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ISSUES IN PUBLIC PROCUREMENT

BUSINESSEUROPE welcomes this opportunity to submit comments with regard to the Parliament's own-initiative report on public procurement. In this paper we highlight our views on some key issues in public procurement and throughout the paper we argue as follows:

- The existing legal framework provides sufficient legal certainty and it secures open, transparent and fair public procurement throughout Europe.
- Green and social objectives as well as the improvement of SME access to public procurement can be pursued within the current legal framework.
- Education and training, the dissemination of best practice examples, and the development of toolkits and guidelines are important tools in pursuit of the above objectives.
- No legislative action is needed on concessions as such legislation would almost certainly hinder the further innovative shaping of concessions in the future.
- BUSINESSEUROPE is convinced that the recent decisions by the ECJ have not created a new approach on in-house procurement. There may, however, be room for clarification by interpretative documents.
- In view of this persistent imbalance in the openness of public procurement markets between the EU and its main trading partners, the EU should put in place a proactive and ambitious market access policy based upon open trade and investment, and reducing discriminatory measures in third countries.

1) The Existing Legal Framework Provides Sufficient Legal Certainty

In the past two years, following a number of decisions by the European Court of Justice (ECJ), some sources have expressed the impression that European public procurement was suffering from legal uncertainty. BUSINESSEUROPE, however, strongly believes that the rules of directives 2004/17/EC and 2004/18/EC ("the 2004 Directives"), and the principles of public procurement stated by the ECJ are indispensable in safeguarding transparency, market openness and competitive tendering in the Internal Market. Safeguarding such objectives is fundamental in combating corruption. Thus, the two very important directives underpin a vital element 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, and has led to a considerable reform of public procurement throughout Europe. The procurement directives have led to important and necessary changes in public procurement, spreading the principle of transparency and the need for legal guarantees by means of effective remedies procedures in the Member States. 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 EU Treaty 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.

Thus, the Directives may be seen as containing some indispensable minimum rules and a lot of proposals for good recipes. It is up to the contracting authorities to pick the procedures relevant to the individual procurement contract.

Most claims of legal uncertainty are in reality founded in a lack of knowledge and training in public procurement. Education and training therefore plays a key role in reducing uncertainties and in promoting competitive and innovative “world-class procurement” in Europe.

2) Improving SME Access to Public Procurement

BUSINESSEUROPE believes that any efforts to strengthen SME access to public procurement must be in conformity with basic market principles. Directives 2004/17/EC and 2018/EC are no hindrance to improve SMEs’ access to public procurement. It is up to contracting authorities to promote concrete SME strategies. To strengthen SME access to procurement the contract 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

In addition, BUSINESSEUROPE believes advanced education and training is key in, amongst other things, adapting contracting authorities to SME needs. Civil servants in charge of public procurement will need highly developed skills to enable them to choose the most economically appropriate procedures and to optimise their project planning. We believe suppliers also need advanced knowledge and training on how to participate successfully in modern procurement procedures.

3) Concession Contracts - A Tool for Innovation

We support the idea of clarifying a number of elements of the debate on concessions insofar as such clarification may help spread the practice of concessions. However, BUSINESSEUROPE does not believe that legislative action on concessions is necessary.

Underlying the concept of a concession is that it carries operational risk. Any concession will be based on a division of risk between the public authority and the concessionaire, where the operator picks up the risk linked to its operation. Assignment



of risk should be left to the parties involved, generally on the basis of who is best placed to manage each risk. Similarly, it is for the negotiating parties to agree on terms of remuneration - in the context of a competitive environment and not based on legislation - and it is essential to maintain the financial-economic equilibrium of the contract.

Where assets are procured through a concession contract, the lifetime of these assets can be an indicative guide to the duration of the contract. This should be up to the parties to agree.

The concept of a concession implies that over the duration of the contract it will have to be adapted and amended. For example, changes in law, demographics, economics, technology, or in customer expectations are to be expected. 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. Instead of new legislation best practice under the existing regime should be promoted.

Public purchasers need to make room for innovative solutions by describing their needs as functions and avoiding specifications that are too prescriptive. It is for public purchasers to inform suppliers about the problem – and to explain any “interface” requirements – and leave the supplier to propose a solution.

To summarise, no 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. This might easily damage innovation in the EU, as 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. Enabling suppliers and public authorities to meet at an early stage of a purchasing process, through a development programme, would stimulate innovation as these forums provide a possibility to develop competitive areas and for the suppliers to get insight into the purchasers’ wants and needs.

4) Green Public Procurement (GPP)

BUSINESSEUROPE acknowledges the importance of a consideration of environmental aspects in public purchasing. GPP can be used within a toolkit aimed at meeting certain environmental policy goals, but its use must balance the environmental benefit with the overall effect on the economy.

Public procurement is not intended 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. However, the framework in many cases allows for the integration of such objectives.

The 2004 Directives provide sufficient legal certainty on how to use GPP. They allow for a wide range of environmental aspects to be considered, provided that these aspects are linked to the object of the contract. Therefore BUSINESSEUROPE strongly



encourages the European Parliament not to call for further legislation on GPP. Instead we 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 intensively and systematically than in the past.

5) Social Considerations

BUSINESSEUROPE recognises the importance of social policy and accepts, to a certain extent and respecting the current European legal framework on public procurement, the inclusion of social aspects in public procurement. 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 directives allow the use of social contracting clause in every type of contract. Also, within the current framework, “reserved contracts” are allowed for specific types of suppliers, for whom 50% of their workforce is disabled and not fit for standard working conditions. Thus it is our view that the existing legal framework for public procurement provides sufficient legal certainty on how to use social criteria and that further legislation is unnecessary.

We therefore propose the development of guidelines which promote social consideration in public procurement, underscore the possibilities within the existing legal framework and facilitate the dissemination of best practices. However, BUSINESSEUROPE underlines that such guidelines should be subject to broad consultation by stakeholders.

6) Cooperation between Public Entities

Following the recent decisions by the ECJ, the question has arisen as to whether there is a new approach on in-house procurement. BUSINESSEUROPE is convinced that basically that is 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, as long as they merely act in the *public* sphere, following the approach set out by the ECJ. In its decision on waste disposal in the city of Hamburg, the Court pointed out that inter-communal cooperation does not require a structure to be set up. 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.

Besides that, business is of the opinion that 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.

7) The International Dimension of Public Procurement

Whereas EU public procurement markets are among the most open in the world, many external markets operate restrictive public procurement practices, in which European companies are either disqualified outright from tendering, or can only tender on less favourable terms than their local competitors. In view of this persistent imbalance, the EU should put in place a proactive and ambitious market access policy based upon open trade and investment, and reducing discriminatory measures in third countries. At the same time, EU procurement markets cannot sustainably remain open whilst third countries refuse to establish a level playing field.

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