

Position Paper

UEAPME¹ position paper on the proposal of the European Commission on Public Procurement

General comments

As already stated in [UEAPME's response](#)² to the green-paper consultation in 2011, for various reasons Crafts and SMEs are very interested in fair and transparent public procurement procedures to ensure the best possible results as regards value for money.

UEAPME is still not convinced that there is a strong need for a reform of the current directives from 2004, implemented in 2007. Even if UEAPME agrees with the aims of the proposed reform, i.e. simplification of procedures, facilitating the access of SMEs and better use of public procurement to fulfil other policy objectives, most of our members argue that these goals could be also achieved by better applying the current directives. In addition, public procurement rules are already a quite complex subject and many practitioners on both side of the market have difficulties to apply them correctly and effectively. A further change of the rules will increase again the level of confusion and risks decreasing the quality of the outcome.

However, as it seems that a reform of the current directives is politically unavoidable, UEAPME presents in this position paper the opinion of Europe's Craft and SME sector on the proposal presented by the European Commission on 20 December 2011, with a specific focus on the general directive on public procurement (COM(2011) 896 final).

The general assessment of the Commission's proposal gives a mixed picture from an SME point of view:

- UEAPME welcomes the proposed measures to facilitate SME participation, such as the threshold for turnover requirements, the simplifications of information obligations, the possibility of direct payment to subcontractors, and the "apply or explain" principle as regards the division into lots.
- UEAPME fears that some measures proposed for simplification and flexibilisation of procurement procedures may result on less transparency and less predictable outcomes. This may especially be true for the wider use of negotiation procedures and in the area of social services. At the same time, UEAPME welcomes the merge of the current A and B list for services.
- As regards the strategic use of public procurement (PP) for other policy objectives, UEAPME welcomes that the Commission keeps the approach only to allow additional criteria related to the subject of the contract and not related to a company as such. At the same time, many SMEs have doubts about the practicability and the additional burdens related to life-cycle cost calculation and the requirements related to production processes and supply-chains.

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.

² See: http://www.ueapme.com/IMG/pdf/110414_PP_greenpaper_final.pdf

Specific comments on the proposal (COM (2011) 896 final)

1. ad Art. 4(d) – threshold for social services

A higher threshold for social and other specific services (Annex XVI) is seen as very critical by SMEs, because in many countries some social services are also provided by private enterprises, including especially SMEs, and a general exemption for all social services will destroy the market for such companies and would hamper the development of European markets for such services in future.

Therefore, UEAPME proposes not to have a higher threshold for social services.

2. ad Art. 11 – relation between public authorities

Allowing legal persons to carry out up to 10% of its activities for the private market (sub-paragraph 1,3 and 4) without losing the right to get contracts without tenders from the public authority, which controls it, will lead to unfair competition on these markets. Most of these cases it will be about local or regional services or work contracts, and SMEs will suffer from such unfair competition.

Therefore, UEAPME asks to delete this 10% clause. Such companies should only get contracts without competition only if they work exclusively for the authority that controls them.

3. ad Art. 15 – principles of procurement

Some of our members miss a reference to the purpose of the directive and would like to also add the principle of mutual recognition to this article.

Therefore, UEAPME proposes:

- to change the title to “Purpose and principles of procurement”
- to add a paragraph such as the following:

The purpose of this Directive is to safeguard the efficiency of the use of public funds, promote high-quality procurement, strengthen competition and the functioning of the public procurement markets and safeguard equal opportunities for companies and other providers in offering supply, service and public works contracts under competitive bidding for public procurement.

- to add the principle of mutual recognition

4. ad Art. 19 – electronic means of communication

UEAPME welcomes the positive and supportive general approach towards electronic means of communication and we underline the importance to use non-discriminatory, general available and

interoperable tools for such communication. However, UEAPME questions the usefulness of the requirement that all procedures must be conducted by electronic means two years after implementation of the directive.

Therefore, UEAPME proposes to leave it to the Member States to decide when all procedures must be conducted by electronic means.

5. ad Art. 24 – choice of procedures

All procedures next to the open or restricted procedures are risky as regards transparency and predictability and should therefore be reduced to an absolute minimum. Furthermore, such procedures are difficult to handle for companies with limited resources, such as SMEs.

With the last reform in 2004, the “competitive dialogue” procedure has been added to allow more leeway for innovative procurement. We do not have significant experience with this procedure, which has not been used very frequently until now. Therefore, we do not see much need for a very similar new procedure next to the competitive dialogue such as the innovation partnerships.

Specifically, Art.24/1(a) allows the negotiated procedure for work contracts, if the contract includes design and execution. This is an invitation to combine these tasks in order to avoid an open or restricted procedure, which would exclude many construction companies only offering execution of works.

Therefore, UEAPME asks to reduce the possibility for negotiated procedures to an absolute minimum - especially to delete Art.24/1(a) - and to prove again the usefulness of innovation partnerships.

6. ad Art. 25 and Art 26 – time limits

The Commission’s proposal suggests reducing significantly the time limits for the receipt of tenders and the request to participate. Less time for preparing an offer or to organise a consortium will limit significantly to possibility – especially for smaller companies – to participate and consequently, it will reduce competition and the number of potential offers (especially from abroad) and the quality of participants.

Therefore, UEAPME asks the rethink the reduction of time limits for the receipt of tenders and the request for participation. The use of electronic means for communication does not justify such significant reductions.

Furthermore, UEAPME requests a clarification that in cases of correction of the tender documents by the contracting authority, the time limit has to be prolonged.

7. ad Art. 32 and 33 – dynamic purchasing systems and electronic auctions

Both procedures may only be useful for the purchase of commonly used products generally available on the market and at more or less standardised quality. They cannot and should not be used for complex or non-standardised products and services

Therefore, UEAPME insists on a strict limitation of these procedures to such standardised products.

8. ad Art. 31/35/37/38 – framework contracts and joint / centralised procurement

Even if framework contracts and joint / centralised procurement may profit from economies of scale, one has to keep in mind that such larger contracts risks to reduce competition significantly and exclude in many cases the participation of SMEs.

Therefore, such procedures go against the aim of facilitating the participation of SMEs and UEAPME asks to limit the use of such procedures to the minimum and only to cases where it can create economic benefits higher than the costs of reduced competition and the exclusion of SMEs.

9. ad Art. 40 – technical specifications

In Article 40 it is proposed that a technical specification should also be allowed to include production processes or other production circumstances. This seems to be allowed irrespectively from where in the value chain they might occur, and quite regardless of whether such circumstances have any relevance to the concrete features of the good or service in question. Article 40 also must be read together with Articles 66 and 67, about contract award criteria and life-cycle costing. We fear such a provision would open up for various requirements that would be irrelevant with regard to the object of the contract.

The possibility to set requirements on production processes (within EU or elsewhere) and at any stage of the creation of a good or a service can have far-reaching negative economic consequences. It is for the small businesses of vital importance that all the requirements are linked to the subject matter of the contract, i.e. that the requirements are relevant. Furthermore, such demands involving production processes in third countries would risk creating trade conflicts.

According to the ECJ (see Wienstrom-case, C-448/01, 4 December 2003) a contracting authority must be able to control/follow up the requirements they demand in public procurement. This is of course of importance both in situations where the requirements are linked to the specific subject matter of the procurement as well in situations where there is no such link. Otherwise, there is a clear risk for arbitration and unfair competition. From this follows that requirements should not be set up by authorities, who have no intention or possibility to follow them up. Taking this into account, we would recommend implementing a rule observing that contracting authorities must be able to control/follow up that the requirements are fulfilled. This should apply to all requirements, irrespective of whether they are linked to the object of the contract or not.

Therefore and taking this into account, UEAPME recommends implementing a rule observing that contracting authorities must be able to control/follow up that the requirements are fulfilled and to limit such requirements clearly to the specific subject matter of the contract. Furthermore, UEAPME demands that in case of the use of life-cycle costing, it has to be ensured that the calculation method has to be provided exclusively by the contracting authority.

10. ad Art. 43 – variants

Allowing the submission of variants is the most common way to open a procurement procedure for innovative tenders. If Europe really wants to push on innovation, allowing variants should become the rule rather than the exception.

Therefore, UEAPME proposes to use the “apply or explain” principle also for variants and to provide a rule that foresees variants in general and demands an explanation in the tender documents if variants are not allowed.

11. ad Art. 44 – division into lots

UEAPME welcomes the proposal to split a tender into smaller lots, if it exceeds 500 000 Euro and to provide written explanation in cases a division seems not possible or justified. Furthermore, UEAPME supports the possibility for contracting authorities to limit the number of lots awarded to a single company (Art.44 (2)). At the same time, UEAPME warns against the provision to allow contracting authorities to award a contract for more than one lot to a tenderer that is not ranked first in all lots covered by this contract (Art.44 (3)).

12. ad Art. 54/2 – rejection of offers

UEAPME welcomes the possibility to reject a tender if it does not comply with the established social law, labour or environmental law at European or international level.

13. ad Art. 56 – minimum turnover

UEAPME welcomes the rule that the required minimum turnover shall not exceed three times the estimated contract value, except in duly justified circumstances, which must be documented in written form.

14. ad Art. 57 – self-declaration and only once principle

UEAPME welcomes the possibility of self-declaration as preliminary evidence that candidates and tenderer fulfil the qualification criteria.

Furthermore, UEAPME welcomes the provision that a contracting authority shall not require a document or certificate, which has already been provided to the same authority.

15. ad Art. 59 – European procurement passport

Even if UEAPME has no general objections against a European Procurement Passport, we have some concerns about its practicability. Such a “European” qualification system would be established in parallel to the existing national / regional systems and risks creating additional complication and confusion for potential participants.

Some of our members have also fears that the Commission may introduce with delegated acts a harmonisation of the qualification systems by the back door.

Therefore, UEAPME proposes to reassess the usefulness of such a proposal and to proceed to a proper impact assessment on the effects such a provision may have for the existing pre-qualification systems.

16. ad Art. 66/2(d) – contract award criteria

As already mentioned in relation to Article 40, UEAPME has concerns about the practicability of the provision in Article 66/2(d), which requires provable knowledge about the whole production process including the supply-chain of a product, which a normal SME cannot provide with reasonable efforts and could exclude many potential bidders from participating, if this provision is used excessively. Furthermore, this provision may be misused to introduce criteria, which are not related to the specific contract.

Therefore, UEAPME demands to delete any provision on the process of production or provision of a service, which goes above the control of the contractor and / or cannot be followed-up by the contracting authority.

17. ad Art. 66 and 67 – lowest cost and life-cycle costing

UEAPME has always argued against the “lowest price” as award criteria, because too often it does not lead to best value for money. From this point of view, replacing the lowest price with the lowest cost criterion may be seen as a progress. However, calculating life-cycle costs is still a quite challenging task. There are rarely commonly agreed standards in Europe and especially smaller companies may have difficulties to use them.

Therefore, UEAPME can accept the “lowest cost criterion”, if there are clear criteria for the calculation available and as long it does not create additional burdens on smaller companies. If this criterion is used, UEAPME demands that the contracting authority has to provide the method for the calculation of life-cycle costs, which has to be SME compatible and has to avoid additional burdens as far as possible. However, UEAPME still recommends the use of the economically most advanced tender as award criteria as much as possible.

18. ad Art. 69 – abnormally low offers

UEAPME welcomes the clarification of the rules for treating abnormally low offers.

19. ad Art. 70 – price fluctuation

Art. 70 provides only the possibility of hedging to compensate for the risk of price fluctuations. This may be the usual method for large companies, but smaller enterprises are normally using clauses with formulas for price adoption to compensate for price fluctuations (raw materials, energy, etc.) and are not used / able to do hedging.

Therefore, UEAPME demands a widening of methods to be used for the mitigation of the risk of price fluctuation, which has also to include the possibility to use price adoption formulas.

20. ad Art. 71 – subcontracting

UEAPME welcomes the possibility for Member States to require direct payment of

subcontractors from the contracting authority, where the nature of the contract allows so and the subcontractor request it.

21. ad Art. 74-76 – social services

UEAPME opposes the proposal to implement a separate and more lightly regulated regime for so-called social services (Article 74-76). Such services can be of considerable economic value and should therefore be of interest from an internal market perspective. We cannot see any valid reason for separate treatment for social services.

Therefore, UEAPME proposes to delete the chapter on social and other specific services (Art 74-76).

22. ad Art. 83-88 – governance

UEAPME believes that effective supervision and assistance activities are of importance in order to achieve effective public procurement, and we support general obligations on the Member States to appoint bodies for such activities. We find however the present proposal to be very detailed and far reaching. We believe that it should be up to each Member State to decide on the organisational structure in detail.

Therefore, UEAPME supports the proposal to appoint national bodies with the obligation to supervise and to provide assistance in order to strengthen the implementation of the directive. However, organisational details of these bodies must stay in the competence of Member States.

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