Contribution to the EC consultation on the modernisation of EU public procurement policy – Towards a more efficient European procurement market

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Introduction

We appreciate the initiative taken by the European Commission to consult with the public on the modernisation of European public procurement policy. Free Software Foundation Europe is an independent, non-profit non-governmental organisation dedicated to the furthering of Free Software and working for freedom in the digital society.

We are limiting our response to a selected number of questions which bear on the areas of Free Software and Open Standards.

19. Would you be in favour of allowing more negotiation in public procurement procedures and/or generalizing the use of the negotiated procedure with prior publication?

The Green Paper on new EU public procurement policy ("the GP") proposes that contracting authorities "*should be allowed to negotiate the terms of the contract with potential bidders. ... This could give contracting authorities more flexibility to obtain procurement outcomes that really fit their needs".* We want the EC be very careful when allowing wider use of negotiated procedures.

We note that according to the Directive 2004/18/EC, negotiated procedures are to be used only in exceptional circumstances. Articles 30 and 31 of the Directive 2004/18/EC provide closed lists of exceptional cases when contracting authorities may use the negotiated procedure with or without prior publication of contract notice, respectively. In any case, usage of the negotiated procedure should be justified by special situation and should not be used in a discriminatory manner.

According to the Recital 2 of the Directive 2004/18/EC, public procurement is subject to the respect, among other principles, of the principle of equal treatment and the principle of transparency. The awards of public contracts should guarantee the opening-up of public procurement to competition.

We believe that the Member States and EU institutions should strictly follow the fundamental principles of public procurement set in the currently effective Directive and the Treaty of Lisbon in order to safeguard competition. In no case should negotiated procedures enable the contracting authority to predetermine the outcome of the process. So, while simplifying the procurement process for small and medium-size enterprises (SMEs), the EC should establish additional safeguards to guarantee the openness of public procurement procedures to the broadest possible set of competent bidders.

39. Should the public procurement Directives regulate the issue of substantial modifications of a contract while it is still in force? If so, what elements of clarification would you propose?

A lack of clarity exists as to how software upgrades should be handled in the procurement process. EC procurement regulations should clarify that major software upgrades (e.g. upgrades requiring reinstallation of the program in question) should be treated in the same way as new purchases, and should be re-tendered. It should be made clear that contracting authorities are obliged to treat software in a similar manner as physical goods, where there is no doubt that purchases of a new version of the original product have to be re-tendered.

60. *In your view, can the attribution of exclusive rights jeopardise fair competition in procurement markets?*

61. *If so, what instruments would you suggest in order to mitigate such risks / ensure fair competition? Do you think that the EU procurement rules should allow the award of contracts without procurement procedure on the basis of exclusive rights only on the condition that the exclusive right in question has itself been awarded in a transparent, competitive procedure?*

The GP suggests to set up in new Directive a principle that *"it would be allowed to award contracts without a competitive procedure on the basis of exclusive rights, only if these exclusive rights have been subject to a competitive procedure".*

In the area of software, an overwhelming share of public authorities remains locked into

proprietary systems and file formats. This lock-in endangeres fair competition in public procurement: currently a significant number of tenders for computer software use trademarks or specific brands to formulate technical and functional requirements. To avoid such bad practices, the technical specifications drawn up by public purchasers need to allow different bidders to participate with different products. The current Directive directly prohibits technical specifications to create obstacles to the *"opening up of public procurement to competition"* (Article 23). We want the EC to clarify in the new Directive that calls for tenders should be based on functional requirements, not on specific products or vendors. Public agencies should always procure software only through a transparent, open procedure to foster competition in software market and a diversity of tender participants.

Lock-in also plays a significant role in calculating the total cost of ownership (TCO) of a software solution. Yet these costs are all too often not reflected in current procurement practices and decisions. The new Directive should specify that when deciding on the economic merits of a bid, the contracting authority must figure in the full costs of transitioning out of the solution to be acquired to a new solution by a different vendor in the future. These "exit costs" are composed of requirements like translating existing data from proprietary file formats into formats based on Open Standards, and replacing or re-developing helper applications. This is the only way to ensure that the bid which gets selected is indeed the most economically advantageous over the lifetime of the purchased product or service.

70. *The criterion of the most economically advantageous tender seems to be best suited for pursuing other policy objectives. Do you think that, in order to take best account of such policy objectives, it would be useful to change the existing rules (for certain types of contracts/ some specific sectors/ in certain circumstances):*

70.1.1. *to eliminate the criterion of the lowest price only;*

70.1.2. *to limit the use of the price criterion or the weight which contracting authorities can give to the price;*

70.1.3. *to introduce a third possibility of award criteria in addition to the lowest price and the economically most advantageous offer? If so, which alternative criterion would you propose that would make it possible to both pursue other policy objectives more effectively and guarantee a level playing field and fair competition between European undertakings?*

The GP encourages the use of public procurement in support of certain policy-related objectives, such as the environmental,social and innovation considerations. Article 53 of the Directive states that the criteria on which the contracting authorities shall base the award of public contracts shall be "*criteria linked to the subject-matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics*", etc. Thus, contracting authorities already are able to include environmental or social award criteria in the call for tenders.

As innovation and technological development are also listed among considerations to be prioritised, we propose to include in this list such criterion as "the openness of technical standards". The revised European Interoperability Framework defines as open "*specifications, software and software development methods that promote collaboration and the results of which can freely be accessed, reused and shared*". It states that "*if the principle of openness is applied in full if (1) all stakeholders can contribute to the elaboration of the specification and public review is organised; (2) the specification document is freely available for everybody to study and to share with others; (3) the specification can be implemented under the different software development approaches.*"

With a list of criteria arrived at through a dialog involving various key players in industry, politics and community, FSFE has arrived at a definition of an Open Standard as a format or protocol that is

• subject to full public assessment and use without constraints in a manner equally available to all parties;

• without any components or extensions that have dependencies on formats or protocols that do not meet the definition of an Open Standard themselves;

• free from legal or technical clauses that limit its utilisation by any party or in any business model;

• managed and further developed independently of any single vendor in a process open to the equal participation of competitors and third parties;

• available in multiple complete implementations by competing vendors, or as a complete implementation equally available to all parties.[1]

In Lisbon 2007, Ministers of EU Member States agree that "*continuous attention shall be given to the definition and openness of technical standards and publicly available specifcations*" (Lisbon Ministerial Declaration, 19 September, 2007). The Digital Agenda for Europe declares that the EU will support development of open standards and platforms. The European Interoperability Framework v.2 recommends public administrations to favour "open specifications" while establishing European Public Services. Moreover, existing judicial practice in EU Member States allows the insertion of Open Standards requirements or preferences in tender requirements. As the Italian Constitutional Court ruled, *"the concepts of Free Software and software whose code can be inspected do not refer to a particular technology, brand or product, but they rather express a legal feature*".[2]

We believe that inclusion of "the openness of technical standards", along with environmental and social criteria, in the list of recommended award criteria would allow public agencies to procure software based on open specifications more freely and extensively. This would be an important and substantial step towards promoting competition and technological development in the European software market.

We would further like to suggest that in the case where public bodies are contracting software development services, there should be a standard policy of making the resulting work available as Free Software. This could be formulated as follows:

“The provider grants the contracting authority the right to use, study, share and improve the resulting work(s) under the terms of a license that is either classified as a Free Software license by the Free Software Foundation[3], approved by the Open Source Initiative[4], or both.”

Such software development is paid for out of public funds. Hence the resulting work should be made available to the public for use and improvement. There is also a significant potential for re-use of software within the European public sector, which is currently not being exploited.

1 http://fsfe.org/projects/os/def.en.html
2 http://softwarelibero.it/Corte_Costituzionale_favorisce_softwarelibero_en
3 http://www.gnu.org/licenses/license-list.html
4 http://www.opensource.org/licenses/alphabetical