



To: Members and Substitutes of the
Internal Market & Consumer Protection
Committee (IMCO) of the European
Parliament

22 November 2012

Dear IMCO Members and Substitutes

RE: Your vote on the Tarabella report on public procurement revision

In view of the European Parliament's Internal Market Committee upcoming vote on the revision of public procurement legislation, BUSINESSEUROPE would like to share with you its views on some key elements.

The main goal of 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. Public procurement can also play an important role in achieving the Europe 2020 strategic goals such as promoting innovation. It is crucial that any revision safeguards transparency, market openness and competitive tendering.

BUSINESSEUROPE calls for simplification efforts that preserve the openness of Europe's public procurement market and do not give way to discrimination, which would be detrimental to companies, especially SMEs.

We fear that some of the amendments being discussed by members of the IMCO committee might affect the well-functioning of the public procurement market, and also the Single Market as a whole. It is essential in the current climate for Europe to make use of every opportunity to rebuild its economy. Public procurement, accounting for approximately 18% of EU GDP, is vital in enabling European industry to grow stronger, more competitive and more efficient.

Our views are set out in further detail at annex.

We remain at your full disposal if you want to discuss these or other points further.

Yours sincerely,

Philippe de Buck



22 November 2012

Annex in view of the European Parliament IMCO vote on public procurement

Cluster 1: public procurement procedures

With regard to the modification of contracts during their term and their termination, BUSINESSEUROPE considers that contract performance issues should not be addressed in public procurement directives but should be dealt with at national level. In particular, we find that Article 72.4, which states that a modification shall not be considered to be substantial where it is below 5% of the price of the contract, is excessively restrictive. In BUSINESSEUROPE's view that limit must be significantly increased and the link with the thresholds set out in Article 4 should be eliminated. In relation to Article 73 section c), we consider that the Commission's proposal may create legal uncertainty and should therefore be deleted.

Time limits for participations and submission of offers should not be fixed lower than according to the present procurement directives, as they are already very short. Any further shortening would risk that a considerable number of companies, among them especially SMEs, would abstain from participating in public procurement, and consequently the number of competitors would decrease, also to the disadvantage of public purchasers.

BUSINESSEUROPE is not in favour of Articles 24 and 26.4, granting exclusions from the regular procedures to sub-central authorities. It seems inconsistent that these public authorities, which account for the most important part of public purchasing, should benefit from exclusions leading to less transparency, while any other stakeholders – also including very small companies – have to respect the whole set of rules.

Cluster 2: Strategic use of public procurement

Social aspects

BUSINESSEUROPE is particularly concerned about the numerous proposals that focus on social criteria and social inclusion and in part go far beyond the existing, already far-reaching possibilities to consider these aspects in public procurement. The existing legal framework provides sufficient legal certainty on how to include social criteria in public procurement. Instead the focus should shift towards developing a practical understanding of how to include these aspects in procurement procedures.

Numerous amendments (to Recital 44, Articles 15, 54-56, 60-61 and 69) refer to 'collective agreements applicable in the place where the work is performed or the service is provided'. BUSINESSEUROPE believes that references to collective agreements should be deleted from all articles. It is problematic to exclude economic operators that are alleged to have violated obligations within collective agreements as these are under constant interpretation. If an economic operator violates the obligation accidentally, bona fide, the consequences may be unreasonably severe. The amendments risk excluding completely sound and responsible companies from public



contracts or even creating disincentives for companies to be part of collective agreements.

In addition, amendments to the public procurement directive must under no circumstances include provisions that would contradict or interfere with the provisions of Directive 96/71/EC on the posting of workers as this would undermine the latter and result in significant legal uncertainty. BUSINESSEUROPE therefore urges MEPs to refrain from amending principles that are included in other EU legislation in force via amendments to the public procurement directives.

Subcontractors

BUSINESSEUROPE underlines that subcontracting is an essential way of allocating resources in an effective way and the relationship with subcontractors is primarily regulated by contract law. A limitation on the use of subcontractors contradicts one of the objectives of the reform, which is to facilitate the participation of SMEs in the procurement market, because SMEs are often used as subcontractors.

BUSINESSEUROPE is also against chain responsibility (joint and several liability); such a liability scheme would shift the duty to enforce law from public authorities to companies and impose substantial costs and administrative burden on companies. Furthermore, such a liability scheme would be a hindrance to the free movement of services, lead to less competition and ultimately be disadvantageous for the taxpayer.

Contract award criteria (Article 66)

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

We are particularly concerned about provisions relating to the production process and the proposal that contracting authorities may refer to all factors linked to the production process in the technical specifications and in the award criteria. It is crucial that any requirements relating to the production process have a direct bearing on the characteristics of the object of the contract.

BUSINESSEUROPE would also like to highlight that it is fundamental to ensure impartiality and transparency between contracting authorities and economic operators. Therefore, in line with recent judgements of the ECJ, the weighting of the subheadings of an award criterion must be defined well before the deadline for the submission of tenders has expired.

Life-cycle costs

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 these into account where relevant. However, it is crucial that life-cycle costs are defined in a way that does not hamper competition and lead to favouritism towards local suppliers. In this context, references to location of production and transport would oppose EU-wide cross-border bidding and goes against two of the four fundamental freedoms of the Single Market: the free movement of goods and services. Furthermore, the particular attention paid to



the transport phase is not necessarily justified. A product made in another country with a better technical performance (e.g. using less energy during the use phase) will result, over the entire life-cycle, in lower costs than a product bought locally but with an inferior performance.

Cluster 3: Reducing document requirements

The simplification of information obligations is essential and requirements imposed on an economic operator by the contracting authority need to be proportionate. Overly demanding requirements will raise transaction costs and could be an obstacle to the involvement of companies, especially SMEs, in public procurement.

BUSINESSEUROPE strongly supports the European Public Procurement Passport, which would gather and standardise corporate information, leading thereby to a significant reduction in document requirements for European companies. By expanding the timeframe to one year, the European Public Procurement Passport will follow the cycle of annual accounts. BUSINESSEUROPE is however deeply concerned about the thinking amongst some MEPs to include requirements such as those related to labour law in the passport.

BUSINESSEUROPE has doubts about the idea to build the European Procurement Passport on the internal market information system (IMI), one reason being that the IMI is an information system between Member States and the European Public Procurement Passport is meant to be applicable to all public procurement transactions, including at national level. Furthermore, it is understood from the discussions that the IMI would be a sort of email system, where contracting authorities can ask for information from each other, i.e. experiences with economic operators. As such it is not a common database and would therefore not reduce transaction costs for economic operators since they would have to send information about company formalities at each tender, that could otherwise be gathered once a year in the procurement passport.

As discussions in the Council on this issue seem to have stalled, BUSINESSEUROPE urges MEPs to take the necessary actions to make a truly simpler and more effective procurement system in the EU.

The provisions on exclusions of bidders are important to set clear rules safeguarding correctness and fighting corruption in public procurement. On the other hand it is equally important that these rules refer to clear and objective conditions. Therefore, the far-reaching instrument of exclusion should not be based on comparatively vague criteria like 'grave professional misconduct' but be limited to cases of a final conviction in court.

BUSINESSEUROPE agrees with the proposal of the Commission on self-cleaning of companies which is important with a view to fighting corruption effectively and overcoming legal uncertainties throughout the EU.



Cluster 5: SME Access

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, employment and innovation. In addition to simplifying information obligations, it is also essential for contracting authorities to abstain from unnecessarily high levels of proof and financial guarantees which are frequently an obstacle to access by SMEs.

It is important to encourage the contracting authority to subdivide the contract into lots where suitable but BUSINESSEUROPE has doubts about the proposal to make this mandatory. It should be remembered that division of a contract into many lots can increase the price and lead to difficulties coordinating the overall contract, when contracting authorities otherwise could have gained the benefits of economies of scale. It can also drive transaction costs up, when contracting authorities and tenderers have to write different tender materials.

Cluster 8: Sound procedures

With a view to fighting dumping offers in an effective, non-discriminatory manner, it will be important to have clear and transparent conditions for identifying abnormally low tenders. For the final shaping of Article 69, BUSINESSEUROPE recommends a figure of 35% (compromise between the amendments 127, 1257 and others (30%) and amendment 1259 (40 %) in Article 69 paragraph 1 (a). The Commission's proposal that the request for explanation of extremely low prices is allowed only if at least five tenders have been submitted (Article 69 paragraph 1 (c)) should be modified; with only three tenders it still seems possible to identify an abnormally low tender. In Art 69 paragraph 2 the word *may* will have to be replaced by *shall*. Article 69 paragraph 4 subparagraph 2 should be shaped more strictly such that a contracting authority *shall* reject the tender, where it has established that the tender is abnormally low in view of the criteria set out in Article 69 paragraph 3. In Article 69 paragraph 5, the word *may* will have to be replaced by *shall* in order to be coherent with the general strengthened approach of this article. Finally it should be specified that the contracting authority has to keep records of the reasons for its decisions in cases of requests regarding abnormally low tenders.

Cluster 9: Governance

BUSINESSEUROPE 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 thereby compromises the efficient and uniform application of European Union law and the development of the single market.



In this context, BUSINESSEUROPE supports a provision on national oversight bodies in the Member States in charge of the monitoring, implementation and control of public procurement. 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 such national authorities must not create any unnecessary burdens as would setting up special new structures for those countries that already have such authorities in place (e.g. such as the UK, Germany and Denmark).

BUSINESSEUROPE is concerned that ongoing discussions in the European Parliament and Council might lead to a watering-down of the Commission's original proposal on this issue which is at odds with parallel efforts by the European institutions to increase the focus on better governance in the single market, especially the goal to make the principles and legislation which we already have function better in practice.

Cluster 10: Definitions and scope

BUSINESSEUROPE does not support the amendments that propose to maintain the distinction between 'A' and 'B' services¹. BUSINESSEUROPE sees no fit justification for restricting the full application of procurement procedures to a limited group of services whilst excluding areas such as hotel services. Similarly, BUSINESSEUROPE is disappointed with the Commission's original 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.

BUSINESSEUROPE believes that the existing threshold levels should be maintained and therefore any further demand for raising the thresholds of the Directive should be declined. It would run counter to the essential goals both of transparency and of opening up EU procurement markets, as well as the duties of the EU in view of the legally binding provisions of the WTO Government Procurement Agreement.

With regard to public-public/in-house situations BUSINESSEUROPE is concerned that Article 11 of the proposed Directive, which, in codifying the case law of the ECJ in this area, gives a much wider interpretation of the jurisprudence of the Court. This is dangerous because it could ultimately lead to the closing of an increasingly large number of markets to private enterprises. Article 15 on concessions contains the same excessive extension of public-public cooperation case law.

In this context, BUSINESSEUROPE believes that in public-public/in-house situations, not being subject to the discipline and regulated competition of the public procurement rules, public authorities/public companies should:

¹ The Italian federation CONFINDUSTRIA has a differing opinion on this issue



- Not be allowed to compete in the open market, as they would then benefit from an unfair competitive advantage and restrict proper access to the market (in particular for SMEs)
- Should only benefit from exclusions from the EU procurement law in cases where they are 100% publicly owned, exclusively performing a specific public task in a defined timeframe on the territory of the involved authorities and where 100% of their activities is dedicated to contracts from the public sector.

Moreover, following the jurisdiction of the ECJ, public-public cooperation may only be exempted from the procurement rules if they are governed exclusively by considerations relating to the *public interest*, imply *genuine cooperation* between all the participating contracting authorities aimed at carrying out jointly their public service tasks, and involving *mutual rights and obligations* of the parties.

Should these conditions not be met, BUSINESSEUROPE would advocate the withdrawal of the provisions related to in-house/ public-public relations.

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