



4 April 2018

Comments on the Commission's 'Public Procurement Package'

REMARKS ON:

COMMUNICATION 'MAKING PUBLIC PROCUREMENT WORK IN AND FOR EUROPE'
COMMUNICATION ON A VOLUNTARY EX ANTE ASSESSMENT PROCEDURE
RECOMMENDATION ON PROFESSIONALISATION OF PUBLIC BUYERS

STAKEHOLDER CONSULTATION ON INNOVATION PROCUREMENT
TARGETED CONSULTATION ON GUIDANCE FOR SOCIAL PROCUREMENT

KEY MESSAGES

- 1** BusinessEurope **welcomes the Commission's continued focus on improving the implementation of the public procurement directives**, amongst others by publication of the 'Public Procurement Package' on 3 October 2017.
- 2** However, the package **only partially addresses the problems that companies face in participation for public tenders**. From the supply side, we see the following main priorities:
 - due to misuse of in-house procurement, private suppliers are regularly excluded from competing in contracts where they could deliver more innovative, affordable and efficient solutions. In such cases, competition is effectively distorted;
 - social, innovation and green procurement are fully legitimate but should not result in unjustified additional barriers for companies to participate in tenders. Given the existing problems in the area of the prescription of strategic aspects, prioritisation of strategic procurement should not be approached as a blanket mandate to stimulate strategic procurement;
 - professionalisation should be organised in such a way that experts from the industry side are involved in the training for public purchasers;
 - infringements of public procurement rules should be rigorously enforced in a national and EU context, in particular those relating to transparency and non-discrimination.



1. Public procurement – priorities from the business side

Companies still experience difficulties when competing for public tenders. This limits the benefits of the Single Market for business and citizens, as it results in less efficient spending of public money. BusinessEurope welcomes the Commission's continued focus on improving the implementation of the public procurement directives, amongst others by publication of the 'Public Procurement Package' on 3 October 2017. We would like to contribute to a constructive dialogue with the Commission to determine whether the principles of transparency, market openness and competitive tendering are respected in public procurement procedures across the Single Market.

In this respect, we welcome the Commission's proposal for a broad partnership with authorities, companies and other stakeholders (communication 'Making Public Procurement Work', under 3). Regarding the role of businesses and business associations as foreseen by the Commission, drawing up "evaluation models" for comparing different solutions in public tendering may often be difficult to realise in practice. It seems more important that business and their associations are effectively heard when pointing out critical factors forming obstacles to a proper functioning of public procurement.

Main problems with public procurement lie in poor enforcement of the rules at national level and a lack of training amongst contracting authorities over how to apply the rules. A stable and predictable legal framework is a precondition for proper implementation. Also given that the relevant EU directives have been revised only in 2014, we welcome the essentially non-legislative nature of the public procurement package. In our view the focus should indeed be on safeguarding that the existing directives are fully, correctly and consistently implemented across the Single Market. However, the package only partially addresses the problems that companies face in participation for public tenders. From the supply side, we see the following main priorities:

- **In-house procurement.** While extended codification of public-public exemptions in the public procurement directives aimed at reducing the circumvention of public procurement rules, there is still misuse of in-house exemptions in practice. This narrows public procurement opportunities for economic operators, and is an important obstacle to participation in public tenders. Private suppliers are regularly excluded from competing in contracts where they could deliver more innovative, affordable and efficient solutions. It is key that the legal framework in this area is as simple and clear as possible, as to provide certainty for all actors involved, and that there is sufficient oversight on its implementation. Both are lacking in the current situation. EU and national competition authorities should be more proactive in tackling anti-competitive practices by public sector bodies.
- **Simplification of public procurement.** Strategic use of public procurement as the Commission proposes in its communication 'Making Public Procurement Work' (under 4a), such as social, innovation and green procurement, is fully legitimate but should not result in unjustified additional (national, regional, or local) barriers for companies to participate in tenders. Strategic procurement, if well understood, can help ensuring a better consistency of important overall



goals. But in practice strategic requirements, such as additional social requirements, if not directly linked to the subject-matter of the contract, can make it more difficult for companies to participate in tenders. Such provisions can then result in a reduction of competitors and may also hinder cross-border procurement (see below for further comments).

- **Professionalisation of public buyers.** We welcome the Commission's emphasis on professionalization (communication 'Making Public Procurement Work' under 4b; communication on a voluntary ex ante assessment procedure; recommendation on professionalisation). As public procurement concerns the area between the public and the private sector, it is advisable that professionalisation should be organised in such a way that experts from the industry side are involved in the training for public purchasers. This happens already in certain instances, and should be further enhanced across Europe.
- **Compliance.** Infringements of public procurement rules should be rigorously enforced in a national and EU context, in particular those relating to transparency and non-discrimination.
 - The Commission has an important role in ensuring proper implementation by infringement procedures against Member States for failures to implement and apply the public procurement Directives.
 - In certain areas we see a need for further guidance. One of these is anticompetitive collusion in procurement markets (discussed in communication 'Making Public Procurement Work', on p.11), where we would like to see further guidance on joint bidding. At present it is unclear under what conditions joint bidding is allowed under the competition rules, which results in significant legal uncertainties. A strict approach by competition authorities will deter companies from participating in consortia and limit rather than stimulate competition. Companies should also be able to recover their costs when a tender is annulled due to errors in the procurement documents.
 - While we explicitly support strict enforcement of the procurement rules, the proposed 'Single Market Information Tool' from the May 2017 'Compliance Package' is in our view not an appropriate compliance tool, as it would create too widely defined and far-reaching access to sensitive company information, even when there is no wrongdoing on the side of the company.¹

2. Detailed comments on strategic procurement

The public procurement directives determine how public purchasers can include social and environmental considerations in their procurement processes. Where a contracting authority specifies performance or awards on the basis of societal criteria

¹ See also BusinessEurope's detailed comments on the Compliance Package:
<https://www.bes.eu/publications/comments-smit-single-digital-gateway-and-solvit>



(environmental, social and innovative aspects), a “direct link” with the subject-matter of the contract must always exist. Interpretation of this direct link should be strict in order not to harm the primary goal of the public purchase.

BusinessEurope finds that, given the existing problems in the prescription of strategic aspects, prioritisation of strategic procurement (Communication ‘Making Public Procurement Work’, under 4a) should not be approached as a blanket mandate to stimulate strategic procurement. The dangers and advisable limits of the use of strategic aspects should be considered and covered in Commission guidance on this topic.

While strategic procurement is legitimate, it should be taken into account that complex conditions and additional specifications in this area may contribute to a decrease in participation in public procurement. As the Commission also points out (communication ‘Making Public Procurement Work’, p. 5) the number of offers per tender has fallen and companies have difficulties accessing procurement markets. A blanket approach to promote strategic procurement could enhance this tendency and would contradict the Commission’s intention to remove access barriers to procurement markets.

- **Social procurement.** National, regional or local suppliers should not be favoured by contracting authorities through overly prescriptive tender requirements and award criteria, or for the furtherance of unrelated societal goals. Priority should be that procurement is not additionally burdened by diverging regional or local rules or by unjustified additional requirements on strategic aspects on social and labour law provisions. Given increasing legal uncertainties and decreasing numbers of bidders, the overall aim should rather be simplification of public procurement. Increased complexity, legal uncertainty and unjustified additional requirements impede access to procurements markets, in particular (but not only) for SMEs.
- **Innovation procurement.** “Innovative procurement” often combines elements of the purchase of specific innovative goods with aspects of funding startup companies or the development of “pre-commercial” goods. Such procedures are complex, and it is key that transparency and non-discrimination are sufficiently respected. While the specific procedures of innovative procurement have recently been promoted, it should be remembered that *any* procurement can lead to the purchase of modern, high quality and innovative goods or services as long as output specifications are used, and not prescriptive technical specifications. Fair, open and competitive procedures are the best way to purchase innovative high-class products and services. It is also key that procurement takes into account criteria other than the lowest price.
- **Green procurement.** Reference to full life-cycle costs enables to buy products with a good long-term performance and may thus contribute to both economically advantageous and sustainable purchasing. However, there is a need for clear and objective methods for public buyers to assess this. Accordingly, the intention of the Commission to develop instruments for voluntary use to calculate the life-cycle costs for certain products is to be welcomed. In some industry sectors, such instruments have already been developed. Reference to life-cycle costs should be shaped in such a way that they do not limit opportunities for cross-border



suppliers when contracting authorities specify qualification criteria or performance conditions.

3. Comments on other elements from the public procurement package

- **Transparency, integrity and better data** (communication 'Making Public Procurement Work', under 4d). Transparency is a crucial element of public procurement. The principle of transparency applies for all data to the extent that there are no reasons for limiting access due to necessities of the protection of interests of the purchaser or business secrets of the bidder/supplier, either in an ongoing procedure or after the procedure has ended. In view of the envisaged publicly accessible contract registers, we will have to assess how far these respect the protection of confidential company information and provide for the necessary exceptions regarding the publication of information about the contract.
- **Digital transformation of public procurement** (communication 'Making Public Procurement Work', under 4e). We have always been in favour of the introduction of electronic means in public procurement. However, there are still significant differences across Member States. Main challenges in this area include increasing interoperability and ensuring a better understanding regarding the use of tools for data security (e.g. electronic signatures and similar tools for authentication and integrity of documents or for encryption tools in order to avoid illegal insight).
- **Cooperating to procure together** (communication 'Making Public Procurement Work', under 4f). Increased centralized procurement can contribute to more professionalism in procurement if it is linked with a good professional education and advanced training of the persons in charge. Nevertheless, bundling of procurement and cooperation of public purchasers may also have negative effects on bidders and especially on companies from the SME sector. Centralised purchasing bodies must be very aware of the potential (future) impact of their purchasing power on the relevant market.

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