

Position Paper

UEAPME¹ reply to the green paper consultation on the modernisation of EU public procurement policy “Towards a more efficient European Procurement Market”

General comments

UEAPME welcomes the current green paper consultation on the modernisation of EU public procurement policy as a timely opportunity to review and discussed the current regulatory system. This is especially important in a time where on the one side more and more other policies request the use of public procurement to support their policy aims and on the other side various stakeholders complain about difficulties as regards access to this important market and about administrative burdens resulting from the existing rules.

Furthermore UEAPME thanks for the opportunity to present the needs and expectations of small and medium sized enterprises as regards an efficient public procurement regime.

Before answering the concrete questions, we would like to outline some general remarks on the issue:

- Public procurement within EU covers a large part of the overall demand of the economy and it is important that public procurement functions effectively. A fundamental aspect of the regulatory framework for public procurement, on which we agree, is that public procurement in the EU should help to make good purchase with the benefit of competition in the internal market. We believe that the current framework provides a basis for the procurement process to ensure the basic EU principles of transparency, non-discrimination, equal treatment, proportionality and mutual recognition. These principles are of fundamental importance to safeguard in the review and possible revision of the acquis.
- SMEs and their employees are the largest taxpayers in the EU and have a strong interest to get best value for money as result of public procurement (PP). Therefore, SMEs are interested to ensure sufficient competition on public procurement markets, which can be achieve only, if procurement procedures are open to all potential companies independent of their size and their location.
- Therefore, UEAPME is asking to facilitate the participation of SMEs in procurement procedures as much as possible, but consequently, UEAPME don't ask for any positive discrimination of SMEs as regards price and quality.
- Small businesses are not participating in public contracts to such an extent that would be possible and desirable. Our experience is, however, that the great obstacle for the small business participation is not in the procurement legislation itself. The problems of small firms arise from the actual designs of tenders, which are essentially not governed by the rules. Proportional and relevant requirements of the provision, reasonable administrative management and appropriate size of the contracts are factors that are significant for small firms' possibilities to participate in public procurement. An increased awareness and a developed approach in

¹ UEAPME subscribes to the European Commission's Register of Interest Representatives and to the related code of conduct as requested by the European Transparency Initiative. Our ID number is [55820581197-35](#).

the design of contracts should be recognized and encouraged in appropriate ways. Likely more sophisticated preparatory work and better monitoring could lead to a better procurement process.

- To achieve this, UEAPME has contributed to the elaboration of the code of good practices to facilitate SME participation in PP, which became part of the Small Business Act. Unfortunately its implementation is quite uneven and more political pressure on public contractors is needed to motivate / force them to apply these measures.
- Finally, we want to underline the importance of stability and predictability within the regulatory framework for public procurement. Too many changes in relative short intervals will create uncertainty and additional cost for both side of the market.

Answers to the questions in the green paper

1. WHAT ARE PUBLIC PROCUREMENT RULES ABOUT?

1.1. Purchasing activities

1. Do you think that the scope of the Public Procurement Directives should be limited to purchasing activities? Should any such limitation simply codify the criterion of the immediate economic benefit developed by the Court or should it provide additional/alternative conditions and concepts?

UEAPME warns against a limitation to purchasing activities, because this would open possibilities to circumvent PP rules by purchasers using creative constructions to escape the regulation.

1.2. Public contracts

2. Do you consider the current structure of the material scope, with its division into works, supplies and services contracts, appropriate? If not, which alternative structure would you propose?

UEAPME is against changing the current structure of the material scope in the interest of continuity and because of reasonable alternatives.

3. Do you think that the definition of “works contract” should be reviewed and simplified? If so, would you propose to omit the reference to a specific list annexed to the Directive? What would be the elements of your proposed definition?

According to our construction sector the current definition should stay, because it has been proven sufficient. However, if there will be any change, it has to be ensured that all aspects are covered, including works contracts executed by third person on behalf of public contractors and any possibility for circumventing the regulation has to be avoided.

4. Do you think that the distinction between A and B services should be reviewed?

and

5. Do you believe that the Public Procurement Directives should apply to all services, possibly on the basis of a more flexible standard regime? If not please indicate which service(s) should continue to follow the regime currently in place for B-services, and the reasons why.

UEAPME thinks the distinction between A and B services should be kept, but there may be good arguments to review the content of the list B. On the one side there are good arguments to include some services in the list B, on the other side some services of the current list B could be removed to list A.

In order to increase competition also for services on the list B, UEAPME would recommend introducing a European wide pre-notification for tenders of these services.

6. Would you advocate that the thresholds for the application of the EU Directives should be raised, despite the fact that this would entail at international level the consequences described above?

Some UEAPME members are not satisfied with the current thresholds and would especially like to adapt the thresholds to the inflation rate, while currently the thresholds in Euro had to be reduced as a result of the appreciation of the Euro currency. At the same time UEAPME sees the limitations coming from the GPA agreement and does not want the EU to pay a specific price for adapting it. However, UEAPME asks the European Commission to verify with its international partners, if a general raise of the thresholds according to the inflation rate would be also in their interest and if some amendments would be possible without paying a price.

7. Do you consider the current provisions on excluded contracts to be appropriate? Do you think that the relevant section should be restructured or that individual exclusions are in need of clarification?

and

8. Do you think that certain exclusions should be abolished, reconsidered or updated? If yes, which ones? What would you propose?

UEAPME does not see the need to amend articles 15 and 16. As regards the problems with concessions UEAPME would recommend to solve them with a separate and specific proposal on this issue.

1.3. Public purchasers

9. Do you consider that the current approach in defining public procurers is appropriate? In particular, do you think that the concept of “body governed by public law” should be clarified and updated in the light of the ECJ case-law? If so, what kind of updating would you consider appropriate?

In general we see the need to improve the definition of public procurers to clarify the consequences of the ECJ case-law and to avoid circumventing the directive, but we think this should be rather done by an explanatory document than by amending the directive. The same is true as regards avoiding circumventing EU law by in-house procurement.

Public utilities

In general, UEAPME sees it absolutely necessary to keep public procurement rules for the public utility sector. A specific set of regulations (Directive 2004/17/EC) may be an appropriate solution, but if it has to be amended, it should become closer to the general rules and it should not be weakened.

10. Do you think that there is still a need for EU rules on public procurement in respect of these sectors? Please explain the reasons for your answer.

10.1. *If yes: Should certain sectors that are currently covered be excluded or, conversely, should other sectors also be subject to the provisions? Please explain which sectors should be covered and give the reasons for your answer.*

UEAPME does not see the need to exclude certain sectors in general. If there is a prove for sufficient competition for specific companies or specific sectors in specific countries, the regulations allows already now an exclusion and we see this provision sufficient.

11. *Currently, the scope of the Directive is defined on the basis of the activities that the entities concerned carry out, their legal statute (public or private) and, where they are private, the existence or absence of special or exclusive rights. Do you consider these criteria to be relevant or should other criteria be used? Please give reasons for your answer.*

12. *Can the profit-seeking or commercial ethos of private companies be presumed to be sufficient to guarantee objective and fair procurement by those entities (even where they operate on the basis of special or exclusive rights)?*

Profit-seeking and commercial ethos can not be seen as sufficient to guarantee objective and fair procurement. This will only be the case, if there is in addition sufficient price competition in and access to the relevant market.

13. *Does the current provision in Article 30 of the Directive constitute an effective way of adapting the scope of the Directive to changing patterns of regulation and competition in the relevant (national and sectoral) markets?*

Yes, this article is seen as sufficient to solve this problem.

2. IMPROVE THE TOOLBOX FOR CONTRACTING AUTHORITIES

14. *Do you think that the current level of detail of the EU public procurement rules is appropriate? If not, are they too detailed or not detailed enough?*

In general UEAPME accepts that the rules have to be detailed. In order to make them better understandable we propose clarifications including ECJ case law in explanatory brochures.

2.1. Modernise procedures

15. *Do you think that the procedures as set out in the current Directives allow contracting authorities to obtain the best possible procurement outcomes? If not: How should the procedures be improved in order to alleviate administrative burdens/reduce transaction costs and duration of the procedures, while at the same time guaranteeing that contracting authorities obtain best value for money?*

In order to improve the outcome to procurement, UEAPME recommends:

- An obligation for pre-notification to allow better preparation of offers, especially for SMEs.

- The use of the principle “best economic offer” should become the rule and the “lowest price” should only be used in justified cases (following the “apply or explain” principle – see chapter 3.1 on page 9).
- Alternative offers should be generally allowed – “apply or explain” principle – see chapter 3.1 on page 9.
- It as to be assured that companies have access to needed additional information during the tendering procedure in a non-discriminatory and transparent manner.

16. *Can you think of other types of procedures which are not available under the current Directives and which could, in your view, increase the cost-effectiveness of public procurement procedures?*

17. *Do you think that the procedures and tools provided by the Directive to address specific needs and to facilitate private participation in public investment through public-private partnerships (e.g. dynamic purchasing system, competitive dialogue, electronic auctions, design contests) should be maintained in their current form, modified (if so, how) or abolished?*

The companies don't have yet enough experiences with these new procedures and therefore, UEAPME is against to change them already now.

18. *On the basis of your experience with the use of the accelerated procedure in 2009 and 2010, would you advocate a generalisation of this possibility of shortening the deadlines under certain circumstances? Would this be possible in your view without jeopardizing the quality of offers?*

SMEs have not made good experiences with shortening the already rather tight deadlines for preparing offers. Shorter deadlines will lead to a lower quality of offers and will exclude companies – especially SMEs – which have not the resources to speed-up the preparation of offers.

19. *Would you be in favour of allowing more negotiation in public procurement procedures and/or generalizing the use of the negotiated procedure with prior publication?*

UEAPME is against the extension of the use of negotiation, because it makes the result of procurement more arbitrary and more open to manipulation and it does not bring simplification for companies, on contrary, the procedures become less transparent and often even more complicate for both sides.

20. *In the latter case, do you think that this possibility should be allowed for all types of contracts/all types of contracting authorities, or only under certain conditions?*

21. *Do you share the view that a generalised use of the negotiated procedure might entail certain risks of abuse/ discrimination? In addition to the safeguards already provided for in the Directives for the negotiated procedure, would additional safeguards for transparency and non-discrimination be necessary in order to compensate for the higher level of discretion? If so, what could such additional safeguards be?*

Yes, UEAPME shares these concerns and sees these risks (see answer to question 19).

22. *Do you think that it would be appropriate to provide simplified procedures for the purchase of commercial goods and services? If so, which forms of simplification would you propose?*

UEAPME would warn against such additional procedures, which will further complicate the system without significant benefits.

23. *Would you be in favour of a more flexible approach to the organisation and sequence of the examination of selection and award criteria as part of the procurement procedure? If so, do you think that it should be possible to examine the award criteria before the selection criteria?*

and

24. *Do you consider that it could be justified in exceptional cases to allow contracting authorities to take into account criteria pertaining to the tenderer himself in the award phase? If so, in which cases, and which additional safeguards would in your view be needed to guarantee the fairness and objectivity of the award decision in such a system?*

UEAPME strictly opposes the use of selection criteria which relates to the qualification of the tenderer in the award phase. This would open possibilities for arbitrage and discrimination by the contraction authority.

25. *Do you think the Directive should explicitly allow previous experience with one or several bidders to be taken into account? If yes, what safeguards would be needed to prevent discriminatory practices?*

UEAPME does not see the need for further provisions as regards the previous experience next to the already allowed possibility to ask for a list of references. Already the demand for such a list discriminates against new competitors and SMEs.

26. *Do you consider that specific rules are needed for procurement by utilities operators? Do the different rules applying to utilities operators and public undertakings adequately recognise the specific character of utilities procurement?*

See answer to questions 10 to 13.

2.2. Specific instruments for small contracting authorities

27. *Do you think that the full public procurement regime is appropriate or by contrast unsuitable for the needs of smaller contracting authorities? Please explain your answer.*

UEAPME thinks that the full public procurement regime has to apply to all contracts covered by the directive. The relevant criterion has to be the volume of a contract not the sized of the contracting authority.

28. *If so, would you be in favour of a simplified procurement regime for relatively small contract awards by local and regional authorities? What should be the characteristics of such a simplified regime in your view?*

Small contracts are not covered by the directive, because contracts above the EU thresholds can not be seen as small.

29. *Do you think that the case-law of the Court of Justice as explained in the Commission Interpretative Communication provides sufficient legal certainty for the award of contracts below the thresholds of the Directives? Or would you consider that additional guidance, for instance on the indications of a possible cross-border interest, or any other EU initiative, might be needed? On which points would you deem this relevant or necessary?*

UEAPME sees the need to improve further the legal certainty as regards the award of contracts below the thresholds and would welcome better explanatory documents, but is strictly against any legislation for such contracts.

2.3. Public-public cooperation

Even, if we see the usefulness for such co-operations in specific cases to entail economics of scale and a more experienced purchasing staff, we have also to remind on the negative side of such co-operations. Large public procurements are discriminating against SMEs and lead to less competition and may eliminate the supply of goods and services at local and regional level. When public-public cooperation is at hand it is of outmost importance to seriously consider dividing contracts into lots in order to make possible also for SMEs to participate in the procurement.

30. *In the light of the above, do you consider it useful to establish legislative rules at EU level regarding the scope and criteria for public-public cooperation?*

31. *Would you agree that a concept with certain common criteria for exempted forms of public-public cooperation should be developed? What would in your view be the important elements of such a concept?*

32. *Or would you prefer specific rules for different forms of cooperation, following the case-law of the ECJ (e.g. in-house and horizontal cooperation)? If so, please explain why and which rules they should be.*

33. *Should EU rules also cover transfers of competences? Please explain the reasons why.*

2.4. Appropriate tools for aggregation of demand / Joint procurement

34. *In general, are you in favour of a stronger aggregation of demand/more joint procurement? What are the benefits and/or drawbacks in your view?*

Aggregation of demand should be done only in case where it is economical justified and outweighs the possible disadvantages as regards less competition and fewer participation of SMEs. Court of Auditors should check the efficiency of central purchasing bodies and similar institutions on a regular base.

35. *Are there in your view obstacles to an efficient aggregation of demand/joint procurement? Do you think that the instruments that these Directives provide for aggregating demand (central purchasing bodies, framework contracts) work well and are sufficient? If not, how should these instruments be modified? What other instruments or provision would be necessary in your view?*

36. *Do you think that a stronger aggregation of demand/ joint procurement might involve certain risks in terms of restricting competition and hampering access to public contracts by SMEs? If so, how could possible risks be mitigated?*

Yes, we see this risk and one instrument of mitigation could be an obligation to consider dividing contracts into lots (apply or explain principle) and to prove the efficiency of such aggregations.

37. *Do you think that joint public procurement would suit some specific product areas more than others? If yes, please specify some of these areas and the reasons.*

38. *Do you see specific problems for cross border joint procurement (e.g. in terms of applicable legislation and review procedures)? Specifically, do you think that your national law would allow a contracting authority to be subjected to a review procedure in another Member State?*

2.5. Address concerns relating to contract execution

In general UEAPME is strictly against any interference in the phase of contract execution. The public procurement law should end with the contract. As regards the modification or extension of contracts the provisions laid down in Article 31(4) in 2004/18/EC seems sufficient. (Answer to question 39 to 42)

39. *Should the public procurement Directives regulate the issue of substantial modifications of a contract while it is still in force? If so, what elements of clarification would you propose?*

40. *Where a new competitive procedure has to be organised following an amendment of one or more essential conditions would the application of a more flexible procedure be justified? What procedure might this be?*

41. *Do you think that EU rules on changes in the context of the contract execution would have an added value? If so, what would be the added value of EU-level rules? In particular, should the EU rules make provision for the explicit obligation or right of contracting authorities to change the supplier/ terminate the contract in certain circumstances? If so, in which circumstances? Should the EU also lay down specific procedures on how the new supplier must/ may be chosen?*

42. *Do you agree that the EU public procurement Directives should require Member States to provide in their national law for a right to cancel contracts that have been awarded in breach of public procurement law?*

43. *Do you think that certain aspects of the contract execution – and which aspects - should be regulated at EU level? Please explain.*

No, UEAPME does not see the need for any regulation at EU level; contract law is national law.

44. *Do you think that contracting authorities should have more possibilities to exert influence on subcontracting by the successful tenderer? If yes, which instruments would you propose?*

No, according to UEAPME, the successful tenderer, which has to carry the risk of contract execution, should be as free as possible to choose its subcontractor. Therefore, additional provisions are not necessary.

3. A MORE ACCESSIBLE EUROPEAN PROCUREMENT MARKET

45. *Do you think that the current Directives allow economic operators to avail themselves fully of procurement opportunities within the Internal Market? If not: Which provisions do you consider are not properly adapted to the needs of economic operators and why?*

3.1. Better access for SMEs and Start-ups

Studies commissioned by DG Enterprise have shown that SME participation in public procurement is not sufficient and that smaller enterprises have to face various barriers to access this market. This was also the reason for DG MARKT to publish in 2008 in the framework of the Small Business Act a “Code of good practices facilitating access by SMEs to public procurement contracts, which has been fully supported by UEAPME.

The code further shows that there is a full range of measures which can facilitate access of SMEs within the current legal framework. However, the scoreboard on the implementation of the SBA has shown that this code is not used to a sufficient level by national or regional contracting authorities and its implementation is quite uneven. From this point of view, it may be very helpful to make at least part of this code obligatory by a European legislation. On the other hand, it seems quite difficult to formulate precise legislative provision on subjects like dividing into lots, minimum turnover requirements, use of alternatives, etc. which can be applied to all tenders.

Therefore, UEAPME would recommend to use a concept, which allows a more flexible implementation of such measures by introducing the **principle of “apply or explain”**, which means that rules like division into lots, allowing alternatives, maximum request for annual turnover should not exceed 5 times (*for example*) the estimated value of the contract, has to be respected by a tenderer or they have to explain in the documentation, why deviation is justified.

46. Do you think that the EU public procurement rules and policy are already sufficiently SME-friendly? Or, alternatively, do you think that certain rules of the Directive should be reviewed or additional measures be introduced to foster SME participation in public procurement? Please explain your choice.

EU rules on public procurement aims to create conditions for good purchase for the public sector, using competition in the internal market. This is of major positive impact for small businesses. For small businesses, it is important that the procurement process is transparent and ensures equal treatment. The procurement directives lay a ground for this. For small businesses, it is in particular also of great importance that the qualification requirements set are relevant and proportionate, that the administrative burden is reasonable and that the contracts awarded are not unduly large. These aspects are all about the approach of the individual procurements. The code of best practice that the Commission has presented in order to create conditions for increased participation of small enterprises observes important factors. The code should be highlighted and widely spread in a clear manner for greater impact in the Member States at national and regional / local level.

47. Would you be of the opinion that some of the measures set out in the Code of Best Practices should be made compulsory for contracting authorities, such as subdivision into lots (subject to certain caveats)?

Yes, UEAPME recommend to make some parts of the Code compulsory by using the “apply or explain” principle – see above. This could be done in the following areas:

- division into slots
- allowing alternatives
- maximum requirements for annual turnover
- allowing consortia
- allowing subcontractors and ensuring equal terms for subcontractors
- giving priority to awarding contracts on the base of the economically most advantageous offer

48. Do you think that the rules relating to the choice of the bidder entail disproportionate administrative burdens for SMEs? If so, how could these rules be alleviated without jeopardizing guarantees for transparency, non-discrimination and high-quality implementation of contracts?

Small businesses are vulnerable to burdensome administrative procedures as well in public procurement as in other contexts. However, the comprehensive management that arises in public procurement is caused, in essence, not by the regulation in itself, but because of the often

complex specifications that companies have to interpret and comprehend to. The regulatory framework which forms the basis for selecting candidates is furthermore often excessively interpreted by the contracting authorities, leading to administrative burdens on businesses. Instead it would be desirable that the authorities in themselves more sought to collect information that is available in other agencies.

49. Would you be in favour of a solution which would require submission and verification of evidence only by short-listed candidates/ the winning bidder?

In order not to deter small companies from public contracts because of high administrative burden, it is important to try to find procedures that minimize the administrative cost to businesses. Any initiative in this direction is welcome. Of the proposed policy options we advocate options 2 (i.e. that only the bidder who is awarded the contract must submit supporting documents), because it is the option with the least administrative burden on the candidates overall.

50. Do you think that self-declarations are an appropriate way to alleviate administrative burdens with regard to evidence for selection criteria, or are they not reliable enough to replace certificates? On which issues could self-declarations be useful (particularly facts in the sphere of the undertaking itself) and on which not?

In accordance with what we have stated above, we believe it is important to reduce the administrative burden on enterprises in public procurement as far as possible. The use of self-declarations from the company concerned causes obviously a much smaller burden on the company than other forms of proof, such as third-party assurance. We believe self-declaration should be used wherever possible given the nature of the procurement at hand.

An important aspect that may deserve to be mentioned in this context is that compliance with the requirements set up in a public procurement should be followed up. This obviously includes such requirements that the company in question by its own declaration states to comply with.

51. Do you agree that excessively strict turnover requirements for proving financial capacity are problematic for SMEs? Should EU legislation set a maximum ratio to ensure the proportionality of selection criteria (for instance: maximum turnover required may not exceed a certain multiple of the contract value)? Would you propose other instruments to ensure that selection criteria are proportionate to the value and the subject-matter of the contract?

Yes, too strict requirements on turnover represent an obvious problem for small and medium-sized businesses. Therefore, we would propose a maximum turnover requirement of 5 times (for example) the contract value and as regards employment a maximum of two times the needed personal, both based on the “apply or explain” principle.

Furthermore, we wish in this context also draw attention to the fact that turnover requirements as such may pose barriers for new firms, who would need other alternative ways to prove their economic status.

52. What are the advantages and disadvantages of an option for Member States to allow or to require their contracting authorities to oblige the successful tenderer to subcontract a certain share of the main contract to third parties?

We believe that it must be up to the winning tenderer to determine, if there are reasons to subcontract the task. We therefore consider that this should not be guided by the contracting authority. Subcontracting should be allowed, but not made obligatory.

3.2. Ensuring fair and effective competition

53. *Do you agree that public procurement can have an important impact on market structures and that procurers should, where possible, seek to adjust their procurement strategies in order to combat anti-competitive market structures?*

Even more important would be that procurers should ensure fair competition and transparent procedures to attract as many participants as possible and to ensure competition also in markets, which are dominated by public procurers on the demand side.

54. *Do you think that European public procurement rules and policy should provide for (optional) instruments to encourage such pro-competitive procurement strategies? If so, which instruments would you suggest?*

Yes, by making division into lots to a rule, according to the “apply or explain principle”.

55. *In this context, do you think more specific instruments or initiatives are needed to encourage the participation of bidders from other Member States? If so, please describe them.*

56. *Do you think the mutual recognition of certificates needs to be improved? Would you be in favour of creating a Europe-wide pre-qualification system?*

Mutual recognition could help, but therefore such certificates have to be based on common European standards. A European pre-qualification system could be a helpful instrument, if it is kept simple, cheap and easily accessible also for SMEs.

57. *How would you propose to tackle the issue of language barriers? Do you take the view that contracting authorities should be obliged to draw up tender specifications for high-value contracts in a second language or to accept tenders in foreign languages?*

58. *What instruments could public procurement rules put in place to prevent the development of dominant suppliers? How could contracting authorities be better protected against the power of dominant suppliers?*

Dominant market structures have to be avoided by a better enforcement of European competition law.

59. *Do you think that stronger safeguards against anti-competitive behaviours in tender procedures should be introduced into EU public procurement rules? If so, which new instruments/provisions would you suggest?*

In general, the European and national competition and anti-fraud law – if sufficiently enforced – should be enough to avoid such behaviours. In addition, it should be forbidden that a contract winner subcontract parts of a contract to a former competitor in that specific procurement procedure.

3.3. Procurement in the case of non-existent competition/exclusive rights

60. *In your view, can the attribution of exclusive rights jeopardise fair competition in procurement markets?*

61. *If so, what instruments would you suggest in order to mitigate such risks / ensure fair competition? Do you think that the EU procurement rules should allow the award of contracts*

without procurement procedure on the basis of exclusive rights only on the condition that the exclusive right in question has itself been awarded in a transparent, competitive procedure?

4. STRATEGIC USE OF PUBLIC PROCUREMENT IN RESPONSE TO NEW CHALLENGES

4.1. "How to buy" in order to achieve the Europe 2020 objectives

Many European documents refer to a better use of public procurement to support energy efficiency, climate change policies, social targets and also innovation. UEAPME was never totally against such approaches – as long as this created additional welfare – but has always argued that this has to be done in a way, which does not discriminate against SMEs and ensures fair and transparent competition.

The biggest treat for SMEs is the request for specific labels / certificates a company has to show as prequalification for participation. Such specific certificates are not directly related to a specific contract and are, especially for smaller companies, quite expensive and often used by contracting authorities to privilege specific providers.

Our general line is, that every contracting authority has to decide on its own (and to justify towards their constituency), what they want to buy (a standard product or the best performing product as regards resource efficiency, the latest technical development, etc.) and how a contract should be executed (by normal standards, by employing a specific number of women or social challenged persons, in a specific environmental friendly manner), but every company, which is qualified to do the job, should be allowed to participate, without showing any environmental or social certificate. Such additional criteria have to be strictly limited to the contract and not to the company as such.

62. Do you consider that the rules on technical specifications make sufficient allowance for the introduction of considerations related to other policy objectives?

Yes, the rules on technical specifications allow sufficient space for other policy objectives. Any expansion in this regard should absolutely not be done.

63. Do you share the view that the possibility of defining technical specifications in terms of performance or functional requirements might enable contracting authorities to achieve their policy needs better than defining them in terms of strict detailed technical requirements? If so, would you advocate making performance or functional requirements mandatory under certain conditions?

Requirements for performance and function can already be imposed in the current situation. The use of such requirements can for example stimulate new, innovative solutions within the framework of public procurement. However, it should still be up to the contracting authority to decide what kind of technical specifications should be used in a given contract. This should not be made mandatory.

64. By way of example, do you think that contracting authorities make sufficient use of the possibilities offered under Article 23 of Directive 2004/18/EC concerning accessibility criteria for persons with disabilities or design for all users? If not, what needs to be done?

65. *Do you think that some of the procedures provided under the current Directives (such as the competitive dialogue, design contests) are particularly suitable for taking into account environmental, social, accessibility and innovation policies?*

66. *What changes would you suggest to the procedures provided under the current Directives to give the fullest possible consideration to the above policy objectives, whilst safeguarding the respect of the principles of non-discrimination and transparency ensuring a level playing field for European undertakings? Could the use of innovative information and communication technologies specifically help procurers in pursuing Europe 2020 objectives?*

We are strongly opposed to changing the procedures of the directives with the aim to fully consider other policy objectives. The procurement rules must continue to focus on robust procedures to protect the EU legal basic principles. Political considerations must be managed and regulated in a different order and within the appropriate policy framework.

67. *Do you see cases where a restriction to local or regional suppliers could be justified by legitimate and objective reasons that are not based on purely economic considerations?*

No, because such conduct restricts competition and close markets.

68. *Do you think that allowing the use of the negotiated procedure with prior publication as a standard procedure could help in taking better account of policy-related considerations, such as environmental, social, innovation, etc.? Or would the risk of discrimination and restricting competition be too high?*

We see clear risks for discrimination and reduced competition with unpredictable results and room for arbitrage.

69. *What would you suggest as useful examples of technical competence or other selection criteria aimed at fostering the achievement of objectives such as protection of environment, promotion of social inclusion, improving accessibility for disabled people and enhancing innovation?*

As stated in the introduction to this chapter, UEAPME insists that environmental, social or other criteria have to be strictly related to the contract and not to the company. Therefore, such additional criteria may not be used as selection criteria.

70. *The criterion of the most economically advantageous tender seems to be best suited for pursuing other policy objectives. Do you think that, in order to take best account of such policy objectives, it would be useful to change the existing rules (for certain types of contracts/ some specific sectors/ in certain circumstances):*

70.1.1. *to eliminate the criterion of the lowest price only;*

The economically most advantageous offer has to stay the crucial criteria for selection and it should not be misused for other political objectives. The aim is to select the offer, which fits best to the criteria of the tender, which is not only the price, but also life-cycle costs, quality etc.

70.1.2. *to limit the use of the price criterion or the weight which contracting authorities can give to the price;*

It will be difficult to obtain the most economically advantageous contract, if the price criterion gets a too low weigh.

70.1.3. to introduce a third possibility of award criteria in addition to the lowest price and the economically most advantageous offer? If so, which alternative criterion would you propose that would make it possible to both pursue other policy objectives more effectively and guarantee a level playing field and fair competition between European undertakings?

There is in our view no reason to introduce new evaluation criteria. We believe that based on these conditions it must be up to the contracting authorities to decide for themselves how the goals they have at hand can best be met in the specific contract.

71. Do you think that in any event the score attributed to environmental, social or innovative criteria, for example, should be limited to a set maximum, so that the criterion does not become more important than the performance or cost criteria?

We believe it is the contracting authorities should determine how the different criteria should be weighted in the contracts they undertake. This should not be regulated.

72. Do you think that the possibility of including environmental or social criteria in the award phase is understood and used? Should it in your view be better spelt out in the Directive?

If there is a need for further explanation, UEAPME would recommend an explanatory document rather than amending the directive.

73. In your view, should it be mandatory to take life-cycle costs into account when determining the economically most advantageous offer, especially in the case of big projects? In this case, would you consider it necessary/appropriate for the Commission services to develop a methodology for life-cycle costing?

Life-cycle costs can sometimes be significant. Estimates of life-cycle costs should however not be made mandatory, but should be used only in cases where this is relevant. It requires resources and expertise in order to make such calculations in a satisfactory way. It may be considered if the Commission in an interpretative communication could provide guidance on how life-cycle costs can be calculated without interfering with the basic principles.

74. Contract performance clauses are the most appropriate stage of the procedure at which to include social considerations relating to the employment and labour conditions of the workers involved in the execution of the contract. Do you agree? If not, please suggest what might be the best alternative solution.

We are opposed in principle to additional contract terms that have no clear link to the subject matter of the contract. Social performance is and has to be regulated in the relevant labour, equal opportunity and similar regulations. UEAPME only accepts performance criteria which are subject of and directly linked to the relevant contract.

75. What kind of contract performance clauses would be particularly appropriate in your view in terms of taking social, environmental and energy efficiency considerations into account?

UEAPME is strictly against contract performance clauses, which are not subject of and directly linked to the relevant contract.

76. Should certain general contract performance clauses, in particular those relating to employment and labour conditions of the workers involved in the execution of the contract, be already specified at EU level?

No, this is already regulated at national level and should not be regulated at EU level.

77. Do you think that the current EU public procurement framework should provide for specific solutions to deal with the issue of verification of the requirements throughout the supply chain? If so, which solutions would you propose to tackle this issue?

No, no such specific solution should be imposed. The European Commission's guiding document, Buying Social "states that a contracting authority has to apply to the prime contractor to collect evidence that specified requirements are complied with by the subcontractors. As far as we know EU Court of Justice has not had the issue of ability to conduct inspections of contractors up for assessment. What is stated in "Buying Social" would therefore be considered to apply.

78. How could contracting authorities' best be helped to verify the requirements? Would the development of "standardised" conformity assessment schemes and documentation, as well as labels facilitate their work? When adopting such an approach, what can be done to minimise administrative burdens?

UEAPME oppose such standardised conformity assessments, which would in the best case mean that authorities outsource administrative burden to companies.

79. Some stakeholders suggest softening or even dropping the condition that requirements imposed by the contracting authority must be linked to the subject matter of the contract (this could make it possible to require, for instance, that tenderers have a gender-equal employment policy in place or employ a certain quota of specific categories of people, such as jobseekers, persons with disabilities, etc.). Do you agree with this suggestion? In your view, what could be the advantages or disadvantages of loosening or dropping the link with the subject matter?

No, this should definitely not be implemented. To alleviate or remove the requirement that the conditions imposed must be related to the subject matter of the contract, would lead to more arbitrary and less predictability in public procurement. This runs counter to the EU law principles of transparency, non-discrimination and equality. The presence of irrelevant requirements that are judged to have no connection to the subject matter is of great importance to small business participation in public procurement. According to a Swedish report (from The Swedish Federation of Business Owners (Företagarna)), "Small businesses and public procurement – a problematic situation but with huge potential" (2008), as much as 46% of the small companies in Sweden have refrained from bidding in public procurement due to irrelevant specifying requirements.) To alleviate or remove the provision that requirements must be linked to the subject matter, would many SMEs discourage from participating in public procurement, which would lead to severely limited competition in public procurement.

80. If the link with the subject matter is to be loosened, which corrective mechanisms, if any, should be put in place in order to mitigate the risks of creating discrimination and of considerably restricting competition?

Our answer to question 79 shows that we are absolutely opposed to alleviate or remove the condition that there has to be a linkage between the requirements set and the subject matter of the contract. We therefore see no reason to consider any proposals for action.

81. Do you believe that SMEs might have problems complying with the various requirements? If so, how should this issue be dealt with in your view?

Yes, to ease or remove the condition that the requirements should be linked to the subject matter would seriously complicate the situation for small and medium-sized businesses, see answer to question 79. This should be handled in such a way as to maintain the condition of a linkage.

82. If you believe that the link with the subject matter should be loosened or eliminated, at which of the successive stages of the procurement process should this occur?

82.1. Do you consider that, in defining the technical specifications, there is a case for relaxing the requirement that specifications relating to the process and production methods must be linked to the characteristics of the product, in order to encompass elements that are not reflected in the product's characteristics (such as for example - when buying coffee - requesting the supplier to pay the producers a premium to be invested in activities aimed at fostering the socio-economic development of local communities)?

No, definitely not. It would be very aggravating especially for smaller companies with such irrelevant specifying requirements for the award.

82.2. Do you think that EU public procurement legislation should allow contracting authorities to apply selection criteria based on characteristics of undertakings that are not linked to the subject of the contract (e.g. requiring tenderers to have a gender-equal employment policy in place, or a general policy of employing certain quotas of specific categories of people, such as jobseekers, persons with disabilities, etc.)?

No, definitely not. We cannot see any reason for the EU to open up for the contracting authorities to – without connection to the subject matter - impose such conditions on firms and thereby controlling their working conditions and production conditions. There are other policies governing these matters.

82.3. Do you consider that the link with the subject matter of the contract should be loosened or eliminated at the award stage in order to take other policy considerations into account (e.g. extra points for tenderers who employ jobseekers or persons with disabilities)?

No, definitely not.

82.3.1. Award criteria other than the lowest price/ the economically most advantageous tender/ criteria not linked to the subject-matter of the contract might separate the application of the EU public procurement rules from that of the State aid rules, in the sense that contracts awarded on the basis of other than economic criteria could entail the award of State aids, potentially problematic under EU State aid rules. Do you share this concern? If so, how should this issue be addressed?

Yes, we share this concern.

82.4. Do you think that the EU public procurement legislation should allow contracting authorities to impose contract execution clauses that are not strictly linked to the provision of the goods and services in question (e.g. requiring the contractor to put in place child care services for the his employees or requiring them to allocate a certain amount of the remuneration to social projects)?

No, definitely not. Such irrelevant requirements would lead to arbitrariness and would seriously limit the ability of smaller firms. See also answer to question 79.

4.2. "What to buy" in support of Europe 2020 policy objectives

UEAPME thinks that every contracting authority should be free to contract any good or services which fit best there needs and have to justify its decision towards its constituency. Furthermore, the public procurement rules are not the right place to enforce any minimum standards as regards energy or resource efficiency performance, environmental performance or similar standards.

If the European legislator agrees to set such minimum standards for (some) public authorities, which goes beyond the existing standards applied to all contracts in Europe, this should be done by specific regulations, which binds procurement authorities.

83. Do you think that EU level obligations on "what to buy" are a good way to achieve other policy objectives? What would be the main advantages and disadvantages of such an approach? For which specific product or service areas or for which specific policies do you think obligations on "what to buy" would be useful? Please explain your choice. Please give examples of Member State procurement practices that could be replicated at EU level.

No, the EU should not regulate what the contracting authorities should purchase. This must be up to the contracting authorities to decide. The regulation of this would be counterproductive in that it would mean that the focus would no longer be to meet the actual needs of the individual authorities by public procurement.

84. Do you think that further obligations on "what to buy" at EU level should be enshrined in policy specific legislation (environmental, energy-related, social, accessibility, etc) or be imposed under general EU public procurement legislation instead?

If at all, it has to be done in such specific regulations.

85. Do you think that obligations on "what to buy" should be imposed at national level? Do you consider that such national obligations could lead to a potential fragmentation of the internal market? If so, what would be the most appropriate way to mitigate this risk?

No, what to buy should not be regulated in the national public procurement rules. It must be up to the contracting authorities to decide on.

86. Do you think that obligations on what to buy should lay down rather obligations for contracting authorities as regards the level of uptake (e.g. of GPP), the characteristics of the goods/services/works they should purchase or specific criteria to be taken into account as one of a number of elements of the tender?

No, because we fundamentally question the regulation of what should be purchased and believe this must instead be determined by the contracting authorities themselves.

86.1. What room for manoeuvre should be left to contracting authorities when making purchasing decisions?

86.2. Should mandatory requirements set the minimum level only so the individual contracting authorities could set more ambitious requirements?

87. In your view, what would be the best instrument for dealing with technology development in terms of the most advanced technology (for example, tasking an entity to monitor which technology has developed to the most advanced stage, or requiring contracting authorities to

take the most advanced technology into account as one of the award criteria, or any other means)?

Most advanced technology must not be the same as state of the art technology. Requiring such levels may create unpredictable risks and cost for procurers and many procurers will be faced with a very limited number of offers. Especially SMEs will rarely be able to participate in such tenders. Furthermore, as already stated, UEAPME opposes such requirements for contracting authorities in principle and believes that allowing alternatives is a much better option to achieve the same results with less risks and less costs.

88. The introduction of mandatory criteria or mandatory targets on what to buy should not lead to the elimination of competition in procurement markets. How could the aim of not eliminating competition be taken into account when setting those criteria or targets?

89. Do you consider that imposing obligations on "what to buy" would increase the administrative burden, particularly for small businesses? If so, how could this risk be mitigated? What kind of implementation measures and/or guidance should accompany such obligations?

Yes, the administration would be likely to increase for small businesses, but even more it will eliminate many SMEs and risks that purchasers are not able to buy the best solution for their needs.

90. If you are not in favour of obligations on "what to buy", would you consider any other instruments (e.g. recommendations or other incentives) to be appropriate?

4.3. Innovation

Also UEAPME sees many opportunities to promote and stimulate innovation through public procurement. This is the reason why UEAPME supports instruments like smart procuring and pro-commercial procurement as already proposed by the European Commission in various documents.

At the same time UEAPME sees in administrative regulations and internal rules for procurement officers the main barrier to achieve such goals:

- Controlling instruments used by Courts of Auditors but also political and public control of PP procedures force procurement officers to buy the cheapest and most well-known standard product or service; buying innovative solutions puts him on risk.
- An administrative separation between entities which buy something and entities which run this investment will force the procurement officer to ignore life-cycle costs and does not allow buying the economic most advanced offer.
- Therefore, only if there is a political will to promote innovation and only if there are clear signals and incentives for procurement officers to stimulate innovation, the legally existing instruments will be used in practice. This is true for all administrative levels, at European, national, regional and local level.
- Furthermore, supporting innovation may create some additional work for procurement offices. Therefore, such support will only take place, if they are part of the internal regulation for procurement offices.

91. Do you think there is a need for further promote and stimulate innovation through public procurement? Which incentives/measures would support and speed up the take-up of innovation by public sector bodies?

The existing procurement rules enable innovation-promoting public procurement. In many ways it's all about

that the contracting authorities must be prepared to examine alternative solutions for meeting identified needs. It requires, however, certain qualifications to properly implement and evaluate such contracts.

92. *Do you think that the competitive dialogue allows sufficient protection of intellectual property rights and innovative solutions, such as to ensure that the tenderers are not deprived of the benefits from their innovative ideas?*

93. *Do you think that other procedures would better meet the requirement of strengthening innovation by protecting original solutions? If so, which kind of procedures would be the most appropriate?*

94. *In your view, is the approach of pre-commercial procurement, which involves contracting authorities procuring R&D services for the development of products that are not yet available on the market, suited to stimulating innovation? Is there a need for further best practice sharing and/or benchmarking of R&D procurement practices used across Member States to facilitate the wider usage of pre-commercial procurement? Might there be any other ways not covered explicitly in the current legal framework in which contracting authorities could request the development of products or services not yet available on the market? Do you see any specific ways that contracting authorities could encourage SMEs and start-ups to participate to pre-commercial procurement?*

We do not have sufficient experience in commercial procurement in order to express an opinion regarding, if this is an effective instrument. On the question of how to allow for small and start-up companies to participate in pre-commercial procurement, we believe it is important that the requirements are not made too extensive.

95. *Are other measures needed to foster the innovation capacity of SMEs? If so, what kind of specific measures would you suggest?*

Yes, there is a need for other measures, but none that have a bearing on public procurement.

96. *What kind of performance measures would you suggest to monitor progress and impact of innovative public procurement? What data would be required for this performance measures and how it can be collected without creating an additional burden on contracting authorities and /or economic operators?*

4.4. Social services

97. *Do you consider that the specific features of social services should be taken more fully into account in EU public procurement legislation? If so, how should this be done?*

No, we do not think social services should be given special treatment within the procurement law.

97.1. *Do you believe that certain aspects concerning the procurement of social services should be regulated to a greater extent at EU level with the aim of further enhancing the quality of these services? In particular:*

97.1.1. *Should the Directives prohibit the criterion of lowest price for the award of contracts / limit the use of the price criterion / limit the weight which contracting authorities can give to the price / introduce a third possibility of award criteria in addition to the lowest price and the economically most advantageous offer?*

The economically most advantageous offer has to stay the crucial criteria for selection and it should not be misused for other political objectives. The aim is to select the offer, which fits best to the criteria of the tender, which is not only the price, but also life-cycle costs, quality etc.

97.1.2. *Should the Directives allow the possibility of reserving contracts involving social services to non-profit organisations / should there be other privileges for such organisations in the context of the award of social services contracts?*

No, definitely not. It is important to uphold the principles of equality and non-discrimination.

97.1.3. *Loosening the award criteria or reserving contracts to certain types of organisations could prejudice the ability of procurement procedures to ensure acquisition of such services "at least cost to the community" and thus carry the risk of the resulting contracts involving State aid. Do you share these concerns?*

Yes, we do.

97.2. *Do you believe that other aspects of the procurement of social services should be less regulated (for instance through higher thresholds or de minimis type rules for such services)? What would be the justification for such special treatment of social services?*

No, there is no need for such special treatment.

5. ENSURING SOUND PROCEDURES

5.1. Preventing conflicts of interest

98. *Would you be in favour of introducing an EU definition of conflict of interest in public procurement? What activities/situations harbouring a potential risk should be covered (personal relationships, business interests such as shareholdings, incompatibilities with external activities/ etc.)?*

99. *Do you think that there is a need for safeguards to prevent, identify and resolve conflict-of-interest situations effectively at EU level? If so, which kind of safeguards would you consider useful?*

5.2. Fighting favouritism and corruption

100. *Do you share the view that procurement markets are exposed to a risk of corruption and favouritism? Do you think EU action in this field is needed or should this be left to Member States alone?*

101. *In your view, what are the critical risks for integrity at each of the different stages of the public procurement process (definition of the subject-matter, preparation of the tender, selection stage, award stage, performance of the contract)?*

102. *Which of the identified risks should, in your opinion, be addressed by introducing more specific/additional rules in the EU public procurement Directives, and how (which rules/safeguards)?*

103. *What additional instruments could be provided by the Directives to tackle organised crime in public procurement? Would you be in favour, for instance, of establishing an ex-ante control on subcontracting?*

5.3. Exclusion of "unsound" bidders

104. Do you think that Article 45 of Directive 2004/18/EC concerning the exclusion of bidders is a useful instrument to sanction unsound business behaviours? What improvements to this mechanism and/or alternative mechanisms would you propose?

105. How could the cooperation among contracting authorities in obtaining the information on the personal situation of candidates and tenderers be strengthened?

106. Do you think that the issue of "self-cleaning measures" should be expressly addressed in Article 45 or it should be regulated only at national level?

107. Is a reasoned decision to reject a tender or an application an appropriate sanction to improve observance of the principle of equality of treatment?

108. Do you think that in light of the Lisbon Treaty, minimum standards for criminal sanctions should be developed at EU level, in particular circumstances, such as corruption or undeclared conflicts of interest?

5.4. Avoiding unfair advantages

109. Should there be specific rules at EU level to address the issue of advantages of certain tenderers because of their prior association with the design of the project subject of the call for tenders? Which safeguards would you propose?

110. Do you think that the problem of possible advantages of incumbent bidders needs to be addressed at EU level and, if so, how?

6. ACCESS OF THIRD COUNTRY SUPPLIERS TO THE EU MARKET

111. What are your experiences with and/or your views on the mechanisms set out in Articles 58 and 59 of Directive 2004/17/EC?

111.1. Should these provisions be further improved? If so, how? Could it be appropriate to expand the scope of these provisions beyond the area of utilities procurement?

112. What other mechanisms would you propose to achieve improved symmetry in access to procurement markets?

FINAL QUESTIONS

113. Are there any other issues which you think should be addressed in a future reform of the EU public procurement Directives? Which issues are these, what are - in your view - the problems to be addressed and what could possible solutions to these problems look like?

114. Please indicate a ranking of the importance of the various issues raised in this Green Paper and other issues that you consider important. If you had to choose three priority issues to be tackled first, which would you choose? Please explain your choice.

According to UEAPME and the needs of SMEs, the most important issues regards the Green Paper are the following:

- Our general impression is that most of the discussed objective could be achieved also in the framework of the current legal framework. If a contracting authority wants to facilitate SME participation, to buy green products or services provided at high social standards or to tender innovative solution, it can be done.
- The real problem are the missing political will at the level of contracting authorities and their hierarchy and the wrong incentives for the persons doing the daily business. If a contracting authority wants to avoid any troubles with the court of auditors, the media or political opponents, it too often goes for the most standardised and cheapest solution.
- UEAPME is not convinced that this missing political will and the wrong incentives at the level of procurement authorities can be compensated by amending the European directives. Furthermore, UEAPME sees many issues put forward by the Commission go back to very specific particular interests, which will come into play – at least at the European Parliament – and it may be very difficult to predict the outcome of such a legal process.

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For further information on this position paper, please contact:

Gerhard Huemer
Director Economic and Fiscal Policy
g.huemer@ueapme.com
+32 2 2307599