New developments in public procurement

2009/2175(INI) - 28/04/2010

The Committee on the Internal Market and Consumer Protection adopted the own-initiative report drawn up by Heide RUHLE (Greens/EFA, DE) on new developments in public procurement. It notes that the 2004 revision of the public procurement directives (Directives 2004/18/EC and 2004/17/EC) was intended to simplify and modernise the relevant procedures, and deplores the fact that the aims of the 2004 revision have not yet been achieved, particularly with regard to the simplification of procurement rules and the creation of more legal certainty. Members express the hope, however, that the most recent judgments handed down by the CJEU will help to resolve the outstanding legal issues and that the number of appeal procedures will fall. They call on the Commission actively to pursue the aims of simplifying the public procurement procedure in any review of the European rules.

The report also deplores the fact that the existing regulations – in combination with incomplete implementation measures at national and regional level, the plethora of soft law proposals put forward by the Commission, and the interpretation of the relevant legal provisions by European and national courts – have given rise to a **complicated and confusing set of rules which is creating serious legal problems** that can no longer be overcome without incurring substantial administrative costs or seeking external legal advice. It urges the Commission to remedy this situation and, as part of the 'Better Lawmaking' initiative, to examine the impact of soft law proposals, to restrict such proposals to key aspects and to assess them in the light of the principles of subsidiarity and proportionality, taking into account the five principles set out in the 2001 White Paper on European Governance (openness, participation, accountability, effectiveness and coherence).

Members point out that as a result of this development **public procurers often have to prioritise legal certainty above policy needs** and, given the pressure on public budgets, frequently have to award the contract or service in question to the cheapest offer rather than the most economically advantageous tender. They are afraid that this will weaken the EU's innovative base and they urge the Commission to remedy this situation. The report emphasises that European initiatives in the area of public procurement must be coordinated more effectively in order to avoid jeopardising consistency with the public procurement directives or creating legal problems for those applying the rules. It calls, therefore, for compulsory coordination measures within the Commission.

Members criticise the **lack of transparency** with regard to the composition and work of the Commission' s internal advisory committee on public procurement (ACPP) and the role and competencies of the Advisory Committee on the Opening-Up of Public Procurement (CCO). They also stress that public contracts must be awarded under transparent conditions. The Commission is asked to carry out an ex-post assessment of the public procurement directives, taking account of the opinions expressed here, and Members expect that review to be carried out with the full involvement of all stakeholders and in close cooperation with the European Parliament. Any revision must take account of the whole framework and encompass the directive on review procedures concerning the award of public contracts as well as an analysis of the national laws transposing the directive on review procedures, in order to prevent any further fragmentation of public procurement law.

The report goes on to give its views on **recent case law** regarding public-public cooperation, service concessions, the matter of the application of procurement law to institutionalised public-private partnerships, town planning/urban development, and procurement below the threshold. On green procurement, Members stress that public authorities should be empowered to base public procurement on

environmental, social and other criteria. They reiterate their call for the Commission to produce a handbook on pre-commercial procurement, which should illustrate practical examples of risk-benefit sharing according to market conditions.

Micro, small and medium-sized enterprises: Members ask the Commission to evaluate the impact of the public procurement directives on these enterprises, especially in their role as sub-contractors, and to assess whether we need further rules on the award of sub-contracts, specifically to avoid SMEs as subcontractors being subject to worse conditions than the main contractor awarded the public contract. It also calls on the Commission to simplify public procurement procedures in order to relieve both local governments and companies from spending a large amount of time and money on purely bureaucratic matters. Members note that SMEs have struggled to gain access to public procurement markets and that more should be done to develop an 'SME strategy'. The Commission is also asked to secure the inclusion, in the renegotiated WTO Government Procurement Agreement (GPA), of a clause enabling the EU to give preference to SMEs when awarding public contracts, along the lines of those already applied by other States Parties to this agreement.

Socially responsible procurement: the committee **emphasises the lack of clarity in the area of socially responsible public procurement**, and calls on the Commission to provide assistance in the form of manuals. It draws attention to the changes in the legal framework brought about by the Lisbon Treaty, and calls on the Commission to devise guidelines or other practical assistance in connection with sustainable procurement.

Practical help: Members call for the development of a frequently updated database of standards, especially those relating to environmental and social criteria, to be made available to public authorities. They also urge Member States and the Commission to use the existing resources and mechanisms at their disposal, such as the peer reviews envisaged in the Services Directive, to encourage small teams of procurement experts from one region to review the activities of another EU region, which may help to build confidence and establish best practices across different Member States. The committee also urges the organisation of training courses and campaigns to raise awareness among local authorities and policy-makers, and to include other stakeholders, in particular providers of social services.

Regional development: the report stresses the need to revise, in cooperation with regional and local authorities, the various sets of rules applicable to public procurement in order to unify them and simplify the whole legal framework for public procurement, in particular with a view to reducing the risk of errors and ensuring more efficient use of the Structural Funds.

International trade: while arguing strongly against protectionist measures in the field of public procurement at global level, the committee firmly believes in the principle of reciprocity and proportionality in that area. It calls on the Commission to consider imposing proportional targeted restrictions on access to parts of the EU's procurement markets for those trading partners which benefit from the openness of the EU market, but have not shown any intention of opening up their own markets to EU companies, in order to encourage our partners to offer reciprocal and proportional market access arrangements for European companies.