

Assessment of the new Public Procurement Directive

On 25 June the European Parliament, the Council and the European Commission found a compromise on the Commission Proposal (from December 2011) for a Directive on Public Procurement (Classical Directive), which has been adopted by the COREPER on 17 July and will be voted by the European Parliament in September.

The main aims of the new directive were simplification of procedures, facilitating the access of SMEs and better use of public procurement to fulfil other policy objectives. UEAPME has [answered](#)¹ to the green paper consultation ahead of the Commission proposal, issued a [position paper](#)² on the Commission proposal and provided input³ for the final negotiations at the Trilogue.

A first assessment of the final outcome gives a quite positive picture for SMEs, even if we did not get all our requests through.

Facilitation access of SMEs

Positive results:

- Art 44: **Division into lots** can be made mandatory by Member States (paragraph 4) and in cases, if it is not mandatory, the contracting authority has to provide the reason for not subdividing into lots (paragraph 1) = **apply or explain principle as demanded by UEAPME**
- Art 56/3: The annual **minimum turnover** for economic operators shall not exceed **two times** the estimated **contract value**. **UEAPME has demanded three times = results are even better than our original demand**
- Art 57: **Self-declaration** has to be accepted as preliminary evidence to prove the fulfilment of the qualification criteria and contracting authorities shall not require a document or certificate, which they can access directly via national database in any Member State. **Both have been requested successfully by UEAPME**
- Art 70: The limitation to hedging as the only possibility to **compensate for price fluctuation** has been deleted **as requested by UEAPME**.
- Art 71/3: Member State can provide that at the request of a **subcontractor** – and where possible – the contracting authority shall pay the subcontractor directly. **This was requested by UEAPME**.

¹ http://www.ueapme.com/IMG/pdf/110414_PP_greenpaper_final.pdf

² http://www.ueapme.com/IMG/pdf/120425_PP_UEAPME_final.pdf

³ http://www.ueapme.com/IMG/pdf/130220_PP_UEAPME_Triologue_final.pdf

Unsuccessful demands:

- Art 43: **Variants** have to be authorised by contracting authorities and on foreseen in general (apply or explain principle) *as required by UEAPME*.

Simplification of procedures

Positive results for SMEs:

- Art 19: The new directive requires electronic communication where ever possible, but does not state anymore a specific date from which electronic communication is obligatory, as the original proposal has foreseen and **has been criticised by UEAPME**.
- Art 4/a and Annex XVI: The current **category B for services** which are not fully covered by the directive has been integrated in the classical directive. However, for most of the **social services** a higher threshold of EUR 750.000 compared to EUR 130.000 / 200.000 applies. **UEAPME asked for the integration of category B services, but also for a lower threshold for social services.**
- Art 24: As regards the choice of procedures, many stakeholders tried to open the competitive procedure with negotiations to all contracting authorities. **UEAPME achieved that this procedure is still limited to specific situations.** However, it will be not possible anymore, that Member States apply this provision even more restrictive than foreseen in the directive.
- Art 66: The new directive gives a clear priority to award a public contract to the most economically advantageous tender, which was **demande by UEAPME since many years.** Furthermore, Member States can restrict price and cost only as the sole award criterion to certain types of contract or may not use it at all.
- Art 67: If the contracting authorities using cost (life-cycle costs) rather than prices, the life- cycle cost has to be calculated in a pre-defined way, which is easily accessible for all economic operators. **UEAPME has demanded this to avoid in-transparency and unnecessary burdens.**

Negative results for SMEs:

- Art 11: The new directive allows public companies to carry out up to 20% of its **activities for the private market** before they lose the possibility to get contracts from public authorities without tenders. The Commission proposed 10% and **UEAPME requested to delete this opportunity** at all, but Parliament and Member States agreed to double the Commission proposal.

- Art 25 and 26: The new directive will dramatically reduce the time limits for the receipt of tenders and the request to participate.

	Tender (before)	Participation (before)
Open procedure	35 (52) days	
Restricted procedure	30 (40) days	30 (40) days
In case of pre-notification	15 days	
Use of electronic communication	5 days less	
In case of urgency	15 days less	

UEAPME has tried to avoid these shortenings, but unfortunately without success.

Better use of public procurement to fulfil other policy objectives

As regards the strategic use of public procurement for other policy objectives, UEAPME always respected the freedom of contracting authorities to choose their appropriate levels for social or environmental standards, if they buy goods, work or services. However, the most important issue for UEAPME was always that any additional requirement above legal provisions has to be strictly related to the subject of the contract and may not relate to a company as such (Art 40). This principle has been kept in the new directive and furthermore, if contracting authorities refer to labels (Art 41), such labels must also refer to criteria which are linked to the subject-matter or in cases where a label goes beyond this, only criteria related to the subject shall apply. Finally, if an economic operator is not able to obtain such a label in due time, it must be allowed to prove the fulfilment of the requested criteria by other means. **Therefore, the main concerns of UEAPME as regards the use of public procurement for other objectives have been respected.**

Brussels, 24 July 2013

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