

# Reform of Public Procurement Strategy, Policy and Priorities

- Professor C. H. Bovis

# **Objectives of EU Procurement reforms**

**1. Simpler / more flexible procedures**

**2. Strategic use**

**3. Better access (SMEs, cross-border trade)**

**4. Sound procedures**

**5. Governance / professionalization of procurement**

# Scope of reform

*International context: Compliance with GPA*

*New Directives replace Directives 2004/18/EC and 2004/17/EC*

*Directive on Concessions*

- WTO GPA International trade instrument*
- Directive on electronic invoicing*

*No changes to the Directives on Defence procurement (2009/81/EC) nor on Remedies (89/665/EEC and 92/13/EC )*

# Scope and general provisions

- *Building on existing case law:*
  - Notion of "**procurement**" (Helmuth Müller, C-451/08)
  - Notion of "**contracting authorities**" (various)
  - **Public-Public** (Teckal et seq. Hamburg, Lecce & Piepenbrock)
  
- *Introduction of some new exclusions for certain categories of services:*
  - Legal services (representation before courts etc; appointed by courts, obligatory notarial services)
  - financial services **and** loans
  - "civil defence, civil protection, danger prevention" (e.g. rescue and fire-fighting services, ambulance services) provided by non-profit organisations or associations

# Principles of procurement

## Art. 15(2) – Horizontal clause

***Observance of obligations in the field of environmental, social and labour law established by EU law, national law, collective agreements or by international environmental, social and labour law***

### Directive 96/71/EC on Posting of workers

#### •References to Art. 15(2)

*Exclusion criteria (Article 55)*

*Abnormally low tenders (Article 69)*

*Subcontracting (Article 71)*

# Main changes to the procedures

- ***Competitive procedures with negotiation:***
  - Replaces current negotiated procedure with publication
  - Extended scope of application
  - Procedural guarantees
- ***Competitive dialogue:***
  - slightly broader scope for negotiations in the final stages
- ***Negotiations without publication:***
  - no substantial changes
- ***Added flexibility for sub-central contracting authorities:***
  - Possibility to use PIN (prior information notice) as a means for calling for competition
  - Possibility to agree deadline with tenderers in restricted procedures, competitive w. negotiation

# Innovation partnership

- *Basic concept: Improve market pull by combining a research contract with a realistic chance to obtain a first purchase if the research result fulfils pre-defined performance levels*
- *Combined contract award with **full competition right at the beginning***
  - Research services for the development of an innovative product by one or more providers **plus**
  - Supply contract
- *Structured in **successive phases** with **intermediate targets and payments and cut-off options***
- ***Negotiation phase following model of competitive procedure with negotiation***

# Technical specifications & labels Art 2, 40 – 42

- **Technical specifications:** Art. 40 mainly unchanged, but clarified production process or other stage of life cycle if linked;
- **Labels:**
  - possible require label as such where label defined in transparent, objective process **and** all its requirements suitable;
  - recognition equivalent labels and other means of proof where no access (art. 41(1))
  - Where **all** requirements are **not** suitable: as now, i. e. underlying requirements (art. 41(2))
- **Third party certification** (art. 42):
  - may be required (tech. spec, award criteria and/or contract performance);
  - mutual recognition re equivalent certificates;
  - Other means where no access



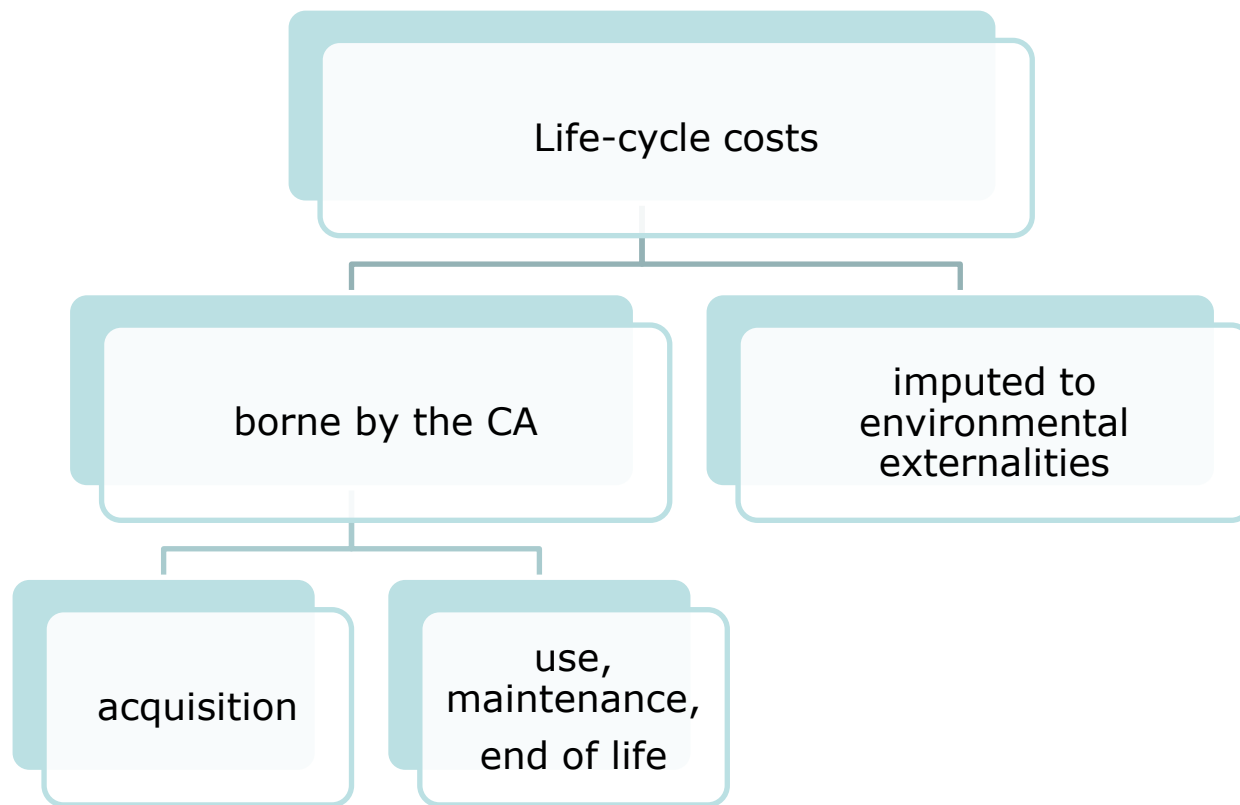
# New exclusion grounds – self-cleaning

- **Mandatory exclusion grounds**
  - Terrorist offences
  - Child labour and other forms of human trafficking
- **Mandatory/optional exclusion grounds**
  - Tax and social security obligations
- **Optional exclusion grounds**
  - Violation of environmental/social/labour law obligations
  - Significant/persistent deficiencies in a prior public contract
  - Unduly influencing decision-making
  - Agreements aimed at distortion of competition
  - Conflict of interest
- **Self-Cleaning:**
  - Compliance measures to re-establish reliability
  - Max duration of exclusion (judgment or 5/3 years)

# Contract award criteria

- ***Sole award criterion: MEAT – most economically advantageous tender -***  
*to be assessed on the basis of*
  - **price, or**
  - **cost**, using a cost-effectiveness approach such as life-cycle costing, **or**
  - **the best price-quality ratio (BPQR)** *to be assessed on the basis of award criteria linked to the subject-matter of the contract.*
  - organisation, qualification and experience of the **staff delivering the contract** where this can significantly impact the level of performance of the contract
- *MS can exclude or restrict the use of price or cost only as sole criterion.*

# Life-cycle costing



# **Subcontracting**

- **Observance of the obligations of 15(2) by subcontractors is ensured through appropriate action, i.e joint liability**
- **Substitution of a subcontractor (excl. grounds)**
- **Transparency of the subcontracting chain (works and services at the facilities – no suppliers)**
- **Direct payments (MS MAY provide)**

# Contract modifications

- *New tender required for **significant changes***
- *Exceptions*
  - **De minimis: (works 15%, services, supplies 10% and below threshold)**
  - **Transparency about possible changes (options etc)**
  - **additional deliveries: econ. / technical reasons & change of contractor causing significant inconveniences (50% limit)**
  - **Unforeseen circumstances (50% limit)**
  - **Change of econ. operator: step-in, succession and no other substantial changes**
- *Substantial: (C-454/06 Pressetext)*

# Light regime

- *New specific simplified rules for social, health, cultural and other services:*
  - **higher threshold – EUR 750 000;**
  - **below threshold: typically no-cross-border interest (except if EU funding)**
  - **only requirements: ex-ante (and ex-post) publicity + non-discrimination principle; for the rest national rules**
  - **MS may impose traditional MEAT (= BPQR) criterion only**
  
- *Other services covered*
  - **Hotel and restaurant services**
  - **Certain legal services**
  - **Rescue, fire fighting and prison services**
  - **Government services and services to the community**

## Utilities Procurement

- *Essentially same changes proposed for the Utilities as for the Public Sector Directive*
- *With due regard to the different field of application (also public and private undertakings) and the ensuing need to conserve a more flexible regime (e.g. use of negotiated procedure unchanged).*
- *Only few changes on issues specific to the Utilities Directive*

# Conclusions

- *EU 2020 Strategy*
- *Strategic Procurement*
- *Innovation*
- *SME*