



**European Committee
of the Regions**

ECON-VI/030

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OPINION

Public procurement package

THE EUROPEAN COMMITTEE OF THE REGIONS

- Calls on the Commission to carry out a thorough assessment, within three years of transposition in all Member States, of how EU rules on public procurement have been transposed into national legislation and how they are being implemented, recommending a multilevel approach; considers that this assessment of the implementation of these rules should emphasise both the way in which they are implemented at local and regional level, in light of the weight of subnational authorities in the field of public procurement, which represent key partners in the implementation phase, and the extent to which the new standards have simplified or complicated regulation in this area, transposing the directives properly, facilitated access to calls for tender by SMEs, cut red tape and increased take up of strategic procurement. Moreover, it should assess whether they have contributed and to what extent to an increase in public and public-private investment, to savings and efficiency in public spending and improving employment. As a follow up to discussions in the Task Force on Subsidiarity the CoR is prepared to cooperate with the other European Institutions in providing better feedback on EU policy implementation at local and regional level with the aim to make the Union's legislation work better for its citizens;
- supports the views that effective governance of public procurement is an integral part of the quality of public administration across the EU, since it is a genuinely cross-cutting government function concerning virtually every public body from federal ministries to local state-owned utilities, making it broadly representative of the quality of government and to this end public procurement should be incorporated into the EU's better regulation agenda.

Rapporteur

Adrian Ovidiu TEBAN (RO/EPP), Mayor of Cugir

References documents

Communication on Making Public Procurement work in and for Europe COM(2017) 572 final

Communication on Helping investment through a voluntary ex-ante assessment of the procurement aspects for large infrastructure projects COM(2017) 573 final

Commission Recommendation on the Professionalisation of public procurement C(2017) 6654 final

Opinion of the European Committee of the Regions – Public procurement package

I. GENERAL COMMENTS

THE EUROPEAN COMMITTEE OF THE REGIONS

1. notes that the 2014 directives on public procurement have recently been transposed in many Member States and the authorities and economic players are still adjusting to them by means of training and advisory processes; in connection with this, notes that more progress also needs to be made on digital public procurement;
2. calls on the Commission to carry out a thorough assessment, within three years of transposition in all Member States, of how EU rules on public procurement have been transposed into national legislation and how they are being implemented, recommending a multilevel approach; considers that this assessment of the implementation of these rules should emphasise both the way in which they are implemented at local and regional level, in light of the weight of subnational authorities in the field of public procurement, which represent key partners in the implementation phase, and the extent to which the new standards have simplified or complicated regulation in this area, transposing the directives properly, facilitated access to calls for tender by SMEs, cut red tape and increased take up of strategic procurement. Moreover, it should assess whether they have contributed and to what extent to an increase in efficiency in public spending and improving employment. As a follow up to discussions in the Task Force on Subsidiarity, the CoR is prepared to cooperate with the other European Institutions in providing better feedback on EU policy implementation at local and regional level with the aim to make the Union's legislation work better for its citizens;
3. considers that strategic procurement, introduced by the 2014 reform, adds another layer of complexity to procurement procedures and that procurement officers may need further training to avoid uncertainty as regards the legality of adding additional criteria to promote innovative or social and environmental objectives; stresses that any new Commission initiative in the field of public procurement must be assessed carefully with a view to taking into account local circumstances and to avoiding any increase in the administrative burden on the awarding authorities;
4. regrets firstly that state aid rules, EU accounting rules such as the ESA 2010 rule and Commission practice in effect exert pressure to use public procurement as an "**easier**" way of complying with EU competition rules and avoiding challenges of "over-compensation". As a result, the discretion of Member States to organise their public services, particularly in the social field is limited and runs counter to the provisions of Article 14 TFEU. Secondly, points out that there is no equivalent in the context of state aid to the "in-house exemption" available under the public procurement rules, which adds further strain, uncertainty and distortions in management, leading ultimately to worse budgetary implementation;

5. expresses its concern with regard to the fact that the Commission's *Quality of public administration: a toolbox for practitioners. 2017 edition*¹, suggests that it is almost an **obligation** for public administrations to engage in strategic procurement to deliver better societal outcomes, including with regard to sustainability and innovation, and that public administrations have an important public policy imperative to engage with contractors;
6. would point out, in this regard, that the consideration of green, social and innovative criteria under the 2014 reform must be left to the discretion of the public authority in question, in line with the principle of local autonomy in organising public services and taking into account, inter alia, criteria regarding opportunity, along with a balanced impact assessment of the costs and outcome of the investment;
7. stresses that, by using their purchasing power to choose environmentally friendly goods, services and works, European public authorities can make a significant contribution to sustainable consumption and production, to a more resource-efficient economy, and thus to the implementation of the Sustainable Development Goals (SDGs), through the voluntary instrument of green public procurement. In this regard, the Committee welcomes the publication, in October 2017, of the European Commission's brochure on Public Procurement for a Circular Economy²;
8. emphasises that the right of public authorities to provide and organise their services directly was approved and the concepts of "in-house" and "public-public cooperation" defined by the 2014 reform. Public procurement is thus only one of many alternative ways of providing public services and should not determine the form of management;
9. calls on the Commission to swiftly finalise the draft on public procurement of innovation and the guide on socially responsible public procurement in order to facilitate the implementation of the relevant legal provisions in the Member States, in particular using "most economically advantageous tender" as the primary award criterion; in this regard, invites the Commission to clarify that this does not mean the lowest prices;

II. POLICY RECOMMENDATIONS

On the Communication on Making public procurement work in and for Europe,

10. supports the view that effective governance of public procurement is an integral part of the quality of public administration across the EU, since it is a genuinely cross-cutting government function concerning virtually every public body from federal ministries to local state-owned utilities, making it broadly representative of the quality of government³ and to this end public procurement should be incorporated into the EU's better regulation agenda;

¹ Available [here](#).

² http://ec.europa.eu/environment/gpp/pubs_en.htm

³ European Commission, *Quality of public administration: a toolbox for practitioners. 2017 edition*, available [here](#).

11. notes that the package is being discussed before the deadlines for the gradual introduction of new Procurement rules for the use of digital tools by October 2018. It is therefore yet to be seen if the new e-procurement rules will achieve their intended goals and if further regulatory fine-tuning will be needed;
12. considers that current public procurement legislation places such strong emphasis on ensuring transparency and strategic use of public procurement that the efficiency of the procedure is undermined. For this reason, smaller local and regional authorities in particular are overwhelmed by public procurement because they fear making procedural mistakes or are reluctant to change traditional patterns of procurement or to develop innovative public procurement; standardised procurement documents should therefore be drafted;
13. points out that the complex procedures and lack of standardised documents have raised the administrative cost of public procurement (for both buyers and sellers) and that the relative ease with which procurement decisions can be challenged in an appeal court have led to a high number of court cases and extensive litigation; while transposing the objectives of directives, Member States' legislation should not increase the complexity of regulation, nor extend it linearly below the thresholds, as has happened in some Member States. The increasing number of claims brought under the Remedies Directive by bidders shows that the Commission and Member States have to take decisive initiatives to prevent bidders from misusing the rights they have under the Remedies Directive;
14. in a similar vein, notes that public procurement of innovation raises further governance and coherence issues between the primary goals of public procurement and its goal as an innovation policy instrument. Innovation in public procurement also means that higher levels of conceptual, operational and managerial skills, as well as standardised documents, are needed to tackle the multilateral negotiations involved in complex projects;
15. notes in this regard that the CoR's analytical work on the European Semester shows that public procurement is a recurrent obstacle to investment⁴. The CoR study on *Obstacles to investments at local and regional level* indicates that public procurement rules represented a significant challenge to investment for cities and regions, particularly due to complexity, diversity in the drafting of rules, or inefficiency in the public procurement framework and to the excessive length and uncertainty regarding legal procedures⁵;
16. considers that the communication's statement that in 55% of calls for tender, the contract is still awarded on the basis of the lowest price may be misleading since the 2014 reform significantly expanded the possibility to consider strategic procurement criteria and the new legal framework was only transposed into national law in 2016; this time period does not allow for a comprehensive evaluation of the impact of the new framework. The Committee would add that awarding a contract based solely on the lowest price does not mean that in a given procurement

⁴ European Committee of the Regions, *2017 European Semester. CoR, Territorial Analysis of the Country Reports and accompanying Communication, Report of the Steering Committee of the Europe 2020 Monitoring Platform*, available [here](#).

⁵ European Committee of the Regions, *Obstacles to investments at local and regional level*, Study, 2016, available [here](#).

procedure, social or environmental objectives have not been taken into account as well: strategic criteria can just as well be effectively indicated in the relevant specifications, for example by fully considering certain environmental or energy-related criteria. In these cases, the contract was awarded on the basis of the lowest price, while all the strategic criteria have been fully considered according to EU rules;

17. refers, in that respect, to a relevant study for the DG for Internal Market, Industry, Entrepreneurship and SMEs on *Strategic use of public procurement in promoting green, social and innovation policies*⁶, which stresses that **regional and local authorities conduct a range of strategic procurement procedures** (for instance, Spain), followed by bodies governed by public law such as public schools, universities and hospitals;
18. recalls that when the new public procurement directives were adopted, the promotion of SMEs was highlighted as one of the five main points of the reform of public procurement; however, a 2016 survey of the winners of the CoR's "European Entrepreneurial Region" award indicates that the degree of simplification is not yet sufficient to increase access by SMEs to public procurement⁷; notes that public procurement is of a major importance to SMEs and their interests should be placed at the heart of the public procurement policy and its implementation;
19. as regards cross-border procurement, highlights that the Commission Communication on *Boosting growth and cohesion in EU border regions*⁸, adopted on 20 September 2017, points out that the root cause of many border difficulties is the different regulations in national legal and administrative systems. Standards stipulated by EU law are often applied with varying degrees of stringency in various Member States. As a result, when two different systems meet along internal borders, this may create complexity and sometimes even legal uncertainty, generating additional costs;
20. therefore reiterates its strong belief that the focus of the Commission at this stage has to be on the implementation of the 2014 directives, since even with a European legal framework, Member States have a degree of flexibility and discretion in the way they transpose this legislation in their national systems and this might, for instance, restrict SMEs' access to public contracts or impede cross-border procurement;
21. considers that the implementation initiative *Increasing transparency, integrity and better data*, and in particular the sub-initiative *Promote the establishment of publicly accessible contract registers*, are key, Nevertheless, the Commission needs to help authorities, not only through practical examples/best practices, but especially through the adoption of documents, forms and standardised specifications, as has already been done with the European Single Procurement Document, which may help to comply with transparency requirements without facilitating collusion by disseminating information which exceeds legal requirements;

⁶ *Strategic use of public procurement in promoting green, social and innovation policies*, study for the DG for Internal Market, Industry, Entrepreneurship and SMEs, published on 15 June 2016, available [here](#).

⁷ European Committee of the Regions, *Report on the Survey of EER Regions: How to make life easier for SMEs?* 2016, Brussels, p. 4-5.

⁸ Available [here](#).

22. in a similar vein, supports the Commission's implementation sub-initiative *Provide guidelines on practical application of new integrity provisions and on exclusion grounds relating to collusion, and set up a database on irregularities* as a step in the right direction and considers that raising the overall awareness of procurement officials through tailored training sessions and providing them with tools to prevent, detect and address corporate crimes such as corruption, collusion and money laundering should be a government priority;
23. regards the Commission's proposal – as part of the efforts to build a broad collaborative partnership – to organise voluntary structured dialogues on public procurement which, where relevant, would be fully aligned with the European Semester process, as a step in the right direction, **albeit under certain conditions**. Since the partners taking part in the partnership are expected to make voluntary commitments, it has to be clear from the outset that these partners have to be vested with legitimacy. At the same time, it should not undermine the fact that the 2014 directives on public procurement gave local authorities discretion to decide on the consideration of green, social and innovative criteria, and should ensure that the social partners are adequately represented in this partnership;
24. notes that, as underscored by the Commission, authorities at all levels and stakeholders are best placed to determine the content and level of their commitments; emphasises that it is not clear, however, whether local and regional authorities will be involved, as they should, in the proposed structured dialogues or whether the European Parliament and the Council will be the Commission's only partners in this exercise;

On the Commission's Recommendation on the professionalisation of public procurement,

25. welcomes the Commission's recommendation as public administrations are expected to make public procurement more efficient and accessible and to leverage it to boost innovation and digitalisation; calls on the Member States to strive for a rapid digital transformation of procedures and for the introduction of e-processes for all major stages, namely from notification, access to tenders and submission to evaluation, contract award, ordering, invoicing and payment;
26. considers that regulation, the Commission's initiatives in this field and the resulting administrative burden upon public authorities have to be proportionate to the weight that public procurement above EU thresholds has in comparison with all public procurement procedures in any given Member State, including public procurement below EU thresholds and that the Commission should take care to safeguard this proportionality;
27. opposes any kind of binding guidelines for the training and education of administrative staff since such rules could violate the sovereignty of the Member States, the regions and the local authorities with regard to the organisation of their respective administrations;
28. refers to the European Commission's staff working document on *The value added of ex ante conditionalities in the European Structural and Investment Funds* published on 31 March

2017⁹, which states that ex ante conditionalities have helped to transpose and implement relevant EU legislation and to tackle barriers to investment in the EU and supported EU policy objectives, and that they have triggered policy reforms and the delivery of relevant country-specific recommendations;

29. regards these initiatives from the European Commission as key to the successful implementation of the EU public procurement framework, but considers that the effectiveness of all these instruments/initiatives must be thoroughly assessed, their synergies and complementarities highlighted and additional measures fully justified so as to avoid placing any unnecessary administrative burdens on local and regional authorities;
30. regrets that scant reference is made to the fact that professionalisation should take place within the overall political strategy and within policies to promote social and green procurement and more broadly to ensure that public money is well spent; considers that professionalisation of buyers should not be seen as separate from good governance/professionalisation in general in operating and providing good local services;
31. in the same vein, stresses that as regards public services, in many cases it might be better to keep services in-house or to use alternatives to public procurement;
32. welcomes the fact that the Commission's proposal of 7 June 2018 for a Regulation establishing the Programme for the single market provides for the option of "support[ing] measures to ensure a wider uptake of strategic public procurement, the professionalisation of public buyers, improved access to procurement markets for SMEs, increase of transparency, integrity and better data, boosting the digital transformation of procurement and promotion of joint procurement, through strengthening a partnership approach with the Member States, improving data gathering and data analysis including through development of dedicated IT tools, supporting exchange of experiences and good practices, providing guidance, pursuing beneficial trade agreements, strengthening cooperation among national authorities and launching pilot projects"¹⁰;
33. notes that more guidance is needed on e-forms and e-procurement procedures so as to avoid national approaches clashing with the EU's approach and local and regional authorities being left uncertain as to when and how to use different forms and procedures. Underlines the positive role that knowledge centres can play in facilitating the correct implementation and interpretation of EU laws and legislations through free information and advice to local and regional authorities and their associations;
34. supports Housing Europe's view that one key driver of professionalisation and innovation in public procurement would be the preparation of a European catalogue of solutions, set out in standardised documents, which range from technical solutions to climate and energy requirements, to innovative solutions to social challenges. This pan-European catalogue, led by

⁹ Available [here](#); additional information available [here](#).

¹⁰ COM(2018) 441

the European Commission Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (DG GROW), should build on the expertise and practices assembled by European federations, would make it possible to standardise procedures, and would reduce the number of claims¹¹;

On the Communication on Helping investment through a voluntary ex-ante assessment of the procurement aspects for large infrastructure projects,

35. is pleased that the ex-ante mechanism is voluntary and believes that the mechanism will be especially important for concessions, which for the first time are subject to a harmonised EU regime;
36. is also confident that the ex-ante mechanism will play a key role in reducing the risk of delays and cost overruns which arises from difficulties in public procurement processes for large-scale cross-border projects;
37. calls on the Commission to ensure that, while publishing information on the website of the ex-ante mechanism and disclosing information through the notification mechanism and the information exchange mechanism, trade secrets are protected and the confidentiality of information that could be used by interested suppliers to distort competition is upheld;
38. would have expected greater clarity with regard to the Commission's response to any request made through the helpdesk, which should be aware of the consequences of these responses, and the notification mechanism on a potential subsequent procurement-related legal case; calls on the Commission to clarify how the ex-ante mechanism could address some of the problems caused by the increasing number of claims brought under the Remedies Directive.

Brussels, 5 July 2018

The President
of the European Committee of the Regions

Karl-Heinz Lambertz

The Secretary-General
of the European Committee of the Regions

Jiří Buriánek

¹¹ Published [here](#).

III. PROCEDURE

Title	Public procurement package
Reference(s)	<ul style="list-style-type: none"> – Communication on Making Public Procurement work in and for Europe. COM(2017) 572 final – Communication on Helping investment through a voluntary ex-ante assessment of the procurement aspects for large infrastructure projects. COM(2017) 573 final – Commission Recommendation on the professionalisation of public procurement. C(2017) 6654 final
Legal basis	Article 307 of the TFEU
Procedural basis	Rule 41(b)(ii) of the Rules of Procedure
Date of Council/EP referral/Date of Commission letter	
Date of Bureau decision	
Commission responsible	Commission for Economic Policy
Rapporteur	Adrian Ovidiu Teban (RO/EPP), Mayor of Cugir
Analysis	2 March 2018
Discussed in commission	23 January 2018 - 24 April 2018
Date adopted by commission	24 April 2018
Result of the vote in commission	By a majority
Date adopted in plenary	5 July 2018
Previous Committee opinions	<ul style="list-style-type: none"> – Opinion of 28 November 2013 on the Directive on E-Invoicing and on end-to-end E-Procurement. Rapporteur: Catarina Segersten Larsson (SE/EPP) – Opinion of 9 October 2012 on the Public procurement package. Rapporteur: Catarina Segersten Larsson (SE/EPP)
Date of subsidiarity monitoring consultation	