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EUROCITIES response to the Green Paper on modernising public procurement policy

EUROCITIES

EUROCITIES is the network of major European cities. Founded in 1986, the network brings together the local governments of over 130 large cities in some 34 European countries. EUROCITIES represents the interests of its members and engages in dialogue with the European institutions across a wide range of policy areas affecting cities. These include: economic development, the environment, transport and mobility, social affairs, culture, the information and knowledge society, and services of general interest.

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INTRODUCTION

Public procurement rules aim at promoting open and transparent tendering procedures to favour competition, counter corruption as well as supporting better services and value for money for taxpayers. However, they often mean heavy procedures, a lack of flexibility, can be a burden for public authorities and even discourage smaller organisations from bidding.

This review is an opportunity to adapt procurement policy to current challenges linked to the Europe 2020 strategy and its flagship initiatives, notably the Innovation Union, the Agenda for new skills and jobs as well as the Single Market Act. It should lead to a clarification and simplification of public procurement rules to make life easier for both public authorities and those bidding for contracts in the EU, especially smaller organisations such as SMEs, NGOs, and social enterprises.

EUROCITIES brings together the local governments of more than 135 major cities in the European Union, with a combined population of more than 120 million people. As the European network of major cities, EUROCITIES is a platform for exchange and learning between cities on a wide range of issues, and we work together to ensure the voice of Europe's major cities is heard at European level.

The review must allow us as cities to achieve better value for taxpayer's money and, at the same time, address issues such as environmental protection, energy efficiency, social inclusion and job creation.

As centres of innovation cities can foster creative solutions to the challenges we face when procuring works, products and services. They therefore need to have discretion in the choice of the form of purchase and provision. This is particularly important for the provision of services of general interest. The autonomy of local authorities allows them to develop innovative local public services that best respond to the needs of their citizens.¹ It is crucial for cities to be free to choose the form of provision: direct, in-house, through their own enterprises, through inter-communal cooperation or through third parties. The European Commission should promote all forms of service provision and not only public procurement. In-house provision should be recognised for all services of general economic interest based on the model of the revised Regulation 1370/2007 for public passenger transport services by rail and by road.

Representing 18% of the EU's GDP, public procurement can be significant to economic recovery, encouraging cross-border cooperation, stimulating innovation, supporting job creation, promoting a low-carbon economy and achieving optimal value for public authorities.

It is important, for the sake of consistency, that the review of procurement rules and the assessment of EU state aid rules and notably the services of general economic interest package, are not done in isolation.

Priority issues for us are:

- 1) Facilitating cities' use of public procurement procedures
- 2) Promoting and supporting local joint procurement
- 3) Supporting the local economy: better access to public procurement for SMEs and other smaller suppliers
- 4) Increasing support for innovation and broader environmental and social objectives

¹ Article 14 of the Treaty on the Functioning of the European Union and Protocol 26 on services of general interest acknowledge the wide discretion of national, regional and local authorities in organising, providing and financing services of general economic interest.

1) FACILITATING CITIES' USE OF PUBLIC PROCUREMENT PROCEDURES

Cities face a lack of legal certainty and flexibility as well as the administrative burden created by EU public procurement rules. For us, the elements below must be taken into account in the review of these rules.

Raising the thresholds

The procurement directives prescribe lengthy and complicated procedures that often impose a disproportionate burden on local authorities and discourage them from starting a tender procedure. Raising the threshold and developing a simpler procedure for smaller contracts, with fewer requirements in terms of notification, would make the process much easier for local public authorities.

Negotiated procedure

Cities would welcome greater opportunities to use the negotiated procedure with prior publication for any type of contract. In our view, this would not constitute a risk of abuse and/or discrimination. Contracts are implemented to achieve the best possible procurement outcomes and the principles of public procurement transparency, equal treatment and non-discrimination can be sustained in a negotiated procedure.

Introducing more flexible rules for substantial modification of a contract

Contracting authorities sometimes need to make amendments during the contract, due to questions from bidders or changes in the local context. It is quite common that changes in the local context occur, particularly with multi-year contracts. In some cases, these amendments are so substantial that they require a new tendering procedure. More flexibility is needed to allow amendments to contracts. Amendments should be allowed provided that the value of these amendments is under a certain percentage of the total value of the contract.

Clarification is needed in terms of which changes in the contract require the reopening of competition. Only material changes should involve a new competition. If a new competition is organised, it should be done through a negotiated procedure without prior notification. There is also a need for greater clarification in terms of the type of changes that affect the provider and result in the contract being terminated.

Increase legal certainty through codification of rulings

We are working with a set of complicated rules and decisions due to incomplete implementation of the Procurement Directives at national and regional levels, European Commission guidance (e.g. on green procurement, social procurement, clean vehicles) and the numerous European and national court rulings. As a result, cities spend considerable time and money seeking external legal advice. They generally prioritise legal certainty to avoid complaints and being brought to court, with the associated costs. This leads to contracts being awarded to the cheapest offer rather than to the most economically advantageous (with the inclusion of criteria linked to the pursuit of environmental and social objectives).

More coherence between the different rules and decisions would be of great help to local public procurers. One way to ensure coherence is to periodically codify the most important rulings of the European Court of Justice (ECJ) regarding procurement legislation.

Single EU procurement rules web portal

Currently, procurement legislation, decisions by the European Commission and European Court of Justice rulings are published on different web portals. One single portal would help local authorities find the information they need more easily. This portal could be managed by the European Commission Directorate General for internal market and services and could contain FAQs and briefings on all major issues, with links to web portals of other directorates general and other institutions.

Modified complaints mechanism

Current rules favour the bidder in a complaint, since, at most, they will have to bear their own costs and an appeal fee. Stipulating that the losing party must bear all costs would significantly reduce complaints procedures, as the complainant would be more likely to assess the objectivity of the complaint before launching it.

Marketplace for A-services

The system for B-services currently works as follows: no general framework agreement is concluded, but each individual call for tender is published in a virtual 'marketplace'. As a result, there are a large number of separate calls for tender in this marketplace, and interested parties can respond to a given tender. Bids are ranked for each tender on the basis of the price. The bids of the five lowest offers in terms of price are considered and assessed on quality criteria. Of these five, the contract is awarded to the tender offering the most economically advantageous bid.

The advantage of such a marketplace is that it improves the chances of self-employed candidates. We would welcome such a system for A-services.

Regular review of procurement rules based on feedback from local authorities

Local authorities should be involved regularly in a review process to avoid discrepancies between procurement rules and their use on the ground.

2) PROMOTING AND SUPPORTING LOCAL JOINT PROCUREMENT AND PUBLIC-PUBLIC COOPERATION

EU support for cross-border procurement

Cross-border procurement is still very rare. EU guidelines and training sessions organised by the European Commission would be a good way to promote it and to support local authorities in the organisation of joint tender processes. A helpdesk available throughout the procurement process would also be useful. Language is a particularly problematic barrier for cross border joint procurement, which might be partially resolved by making certain standardised tender elements available in all languages. The Commission could consider providing services such as translating

tender documents or publishing documents in a second language.

Co-funding for cross-border joint procurement initiatives that support innovation would be very welcome. Future funding programmes to foster competitiveness and innovation could support such processes, for instance for the set up of tenders that would include criteria to foster innovative solutions and products.

Joint assessment of needs

The procurement of innovative solutions starts with a needs assessment. Where other local authorities have similar needs, joining forces can help achieve a critical mass. The EU could facilitate needs-assessment by providing financial support for exchanges between public authorities and secondments.

Public-public cooperation

Clarification is needed in terms of those situations in which public authorities entrust economic activities to other public authorities, or carry out these activities jointly with other public authorities.

Two recent and very important ECJ rulings concern the application of public procurement rules to the cooperation between public authorities: *Coditel*² and *Hamburg*³. The first one develops the concept of 'in-house' contract awards⁴ and, by accepting joint control, facilitates the use of an 'in-house entity' in the context of inter-municipal cooperation. The second specifies that, for public-public cooperation not to fall under public procurement rules, the creation of jointly controlled entities is not required. It states that such cooperation can also be based on a not-for-profit collaboration aimed at jointly ensuring the execution of public tasks and solely governed by considerations and requirements relating to the achievement of objectives in the public interest. This matter is particularly complex and discussions on the scope and interpretation of the case-law are still ongoing, notably with Member States within the Advisory Committee for Public Contracts.

A new act on free choice entered into force in Sweden in January 2009. This model is not based on the award of public service contracts or concessions in the sense of the EU public procurement rules, but on a system of non-exclusive authorisations. This new system can be implemented by local authorities wanting to empower users and to improve the quality of the services provided. There is no competition on price as the compensation is established by the public authority on the basis of the cost of the in-house provision. All providers meeting the conditions defined by the competent public authority are authorised to operate and must provide the service upon request from a beneficiary.

Public-public cooperation is key to achieving critical mass and influencing the market. An exemption to procurement directives should be included in the reviewed legislation.

² Ruling of 13 November 2008 in case C-324/07 *Coditel Brabant* [2009] ECR I-0000 (reference for a preliminary ruling from the Belgian Conseil d'État).

³ Ruling of 9 June 2009 in case C-480/06 *Commission v Germany* [2009] ECR I-0000.

⁴ The "in-house" exception refers to a situation where a public authority (or various public authorities together) decides to provide a service itself, albeit acting through a legally independent entity. This entity is however so closely connected to the public authority that the two are effectively regarded as one. Such a relation is not covered by the EU public procurement rules.

3) SUPPORTING THE LOCAL ECONOMY: BETTER ACCESS TO PUBLIC PROCUREMENT FOR SMES AND OTHER SMALLER SUPPLIERS

Cities can support their local economy, especially SMEs and other small organisations, such as NGOs, mutuals, cooperatives, social enterprises and sheltered workshops⁵, by the way they procure goods and services.

However procurement processes often discourage small undertakings from bidding. The gap between SME participation in European public procurements and their real involvement in the overall EU economy suggests that existing directives should be better designed to foster their involvement. A simplification of rules would ease the administrative and financial burden for small organisations.

Developing procurement portals for SMEs and smaller suppliers

The introduction of ‘procurement portals’ would be a useful development. Information in these web portals or databases would be valid for a year and would contain a compilation of legal and financial documents.

This would allow SMEs and other small organisations to submit the required legal and financial documents only once, rather than doing so each time they answer a call for tender. SMEs do not have large bid-preparation teams and the financial requirements in the majority of cases exceed the turnover of the SME. The generic requirements uploaded could include, company information, financial information, health and safety details, environmental quality policies, equality and diversity policies. The contractors/SMEs would be responsible for updating information on an annual basis.

In order to set up these web portals, there could be a transition period where small organisations would pass the submission and verification of evidence stage once per year. In such a system, if they have already passed this stage with a one authority, the company could submit a statement with this information to another authority in charge of the new process, and the first authority could certify that the organisation passed this stage in a similar bid.

Some local authorities already use this system of web databases but it could be more widespread and there would be greater legal certainty if the European Commission would encourage member states to include it in their procurement legislation.

These web portals could also include a tender alert service. It would help future bidders to find information on opened tenders. They should also contain reporting mechanisms. Public authorities would report on the lessons learned from a project, which could serve as kind of benchmark for similar projects and help other authorities to go a step further.

⁵ Organisation which provides employment opportunities for people with disabilities

Differentiating requirements in a two-stage process

The main administrative burden for SMEs seems to be the fact that the procurement process has to be clearly separated into a 'selection stage' and an 'awarding stage'. They have to carefully separate the information related to each step and if they don't, it can result in disqualification.

The process could be simplified: the first-stage requirements ('selection stage') could be as simple as submitting a check-list, a statement from another public organisation for which they have worked before or indicating their presence in a database on the web portal (mentioned above). The 'awarding stage' would involve submission of a full proposal.

Supporting the local economy

Cities have developed services to support businesses, for example establishing a partnership with catering providers to integrate sustainability into their menus; or training the cleaning company employees to use green cleaning techniques/products. Legislation should be adapted so that procurement of local products is privileged over products which have to be transported over a long distance. In the current directives, transport and distance are not seen as decisive criteria.

4) INCREASING SUPPORT FOR INNOVATION AND BROADER ENVIRONMENTAL AND SOCIAL OBJECTIVES

The European Commission should encourage local authorities and empower them to base public procurement on environmental, social and other quality criteria.

Local authorities purchase organic and local food for their catering services, fair trade and organic textile, energy-efficient building construction and renovation, wind turbines, labelled timber, clean vehicles, green gardening, eco-labelled cleaning products, eco-cement, and recycled or eco-certified paper.

Despite the publication of the green procurement handbook by the European Commission in 2006, cities still face legal uncertainty when including environmental criteria in public tenders. It still involves higher costs for them to introduce these criteria. They face difficulties when evaluating the services or the products from the environmental point of view. Sometimes the green products or services they want to purchase do not yet exist on the market.

Cities also still face issues when they wish to combine green and social criteria. For instance, they want to support their local SMEs but none of them can fulfill the environmental criteria set out.

Pre-commercial procurement

In cases where a public body needs an innovative solution that is not commercially available on the market, it may decide to procure research and development (R&D) services. Pre-commercial procurement (PCP) is one particular approach of procuring R&D services. PCP does not involve state-aid and the EU public procurement directives do not apply.

Market consultation helps contracting authorities to understand the ability of the market to deliver innovative solutions to meet their procurement needs. It can also help determine whether it is

possible to proceed directly to procurement, or whether PCP or other pre-procurement activities may be needed. Joint market consultation may take place where two or more authorities have identified a similar need. The European Commission could support market consultation by organising training and giving expert advice. It could also organise meetings for local authorities that are interested in the same products and want to launch a joint pre-commercial procedure.

Subject of the contract

The procurement directives only allow public authorities to set policy objectives if these are linked to the subject of the contract. This is a considerable barrier to setting objectives which support wider social and environmental policies and innovation policies. More flexibility is needed for the integration of policy objectives in procurement processes, as local authorities know best their local context and how to support their local economy, environment and society.

‘Quality criteria’ as ‘award criteria’

In both the 2004 guide on green procurement and in the 2010 guide on social procurement, the European Commission promotes the approach that award criteria should be limited to the physical qualities and characteristics of the products.

Procurement rules could allow more scope for social and environmental considerations to be taken into account in the award stage of the contract. Including, for example, criteria on the quality of products, the production methods, life cycle costing, and processes which support innovation and product sustainability.

The European Court of Justice has clarified that the requirement of transparency does not mean that the contracting authority must adopt criteria which are quantitative or related solely to prices. Instead, it has observed that even where criteria, which are not expressed in quantitative terms, are included in tender specifications, they can be applied objectively and uniformly in order to compare the tenders and are clearly relevant for identifying the most advantageous tender. Moreover, the Court has repeatedly asserted that the way to ensure that qualitative procurement criteria are applied objectively and uniformly is to make tender selection processes and the criteria used to assess tenders, including the relative weight accorded to various criteria, clearer, more transparent, and more easily subject to review.

These rulings should be codified in the revised procurement directives in order to support innovation and quality criteria linked to broader environmental and social goals.

The European Commission should promote further quality clauses. There should encourage member states to create databases with examples of procurement contracts that include these quality criteria. The European Commission should also further support local authorities through awareness-raising seminars and training opportunities.

Social quality criteria

The recruitment of target groups, such as long-term unemployed people, young people and disabled people should be promoted at EU level in the execution of public procurement contracts. Contracting authorities should be able to include an award criterion in their call for tender to the effect that the operator who wins the contract should earmark a given percentage of the value of

the contract for recruitment of these target groups. Currently these can only be included in the contract performance clauses, which is too late in the process.

The European Commission has argued (notably in the Buying Social Guide) that labour conditions of workers involved in delivering a works contract are not linked to the subject matter of the contract, and therefore cannot be taken into account as award criteria. It is not clear whether this is also considered to apply to service contracts, where the subject matter of the contract might consist solely of such human labour. Articles 53 of Directive 2004/18/EC and Article 55 of Directive 2004/17/EC should be amended to include specific reference to social considerations. This would ensure legal certainty.

Fair trade criteria

We believe the Commission should encourage the use of fair trade criteria in public tenders and purchasing policies on the basis of the definition of fair trade set out in the European Parliament resolution of 6 July 2006 on fair trade and development and the Commission communication COM(2009) 215 final of 5 May 2009. We would welcome the development of a frequently updated database with guidelines on fair trade procurement.

Contract performance clauses

The development of contract performance clauses can support the inclusion of innovative solutions in tenders. These specifications are complicated to design. The European Commission could support local authorities through the organisation of training sessions and the creation of a database of examples of contract performance specifications that have already been used.

Involvement of users of a service

There are various ways of involving users to a greater or lesser extent (e.g. polls, inviting suggestions). The public authority may have precise ideas about the degree of user participation it wants. It might, for example, require the service provider that obtains the contract to make arrangements for user representatives to be involved in decision-making at the contract performance stage, provided that these decisions do not change the contract and are not discriminatory. It is still difficult for cities to make sure they will not receive complaints on the basis of these two criteria.

If the public authority does not have any precise ideas on this issue, it may also ask the candidates to suggest approaches to ensure such participation. For example, in the case of complex social services for which the public authority is not in a position to identify the best way of meeting users' specific needs, it can use a procedure similar to that of the competitive dialogue. Cities would welcome a clarification of this opportunity.

Competitive dialogue

Competitive dialogue can be a useful mechanism for contracting authorities to take into account environmental, social, accessibility and innovation policies and its use should be encouraged. Considerable time is required and there is a lack of understanding of how to use it and what are the legal implications of its use. Training and guidance on how it can be used and providing examples of the value of competitive dialogue would ensure the further uptake of this mechanism.

Supporting the development of clean and energy efficient vehicles

Public procurement is a key high visibility policy that can effectively help to promote and stimulate a broader market introduction of clean and energy-efficient vehicles and to prompt industry to invest in and develop this type of vehicle.

Evidence shows that the market for such vehicles exists, however the problem remains the cost of pilot research and initial production. If the demand remains local, only addressing city fleets, the spill-over effect on the market will not create enough economies of scale to allow for mass production. Joint procurement initiatives can help increase the market demand.

The European Commission plays an important role by helping to standardise a basic set of minimum criteria for procurement. This should lead to an increase in demand and should help shift production from a niche market to a wider access. For this reason, EUROCITIES members welcome the Directive of 2009⁶ which requires that energy and environmental impacts linked to the operation of vehicles over their whole lifetime are taken into account in purchase decisions. Purchasers may also consider other environmental impacts. Taking into account these 'external' costs in vehicle purchase decisions contributes to environmental, climate and energy policies by reducing energy consumption, CO₂ and pollutant emissions. It is crucial that local authorities have the flexibility to add additional sustainability criteria for the awarding of procurement contracts.

Supporting procurement of IT systems

Contracting authorities experience considerable problems with the procurement of ICT systems. The ICT environment of a contracting authority consists of different interconnected systems. This means that additional works, such as extra licences and suitable new modules, cannot always be tendered for without serious inconvenience, both technical and financial.

We therefore recommend that the European Commission consider whether the exclusion options could be broadened and/or a new procedure introduced for ICT systems whereby competition is not between producers but between suppliers.

We agree that innovation must be encouraged, and propose that an exemption from mandatory procurement be introduced for a period of two years after a recognised patent has been issued for an invention. This is an important way to support small businesses.

⁶ Directive 2009/33/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of clean and energy-efficient road transport vehicles
http://ec.europa.eu/transport/urban/vehicles/clean_energy_efficient_vehicles_en.htm