



To: EP Internal Market Committee

4 July 2012

Dear Sir/Madam

RE: In view of the deadline for submission of amendments in IMCO on 5 July

In view of the 5 July deadline for submission of amendments by the IMCO Committee on the draft public procurement directive, BUSINESSEUROPE would like to share with you our general comments on the draft report presented by the rapporteur, MEP Marc Tarabella (see annex).

In the BUSINESSEUROPE position paper of 19 March, we emphasised that transparency, market openness and competitive tendering should be safeguarded in the revision of the public procurement legislation. We called 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.

BUSINESSEUROPE has significant concerns around the implications of many of the proposed amendments set out by the rapporteur. In the annex we comment on a few of them. It is our belief that, if enacted, many of these amendments will prevent open competition in public procurement markets and significantly damage the interest – particularly those of small and medium-sized businesses – of suppliers to the public sector. The impact on the quality of public services and value for money for taxpayers across Europe will also be significant.

BUSINESSEUROPE encourages you to take active part in this debate and ensure the delivery of a text that can really secure a more uniform application and enforcement of EU procurement legislation and better provision of assistance to contracting authorities in carrying out award procedures.

Thank you in advance for taking our position into account. We remain at your full disposal if you want to discuss these or other points.

Yours sincerely,

Jérôme P. Chauvin
Director
Legal Affairs Affairs Department
Internal Market Department

Annex to BUSINESSEUROPE letter in view of the deadline for submission of amendments

1. Social sustainability

Amendments 2, 7, 12, 13, 14, 16, 17, 18, 26, 32, 33, 35, 36, 37, 60, 61, 64, 66, 70, 118, 160

BUSINESSEUROPE finds it worrying that the rapporteur wants to use public procurement as an instrument for a number of political purposes typically governed by law. Numerous amendments set out by the rapporteur focus significantly on social criteria, social inclusion and consumer protection. Whilst these are laudable objectives which BUSINESSEUROPE fully supports, it is immensely difficult for suppliers and contracting authorities alike to apply such criteria in practice as they are not easily connected to the subject matter of the contracts. Such criteria are unsuitable for application in public procurement. They should be removed and addressed in other, more appropriate legislation. Therefore, the references to social sustainability should be deleted from all articles.

2. Collective agreements

Amendments 21, 26, 86, 91, 98, 107, 110, 133, 135, 139, 165

The references to collective agreements should be deleted from all articles. It is problematic to exclude economic operators that have violated obligations within collective agreements. Collective agreements are under constant interpretation. This means that well run and responsible companies can have violated collective agreements in the past/and or be part of a case at the time of tendering. The amendments risk excluding completely sound and responsible companies from public contracts. Or worse, it would create incentives for companies to not want to be a part of collective agreements. There is also a risk of causing unnecessary transaction costs for the contracting authorities when spending time and resources on explaining sound behaviour. The amendment thereby risks reducing contracting authorities' incentives to procure services in the market.

3. Life-cycle and Life-cycle characteristics

Amendments 24 and 25

Amendment 24 should not be accepted. A life-cycle approach is key to ensure the best economic value for taxpayers' money. However, it should not be at the expense of cross-border bidding and go against two of the four fundamental freedoms of the Single Market: the free movement of goods and services. The reference to location of production in article 2 should thus be rejected. In order to avoid risk of confusion and poor regulation, we also reject amendment 25.



4. Public-public cooperation

Amendment 32, 33, 34, 35, 36, 37

BUSINESSEUROPE strongly opposes any further softening of the public-public cooperation derogations from the scope of EU procurement rules. We ask for the rejection of amendments 31 and 34 which state that in-house entities can be directly awarded a contract by its controlling public sector entity if a bulk of its activities is carried out for this controlling authority. 100% of its activities should be carried out for the controlling authority in order to guarantee a level playing field for other economic operators on open markets. Amendments 32, 33, 35 and 37 which allow private participation in in-house entities should also be rejected. Amendment 36 which suppresses the conditions for exclusions of horizontal public sector cooperation should also be rejected.

Furthermore, in order to guarantee fairer treatment of public and private management, BUSINESSEUROPE believes that (1) paragraphs that go beyond the stable basic jurisprudence should be deleted, (2) public entities party to agreements that have not been advertised in accordance with the directive should not be able to perform on the open market, (3) in-house management should be limited in time or at least be subject to prior notice.

There is no level playing field if a public sector entity may sell public services and products in the same competitive market with private entities and at the same time sell those services and products to its public controller without any transparency and tendering obligations. In order not to risk a fragmentation of the internal market, the exclusions from the directive's scope must be strict, clear and controllable.

5. Award criteria

Amendments 48, 50, 54, 99, 114

BUSINESSEUROPE's view is that 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 award criteria should always be directly linked (only) to the price and quality of the good or the service, not to the criteria linked to the process or the company itself. Anything else would make the legislation more complicated, give room to discrimination and prevent the effective use of public money. BUSINESSEUROPE therefore opposes any weakening of the link between the requirements and the subject matter of the contract as set out in amendment 99.

6. Technical specifications

Amendment 74

The principle of non-discrimination has long been a foundation of the EU's procurement framework. Amendment 74 would reverse this longstanding principle, and would allow contracting authorities to make explicit reference to specific solutions and services,



locations of production and trade marks in tenders – even when those references favour certain economic operators and disadvantage others. The ability to compete equally in procurement is critical in order for European enterprises to benefit from the significant opportunities created by public procurement. Amendment 74 should be rejected.

7. Division into lots

Amendment 81, 82 and 83

It is obviously important to encourage the contracting authority to subdivide the contract into lots in order to make it easier for SMEs to participate in public tendering competitions. However it should not be an obligation to split contracts into lots as suggested by the rapporteur. It should be remembered that division of a contract into many lots can increase the price of the overall contract, when contracting authorities otherwise could have gained the benefits of scale. It also drives transaction costs up, when contracting authorities and bidders have to write different tender materials. Consequently, the contracting authority should be able to determine when a division into lots makes economic sense and when such a division would lead to inefficiencies, increased costs and resource issues.

8. Abnormally low tenders

Amendment 127

It is positive to have clear conditions for identifying an abnormally low tender and the figure suggested takes into consideration that even lower figures are used in some countries. BUSINESSEUROPE therefore supports amendment 127 on abnormally low tenders which propose to lower the percentage deviation from 50% to 30%, which is a step in the right direction.

9. Subcontracting

Amendment 84, 94, 136, 137

BUSINESSEUROPE would like to underline that subcontracting is an essential way of allocating resources in an effective way. There is no reason to make it difficult to use subcontracting.

As the main contractor is always liable for fulfilling all its obligations towards the contracting unit, the contracting unit has no reason to ask the bidder to indicate the share of the contract it may intend to subcontract. Not only is the proposition impossible to apply in practice as the contracting authority is not able to define the price of the relevant services, supplies or works of the subcontractor, as it is a business secret of the main contractor. Another problem is that the subcontractor may have infringed the agreement with the main contractor and in those cases it may be highly problematic if the contracting authority has already made a payment to the subcontractor. This kind of proposition makes it hard to use subcontracting and as the



subcontractor is usually SMEs, this proposition makes it more difficult for SMEs to get public procurement contracts. Amendment 136 should be rejected.

Amendment 94 should be rejected as it provides for an exclusion of the main contractor in case of exclusion grounds fulfilled by the subcontractor. This is unnecessary as it would be sufficient to simply substitute the subcontractor.

Amendment 137 limits the sub-contracting levels to three successive levels. BUSINESSEUROPE opposes this amendment and asks for its rejection. It is in practice impossible to control the number of levels. If the main contractor has decided not to do some part of the process itself, but give it to the subcontractor, a provision in the public procurement regulation would probably not affect the company's decision. Instead the result would be that the company would not participate in the tendering.

10. Joint and several liability

Amendment 139

BUSINESSEUROPE is against establishing an obligatory EU joint and several liability scheme for minimum wages and other employment conditions in subcontracting. The rapporteur introduces a request for member states to provide for a system of joint and several liability down the sub-contracting chain. Companies should not have to assume responsibilities of public authorities to enforce the application of employment terms and conditions by other companies. It is the role of public authorities to enforce law, as they are the only body with the necessary powers to do so effectively. At the same time, such a system would impose considerable costs on companies. It would increase prices and decrease quality in public procurement. Amendment 139 should therefore be rejected.

11. Oversight mechanisms

Amendment 145

BUSINESSEUROPE aims for the setting-up of 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 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).

BUSINESSEUROPE therefore supports amendment 145 which ensures that Member States do not have to appoint a new body if an oversight body already exists.

* * *