

PUBLIC PROCUREMENT – ETUC EVALUATION OF IMCO REPORT

ETUC DEMANDS ¹	IMCO REPORT	COMMENTS
<ul style="list-style-type: none"> ➤ All parties to public procurement procedure must be under the obligation to respect applicable terms & conditions of employment of the place of work. ➤ Applicable terms and conditions are to be understood as those defined by national labour law and collective agreements ➤ Particular attention should be paid to the following articles: <ul style="list-style-type: none"> - Conditions for contract performance - Abnormally low tenders - Exclusion grounds ➤ Mandatory social clause must also apply to social services 	<ul style="list-style-type: none"> ➤ Amendment 89 adds the following paragraph to Art 15: <i>“2. Member States shall ensure that economic operators comply with the environmental, social and labour law provisions which apply at the place where the works are executed, services provided or goods produced or supplied, as set out in international conventions listed in Annex XI and in Union and national law as well as in collective agreements concluded in accordance with national law and practices which respect Union law”.</i> <ul style="list-style-type: none"> ➤ Cross references to new Art 15.2 are included in the following articles: <ul style="list-style-type: none"> - Art 54 on awarding criteria (am 167) - Art 55 on exclusion grounds (am 170) - Art 69 on abnormally low tenders (am 193, 194, 198) ➤ On social services, amendment 221 to Art 	<ul style="list-style-type: none"> ➤ In line with ETUC demand, the respect of labour standards of the place of work is mandatory. In the Commission’s proposal, social considerations are optional upon contracting authorities. ➤ In line with ETUC demand, the applicable terms & conditions are understood as the entire national labour law + collective agreements. The Commission’s proposal merely refers to Union legislation and core ILO Conventions. <p>NB: The reference to “respect of Union law” means that collective agreements have to be in conformity with Union law. This confirms the existing legal situation: ever since the Costa landmark case (1964), the primacy of EU law over national law and practices apply.</p> <p>This is problematic as in the light of the very restrictive Ruffert judgment, some locally</p>

¹ See Resolution of March 2012 : <http://www.etuc.org/a/9801>

	<p>76.2 adds reference to quality and sustainability criteria for the award of contracts but there is no cross reference to Art 15.2</p>	<p>applicable collective agreements may not respect Directive 96/71 on the posting of workers. Ways should be found to ensure that the social considerations of the public procurement framework can take precedence over Directive 96/71. In particular, Recital 44 of the Commission's proposal should be rewritten. Amendment 45 of IMCO report is incomplete in this regard.</p> <p>➤ In the IMCO report, the respect of mandatory social clause intervenes at several stages of the public procurement procedure:</p> <ul style="list-style-type: none"> - Contracting authorities shall not award a contract where it has been established on clear and sufficient evidence that the tender does not comply with Art 15.2 - Contracting authorities may exclude from participation in a public contract economic operators which have seriously or repeatedly violated obligations in the field of social or labour law as referred to in Art 15.5 - Contracting authorities shall reject an abnormally low tender which does not comply with social and labour law provisions referred to in Art 15.2 - Contracting authorities shall require economic operators to explain the price or costs proposed in case of abnormally low tenders. These explanations may relate to compliance with social and labour law provisions referred to in Art 15.2.
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<p>Add possibility to include additional social considerations</p>	<p>➤ Am 154 to Art 41 specifies that contracting authorities may lay down social criteria in the technical specifications, award criteria or performance clause. Labels or certificates may then be required as a proof of compliance.</p> <p>➤ Ams 186 and 187 to Art 66.2 on contract award criteria specifies that the most economically advantageous tender may include in addition to price or costs, social considerations such as:</p> <p>(a) quality, including technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics, including cost effectiveness of short-distance procurement where relevant, and the costs over the life-cycle in accordance with Article 67;</p> <p>(b) where relevant for the performance of the contract, qualification and experience of the staff assigned to performing the contract in question;</p> <p>(c) after-sales service, technical assistance, and</p>	<p>IMCO report seems to be in line with ETUC demand: contracting authorities may lay down social criteria in the technical specifications, contract performance clause and contract award criteria.</p> <p>However, no clear understanding of the notion of social considerations + scattered references throughout the text makes the global reading difficult.</p>

	<p>delivery conditions such as delivery date and delivery period or period of completion;</p> <ul style="list-style-type: none"> ➤ Am 201 to Art 70 include social or employment-related considerations to the special conditions that contracting authorities may lay down to the performance of a contract 	
Promote ratification of ILO Convention C94 and ensure that those Member States which have already ratified it can continue to implement it	No reference to ILO C94	ETUC demand not fulfilled
Promote transparency in chains of subcontracting Mandatory joint & several liability mechanism	<ul style="list-style-type: none"> ➤ Am 202 to Art 71 obliges contracting authorities to ask the tenderer to indicate any share of the contract it intends to subcontract ➤ Am 203 to Art 71 obliges the selected tenderer to indicate to contracting authorities names and contact details of subcontractors. The information is to be kept up to date. ➤ Am 204 to Art 71 introduces optional joint & several liability mechanism: <p><i>3a. Member States shall ensure that subcontractors respect all mandatory legal, regulatory and administrative provisions in force in the Member States of contract performance, including the obligations referred to in Article 15(2). To this end, Member States may provide for a system of liability throughout the subcontracting chain</i></p>	<p>With regard to transparency, ETUC demand fulfilled</p> <p>With regard to joint & several liability mechanism, IMCO report introduces a mechanism of direct level liability which was not present in the Commission’s proposal. Nonetheless, this mechanism is optional upon the Member States, whilst ETUC position is that it should be mandatory.</p>

	<p><i>so that the direct contractor of a subcontractor is liable in the event that the subcontractor fails to comply with one of those provisions or is insolvent. When a direct contractor is insolvent, such system should provide that the next solvent direct contractor up the subcontracting chain, including the main contractor, is liable.</i></p> <p>3b. Member States may provide for more stringent liability rules under national law.</p>	
Abolish the lowest cost criterion	Am 185 abolishes the lowest cost criterion.	ETUC demand fulfilled.
Cross reference to transfer of undertakings Directive	No amendment	ETUC demand not fulfilled
Include social dimension in life cycle costs	Am 191 to Art 67 adds social costs to life cycle costing	ETUC demand fulfilled
Wide interpretation of in house arrangements so as to cover public-public cooperation and cooperation with non-profit making providers	<ul style="list-style-type: none"> ➤ Am 54 to Art 1: “2a. <i>This Directive is without prejudice to the right of public authorities at all levels to decide whether, how and to what extent they want to perform public functions themselves pursuant to Protocol (No 26) on Services of General Interest and Article 14 TFEU</i> » ➤ Am 63 to Art 7 b new excludes from the scope of the Directive services awarded by a contracting authority to another contracting authority on the basis of an exclusive right created by law. This legal entitlement must be compatible with the Treaties (presumably EU 	<p>Reference to services of general interest in line with ETUC position</p> <p>More flexibility foreseen for in house arrangements</p>

	<p>competition rules).</p> <p>➤ Ams 70 to 86 to Art 11 rewrite the provisions relating to cooperation between public authorities:</p> <ul style="list-style-type: none"> - maximum percentage of turnover carried out for the controlling contracting authority is lowered from 90% to 80% (Am 72, 78) - contracting authorities no longer need to demonstrate that their agreement represents less than 10% market shares and that there is no financial transfers between them other than reimbursement of costs (am 83) - exclusion from the scope of the directive for agreements between contracting authorities which “which make provision, in the context of the internal institutional and administrative organisation of a Member State and pursuant to applicable national law or regulation, for the transfer of powers or for the transfer of a public service task between the parties. There shall be no private participation in any of the contracting authorities or entities involved » (am 85). 	
Delete references to social security and trade unions services from Annex XVI	Am 54: “2b. this Directive does not affect the way in which the Member States organise their social security legislation”.	Problematic reference to trade unions services not solved