

# Proposals for the revision of the Public Procurement Directives -

20/12/2011

## Introduction



### ◆ Directive « Concessions »

#### ***Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts***

- ◆ This is a new initiative for this kind of contract which has so far been regulated by EU law at the lowest possible level - articles 46 and 65 of directive 2004/18 on work concessions
  - General principles on service concessions in the EU Treaty (CJEU, 7 Dec. 2000, C-324/98, Teleaustria)
- ◆ Impact for France:
  - Public work concessions
  - delegation of public services (concessions; lease contract; open tendering, long term real estate lease contracts, management agreement)

### ◆ Directive « Public Procurement»

#### ***Proposal for a Directive of the European Parliament and of the Council on public procurement***

**The directive replaces the current directive 2004/12 from 31 March 2004.**

- ◆ Impact for France:
  - public procurement
  - partnership contracts and sectoral PPP
  - long term real estate lease contracts (BEA) and Transport Organisation Authorities (AOT) in France are in line with the definition in community law

### ◆ Directive on public procurement in the water, energy, transport and postal services sectors

#### ***Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors***

**The directive replaces the current directive 2004/17 from 31 March 2004**

- ◆ Impact for France: same contracts as for the public procurement directive if they are concluded by the contracting entities (i.e. in the water, energy transport sectors and postal services sectors)

# Proposals Directives on Public Procurement 20/12/2011

## What is at stake?



### • **The main issues at stake are the same for all three directives:**

- Complex distinction between the concept of « contracting authority » and the concept of « contracting entity »
- Considerable extension of the concept of « in house » through the concept of « affiliated undertaking »
- Obligation for public entities to refuse any offer which exceeds the fixed budget
- The definition of cases where operators can be excluded from consultation is sometimes subjective
- Possibility for public entities to impose the formation of a consortium with joint liability or a project company.
- The 'effet utile' of the remedies directive is not taken into account
- Rigid framework for contract amendments
- Possibility to terminate the contract in case of illegal amendments

### • **Some issues are specific for the Directive Concessions or the public procurement directive:**

#### **Concessions:**

- The definition of "concession" itself, according to which the contract could have structural deficits
- The duration of the concession, calculated based on a single investment criteria, which is inoperative for services concessions
- Ambiguity regarding the submission deadlines for applications and tenders
- Introduction of weighted or hierarchical selection criteria.

#### **Public procurement:**

- Reappearance of the award criteria which takes into account the lowest bidder
- Endorsement of the split tendering principle, which is conflicting with the idea of PPP

# Common issues at stake in the Directive on Concessions and in the Public Procurement Directives

## 1. Distinction between contracting authority and contracting entity

### Uptake of the definition from the directives 2004/18 and 2004/17

- ◆ Multiplicity of **contracting authorities**, easy to comprehend

“state”	For France those are: - The state and its public institutions - local and regional authorities and their public institutions - semi-public companies, local public companies, public housing offices etc.
“regional or local authorities”	
“bodies governed by public law”: It is established for or has the specific purpose of meeting needs in the general interest, not having an industrial or commercial character, (ii) it has legal personality;, and (iii) it is financed, for the most part, by the State, regional or local authorities, or other bodies governed by public law, or subject to management supervision by those bodies	
“associations formed by one or more such authorities or one or more such bodies governed by public law”	

- ◆ The more complex concept of **contracting entities**
  - **by nature**: public companies/ entities operating on the basis of special or exclusive rights granted by a competent authority of a Member State (i.e. not attribute by means of a call for competition)
  - **by subject**: contracting authorities which carry out activities in the network sectors

### Uncertainty related to the application of rules for network sectors to the delegations of public services that can be considered as concessions

- ◆ Making available or operating fixed networks **which are intended** to deliver a public service in the field of production, transport or distribution of heat
- ◆ Supply of heat to the network

### Less favourable system for operators if contracts are concluded with contracting entities (in house/ amendment of contracts)

# Common issues at stake in the Directive Concessions and in the Public Procurement Directives

## 2. In house



- **Considerable extension of « in house » through the concept of « affiliated undertaking »**
  - **Today, in-house**
    - (...) implies **100% public shareholding**
    - public entities can conclude negotiated contracts if they entrust the service to a third party on which they exercise a control which is similar to that which they exercise over their own services  
(CJCE, 11 Janv. 2005, C-26/03, Stadt Halle).
  - (...) can take the form of shared 'in house' between several local authorities
- **From now on, contracting entities are authorised to award a contract, without call for competition, to an « affiliated undertaking »**
  - **Article 11 Concessions directive / article 22 of the Public Procurement Directive for network sectors**
  - **Affiliated undertaking:** any undertaking the annual accounts of which are consolidated with those of the contracting entity

# Common issues at stake in the Directive on Concessions and in the Public Procurement Directives

## 3. Awarding of contracts



- **Obligation for public entities to refuse any offer which exceeds the fixed budget**
  - Article 26 §6 of the Directive on Concessions/ Article 30 §2 of the Public Procurement Directive/ Article 44 of the Public Procurement Directive for network sectors
  
- **Exclusion of operators which have shown significant or persistent deficiencies in the performance of any substantive requirement under a prior contract (option for Member States)**
  - Article 36 §7 of the Directive on Concessions / Article 55 §3 of the Public Procurement Directive/ Article 74 of the Public Procurement Directive for network sectors
  
- **Possibility for public entities to impose the formation of a consortium with joint liability or a project company**
  - Article 22 of the Directive on Concessions/ Article 16 of the Public Procurement Directive/ Article 30 of the Public Procurement Directive for network sectors
  
- **Rejected candidates shall be informed as soon as possible (and not within a time limit which allows for pre-contractual remedy)**
  - Article 35 of the Directive on Concessions/ Article 53 of the Public Procurement Directive/ Article 69 of the public Procurement Directive for network sectors

# Common issues at stake in the Directive on Concessions and in the Public Procurement Directives

## 4. amendments and termination



### Amendments

- **Interdiction of amendments which modify the economic balance of the contract in favour of the co-contracting party**
- **Except in the event of an unforeseeable circumstance, substantial modifications are only allowed if they had been anticipated in the consultation documents (without reference the contract which followed the negotiations)**
- **Substantial modifications in the general interest and at the request of the public entity are not anticipated**
- **The threshold of 50% price increase which is allowed for amendments in the event of unforeseeable circumstances only applies to contracting authorities (and not to contracting entities)**
  - Article 42 of the Directive on Concessions/ article 72 of the Public Procurement Directive/ article 82 of the Public Procurement Directive for network sectors

### Termination

- **Public entities may terminate a contract in case of illegal amendments**
  - Article 43 of the Directive on Concession/ Article 73 of the Public Procurement Directive/ Article 83 of the Public Procurement Directive for network sectors

# Specific issues at stake in the Directive on Concessions



## ● Definition of 'Concession' and risk criteria

### ● Article 2 §2 of the Directive on Concession:

*"The right to exploit the works or services as referred to in points 2, 4 and 7 of the first paragraph shall imply the transfer to the concessionaire of the substantial operating risk. The concessionaire shall be deemed to assume the substantial operating risk where it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession."*

- This definition is questionable as the concession is presented as having a structural deficit. The Concession is a novation in the European Community law based on the concept of "operating risk"

## ● Definition of the duration of the Concession and investment criteria

### ● Article 16 of the Directive on Concessions:

- The duration of the concession shall be limited to the time estimated to be necessary for the concessionaire to recoup the investments made in operating the works or services together with a reasonable return on invested capital.

- This definition does not allow defining the duration of service contracts without works.

## ● Clarification desirable on submission deadlines for applications and tenders

- Article 38 of the Directive on Concessions: confusion between application and tender. The time limit of 52 days should be applicable only for applications (if the rule in Article 59 of Directive 2004/18 is maintained)

# Specific issues at stake in the Public Procurement Directives



## ● Reappearance of the award criteria which takes into account the lowest bidder

- Article 66 of the Public Procurement Directive (same rule as in Article 76 of the Public Procurement Directive for network sectors) :

*“Without prejudice to national laws, regulations or administrative provisions on the remuneration of certain services, the criteria on which contracting entities shall base the award of contracts shall be one of the following: (a) the most economically advantageous tender; (b) the lowest cost. Costs may be assessed, at the choice of the contracting entity, 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.”*

- This criteria disappeared from the French public procurement code in 2001

## ● Endorsement of the split tendering principle, which is conflicting with the idea of PPP

- Article 44 of the Public Procurement Directive (difference to the Public Procurement Directive for network sectors where the rule is more flexible, Article 59) :

*“Public contracts may be subdivided into homogenous or heterogeneous lots. For contracts with a value equal to or greater than the thresholds provided for in Article 4 but not less than EUR 500 000, determined in accordance with Article 5, where the contracting authority does not deem it appropriate to split into lots, it shall provide in the contract notice or in the invitation to confirm interest a specific explanation of its reasons.”*

- In France, this principle only exists for public procurement (and not for other markets: PPP where this principle is incompatible with the purpose of the contract)