

**Committee of the Regions****ECOS-V-013****90th Plenary Session****11-12 May 2011**

OPINION
of the
Committee of the Regions
on the
MODERNISATION OF EU PUBLIC PROCUREMENT POLICY:
TOWARDS A MORE EFFICIENT EUROPEAN PROCUREMENT
MARKET

THE COMMITTEE OF THE REGIONS

- The Committee welcomes the Commission's view of SMEs as the backbone of the EU economy and believes that ready access for SMEs to procurement procedures is critically important to maintaining employment. It is therefore important that the obstacles faced by SMEs in bidding for contracts be removed as far as possible.
- The Committee would like the Commission to promote the option at national level for bidders to apply for a "procurement passport" (preferably in the form of an electronic registration system), whose content and use would be standardised. Such a passport would demonstrate that an operator has the declarations and documentation that are often requested by contracting authorities during procurement. The fact that they only have to apply once for the passport means that operators do not have to keep presenting the same declarations and documents. This saves considerable time and resources when an operator frequently takes part in procurement procedures.
- The Committee attaches great importance to the possibility of realising through public procurement objectives relating to innovation, social inclusion, sustainability and the environment. Achievement of these objectives is constrained by the criterion that requirements and requests addressed to tenderers must be relevant to the subject matter of the call for tender. Relevance to the subject matter of the call for tender should therefore not be required.

Rapporteur

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Reference document

Green Paper from the Commission on the modernisation of EU public procurement policy: towards a more efficient European Procurement Market
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I. COMMENTS ON THE PROPOSAL

1. The Committee welcomes the publication of the European Commission's Green Paper on the modernisation of EU public procurement policy: towards a more efficient European Procurement Market, which takes on board the views of local and regional authorities and other contracting authorities with regard to cost-saving, modernisation, and clarification and simplification of the public procurement directives.
2. The Committee believes that Directive 2004/18/EC (hereinafter "the Directive") is too detailed in certain areas and recommends that the Commission simplify this Directive as far as possible.
3. On the other hand, it also recommends that the Directive be clarified where necessary. Key aspects of the Directive have been interpreted by the Court of Justice of the European Union. The Committee believes it would be very useful to codify key elements of case-law, without further tightening them up, and insists that there should be no mandatory procurement or transparency obligation for B-services, subsidies, land transactions and contracts below the thresholds if there is no cross-border relevance.
4. The Committee believes it is important to promote professionalism among both contracting authorities and market operators in order to optimise the functioning of the internal market. It recommends that the Commission set up (or have set up) national knowledge centres and an overarching European knowledge centre. These centres should be set up under the already existing national frameworks. Such centres could also help contracting authorities to flesh out the objectives relating to innovation, social procurement, sustainability and the environment. The use of these centres should not be mandatory. Local authorities need to be free to choose in this matter.

II. RECOMMENDATIONS

Small and medium-sized enterprises (SMEs)

5. The Committee welcomes the Commission's view of SMEs as the backbone of the EU economy and believes that ready access for SMEs to procurement procedures is critically important to maintaining employment. It is therefore important that the obstacles faced by SMEs in bidding for contracts be removed as far as possible.
6. The costs for companies of taking part in public procurement procedures must be minimised. The Committee therefore endorses the Commission's proposal to make do where feasible with self-declarations and to only request original documents from the short-listed candidates or the successful tenderer.
7. The Committee would like the Commission to promote the option at national level for bidders to apply for a "procurement passport" (preferably in the form of an electronic registration system), whose content and use would be standardised. Such a passport would demonstrate

that an operator has the declarations and documentation that are often requested by contracting authorities during procurement. The fact that they only have to apply once for the passport means that operators do not have to keep presenting the same declarations and documents. This saves considerable time and resources when an operator frequently takes part in procurement procedures. Such a procurement passport would be valid for a given period - since the relevant certificates have limited validity - enhancing its credibility. Such a system already exists in some places at local level, and experience with it has been positive. In view of the nature of the procurement passport, it must not entail high costs.

8. It is not a good idea for contracts to be grouped unnecessarily between contracting authorities, or for contracts of a different nature to be grouped, since larger contracts could carry more onerous criteria. The Committee consequently suggests that the European Commission increases the awareness of this problem for SMEs and the importance of lots be emphasised in the explanatory memorandum or an appropriate policy document.
9. Increased scope for using the negotiating procedure benefits SMEs. This procedure provides both contracting authorities and bidders with a degree of flexibility. The focus of SMEs is, after all, on knowledge of their product or service and not on the tender process. The Committee calls on the Commission to allow the negotiating procedure to be used as a standard procedure. This should be regulated in the same way as in Directive 2004/17/EC (Utilities Directive), in which the contracting authorities choose the form of procurement that, in their opinion, is the most appropriate for the procurement procedure in question. The Committee recommends that all parallel procedures are simplified.
10. The current restricted procedure can be unfavourable for SMEs. During the first phase (or selection phase) of a restricted procedure it is only possible at the moment to set out requirements or requests relevant to the operator. Selection requests generally consist of an enquiry about an operator's track record and experience in project delivery. Larger operators have usually carried out more projects than SMEs, which means that they cite more relevant reference projects and so have a greater chance of winning the bid. The Committee therefore recommends also allowing assessment of (certain) award criteria during the first round of the restricted procedure.

Flexibility

11. The Committee would like more flexibility to be permitted in procurement procedures.
12. Public procurement law is complex and tenderers have limited possibilities for rectifying omissions in their bids. This is partly a result of (national) case law and decisions made by the contracting authority in the relevant tender documents. The Committee would therefore recommend that the directive or the explanatory memorandum elaborate on what omissions may be rectified by bidders and what additions or adjustments are allowed.
13. A contracting authority may need to amend or adapt its contract during the procurement procedure in response to questions from bidders. At the moment, a substantial amendment to

the contract entails stopping and then re-launching the procurement process. The Committee recommends that a simple mechanism be introduced for contracting authorities to change their contract, such as an official corrigendum with a short extension of the deadline for submission of tenders.

14. During execution of the contract it may transpire that the contracting authority has overlooked a point that it would like to amend, but that cannot be considered unforeseeable and necessary. The Committee thinks it would make sense to relax the existing provision about adjustments. One possibility could be to allow additional work representing a given percentage of the contract to be assigned to the original contractor as an adjustment, without the need for compliance with Article 31 of the Directive.
15. The Committee urges the Commission to include much more flexible provisions for framework agreements in the new Directive. Framework agreements should be regulated in the same way as in the Utilities Directive. Contract terms, and the provision that two suppliers are required in a framework agreement only in exceptional cases, are unnecessary regulations and should be deleted.

Encouraging innovation, social procurement, sustainability and environmental protection through public procurement

16. The Committee welcomes the Commission's concern in the Green Paper to realise objectives relating to environmental protection, promoting social inclusion, improving accessibility criteria for people with disabilities and strengthening innovation.
17. The Committee stresses that the success of the EU 2020 Strategy depends crucially on how well the local and regional level manages to implement the new innovative solutions set as goals in the flagship initiatives. New innovative practices do not come about by themselves. The modernisation of EU procurement rules must increase the strategic agility and activities of municipalities and other public operators as creators of new solutions.
18. The Committee stresses that the modernisation of procurement rules must enhance the role of the public sector in promoting innovations. Conditions must be created that also allow for big development projects amounting to several million euros which address complex social challenges and which take the form of risk-taking consortia. It must be possible for a municipality or some other public operator, at its own expense, to create such groupings pooling the necessary competences from companies and other organisations. Normal competitive tendering is difficult and even impossible. Notwithstanding tendering rules, when something entirely new is created it must be possible to bring together, through negotiation, different competences and, in particular, to open the door to participation by small companies.
19. The Committee attaches great importance to the possibility of realising through public procurement objectives relating to innovation, social inclusion, sustainability and the environment. Achievement of these objectives is constrained by the criterion that

requirements and requests addressed to tenderers must be relevant to the subject matter of the call for tender. Relevance to the subject matter of the call for tender should therefore not be required. Contracting authorities could then decide themselves whether to drop the link with the subject matter for these factors and what criteria they apply, since circumstances vary widely between Member States. The Committee recommends that this approach be adopted in the new directive.

20. Agrees with the European Commission that public authorities can make an important contribution to the achievement of the Europe2020 strategic goals, by using their purchasing power to procure goods and services with higher "societal value", for example in terms of fostering innovation, or respecting the environment and fighting climate change, or reducing energy consumption, or improving employment, public health and social conditions, or promoting equality while improving inclusion of disadvantaged groups. A balance has to be struck between the above goals, objectivity and non discrimination, aiming at fair competition, enabling fair access for SMEs. In addition, local and regional authorities must be able to apply higher criteria than EU minimum rules, without jeopardising free competition. It calls nevertheless on the Commission to grant a certain amount of latitude to contracting authorities in the new public procurement Directive. This could be achieved by on the one hand, requiring public authorities to promote certain services of "societal value" in their public procurement, but on the other hand giving them the latitude to choose one or more from a list of options.
21. The Committee proposes to the Commission to increase awareness and to develop new ways to promote recruitment of long-term unemployed people, disabled people and trainees at EU level. Thus contracting authorities can include, if they so wish, an award criterion or specification in their call for tender to the effect that the operator who wins the contract should earmark a given percentage of the value of the contract for recruitment of these target groups, when the contract is executed or elsewhere in their undertaking. Such requirements must remain voluntary at EU level and local and regional authorities must maintain maximum flexibility to specify the different policy goals they wish to achieve in a procurement, whilst focusing on achieving best value.
22. The Committee considers the criterion of the most economically advantageous tender to be a very effective instrument for meeting objectives relating to innovation, social procurement, sustainability and the environment. In response to the Commission's question, the Committee does not think that the "lowest price" criterion should be eliminated for certain categories. The above-mentioned objectives can also be relevant to the "lowest price" criterion, for instance in the form of minimum requirements. Contracting authorities must be able to make a choice here, depending on the contract. In addition, they must often include a cost-cutting target, which has to be taken into account when deciding on the award criterion.
23. It is not always possible for contracting authorities to verify compliance with requirements over the supply chain. For instance, it is difficult to check whether a production process taking place in a non-EU country involves child labour. The Committee urges the Commission to pay attention to this issue.

New procedures

24. The Committee recommends that a number of new procedures be included in the new directive, namely a "marketplace" for A-services, a public choice model and a procedure for tenders characterised by price volatility.
25. Marketplace for A-services. In some Member States, the system for B-services currently works as follows: no general framework agreement is concluded, but each individual call for tender is published in a (digital) "marketplace". Thus there are a large number of separate calls for tender in this marketplace, and interested parties can respond to a given tender. Bids are ranked for each tender on the basis of the price quoted. The bids of the five lowest-cost tenderers are considered and assessed on quality criteria. The contract is awarded to the tenderer submitting the most economically advantageous bid among these five. The advantage of such a marketplace is that it improves the chances of candidates who are self-employed without employees. It is proposed that such a system also be developed for A-services.
26. Public choice model. The public choice model is a procedure that offers a solution for tenders where it is important for a citizen to be able to choose a specific operator. This is the case, for instance, with tenders for personal services. Under this system, all bidders that meet the quality requirements and agree to a (maximum) price set by the contracting authority are awarded a framework contract. Citizens then choose which operator they would like to deliver the personal service.
27. Volatile price procedure. Some markets, energy for instance, are characterised by volatile prices. With calls for tender in these markets it is preferable for the deadline for appeals to be as short as possible, since bids are based on the market price for energy on the day the tender is submitted. It is proposed that the new directive should introduce a special appeals deadline for such markets.

Changes in thresholds

28. The Committee welcomes the Commission's review of the thresholds and recommends determining the thresholds at which there is interest from another Member State. This would mean thresholds for supplies and services set at levels which are significantly higher than those currently used. If there is unlikely to be such interest, the contracting authorities can be spared the costs of an EU procurement procedure. In the Committee's view, the need for significantly higher thresholds must be in any re-negotiation of the WTO Agreement on Public Procurement (GPA).

Principle of transparency

29. General: It is not always clear whether a cross-border interest exists. In many cases this requires a market assessment, which entails extra costs for contracting authorities. It would be

a good idea to clarify what is meant by "cross-border" so as to give contracting authorities greater certainty. The Committee therefore recommends that the Commission draw up a list of subject matters or markets for which the cross-border factor is relevant. It should also be established whether the whole Member State is affected or just the cross-border areas.

30. In answer to the Commission's question, the Committee believes that the contracting authorities should not be obliged to draw up tender specifications for high-value contracts in a second language and/or to accept tenders in foreign languages. This would substantially increase the administrative burden and would probably do very little effect to encourage more tenders from abroad.
31. Contracts below the EU thresholds: The Committee believes that no contracts below the EU thresholds should fall into the "cross-border" category, since current practice has shown that calls for tender above the EU threshold only involve foreign candidates in a very limited number of cases. The Committee suggests that the Commission do an investigation to establish the actual figures. It could be determined on this basis whether it is appropriate at all to classify contracts below the EU thresholds as "cross-border".
32. Excluded contracts: It is not clear to what extent the transparency principle is relevant for excluded contracts. With some excluded contracts, for example concession contracts for services, this is more obviously a factor, whereas with others, such as employment contracts and land transactions, the transparency principle should not apply. The Committee asks the Commission to clarify which excluded contracts are subject to the transparency principle.
33. B-services: The Committee recommends that B services entered on the B list after the review of the A- and B-services list should not be subject to the transparency principle, and asks the Commission to provide for this in the new directive.

Reclassification of A and B services

34. The Committee is keen that the current classification of A- and B-service categories should be maintained. The B-list should be retained for subject matters where there is no cross-border competition or which have a personal component that makes EU public procurement undesirable, for example for healthcare and social services. In such cases, it is crucial for the contracting party and the user/patient to have trust in the party responsible for executing the contract. These are often subjective criteria that are not germane to a public procurement procedure. The Committee urges the Commission to move A-services that are not suitable for cross-border trade into the list of B-services. The Committee also calls on the Commission to develop tools that make it easier for local and regional authorities to clarify whether specific contract tasks are covered by the annex for A- or B-services.
35. The Committee urges the Commission to evaluate the CPV reference lists, as these and the associated services raise questions and are difficult to interpret. The Committee calls for a clear explanation or for a guide to the CPV references.

Exclusions

36. The Committee recommends reviewing the provisions on excluded contracts and considering both clarifying and adding to these clauses. It is unclear, for instance, what financial services are excluded under Article 16(d) and when the financial service is an A-service (category 6).
37. The Committee calls for an exclusion in the new directive for contracts between contracting authorities. Given authorities' obligation to handle taxes paid by the general public in a responsible manner, they should be able to draw on each others' expertise and skills, against payment of costs incurred, without a public procurement requirement arising. Such an exclusion would represent a major improvement to the coherence of the EU legal framework and would be the solution to one of the most pressing procurement problems currently facing local and regional authorities.
38. Contracting authorities experience serious problems with procurement of ICT systems. The ICT environment of a contracting authority consists of different interconnected systems. This means that additional works such as extra licences and suitable new modules cannot always be tendered for without serious inconvenience, both technical and cost-related. The Committee therefore recommends that the Commission consider whether the exclusion options here could be broadened and/or a new procedure introduced for ICT systems in the new directive whereby competition is not between producers but between suppliers, with a specific brand being requested.
39. The Committee agrees with the Commission that innovation must be encouraged. Public procurement law means that contracting authorities cannot easily purchase new and innovative products. The Committee suggests that the Commission should investigate the possibilities for an exemption, for example with an exemption which could apply for two years from the date when a recognised patent has been issued for the invention.

Past performance

40. The Committee believes that contracting authorities should have the opportunity to benefit from previous experience with a tenderer in future calls for tender. Negative experiences, where the end result was unsatisfactory, should also be included. At the moment, a party that is (intentionally) non-performing can in principle take part later in a new procedure that in certain cases only has to be organised because the incumbent has dropped out. This can often be undesirable because of its disruptive impact on relations, trust and services delivered. The Committee would advocate a system that allows experience with a given operator to be taken into account. Obviously there must be a means of safeguarding objectivity. This can be done using an official evaluation report for previous contracts and introducing a time limit for exclusion.

Definition of mandatory public procurement

41. The Committee urges that the scope of the new directive be limited to contracting authorities' own purchasing activities. This position is supported by the case law of the EU Court of Justice, which has ruled that the scope of the Directive is determined by the presence of immediate economic benefit. General agreements, for instance on local development and granting of subsidies, should fall outside this definition. Simply setting requirements, for example for a works contract, does not create any purchase or public procurement obligation. When exercising their public duties, contracting services must be free to include requirements so as to provide guidance. The Committee calls for the definition of mandatory public procurement to be clarified through codification of the case law in this area.
42. Contracting authorities have problems with the definition of public works contracts. The Committee believes that questions are raised by the criterion "the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority", and calls for this definition to be adapted and simplified.

Bodies governed by public law

43. The Committee asks for the position of small bodies under public law to be given consideration. Mandatory procurement is disproportionately burdensome for these small bodies.
44. The definition of a body governed by public law must be emended. It is onerous for operators to establish whether they are dealing with a body governed by public law, since the definition comprises financial and surveillance criteria that cannot be verified by an outside body. Moreover, the EU Court of Justice has interpreted the criteria for bodies governed by public law. The Committee recommends that the Commission frame a new definition of the concept.

Brussels, 11 May 2011

The President
of the Committee of the Regions

Mercedes Bresso

The Secretary-General
of the Committee of the Regions

Gerhard Stahl

III. PROCEDURE

Title	Modernisation of EU public procurement policy: towards a more efficient European Procurement Market
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Previous Committee opinions	Opinion on Mobilising private and public investment for recovery and long term structural change: developing Public Private Partnerships (CdR 21/2010 fin) Opinion on Improving the effectiveness of review procedures concerning the award of public contracts (CdR 182/2006 fin) Opinion on Public-Private Partnerships and Community Law on Public Procurement and Concessions (CdR 41/2006 fin) Opinion on the Green Paper on public-private partnerships and Community law on public contracts and concessions (CdR 239/2004 fin)