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“ISSUES IN PUBLIC PROCUREMENT”

Dear Ladies and Gentlemen, Members of the European Parliament

Thank you for giving me the opportunity to present our views on issues in public procurement.

Are there legal uncertainties or is there a need to deepen the understanding of a transparent and effective public procurement in the EU?

BUSINESSEUROPE believes the existing public procurement rules are adequate and sufficient. Loopholes and uncertainties are addressed by the ECJ which further clarifies the directives and the Treaty.

The 2004 Directives are a sound basis both for transparent public purchasing and for the necessary fair competition among the bidders. Safeguarding such objectives is fundamental in combating corruption. Thus, these two very important directives should definitely not be put into question; they underpin a vital element in supporting the European economy and public services.

The transposition of the directives into national law has accomplished one of the most ambitious revisions of the internal market law in recent times. Business is convinced that it is important to conduct procurement procedures according to EU procurement law, both above and below the thresholds. Above the thresholds, public procurement is governed by the Directives, and below the thresholds the principles of the Treaty of the EU and the jurisprudence of the ECJ have to be respected. Especially with regard to SMEs which are crucial for innovation and employment, more transparency is needed below the thresholds. Also, efficient legal remedies are needed for below-threshold procurement, however, for practical reasons they might not be as extensive as for above-threshold procurement.

Consequently, there is no urgent need to modify the directives. Business prefers stability to constantly changing rules.

On improving SME access to public procurement

Directives 2004/17/EC and 2018/EC are no hindrance to the improvement of SMEs' access to public procurement.



It is up to the contracting authorities to promote concrete SME strategies. Primarily the contracting authorities should:

- encourage small enterprises to bid for contracts
- divide contracts into lots where suitable
- encourage subcontracting of larger contracts
- apply well balanced contracts to avoid unbalanced risk
- apply suitable qualification criteria
- abstain from unnecessarily high levels of proof and financial guarantees
- advertise not only large, but also small public procurement opportunities on national centralised websites

On Concession Contracts

BUSINESSEUROPE does not believe that legislative action on concessions is needed. It is necessary to emphasise that service concession contracts have to follow the principles of the Treaty, while works concessions are covered by directive 2004/18. Underlying the concept of a concession is that it carries operational risk and that over the duration of the contract it will have to be adapted and amended. Assignment of risk and duration of the contract should be left to the parties involved.

Changes have to be addressed in a manner that is fair to both parties. Rules that restrict amendment of contracts should therefore be avoided, as this could hinder the ability of stakeholders to adapt to change.

To summarise, no new legislative action on concessions is needed. Any such legislation might be too prescriptive and would almost certainly hinder the further innovative shaping of concessions in future. Any barriers to an innovative future shaping of concessions would directly harm innovation in Europe, the latter being a core element of future welfare in the EU. Instead, BUSINESSEUROPE believes that a Supplier Development Programme should be promoted as a tool for stimulating further innovation.

On Green public procurement (GPP)

Public procurement is not meant to be an instrument for the pursuit of policy objectives other than safeguarding a fair, transparent and efficient purchasing procedure and the proper furtherance of the internal market.

BUSINESSEUROPE acknowledges the importance of a consideration of environmental aspects in public purchasing. The 2004 Directives provide sufficient legal certainty on how to use GPP. They allow for a very wide range of environmental aspects to be considered, as long as they are linked to the specifications or to the object of the contract. Therefore the EU legislator should abstain from further legislation on GPP. Instead we do support the development of guidelines or training toolkits for public purchasers with recommendations on how to set “green” criteria in public procurement. Also, best practice examples should be promoted. As far as EU or Member States’



actions regarding GPP are concerned, industry should be consulted more intensely and systematically than in the past.

On Social considerations

The use of the “economically most advantageous” award criterion, consistent with relevant case law from ECJ, leaves room for public purchasers to include social criteria, provided that these criteria are directly linked to the object of the contract. In addition, the directive allows the use of social contracting clause in every type of contract. The directive also allows “reserved contracts” for specific types of suppliers with 50% of the workforce disabled and not fit for standard working conditions. Thus further legislation is unnecessary.

We therefore propose the development of guidelines that promote social consideration in public procurement, underscore the possibilities within the existing legal framework and facilitate the dissemination of best practices.

Concerning cooperation between public entities, is there a new approach on in-house procurement?

After the recent decisions by the ECJ, the question arose as to whether there is a new approach on in-house procurement. European business is convinced that this is basically not the case. Nevertheless, there may be room for clarification. This clarification, however, can be done through interpretative documents without the need for new EU legislation.

Business acknowledges that contracting authorities are allowed to do things completely on their own and that under certain conditions municipalities can organise their cooperation as they wish, provided that they merely act according to the rules set out by the ECJ.

In its decision on waste disposal in the city of Hamburg, the Court pointed out that cooperation between public entities does not require setting up a structure. Nevertheless it is important to mention that according to the Court, contracting without a prior tender notice is only admissible if at least three conditions are met:

- 1) First, that there is a clear necessity of a *public* interest.
- 2) Secondly, that no private partner - and not even the smallest private participation on one partner's side - is permitted.
- 3) Thirdly, that such cooperation, as in the case of the city of Hamburg, must be characterised by an active *cooperative interaction* among the public partners and not just consist of one partner delivering the solution while the others pay for it.

These findings for cooperation between public entities, however, do not have any bearing on the ability of local authorities to contract within the sphere of their own authority. This remains subject to the strict rules of the in-house exception which are clarified by the Teckal decision of the ECJ.



Summarising, EU industry is of the opinion that the Directives 2004/18/EC and 2004/17/EC should not be “reopened” just some five years after entering into force.

Where an open market has already been established successfully, competition is the solution. Our society is currently facing serious economic difficulties as well as challenges coming from the environment, climate change, an ageing population and energy shortages. Stronger partnership between the public and the private sectors can combine successfully a drive for efficiency and competitiveness with the pursuit of environmentally-friendly solutions to development; and it is respectful of society’s aspirations for customer satisfaction and quality of employment.

If, however, new developments lead to a revision of this legislation or non-legislative initiatives, BUSINESSEUROPE is willing to actively assist the European Parliament in its reflections on potential further action.

Thank you for your attention.