contract in question. Those criteria shall include, in addition to the price or costs referred to in point (b) of paragraph 1, other criteria linked to the subject-matter of the public contract in question, such as:

(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, environmental characteristics and innovative character;

(b) for service contracts and contracts involving the design of works, the organisation, qualifications, resources and experience of the economic operator to be engaged in ~~experience of the staff assigned to~~ performing the contract in question may be taken into consideration, ~~with the consequence that, following the award of the contract, such staff may only be replaced with the consent of the contracting authority, which must verify that replacements ensure equivalent organisation and quality;~~

(c) after-sales service and technical assistance, delivery date and delivery period or period of completion; and

(d) the specific process of production or provision of the requested works, supplies or services or of any other stage of its life cycle as referred to in point (22) of Article 2, to the extent that those criteria are specified in accordance with paragraph 4 and they concern factors directly involved in these processes and characterise the specific process of production or provision of the requested works, supplies or services.

3. *Member States may provide that the award of certain types of contracts shall be based on the most economically advantageous tender as referred to in point (a) of paragraph 1 and in paragraph 2.*
4. *Award criteria shall not confer an unrestricted freedom of choice on the contracting authority. They shall ensure the possibility of effective competition and shall be accompanied by requirements that allow the information provided by the tenderers to be effectively verified. Contracting authorities shall verify effectively, on the basis of the information and proof provided by the tenderers, whether the tenders meet the award criteria.*
5. *In the case referred to in point (a) of paragraph 1 the contracting authority shall specify, in the contract notice, in the invitation to confirm interest, in the procurement documents or, in the case of a competitive dialogue, in the descriptive document, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender. Those weightings may be expressed by providing for a range with an appropriate maximum spread. Where weighting is not possible for objective reasons, the contracting authority shall indicate the criteria in decreasing order of importance.*

Article 67

Life-cycle costing

1. Life-cycle costing ~~may~~ shall to the extent relevant cover the following costs over the life cycle of a product, service or works as defined in point (22) of Article 2:
 - (a) *internal costs, including costs relating to acquisition, such as production costs, use, such as energy consumption, maintenance costs, and end of life, such as collection and recycling costs; and*
 - (b) *external environmental costs directly linked to the life cycle, provided their monetary value can be determined and verified, which may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.*
2. *Where contracting authorities assess the costs using a life-cycle costing approach, they shall indicate in the procurement documents the methodology used for the calculation of the life-cycle costs. The methodology used must fulfil all of the following conditions:*
 - (a) *it has been drawn up on the basis of scientific information or is based on other objectively verifiable and non-discriminatory criteria;*
 - (b) *it has been established for repeated or continuous application; and*
 - (c) *it is accessible to all interested parties.*

~~Contracting authorities shall allow economic operators, including economic operators from third countries, to apply a different methodology for establishing the life cycle costs of their~~

~~offer, provided that they prove that this methodology complies with the requirements set out in points a, b and c and is equivalent to the methodology indicated by the contracting authority.~~

3. Whenever a common methodology for the calculation of life-cycle costs is adopted as part of a legislative act of the Union, including by delegated acts pursuant to sector specific legislation, it shall be applied where life-cycle costing is included in the award criteria referred to in Article 66(1). A list of such legislative and delegated acts is set out in Annex XV. The Commission shall be empowered to adopt delegated acts in accordance with Article 89 concerning the update of this list, when on the basis of the adoption of new legislation, repeal or modification of such legislation, such amendments prove necessary.

2. **Contractual performance clauses**

Article 70

Conditions for performance of contracts

Contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are indicated in the call for competition or in the specifications and are compatible with European Union law. Those conditions may, in particular, concern social and environmental considerations. ~~They may also include the requirement that economic operators foresee compensations for risks of price increases that are the result of price fluctuations (hedging) and that could substantially impact the performance of a contract.~~

3. **Technical Specifications**

Article 40

Technical specifications

1. The technical specifications as defined in point 1 of Annex VIII shall be set out in the procurement documents. They shall define the characteristics required of a works, service or supply. These characteristics may also refer to the specific process of production or provision of the requested works, supplies or services or of any other stage of its life cycle as referred to in point (22) of Article 2. The technical specifications shall also specify whether the transfer of intellectual property rights will be required. For all procurement the subject of which is intended for use by 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 people 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 are concerned, be defined by reference thereto.
2. Technical specifications shall guarantee equal access of economic operators to the procurement procedure and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

3. *Without prejudice to mandatory national technical rules, to the extent that they are compatible with Union law, the technical specifications shall be formulated in one of the following ways:*
 - (a) *in terms of performance or functional requirements, including environmental characteristics, provided that the parameters are sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract;*
 - (b) *by reference to technical specifications and, in order of preference, to national standards transposing European standards, European technical approvals, common technical specifications, international standards, other technical reference systems established by the European standardisation bodies or — when those do not exist — national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the supplies; each reference shall be accompanied by the words 'or equivalent';*
 - (c) *in terms of performance or functional requirements as referred to in point (a), with reference to the technical specifications referred to in point (b) as a means of presuming conformity with such performance or functional requirements; or*
 - (d) *by reference to the technical specifications referred to in point (b) for certain characteristics, and by reference to the performance or functional requirements referred to in point (a) for other characteristics.*
4. *Unless justified by the subject-matter of the contract, technical specifications shall not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference shall be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract pursuant to paragraph 3 is not possible. Such reference shall be accompanied by the words "or equivalent".*
5. *Where a contracting authority uses the option of referring to the specifications referred to in point (b) of paragraph 3, it shall not reject a tender on the grounds that the works, supplies and services tendered for do not comply with the specifications to which it has referred, once the tenderer proves in its tender by whatever appropriate means, including the means of proof referred to in Article 42, that the solutions it proposes satisfy in an equivalent manner the requirements defined by the technical specifications.*
6. *Where a contracting authority uses the option laid down in point (a) of paragraph 3 to formulate technical specifications in terms of performance or functional requirements, it shall not reject a tender for works, supplies or services which comply with a national standard transposing a European standard, a European technical approval, a common technical specification, an international standard or a technical reference system established by a European standardisation body, where those specifications address the performance or*

functional requirements which it has laid down. In its tender, the tenderer shall prove by any appropriate means, including those referred to in Article 42, that the work, supply or service in compliance with the standard meets the performance or functional requirements of the contracting authority.

Article 41

Labels

1. *Where contracting authorities lay down environmental, social or other characteristics of a works, service or supply in terms of performance or functional requirements as referred to in point (a) of Article 40(3) they may require that these works, services or supplies bear a specific label, provided that all of the following conditions are fulfilled:*
 - (a) *the requirements for the label only concern characteristics which are linked to the subject-matter of the contract and are appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract;*
 - (b) *the requirements for the label are drawn up on the basis of scientific information or based on other objectively verifiable and non-discriminatory criteria;*
 - (c) *the labels are established in an open and transparent procedure in which all stakeholders, including government bodies, consumers, manufacturers, distributors and environmental organisations, may participate;*
 - (d) *the labels are accessible to all interested parties; and*
 - (e) *the criteria of the label are set by a third party who is independent from the economic operator applying for the label. Contracting authorities requiring a specific label shall accept all equivalent labels that fulfil the requirements of the label indicated by the contracting authorities. For products that do not bear the label, contracting authorities shall also accept a technical dossier of the manufacturer or other appropriate means of proof.*

2. *Where a label fulfils the conditions provided in points (b), (c), (d) and (e) of paragraph 1 but also sets out requirements not linked to the subject-matter of the contract, contracting authorities may define the technical specification by reference to those of the detailed specifications of that label, or, where necessary, parts thereof, that are linked to the subject-matter of the contract and are appropriate to define characteristics of this subject-matter.*

Article 42

Test reports, certification and other means of proof

1. *Contracting authorities may require that economic operators provide a test report from a recognised body or a certificate issued by such a body as means of proof of conformity with the technical specifications. Where contracting authorities require the submission of certificates drawn up by recognised bodies attesting conformity with a particular technical specification, certificates from equivalent other recognised bodies shall also be accepted by the contracting authorities.*
2. *Contracting authorities shall accept other appropriate means of proof than those referred to in paragraph 1, such as a technical dossier of the manufacturer where the economic operator concerned has no access to the certificates or test reports referred to in paragraph 1, or no possibility of obtaining them within the relevant time limits.*
3. *Recognised bodies within the meaning of paragraph 1 of this Article shall be test and calibration laboratories and any certification and inspection bodies accredited in accordance with Regulation (EC) No 765/2008 of the European Parliament and of the Council.*
4. *Member States shall make available to other Member States, upon request, any information related to the evidence and documents submitted in accordance with Article 40(6), Article 41 and paragraphs 1, 2 and 3 of this Article to prove compliance with technical requirements. The competent authorities of the Member State of establishment shall provide this information in accordance with Article 88.*

4. Exclusions for violations of social and environmental obligations

Article 54

General principles

1. *Contracts shall be awarded on the basis of the criteria laid down in Articles 66 to 69, provided that the following cumulative conditions are fulfilled:*
 - (a) *the tender complies with the requirements, conditions and criteria set out in the contract notice or the invitation to confirm interest and in the procurement documents, taking into account Article 43; and*
 - (b) *the tender comes from a tenderer that is not excluded in accordance with Articles 21 and 55 and that meets the selection criteria set out by the contracting authority in accordance with Article 56 and, where appropriate, the non-discriminatory rules and criteria referred to in Article 64.*
2. *Contracting authorities may decide not to award a contract to the tenderer submitting the best tender where they have established that the tender does not comply, at least in an equivalent manner, with obligations established by Union legislation in the field of social and*

labour law or environmental law or of the international social and environmental law provisions listed in Annex XI.

3. *In open procedures, contracting authorities may decide to examine tenders before verifying the fulfilment of the selection criteria, provided that the relevant provisions of this section are observed, including the rule that the contract shall not be awarded to a tenderer that should have been excluded pursuant to Article 55 or that does not meet the selection criteria set out by the contracting authority, in accordance with subsection 1 of this section.*
4. *The Commission shall be empowered to adopt delegated acts in accordance with Article 89 to amend the list in Annex XI, where necessary due to the conclusion of new international agreements or modification of existing international agreements.*

Article 55

Exclusion Grounds

3. A contracting authority may exclude from participation in a public contract any economic operator if one of the following conditions is fulfilled:
 - (a) where it is aware of any violation of obligations established by Union legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XI. Compliance with Union legislation or with international provisions also includes compliance in an equivalent manner.

Article 69

Abnormally low tenders

1. Contracting authorities shall consider requiringe economic operators to explain the price or costs charged, where all of the following conditions are fulfilled:
 - (a) the price or cost charged is more than 50% lower than the average price or costs of the remaining tenders;
 - (b) the price or cost charged is more than 20% lower than the price or costs of the second lowest tender; and
 - (c) at least five tenders have been submitted.
2. Where tenders appear to be abnormally low for other reasons, contracting authorities may also request such explanations.
3. The explanations referred to in paragraphs 1 and 2 may in particular relate to:
 - (a) the economics of the construction method, the manufacturing process or the services provided;

- (b) *the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the execution of the work or for the supply of the goods or services;*
 - (c) *the originality of the work, supplies or services proposed by the tenderer;*
 - (d) *compliance, at least in an equivalent manner, with obligations established by Union legislation in the field of social and labour law or environmental law or of the international social and environmental law provisions listed in Annex XI or, where not applicable, with other provisions ensuring an equivalent level of protection; or*
 - (e) *the possibility of the tenderer obtaining State aid.*
4. *The contracting authority shall verify the information provided by consulting the tenderer. It may only reject the tender where the evidence does not justify the low level of price or costs charged, taking into account the elements referred to in paragraph 3. Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with obligations established by Union legislation in the field of social and labour law or environmental law or by the international social and environmental law provisions listed in Annex XI.*
5. *Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender may be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority, that the aid in question was compatible with the internal market within the meaning of Article 107 of the Treaty. Where the contracting authority rejects a tender in those circumstances, it shall inform the Commission thereof.*
6. *Upon request, Member States shall make available to other Member States, in accordance with Article 88, any information relating to the evidence and documents produced in relation to details listed in paragraph 3.*

5. **Reserved Contracts**

Article 17

Reserved contracts

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 workers or provide for such contracts to be performed in the context of sheltered employment programmes, provided that more than 30% of the employees of those workshops, economic operators or programmes are disabled or disadvantaged workers.

The call for competition shall make reference to this provision.

6. Social Services

Article 4

Thresholds amounts

This Directive shall apply to procurements with a value exclusive of value-added tax (VAT) estimated to be equal to or greater than the following thresholds:

- (a) EUR 5,000,000 for public works contracts;*
- (b) EUR 130,000 for public supply and service contracts awarded by central government authorities and design contests organised by such authorities; where public supply contracts are awarded by contracting authorities operating in the field of defence, that threshold shall apply only to contracts concerning products covered by Annex III;*
- (c) EUR 200,000 for public supply and service contracts awarded by sub-central contracting authorities and design contests organised by such authorities; and*
- (d) EUR 500,000 for public contracts for social and other specific services listed in Annex XVI.*

Article 74

Award of contracts for social and other specific services

Contracts for social and other specific services listed in Annex XVI shall be awarded in accordance with this Chapter, where the value of the contracts is equal to or greater than the threshold indicated in Article 4(d).

Article 75

Publication of notices

- 1. Contracting authorities intending to award a public contract for the services referred to in Article 74 shall make known their intention by means of a contract notice.*
- 2. Contracting authorities that have awarded a public contract for the services referred to in Article 74 shall make known the results of the procurement procedure by means of a contract award notice.*
- 3. The notices referred to in paragraphs 1 and 2 shall contain the information referred to in Annexes VI Part H and I, in accordance with the standard forms. The Commission shall establish the standard forms. Those implementing acts shall be adopted in accordance with the advisory procedure referred to in Article 91.*
- 4. The notices referred to in paragraphs 1 and 2 shall be published in accordance with Article 49.*

Article 76

Principles of awarding contracts

- 1. Member States shall put in place appropriate procedures for the award of contracts subject to this Chapter, ensuring full compliance with the principles of transparency and equal treatment of economic operators and allowing 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, availability and comprehensiveness of the services, the specific needs of different categories of users, the involvement and empowerment of users and innovation. 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.*