BUSINESSEUROPE

20 April 2015

Public Procurement in Europe - *Functioning in practice*

KEY MESSAGES

1 Accounting for 19% of EU GDP, **public procurement is an important economic lever for growth and investment**. However, this significant economic opportunity is not being fully realised. This economic potential is being hampered by unnecessary, counterproductive barriers which should be removed.

2 Excessive circumvention of public procurement rules through reserved contracts, public-public (including in-house) exemptions and cross-subsidisation is **narrowing public procurement opportunities** for economic operators.

3 **National or even regional suppliers are being favoured** by contracting authorities in part, through overly prescriptive qualification tender requirements or furtherance of unrelated societal goals.

****See page 2 for a list of important cross-sector recommendations****

The single market increases transparency in public procurement markets and cross-border competition. This enhances supplier quality and promotes cost effective solutions to the benefit of contracting authorities. The use of public procurement in Europe has the ability to deliver European citizens high value for money. Accounting for 19% of EU GDP, **public procurement is also a strong lever for growth and investment.** It is clear that there is an untapped opportunity to deliver high quality public goods, works and services for European citizens, while streamlining public finances and raising investment opportunities for business. However, the potential positive effect of public procurement is not being fully utilised due to existing counterproductive barriers.

At a time of strained public finances, ensuring a system of **transparent, competitive and market open tendering** is paramount to achieve value for taxpayers' money. Promoting these principles at all levels of government across the EU will ensure efficient use of public procurement through the single market. It is often experienced that a drop down effect of EU legislation occurs, enabling public procurement framework to improve conditions below the EU threshold in domestic legislation or practice.

The public procurement framework should therefore ensure a stable and fair system. However, **suppliers still experience difficulties when competing for public tenders** due to national favouritism, lack of opportunities, ineffective administration or even corruption. This is limiting the benefits of the single market for business and delivering less advantageous solutions for citizens.

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Important cross-sector recommendations for EU institutions, Member States and Contracting Authorities

1. **An even and coordinated implementation of public procurement framework (classical, utilities and concessions Directives) across the single market is essential. Increased Member State – European Commission – economic operator dialogue is needed.**

2. **Full respect of a "direct link" with the subject-matter of the contract must exist in practice, where a contracting authority specifies performance or awards on the basis of societal criteria (environmental, social and innovative aspects). Interpretation of the "direct link" should not be excessively wide, so as to harm the primary goal of the public purchase.**

3. **Public-public (including "in-house") exemptions should not be excessively used due to the negative impact caused to competition on open markets, especially where those directly awarded public entities operate.**

4. **Knowledge and understanding of the field in which contracting authorities are procuring must be improved, especially when highly technical or specialist.**

5. **Contracting authorities should make full use of appropriate innovative solutions in order to trigger the delivery of modernised goods, works and services for citizens.**

6. **Qualification criteria and the use of labels should not be overly prescriptive, especially where it would result in narrowing the public procurement procedure to include only localised suppliers or restrict potential solutions.**

7. **The use of the "production process" or "life-cycle costing" as criteria should not prohibit opportunities for cross-border suppliers when contracting authorities either specify qualification criteria or performance conditions.**

8. **To ensure high quality solutions for taxpayers, time limits should be sufficient so that suppliers are not prohibited from competing or devising comprehensive solutions. Minimum deadlines must not be misunderstood as regular deadlines. Contracting authorities should determine time limits on the basis of tender complexity.**

9. **Good governance will ensure coherent application of the public procurement framework. National, regional and local contracting authorities should cooperate to ensure the efficient use of public funds.**

10. **The European Commission should cooperate with economic operators to analyse, review and publish information on the impact of implementation, to determine whether the principles of transparency, market openness and competitive tendering are respected in public procurement procedures across the single market.**

Public Procurement in Europe
- Functioning in practice

"*There is far too much localism, bureaucracy and red tape, sometimes even corruption, and all in all there is not enough integration, opportunities for EU businesses. I will work in close cooperation with Member States to modernise public procurement systems, focussing joint efforts on the most important systemic issues and most relevant sectors...*" - **Commissioner Bieńkowska**[1]

Introduction

The public procurement package, consisting of: the revised Classical Directive 2014/24/EU (goods, works and services), revised Utilities Directive 2014/25/EU (water, energy, transport and postal services) and a new Concessions Directive 2014/23/EU, came into force on 17 April 2014. The deadline for Member State implementation is 18 April 2016 (except with regard to the provisions for eProcurement).

BUSINESSEUROPE acknowledges the work undertaken to update public procurement framework; however, negotiations achieved both positive and negative results. The revision attempts to reduce existing administrative burdens for suppliers; for example, through introducing the principle of self-declaration and improving access for SMEs. It enhances the ability for contracting authorities to lead the way in purchasing to deliver European strategic goals. More flexible procedures are also supported to create a more efficient tendering process. Yet the impact of these intentions and more will be determined through member state implementation and contracting authority application. National legislation indirectly attempting to achieve the goals of the new Directives can also have an impact on the overall framework in practice. As a result, interpretation of provisions still requires intense discussion.

Due to the wider flexibility offered to contracting authorities through the new Directives, the importance of monitoring the functioning of current public procurement systems has never been more apparent. The current application and practice of public procurement provisions remains fragmented across the single market. In conclusion, the new Directives offer Member States the ability to update and improve current national systems, if implemented correctly. However, the tools to achieve this end could result in the delivery of poorer goods, works and services as a result of ineffective or even corrupt administration. This is the paradox currently presented to the public procurement framework in the single market.

In order to ensure transparent, competitive and market open tendering, it is essential to monitor functionality of current public procurement systems and the impact that reform will have. To aid EU institutions (specifically, the European Commission and European Parliament), contracting authorities and suppliers, BUSINESSEUROPE outlines below,

[1] Answers to EP questionnaire, Commissioner Bieńkowska (2014), p7

the current state of public procurement in the single market. The comments included in this paper are the result of consultation from our members across the EU/EEA.

Given the importance of public procurement as a lever for growth and investment, we acknowledge the approach taken by the Commission to monitor public procurement in the sectors of key economic importance. We remind the Commission that many examples used below similarly exist in other sectors.

Sectoral Approach

This report focuses on **four sectors** of public procurement that the Commission has indicated as involving the **largest market share of public spending in the single market.**

These sectors are:

- Health
- ICT
- Waste Management
- Land Development

The detailed information supplied below is not exclusively limited to each sector which the Commission indicates and in many cases takes place across a number of other sectors.

The most important cross-sector recommendations are mentioned above.

All references to Articles, Recitals and Annexes below are limited to Directive 2014/24/EU.

Health

Suppliers cooperate with contracting authorities in order to deliver their general responsibility to maintain public health. This sector delivers advanced and innovative high tech goods and services that administer medical treatment, but can also include organisational aspects (e.g. patient transport and laboratory refrigeration). In 2008, member states spent over €500 billion in public procurement markets to supply solutions to protect public health. However, only 9% of tenders were competitively published.[2]

The "light regime"

Suppliers who offer patient transport services across the single market are finding it difficult to compete with domestic companies above the EU threshold for tender. This is due to application of current provisions that protect not-for-profit domestic suppliers, while positively discriminating against cross-border suppliers. The principle of market openness is not being respected. As a result, competition in public procurement markets is being weakened. National providers assume a preferential not-for-profit status while operating *for-profit* on the market, therefore not differing from other private suppliers.

This is currently achievable through the practice of contracting authorities exempting not-for-profit providers of emergency services from full public procurement provisions. Expanding the use of reserved contracts also promotes a culture of local buying in this sector.

The new Directives could all too easily increase this current practice. Recital 28 explains that not-for-profit emergency services are exempt from new provisions. It also clarifies that patient transport services are covered by the "light regime". This means that contracting authorities do not have to follow regular procedures or adhere to full provisions of the Directives, except to be generally transparent and treat bidders "equally". Article 77 also empowers contracting authorities to use reserved contracts for certain health services. This could exacerbate the current situation in practice.

BUSINESSEUROPE urges monitoring of use of the "light regime" and reserved contracts by contracting authorities, especially in health services which are increasingly being offered cross-border. Contracting authorities should be reminded that Article 77 should remain voluntary and not mandatory. Restrictions linked to this Article should be enforced in order to prevent uncompetitive tendering which risks delivering less advantageous solutions in health services.

Superfluous criteria

Suppliers who offer a broad range of healthcare solutions across the single market are finding it difficult to compete with domestic companies above the EU threshold when

[2] Annual Public Procurement Implementation Review, European Commission (2012), p30

tendering. This is due to contracting authorities overly prescribing specifications that demand solutions from only localised operators. These restrictive conditions block new suppliers from entering markets where local entities already exist.

In practice, this takes place through contracting authorities specifying that tenderers should complete a number of prerequisite actions in order to compete. In the health sector, such examples include requiring specific local knowledge or documentation in order to take part in a tender.

Particularly, specifications often stipulate that in order for a supplier to compete, they must have trained staff, inventory and infrastructure already operational in the market of interest. As a result, cross-border tendering is being blocked as the risk involved in financing such investment in advance of award is too great. In practice, it is regular for cross-border healthcare service providers to employ a substantial proportion of staff from the local area; this is not possible until the contract is secured.

In other cases, contracting authorities specify that healthcare service suppliers must obtain regional or local certifications in order to compete in tenders. This is a direct example of narrowing competition to only localised providers that are also often public not-for-profit providers (see above). At the same time, obtaining certification itself can require all health services provided by the supplier to be dedicated exclusively to that region or local area. This does not reflect the current state of the industry. Many cross-border suppliers in the health sector compete across a number of different Member States, let alone regions, as a result they are restricted by such exclusivity requirements.

The new Directives could exacerbate this current situation. Specifications stipulated under Article 42 may take into account the production process (Recital 74 and 99) or the life cycle of the goods, works or service offered. As demonstrated (below), this could distort competition and lead to increased localism.

BUSINESSEUROPE urges monitoring the use of overly prescriptive criteria in specifications that have the tendency to increase localism; especially where the production process or life cycle costing is viewed (also relevant for performance conditions). Under Article 42, these characteristics may only be used provided that there is a link with the subject matter of the contract that is proportionate to its value and objective. This grants a broad responsibility to contracting authorities. It is essential that competition is not hampered in this sector by local suppliers being inadvertently favoured.

Incorrect use of CPV codes

The Common Procurement Vocabulary (CPV codes) is a standard reference used by contracting authorities and suppliers as a means to identify a specific set of tenders. CPV codes are established in Regulation 213/2008 to achieve market open and transparent public procurement.

Suppliers regularly use CPV codes to locate tenders on the TED database. Many keep an operational list of those they regularly compete for. Yet in practice, CPV codes are

inadequately used. Insufficient translations of the code text or insufficient knowledge of the content of the CPV codes by contracting authorities are making it difficult for suppliers to obtain tender knowledge.

Health sector suppliers regularly discover that incorrect CPV codes are being used for tenders. This is limiting competition with local suppliers who do not have to use CPV codes in order gain information about the tender.

BUSINESSEUROPE urges monitoring of the use of Article 74 and annex XIV which lists CPV codes for particular procurement regimes. The use of CPV codes should not limit competition or transparency of public procurement. Effective use will enable suppliers to indicate relevant cross-border tenders and therefore enhance participation.

ICT

With the explosion of technology, suppliers have increasingly offered solutions in ICT to solve numerous complex obstacles for contracting authorities. In areas, such as aerospace, defence and utilities (to name a few), public authorities naturally have more of a vested interest in the manner in which the solution is prepared or carried out. This element of upstream "control" should exist only where ICT solutions are purchased in sensitive areas. Interference should be limited where the contracting authority has less skill and experience in that technical area than the supplier. It is also important to note that this sector can involve more basic public procurement solutions – such as delivery of ICT office equipment in public sector working spaces.

Time limits

Businesses that offer complex goods and services across the single market find it hard to compete in tenders that require highly technical solutions, because of the short time limits being set in which businesses have to respond. Sufficient time is needed in order to present highly complex ICT solutions for technical tenders. For example, delivering a network for air traffic controllers that will coordinate communication across Europe is not just about delivering technology, but devising an innovative solution that will remain interoperable over a period of time.

When competing for such complex contracts, information must be clearly and comprehensively expressed through tender documentation. The ICT sector regularly uses a breadth of technical language to fulfil: technical requirements, functional requirements, implementation requirements and more. Currently, suppliers delivering ICT based solutions find it difficult to complete a comprehensive tender on time with such technical explanations. This is mainly because there is insufficient time to gain a clear understanding between the supplier and contracting authority. This is risking adoption of inadequate technical solutions for society instead of the best technical solution that could have been offered. Also, the ex-post effect of delivering inadequate technical solutions puts a strain on public finances.

Further to this, suppliers experience that during the pre-bidding stage; information has already been disclosed or discussed with a preferred bidder whether informally or through closed information notices, bidder days or webinars. In effect, discriminatory communication has begun before the official procedure has been declared. These practices, coupled with short time limits for tender preparation are closing opportunities for a number of ICT suppliers to compete in complex tenders. It is vital that a level playing field is maintained in all aspects of the process.

The new Directives could enhance this practice. Article 27 permits significant reductions in time limits to the open procedure (35 days). The procedure can be shortened further to 15 days when a contract notice has been sent in advance. Simplification in this manner grants contracting authorities the ability to apply inappropriate pressure on ICT suppliers when competing in complex tenders. As explained above, ICT suppliers already find it difficult to adequately compete in the time available. Article 47 will make it noticeably harder to prolong time limits and it remains unclear who will determine when this basis can arise. BUSINESSEUROPE urges

monitoring of implementation and current use by contracting authorities of time limit setting in the deliverance of complex tenders.

Societal criteria

In order to compete successfully, suppliers respect the legal framework of public procurement, which includes acting as a reliable supplier through adhering to overall social and environmental legal requirements. Not only important and thoroughly respected, overarching legal requirements often serve as important elements of technical specifications or award criteria for the tender. The current legal framework provides the opportunity for contracting authorities to include societal criteria in public procurement. For example, to promote “green ICT procurement” for office equipment, seeking to limit energy functioning, noise emission, use of mercury and disassembly waste. Yet conditions often go beyond primary goals of the tender and lead to legal uncertainty for suppliers when determining whether they could guarantee such obligations.

Additional burdens for suppliers willing to compete in cross-border tenders are being endured through the legally uncertain use of societal criteria, which often stretches beyond the primary purpose of the procurement and national legal framework itself. This arises through tender specifications or at the award stage. As a result, localism is favoured to the detriment of the public procurement which delivers uncompetitive and low quality goods, works or services.

In order to ensure legal certainty in procedures and maximise opportunities for cross-border procurement, contracting authorities should focus on how to include any societal aspects in tenders correctly, without putting principles of non-discrimination and transparency at risk. Ensuring a direct link with the subject matter of the contract when including societal criteria would achieve this goal. However, the new Directives make it more unpredictable for contracting authorities to achieve.

As outlined in Recital 74 and explained in detail at Annex VII, technical specifications will have the ability to take the production process into account when contracting authorities specify what goods, works or services they require. This ability will enable contracting authorities to determine all factors of the production process, even when it does not primarily affect the subject of the tender. Using elements of the production process that are irrelevant to the subject of the contract will limit solutions and further close opportunities for cross-border procurement. Also, Recital 99 specifically enables contracting authorities to consider the production process when awarding in order to further social criteria. This could consider, for example, the specific working conditions of employees concerned that extend beyond current legal requirements.

Life cycle costing will also play a prominent role in the ICT sector. Article 68 promotes the internal and external approach for contracting authorities to determine all costs of the goods, works or services of the contract. Promoting determination of internal life cycle costs, such as production and transport when awarding for tender, could hinder cross-border procurement, leading to an unintended preference of local suppliers.

Although the new Directives permit a wider use of societal criteria in public procurement procedures, contracting authorities should be aware of the fact that a far reaching use of such criteria will critically impact the objective of the tender and limit opportunities for suppliers to compete cross-border.

BUSINESSEUROPE urges monitoring of implementation of current and future use by contracting authorities of societal criteria in specifications or at award stage. As an example of current good practice, industry associations in the ICT sector form partnerships with national ministries to create standard guidelines that seek to enhance social and environmental goals, while promoting market open procedures.

ICT Standardisation

Businesses that invest a high amount of resources in developing and delivering solutions attempt over time to "lock-in" consumers to ensure a high return on investment. Although this natural commercial practice cannot directly be alleviated by the European institutions, it sets the background behind the impact that undeveloped standardisation has on ICT procurement. In practice, it is often the case that delivery of ICT solutions in governmental establishments is predominantly won by a single supplier over an extended period of time. A lack of standardisation in complex ICT products is blocking some suppliers from adequately competing in certain tenders as interoperability issues result in a single supplier being used. Use of tried and tested commercial ICT assets that meet interoperability and open access data requirements should be deployed. This would avoid "ad hoc" development from scratch and put a focus on the innovative part of the solution.

BUSINESSEUROPE supports the role of voluntary standardisation in ICT where market relevance exists. The Commission should support Recital 56 in order to enhance interoperability between differing technical formats or processes to improve tender competition in this sector.

Exclusion clauses

Data protection is of great importance for contracting authorities. Suppliers of ICT solutions find that "no-spy" clauses are increasingly prescribed by contracting authorities. "No-spy" clauses attempt to ensure that data used in the implementation of the offered solution remains fully protected from any external risk. In practice, many suppliers are excluded from participation in tenders as they cannot guarantee zero risk in the sphere of their company.

These exclusion clauses are being justified on the basis of protecting data security in services offered by contracting authorities. As a result, legal uncertainty exists in public procurement procedures. After calculating costs, most suppliers do not take part due to the vast expenditure required to ensure full guarantees. At the risk of delivering inefficient solutions and distorting competition due to qualitative exclusions, BUSINESSEUROPE would remind the Commission that only exclusion grounds cited

in Article 57 should be used by contracting authorities. Contracting authorities should arrange their services without creating legal uncertainty for suppliers.

New advantages for the ICT sector

Article 31 introduces the innovation partnership as a new procurement procedure. This procedure supports less prescriptive solutions allowing suppliers to be freely innovative when providing solutions. This is a positive measure that will be put to use by the ICT sector as it will permit many suppliers being involved at separate stages. This will deliver high quality solutions as specific expertise can be utilised for each step of the process. In order to avoid distortion of competition, considerable purchaser diligence will be required regarding the qualification of an “innovative” good or service. For a solution to qualify as being included in this procedure, “innovation” should mean that it is not currently possible to purchase on the market.

Article 14 exempts research and development from the directive which will encourage pre-commercial procurement. This is welcomed by the ICT sector, provided the overall conditions of competitiveness, transparency and market openness are adhered to. Enhancing the use of pre-commercial procurement may contribute towards developing technologies that positively impact society.

Waste Management

The waste management sector encompasses many goods, works and services from the organisational (collection and sorting) to the practical (treatment, disposal and deployment of bins, vehicles and chemicals). In recent years, the tendency for contracting authorities to outsource the supply of such goods, works and services has decreased. As a result, the waste management sector has automatically grown at a local level. In practice, two competing systems exist, the public service (which presides over household and some commercial waste) and the private market (which operates over the remaining commercial waste).

Public-public (including in-house) exemptions and exclusive rights

Private suppliers offering waste management solutions to industrial clients, and/or municipal clients through public procurement, find it difficult to compete on equal terms with publicly owned operators. The structural risk of unfair competition between private and public operators lies in the many exemptions that contracting authorities can use in order to bypass a public procurement or concession procedure. Consequently, entities being directly granted a contract for the management of household waste can also compete on open household or industrial waste management markets.

Private suppliers are being excluded from competing in contracts where they could deliver more effective, affordable and efficient solutions. In practice, private suppliers have found that public entities can bypass public procurement provisions through public-public[3], in-house[4] exemptions or exclusive rights. The legality of bypassing rules in this manner is questionable and often leads to court procedures at the expense of taxpayers and economic operators. The extended codification of these exemptions in the new package will not help reduce circumvention of public procurement rules.

Publicly owned waste operators that are directly granted management of household waste often benefit from unfair competitive advantages. Not only is the management of household waste directly granted, but those operators are also permitted to operate on open household waste or industrial waste markets. There is also a tendency of cross-subsidisation in publicly owned companies active in different sectors. In addition, public companies do not fall under usual insolvency or bankruptcy procedures applicable to fully private suppliers. This improves their financial position to reduce charges which would normally feature in their budgets, such as VAT.

The new Directives inherently bear the risk of enhancing this current practice. Article 12 explicitly enhances the ability for contracting authorities to utilise public-public (including in-house) exemptions already outlined in European case law. In fact, legislation now goes beyond this: the activities that the public company must carry out for the contracting authority has been set at 80%. Public companies can also receive up to 20% of their activities from open markets. These new provisions bear a significant risk to an increased use of public-public exemptions. Excessive use will damage

[3] Case C-15/13 *Technische Universität Hamburg-Harburg,Hochschul-Informations-System GmbH v Datenlotsen Informationssysteme GmbH* EU:C:2014:303, para 25
[4] *Case C-107/98 Teckal Srl v Comune di Viano & Azienda Gas EU:C:1999:562, para 50*

market openness and transparency as well as competitiveness of public procurement and concessions across the single market. This could impact the affordability of waste management services. Moreover, controlling the correct application of these exemptions will be challenging and costly both for public authorities and economic operators.

BUSINESSEUROPE urges monitoring of implementation and current use of public-public (including in-house) exemptions and exclusive rights by contracting authorities, particularly when awarding household waste management contracts. It is important to monitor the effect that municipal waste management services have when participating in private markets.

BUSINESSEUROPE also reminds Member States and contracting authorities that the implementation and use of these exemptions are optional and not obligatory. For improved legal certainty, restrictive use of these exemptions should be favoured. Similar services being provided by fully private suppliers do not enjoy the same benefits. Yet being fully exposed to competition regularly ensures that private suppliers offer higher quality services at a lower price when compared to their municipal counterparts – this should be harnessed by contracting authorities.

Labelling

To achieve additional public procurement goals, such as green procurement (but not limited thereto), labelling is used to further energy and environmental aspects in public procurement procedures. Contracting authorities are enabled, but not required, to use labels in public procurement procedures. The limit is drawn at illegally favouring or eliminating certain suppliers due to labelling.

In practice, environmental and social labels are regularly used to award contracts on the basis of fulfilling the label criteria alone. This is not necessarily the best solution in terms of price or quality. As a result, suppliers are being automatically directed to operate in a certain way to compete in a tender. These specifications often go beyond legal requirements.

It is often experienced that many labels used to further environmental aspects conflict with one another. This is making it difficult for suppliers to comply with specifications of the tender. When suppliers aim to fulfil these requirements they are burdened with uncertainty and bureaucracy. Commonly known labels are used by contracting authorities that do not necessarily relate to the subject matter at hand (in some cases as many labelling standards as possible are used to cover all subject bases).

Article 43 will continue the practice of labelling schemes in public procurement procedures when specifying or awarding a public procurement contract. It is important that contracting authorities are as concrete as possible when determining what is being procured, either as concrete specifications or clear functional requirements (leaving room for well adapted solutions). Overall, lists of labels cannot replace a clear description of what the public authority wants to achieve. Specialised training in sectors

that are regularly used by individual contracting authorities could improve the current situation and reduce the inappropriate use of labels.

BUSINESSEUROPE urges monitoring of implementation and current use by contracting authorities of labelling schemes in public procurement and would support specialised training for contracting authorities, especially in the case of tendering for environmental and social characteristics.

New advantages for the Waste Management sector

Article 67 strengthens the ability for contracting authorities to award upon the most economically advantageous tender (MEAT). MEAT will take economic criteria and additional criteria into account, for example: resource efficiency and environmentally sound treatment of household waste. This will in principle contribute to the delivery of efficient solutions for EU citizens whilst promoting competitiveness among tenderers.

Land Development

Public procurement in land development can involve the process in which suppliers compete to be approved to develop works on land. Public procurement provisions might eventually become relevant where a public entity approves the sale of land which also includes services of land development or where a public entity concludes another contract including land development services with one operator. In a considerable number of cases, other operators may not be able to realise the decision of the public entity to offer an additional requirement respectively to conclude such a contract. In practice, these third party operators may equally be interested and capable of performing such services.

Cases of land development primarily take place at local level, but may also occur at regional or national level. Land development is not to be confused with the procurement of public works itself, such as the construction of a school, but may under certain conditions concern the decision to transfer ownership of the land that gives rise to a works contract.

Giving rise to a works contract

The line between a land development contract and public works contract can be vague. In practice relevant contracts or wider contractual relations are often of a mixed nature. The sale of land as well as land development is often included. One of the most important practical reasons for such contracts is a lack of public finances. As a result, communes accept offers of certain private operators to run public construction planning and land development. In return of providing such planning services on their own costs, land or other incentives are transferred to private operators.

As a general rule, granting the development of land in the public interest does not itself create a public works contract.[5] However, public procurement rules will apply where a contracting authority is entrusted by another to develop land and as a result awards a works contract. It is important that communal planning remains transparent. It is currently experienced that land is being granted between contracting authorities (originally outside of public procurement rules), which gives rise to a public works contract. Contracting authorities that receive land and are immediately economically benefitted will give rise to a works contract. However, the transparency of this practice is limited. Many developers determine the structures on the land before it is transferred and contracts are already drawn up (outside of public procurement rules). As a result, other prospective operators and land owners in the planning area miss information due to a lack of ex-ante transparency.

A sale of land could also give rise to a works contract where a contracting authority defines the type of work or specifies requirements to be carried out on the land in unity with the transfer of ownership. In these cases the process of competitive, transparent and market open public procurement should take place.

[5] *Case C -451/08 Helmut Müller GmbH v Bundesanstalt für Immobilienaufgaben EU:C:2010:168 para 57-58*

To a certain extent Article 2(1)(6) attempts to codify previous jurisprudence on when a land development contract gives rise to a works contract. In order to ensure a coherent framework, BUSINESSEUROPE would especially urge monitoring of the public-public transfer of land which is immediately developed through a works contract, or where a decisive influence is exercised over the type or design of land. If the development of land gives rise to a works contract, transparency should have been ensured in the primary transfer.

Beyond the scope of application of the new Directives and their specific provisions on transparency, the basic transparency requirements of EU primary law will also have to be drawn into consideration in this area.

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