

Modernisation of public procurement

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The Committee on the Internal Market and Consumer Protection adopted the own-initiative report by Heide RÜHLE (Greens/EFA, DE) following the Commission Green Paper on modernisation of public procurement in the EU.

Whilst welcoming the Green Paper, Members point out that, although the revision of the EU procurement directives in 2004 led to useful further development of the single market for public procurement, there is a need –some years after the transposition of Directives 2004/17 and 2004/18 into national law – to assess whether optimisation and clarification of the directives will be necessary. They make the following recommendations in order to address shortcomings that have become evident in practice:

First task: improving legal clarity: the report asks for **clarification of the scope** of the directives, and points out that there must be a direct benefit for the contracting authority in order for a procedure to qualify as public procurement. Members recall [Parliament's resolution of May 2010](#) on recent developments in public procurement, which took note of the ECJ case-law and took the view that public-public cooperation was not subject to public procurement rules as long as certain criteria were met. They emphasise the **exclusion of service concessions** from the scope of European procurement rules, insisting that any proposal for a legal act dealing with service concessions would be justified only with a view to remedying distortions in the functioning of the internal market. They point out that such distortions have not hitherto been identified, and that a legal act on service concessions is therefore unnecessary.

The report emphasises that the current classification of **A and B service categories** should be maintained in so far as 'lighter' provisions for B services have their justification in the characteristics of that category as mainly locally or regionally provided services. It observes, in this context, that the application of procurement law to the provision of personal social services is often not the best way of ensuring optimum results for the users of the services in question. The committee calls for recognition under European law of tried and tested Member State procedures based on the principle that all providers able to comply with the conditions previously laid down by law should, irrespective of their legal form, be permitted to provide services, provided that account is taken of the general principles of equal treatment, transparency and non-discrimination.

The Commission is asked to align the Remedies Directive with the new public procurement framework which will emerge following the current review, and to carry out this exercise in parallel to the main legislative proposal, in order to ensure consistency.

Second task: developing the full potential of public procurement – best value for money: Members take the view that the criterion of lowest price should no longer be the determining one for the award of contracts, and that it should, in general, be replaced by the criterion of most economically advantageous tender, in terms of economic, social and environmental benefits – taking into account the entire life-cycle costs of the relevant goods, services or works. They stress that supporting the criterion of 'maximum economic benefit' would foster innovation and efforts to achieve the best quality and value, i.e. to comply with the requirements of the Europe 2020 strategy; stresses that this is particularly relevant in relation to public procurement of goods that have an impact on consumers' health – in the food sector, for example – where quality and production methods play an important role.

The Commission is urged, amongst other things, to:

- encourage governments and contracting authorities to increase the use of sustainable public procurement, supporting and promoting high-quality employment;
- propose an adaptation of the relevant procurement or state aid rules as part of the overall revision exercise, in order to boost the take-up of pre-commercial procurement;
- assess, with an eye to the future review of the directives, whether further rules on the award of subcontracts are needed;
- reassess the appropriate level of thresholds for supply and services contracts, and if necessary raise them, so as facilitate access to public procurement by, amongst others, not-for-profit and social-economy operators and SMEs.

Third task: simplifying the rules and allowing more flexible procedures : the report advocates, when European public procurement law is being revised, clear, simple and flexible rules, reducing the level of detail and making procurement procedures simpler, less cumbersome, cheaper, more open to SMEs and more conducive to investment. It asks for more space for negotiation and communication, combined with measures to assure transparency and to prevent abuse and discrimination, and urges that market consultation be explicitly allowed as a possible first step.

Members advocate assessing whether wider use of the negotiated procedure with prior EU-wide publication might be allowed, beyond that provided for in the current directives, so that contracting authorities and economic operators can communicate better, and supply and demand can be coordinated effectively. They reiterate their insistence on the **systematic admission of alternative bids (or variants)**, as they are crucial to promoting and disseminating innovative solutions.

Members consider it regrettable that tenderers have only limited opportunities to rectify omissions in their bids. They also regret the Green Paper's failure to mention shortcomings, the lack of expertise and knowledge about procurement and the inadequacy of public procurement strategies. They recommend setting up a network of centres of excellence within the existing national frameworks, and promoting exchanges of information and good practices between Member States.

Fourth task: improving access for SMEs: the report stresses that simplifying the procedures and administrative formalities, as well as creating SME-friendly strategies and implementing the code of good practice, will facilitate SMEs' access to public contracts and enable them to participate on a more equal and fairer footing. It points out that selection criteria on financial standing, e.g. in relation to company turnover, should be proportional to the character of a given contract.

The Commission is asked to:

- secure the inclusion in the Government Procurement Agreement of a clause allowing the EU to give preference to European producers, especially SMEs, in the award of certain public procurement contracts;
- increase awareness of the importance of splitting contracts into lots, and to consider the implementation of the 'apply or explain' principle, whereby rules on matters such as division into lots must be complied with, or the failure to comply explained;
- investigate all the possibilities for encouraging the temporary or permanent grouping of SMEs and small businesses in order to enable them to take part in invitations to tender that are not split into lots, without having to operate as subcontractors.

Members propose that self-declarations be allowed where feasible, and that original documents be requested only from the short listed candidates or the successful tenderer, whilst avoiding any delays or market distortions caused by incorrect declarations. They ask the Commission to promote the option of an 'electronic procurement passport' accepted by all Member States and proving that the economic operator fulfils the conditions required under EU legislation on public contracts.

Fifth task: ensuring sound procedures and avoiding unfair advantages: Members call on the Commission to promote more efficient reporting practices, including exchanges of information between Member States on the exclusion of unsound bidders, with a view to fighting corruption in public procurement. They also call on the Commission to assess the problems associated with **exceptionally low bids** and to propose appropriate solutions. Members ask for a common approach on ‘self-cleaning’ measures to avoid market distortion and ensure legal certainty for economic operators and contracting authorities alike.

Sixth task: expanding the use of e-procurement: the report points out that the e-procurement action plan has failed to achieve its goal and that more political leadership at all levels of government – including EU level – is needed in order to maintain and accelerate the transition to e-procurement.

Members want to ensure that **at least 50% of both the EU institutions’ and the Member States’ public procurement operations are carried out electronically**, in line with the commitment made by the Member State governments at the ministerial conference on e-government in Manchester in 2005.