

19 March 2012

BUSINESSEUROPE's views on the public procurement reform proposal

KEY MESSAGES

- 1** The main goal of the public procurement rules must be to achieve efficiency in public spending and ensure the best economic value for taxpayers' money at the same time as opening up the internal market.
- 2** Whilst supporting certain amendments in specific areas, we oppose a major overhaul of the current legislative framework and believe that any revision must safeguard transparency, market openness and competitive tendering.
- 3** Efforts should above all concentrate on more uniform application and enforcement of EU procurement legislation and better provision of assistance to contracting authorities in carrying out award procedures.

WHAT DOES BUSINESSEUROPE AIM FOR?

- Simplification efforts that preserve the openness of Europe's public procurement market and do not give way to discriminatory behaviour, which would be detrimental to companies, especially SMEs.
- An enabling approach when it comes to the strategic use of public procurement towards achieving the Europe 2020 strategic goals and ensuring a direct link with the subject-matter of the contract when including environmental/social aspects in procurement procedures.
- The setting-up of national oversight bodies in the Member States in charge of the monitoring, implementation and control of public procurement.



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INTRODUCTION

Public procurement plays an essential role in the European economy with total annual expenditure on the public procurement of goods and services in the European Union amounting to approximately 18% of EU GDP.

On 20 December 2011 the Commission published its proposal on the revision of the legislative framework for public procurement. This legislative proposal constitutes one of the 12 levers highlighted in the European Commission's Single Market Act.

BUSINESSEUROPE considers that the main goal of public procurement rules must be to achieve efficiency in public spending and ensure the best economic value for tax payers' money at the same time as opening up the internal market. Whilst supporting certain amendments in specific areas BUSINESSEUROPE has consistently voiced its opposition to a major overhaul of the current legislative framework and urged the Commission to make sure that any revision safeguards transparency, market openness and competitive tendering.¹ Efforts should concentrate on more uniform application and enforcement of EU procurement legislation and better provision of assistance to contracting authorities in carrying out award procedures.

In this context, BUSINESSEUROPE's assessment of the proposal is mixed. Business is pleased that many elements of Directive 2004/18/EC have been preserved in the Commission's proposal. There is also an important emphasis on better governance which should lead to better monitoring, implementation and control of public procurement.

However, BUSINESSEUROPE has concerns about a large number of the provisions which it hopes will be addressed by the European Parliament and Council during the normal legislative procedure.

BUSINESSEUROPE sets out below its key messages on the proposal, which should be seen as constructive contributions aimed at the well-functioning of public procurement and the internal market as a whole. Further comments will be provided once the work of the co-legislators work is fully underway.

¹ <http://www.businesseurope.eu/content/default.asp?PageID=568&DocID=28558>



MAKING PROCUREMENT PROCEDURES SIMPLER AND MORE FLEXIBLE

BUSINESSEUROPE believes that simplification is important since the procurement process can entail large costs for both contracting authorities and bidders. At the same time it is crucial that attempts to simplify and provide for more flexibility in public procurement do not create competition and transparency problems. If done badly, simplification could lead to less openness in the market and enable discriminatory behaviour, which would be detrimental to companies, especially SMEs.

Certain simplification efforts made albeit with some trade-offs

BUSINESSEUROPE welcomes the proposal's introduction of certain simplification measures. For instance, business welcomes the simplification of information obligations for economic operators. Also, the abolition of the distinction between 'A'² and 'B'³ services is supported as there is no justification for restricting the full application of procurement law to a limited group of services whilst excluding areas such as water or hotel services.

However, BUSINESSEUROPE is disappointed to see that an apparent trade-off linked to the abolition of 'A' and 'B' services is the proposal to set up a new specific regime for social services with a higher threshold of EUR 500,000 and imposing only the respect of basic principles of transparency and equal treatment. The new Directive should not create obstacles for private operators to provide social services, many of which, including health services, do have a growing cross-border dimension.

Public procurement procedures

BUSINESSEUROPE is pleased that the two basic forms remain the open and restricted procedures. Whilst not suitable in all situations, the open procedure is currently considered the most transparent and accounts for nearly three quarters of all procurement operations. Whilst we do not necessarily see the need for a generalisation of the negotiated procedure, business could support more widespread use of this procedure providing that adequate safeguards are put in place to ensure observance of the principles of fair competition, equal treatment and transparency. As negotiation tends to focus on the price, strict conditions are needed to avoid a situation of blackmailing on price criteria as well as the disclosure of trade secrets during the procurement process.

We oppose the Commission's proposal to provide a lighter procedural framework for sub-central contracting authorities. The majority of public procurement (in numbers and in value) is accounted for by these authorities. Even small contracting authorities often commission very large contracts. A lighter framework for sub-central authorities would put more burdens on suppliers to be aware of concrete purchasing opportunities, working against the aim of protecting and further enhancing the functioning of the internal market. It is of course important for small contracting authorities to be adequately supported to carry out their procurement procedures. However, all layers of government should follow the same procedures.

² Services listed in Annex II A of Directive 2004/18/EC or Annex XVII A of Directive 2004/17/EC.

³ Services listed in Annex II B of Directive 2004/18/EC or Annex XVII B of Directive 2004/17/EC



Concerns also arise in relation to the possibility, included in the Commission's proposal, of making more flexible the distinction between the selection of tenderers phase and the award of contracts phase, enabling contracting authorities to decide on the sequencing.

Moreover, we think that the reduction of time-limits for participations and submission of offers, based on the premise that it will allow for a quicker and more streamlined procurement as explained by the Commission, is not justified. There are aspects that can be improved upon on the side of the contracting authorities to achieve more efficiency in public procurement (e.g. better training and improved knowledge and expertise), rather than reducing the period that the economic operators may need to prepare the offer properly.

Finally, BUSINESSEUROPE has doubts about whether the modification and the termination of contracts should be regulated at European level.

E-procurement

Business fully supports the wider use of e-procurement and believes that it can provide numerous benefits, including simplification goals and reduction of costs. However, BUSINESSEUROPE has doubts about the Commission's proposal to make e-procurement mandatory within a transition period of 2 years. We think it important for contracting authorities to provide tender material digitally to businesses and also have the possibility to receive tender proposals in a digital form from businesses. In this way, businesses that are ready to take advantage of the many benefits of e-procurement solutions can do so. First and foremost though, it is essential to address the operational challenges faced with e-procurement, namely interoperability and security of sensitive data as in numerous Member States diverging applications exist at central, regional and local level. In this context, the work carried out by the Commission's e-Tendering Expert Group is important in contributing to this goal.

Clarification on 'self-cleaning'

BUSINESSEUROPE generally supports the proposal's provision for the possibility of 'self-cleaning'. Given the serious legal uncertainty in this area, a legislative amendment is supported where it is clarified that a company can regain reliability in spite of prior wrong-doing if it can demonstrate that it has taken appropriate measures to remedy the consequences of any illicit behaviour. However, some concerns exist with regard to the criteria for exclusion as currently set out in article 55 section 3. Firstly, concerning section 3a the ability to exclude for violation of labour and environmental laws anywhere in the world represents a significant potential obstacle to companies operating in third countries which may be subject to international rules that are at variance with local laws. Secondly, in section 3b the situation where an economic operator has entered into an arrangement with creditors should not be considered as a ground for exclusion. Thirdly, sections 3c and d are very subjective and would potentially allow exclusions without any formal finding of fault and as such could be used as a protectionist tool to exclude companies challenging local participants.



Public-public co-operation

BUSINESSEUROPE believes that if legislation in this field is to be considered, under no circumstances should it end up with the area of public procurement becoming substantially restricted as this would damage the Internal Market. In this context, there are significant concerns that Article 11 of the proposed Directive, which codifies the case law of the ECJ on in-house and inter-municipal cooperation, gives a much wider interpretation of the jurisprudence of the Court. This applies in particular to the following provisions: the collective shareholding of the in-house entity, the exemption for inter-municipal cooperation and the extension of the "in-house" exemption to contracts between entities controlled by the same contracting authority. This is dangerous because it could ultimately lead to the closing of an increasingly large number of markets to private enterprises. The proposal on concessions (Article 15) on which BUSINESSEUROPE will submit further comments contains the same excessive codification of public-public co-operation case law.

STRATEGIC USE OF PUBLIC PROCUREMENT IN RESPONSE TO NEW CHALLENGES

Public authorities do indeed have a role to play in achieving the Europe 2020 strategic goals, leading by example and using their purchasing power to open up new markets and key technologies, as is done by some of the EU's international trading partners. They can also play a role in using their purchasing power to procure goods and services that promote environmental and social goals.

In BUSINESSEUROPE's view, the existing legal framework for public procurement provides sufficient legal certainty on how to introduce environmental and social criteria in public procurement and therefore no major changes are needed. Instead the focus should shift towards developing a better practical understanding of how to include these aspects in procurement procedures.

It is essential when including environmental/social aspects in procurement procedures that a direct link with the subject-matter of the contract is made. Softening or dropping the link would open up for opportunities to steer contracts to favoured suppliers and put the fundamental principles of non-discrimination and transparency at risk.

The Commission claims that this section of the proposal is based on an enabling approach and that the link to the subject matter is largely maintained. However, when looking into the detail of the provisions it emerges that a number of elements seem to contradict this intention causing significant concern to business.

An example of this can be found in the provisions relating to the production process and the fact that contracting authorities may refer to all factors linked to the production process in the technical specifications and in the award criteria. BUSINESSEUROPE supports a continuous improvement of production processes, a wide choice of sustainable products and new business opportunities for companies. However, it is crucial that any requirements relating to the production process have a direct bearing on the characteristics of the object of the contract. The language in the newly proposed Directive is ambiguous and should be amended to reflect the importance of this link with the subject matter.



Concerning the possibility given to public purchasers to base their award decisions on life-cycle costs of the products, services or works to be purchased BUSINESSEUROPE agrees that it is important to take life-cycle costs into account where relevant and that this could be further promoted by using an indicative methodology that is transparent, objective, standardised and measurable, and considers potential specificities of the relevant sectors. However, the methodology for life-cycle costs, in particular the proposal for life-cycle costing to also cover external environmental costs (e.g. activities relating to the transport of goods) must be defined in such a way that it could not hamper competition and lead to unintended favouritism towards local suppliers, working against the Commission's goal of increasing cross-border procurement.

As regards the Commission's proposal enabling contracting authorities to require that works, supplies or services bear specific labels certifying environmental, social or other characteristics, BUSINESSEUROPE supports the provisions in the current Directive, which enables contracting authorities to refer to specifications that are defined in certain labels (e.g. ecolabel) but rightly contains some restrictions on the use of labels so as to eliminate the effect of favouring or eliminating certain undertakings or certain products. In the past BUSINESSEUROPE has emphasised that when environmental requirements are used as award criteria it is of the utmost importance that such criteria would not be merely to meet the requirements of a particular 'labelling' scheme. The same is true for social requirements. A requirement for companies to bear a specific label risks prescribing a standard for the way that companies operate, beyond their legal obligations. There may be other justified reasons that a company has not applied a specific label, irrespective of the way that they operate.

BETTER ACCESS TO THE MARKET FOR SMES

BUSINESSEUROPE supports the objective of improving SME access to public procurement. SMEs are the backbone of the European economy when it comes to creating new jobs, and facilitating their access to procurement opportunities can allow them to strengthen their competitiveness enabling them to contribute more towards growth and employment.

We see a number of positive aspects in the Commission's proposal. Our support for the simplification of information obligations has already been highlighted above. It is also good that the Commission has taken some measures which would lead contracting authorities to abstain from unnecessarily high levels of proof and financial guarantees which are frequently an obstacle to access by SMEs. The Commission's proposal to limit turnover requirements to three times the estimated contract value could be lowered even further in our view.

However, BUSINESSEUROPE is concerned about certain provisions in this section.

Firstly, the provision that would enable Member States to provide that subcontractors may request for direct payment by the contracting authority of supplies, works and services provided to the main contractor is problematic. It could lead to a situation where the contracting authority pays a subcontractor which has not yet fulfilled his



contractual obligations. To avoid this, the contracting authority would need to act as a mediator between the main contractor and the subcontractor which would be burdensome for the contracting authority and have questionable practical implications. If the subcontractor has failed to meet the relevant contractual obligations, the main contractor should retain the right to hold back a proportionate fee, in the same way as the contracting authority can do this if the main contractor fails to meet the obligations set out by the contracting authorities.

Secondly, there are problems with the way in which the provision on the possibility to divide contracts into lots is laid out. The obligations to 'apply or explain' means contracting authorities will be inclined to divide contracts into lots even if this is not suitable to avoid having to provide an explanation. An explanation could trigger complaints and litigation from SMEs. The lack of information about what grounds would exist for taking a decision not to divide and what, if any, scope there would be for potential bidders to challenge the decision to either divide or not divide the contract is of concern. The absence of clear rules could create a culture of uncertainty, especially where complex projects are being procured. There are also issues around the ability of public authorities to effectively manage divided contracts on complex projects.

GOVERNANCE

BUSINESSEUROPE strongly believes that many of the intentions of the public procurement revision can be achieved by improving national enforcement of public procurement legislation. Not all Member States consistently monitor the functioning of the public procurement rules which compromises the efficient and uniform application of European Union law.

In this context, BUSINESSEUROPE welcomes the proposal to set up a national oversight body in each Member State that would be in charge of the monitoring, implementation and control of public procurement. If well implemented, such oversight bodies could potentially limit the use and need for remedies saving time and costs for business and contracting authorities alike. However, the designation of a single national authority must not create any unnecessary burdens and setting up of special new structures for those countries that already have a body in place to do this (e.g. such as the UK).

It is also essential that civil servants in charge of public procurement develop the necessary expertise to prepare and conduct procurement procedures and learn how to deal with complex projects. This is why BUSINESSEUROPE also supports the proposal to set up knowledge centres to provide contracting authorities with support structures offering legal and economic advice, guidance, training and assistance.

Better enforcement and efforts to better train contracting authorities in the award of procurement procedures will both help to simplify the way in which public procurement is carried out and facilitate the inclusion of environmental/social/innovative aspects in procurement procedures, thereby contributing to the EU 2020 goals.

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