

Innovation and Better Synergies of Public Procurement with other Policies



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Abstract

This document provides the legal and policy background for the interface of the public procurement regime with policies, which promote socio-economic and environmental objectives and allow innovative and strategic procurement to deploy its application in alignment with the European 2020 Growth Strategy.

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AUTHOR

Prof. Dr Christopher Bovis FRSA, University of Hull

ADMINISTRATOR RESPONSIBLE

Mariusz MACIEJEWSKI

EDITORIAL ASSISTANT

Irene VERNACOTOLA

LINGUISTIC VERSIONS

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ABOUT THE EDITOR

Policy departments provide in-house and external expertise to support EP committees and other parliamentary bodies in shaping legislation and exercising democratic scrutiny over EU internal policies.

To contact the Policy Department or to subscribe for updates, please write to:
Policy Department for Economic, Scientific and Quality of Life Policies
European Parliament
B-1047 Brussels
Email: Poldep-Economy-Science@ep.europa.eu

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EXECUTIVE SUMMARY

The 2014 EU Public Procurement Directives offer to Member States several methods to pursue strategic procurement, that is procurement by Member States and contracting authorities, which promotes **sustainable and socio-economic goals as well as harnessing innovation..**

Strategic procurement can be pursued during the **pre-procurement phase** where contracting authorities can explore multiple options in their procurement strategy by setting out their innovation or strategic procurement requirements without the risk of conflict or discrimination. The pre-procurement phase has high relevance in raising awareness, market intelligence, market testing, business case development and supply side engagement for the innovation partnership procedure.

Strategic procurement is also reflected upon the option to pursue joint and cross-border procurement, which covers the ability and freedom on the part of contracting authorities for the procurement of products or services and the design and execution of work contracts to be awarded jointly. The decision to award contracts jointly must be determined by qualitative and economic criteria, which may be defined by national law.

Strategic procurement can be pursued by the division of contracts into lots and disaggregation to allow better market access to SMEs.

Strategic procurement can be pursued during the **phase of the selection and qualification of candidates**. The selection and qualification of candidates phase involves the drafting of the specifications for the contract, the establishment of technical specifications, the determination of standards, the acceptance of labels and the validation of certification for products and services. Contracting authorities have a wide margin of discretion in drawing specifications and determining standards, provided they both fulfil the subject matter of the contract. The selection and qualification of candidates phase provides contracting authorities' discretion in drawing contract specifications and determining standards taking into account products and services features and their functionality and performance as legitimate determinants of specifications.

Strategic procurement can be pursued in the **award phase of the contract**. The award phase covers the award procedures and the award criteria. Contracting authorities have discretion to use the innovation partnership procedure, allow the submission of variants and alternative specifications and apply the best quality price ratio (BPQR) and most economically advantageous tender (MEAT) as award criteria.

The most economically advantageous criterion and the best price quality ratio as award criterion can legitimately cover socio-economic and environmental policies.

Life cycle costing as an award criterion covers all production stages of a product of a service including research and development, transport, use and maintenance, disposal, clearance and end of service or utilisation.

In variant offers of tenderers, if such option is provided by contracting authorities during the award stage of the contract, the pursuit of socio-economic or environmental objectives is legitimate, provided such variant offers are linked with the subject matter of the contract.

Strategic procurement and procurement objectives which support horizontal policy objectives must be contained within the subject matter of the contract in order to avoid discrimination of bidders and economic operators.

Obstacles to the application of strategic procurement

Aggregation of contracts by contracting authorities may pose barriers to entry for SMEs and dissuade them from public procurement due to high levels of financial and economic standing criteria. The higher the value of a contract, the more difficult is for SMEs to participate in the award procedures.

In the selection and qualification stage of economic operators, the tenderer turnover to contract value ratio may pose barriers for SMEs. The minimum required annual turnover of economic operators shall not exceed two times the estimated contract value, except in cases where special risks attached to the nature of the works, services or supplies may require higher turnover to contract value ratio.

The lowest price award criterion may not be conducive to strategic procurement and procurement which promotes environmental and socio-economic objectives as well as innovation, since it deprives contracting authorities from taking into consideration qualitative features in the award process including, running costs, cost-effectiveness, technical merit, product or work quality, aesthetic and functional characteristics, after-sales service and technical assistance, commitment with regard to spare parts and components and maintenance costs, security of supplies.

The European Commission Package

Strategic procurement is promoted in the six priorities set out by the Commission for improvement in the area of public procurement both at the Member State and EU level, focusing on: greater uptake of innovation, green and social criteria in awarding public contracts, professionalization of public buyers, improving access by SMEs to procurement markets in the EU and by EU companies in third countries, increasing transparency, integrity and quality of procurement data; digitisation of procurement processes, and more cooperation among public buyers across the EU.

Strategic procurement will benefit from the professionalization of public buyers and the acquisition of business skills, technical knowledge and commercial application of public procurement rules.

INTRODUCTION

The strategic importance of public procurement for the European integration process has been recognised by the 2011 Single Market Act which has prompted a series of reforms to the EU public procurement acquis. These reforms aim at linking directly public procurement with the European 2020 Strategy which focuses on growth and competitiveness. The importance of a liberalised and integrated public procurement as an essential component of the Single Market has been clearly established. The conceptual origins of public procurement regulation in the European Union can be traced in policy instruments which identified purchasing practices of Member States as considerable non-tariff barriers and as hindering factors for the functioning of a genuinely competitive Internal Market. Economic justifications for regulating public procurement have pointed towards introducing competitiveness into the relevant markets in order to increase cross-border trade of products and services destined for the public sector and to achieve price transparency and price convergence across the European Union, thus achieving significant savings. The need for competitiveness and transparency in public procurement markets is also considered as a safeguard to fundamental Treaty principles, such as the free movement of goods and services, the right of establishment and the prohibition of discrimination on grounds of nationality.

The 2014 EU legislative framework on public procurement and concessions has been enacted with expectations to enhance competitiveness and growth and to ensure the indispensable link of strategic procurement in the delivery of public services in the EU and its Member States.

The 2014 EU legislative framework benefits from simplification, modernisation, procedural efficiencies and from streamlining the application of the substantive rules. The reforms have set the relation of market integration for the public and utilities and concession sectors in the EU with the need for market access from third countries and for better market access for SMEs.

Public procurement is an essential part of the Single Market Act and has a pivotal role in the Europe 2020 Growth Strategy.

1. STRATEGIC PUBLIC PROCUREMENT WITHIN THE EU PUBLIC PROCUREMENT DIRECTIVES

KEY FINDINGS

- Strategic procurement can be pursued during the pre-procurement phase where contracting authorities can explore multiple options in their procurement strategy by setting out their innovation or strategic procurement requirements without the risk of conflict or discrimination.
- Strategic procurement can be pursued by the division of contracts into lots and disaggregation to allow better market access to SMEs.
- Strategic procurement can be preserved by applying reasons for exclusion which are discretionary to the contracting authorities, subject to the laws of Member States.
- Contracting authorities have a wide margin of discretion in drawing specifications and determining standards.
- Technical specifications must afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.
- Contracting authorities may require that economic operators provide a test report from a conformity assessment body or a certificate issued by such a body as means of proof of conformity with requirements or criteria set out in the technical specifications.
- The award phase covers the award procedures and the award criteria. Contracting authorities have discretion to use the innovation partnership procedure, allow the submission of variants and alternative specifications and apply the best quality price ratio (BPQR) and most economically advantageous tender (MEAT) as award criteria.

Strategic procurement is procurement by Member States and contracting authorities, which promotes **sustainable and socio-economic goals as well as harnessing innovation**.

The 2014 EU Public Procurement Directives offer to Member States several methods to pursue strategic procurement.

Strategic procurement can be pursued in the following phases of the public procurement process.

1.1. The pre-procurement phase

Strategic procurement can be pursued during the pre-procurement phase where contracting authorities can explore multiple options in their procurement strategy by setting out their innovation or strategic procurement requirements without the risk of conflict or discrimination. The pre-procurement phase has high relevance in raising awareness, market intelligence, market testing, business case development and supply side engagement for the innovation partnership procedure.

The pre-procurement phase includes two mechanisms under which contracting authorities may engage with suppliers before the procurement commences:

- 1) consultation exercise,
- 2) market testing exercise.

1.1.1. Preliminary market consultation

Before launching a procurement procedure, contracting authorities may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements.

For this purposes, contracting authorities may for example seek or accept advice from independent experts or other contracting authorities or from market participants. That advice may be used in the planning and conduct of the procurement procedure, the design of specifications and the selection of standards, provided that such advice does not have the effect of distorting competition and does not breach the principles of non-discrimination and transparency.

1.1.2. Market testing and prior involvement of candidates

Where the prior involvement of candidates through a pre-procurement engagement exercise has resulted in a market testing which is reflected through the candidate having advised the contracting authority or been involved in the preparation of the procurement procedure, the contracting authority must ensure that competition is not distorted by the participation of that candidate.

The contracting authority must communicate to all candidates of the market testing and pre-procurement engagement exercise and avail to them all relevant information exchanged in the context of or resulting from the involvement of the candidate in the preparation of the procurement procedure.

The contracting authority must offer adequate time limits for the receipt of tenders from candidates who have not been involved in the market testing and pre-procurement engagement exercise.

Only exceptionally and when there are no other means to ensure compliance with the principle of equal treatment between all candidates, the candidate who has been previously involved in the market testing and pre-procurement engagement exercise could be excluded from the main procurement procedure and only after being given the opportunity to prove that their pre-procurement engagement is not capable of distorting competition.

1.1.3. Joint and cross-border procurement

Strategic procurement is also reflected upon the option to pursue joint and cross-border procurement, which covers the ability and freedom on the part of contracting authorities for the procurement of products or services and the design and execution of work contracts to be awarded jointly. The decision to award contracts jointly must be determined by qualitative and economic criteria, which may be defined by national law.

1.1.4. Division of contracts into lots – Disaggregation

Strategic procurement can be pursued by the division of contracts into lots and disaggregation to allow better market access to SMEs. This option should not be pursued with the intention to circumvent the EU directives rendering their provisions inapplicable by intentionally lowering the relevant contract value thresholds.

1.2. Selection and qualification phase

Strategic procurement can be pursued during the phase of the selection and qualification of candidates. The selection and qualification of candidates phase starts with the application of exclusion criteria for economic operators and also involves the drafting of the specifications for the contract, the establishment of technical specifications, the determination of standards, the acceptance of labels and the validation of certification for products and services.

1.2.1. Exclusion grounds

Strategic procurement can be preserved by applying reasons for exclusion which are discretionary to the contracting authorities, subject to the laws of Member States. In particular, reasons for discretionary exclusion which are pertinent to strategic procurement include violation of social, environmental or labour law; non-payment of social security contributions; non-fulfillment of obligations relating to the payment of taxes.

1.2.2. Technical specifications

Contracting authorities have a wide margin of discretion in drawing specifications and determining standards, taking into account products and services features and their functionality and performance as legitimate determinants of specifications, provided they both fulfil the subject matter of the contract.

The selection and qualification phase involves two stages under which contracting authorities may with suppliers before the procurement process commences:

- 1) the drawing of specifications,
- 2) utilization of standards.

Contracting authorities must set out the technical specifications in the contract documents, such as contract notices, contract documents or any additional documents.

Technical specifications must afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.

Technical specifications must lay down the characteristics required of a works, service or supply. Those characteristics may also refer to the specific process or method of production or provision of the requested works, supplies or services or to a specific process for another stage of its life cycle even where such factors do not form part of their material substance provided that they are linked to the subject-matter of the contract and proportionate to its value and its objectives.

The technical specifications may also specify whether the transfer of intellectual property rights will be required.

Technical specifications may refer to mandatory national technical rules, provided these are compatible with EU law and do not discriminate against other national standards. For example, if mandatory national technical standards are higher than other national standards and are objectively determined, then they are deemed compatible.

Technical specifications in the selection and qualification process of public procurement must be formulated:

(a) either by reference to technical specifications which are relevant to the subject matter of the contract and, in order of preference, to national standards transposing European standards, European technical approvals, common technical specifications, international standards, other technical reference systems established by the European standardization bodies, or when the above technical specifications do not exist, by reference to national standards, national technical approvals or national technical specifications relating to the design, calculation and execution of the works and use of the products. Each reference must be accompanied by the words 'or equivalent';

(b) or in terms of performance or functional requirements; the latter may include environmental characteristics. However, such parameters must be sufficiently precise to allow tenderers to determine the subject-matter of the contract and to allow contracting authorities to award the contract.

Where contracting authorities lay down environmental characteristics in terms of performance or functional requirements they may use the detailed specifications, or, if necessary, parts thereof, as defined by European or (multi-) national eco-labels, or by any other eco-label, provided that those specifications are appropriate to define the characteristics of the supplies or services that are the object of the contract, that the requirements for the label are drawn up on the basis of scientific information, that the eco-labels are adopted using a procedure in which all stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organizations can participate, and finally they are accessible to all interested parties.

Contracting authorities may indicate that the products and services bearing the eco-label are presumed to comply with the technical specifications laid down in the contract documents; they must accept any other appropriate means of proof, such as a technical dossier of the manufacturer or a test report from a recognized body. Recognized bodies are test and calibration laboratories and certification and inspection bodies which comply with applicable European standards. Contracting authorities must accept certificates from recognized bodies established in other Member States.

Unless justified by the subject-matter of the contract, technical specifications must not refer to a specific make or source, or a particular process, or to trade marks, patents, types or a specific origin or production with the effect of favouring or eliminating certain undertakings or certain products. Such reference must be permitted on an exceptional basis, where a sufficiently precise and intelligible description of the subject-matter of the contract and such reference must be accompanied by the words 'or equivalent'.

1.2.3. Labels

Where contracting authorities intend to purchase works, supplies or services with specific environmental, social or other characteristics they may, in the technical specifications, the award criteria or the contract performance conditions, require a specific label as means of proof that the works, services or supplies correspond to the required characteristics, provided that all of the following conditions are fulfilled:

a) the label requirements only concern criteria which are linked to the subject-matter of the contract and are appropriate to define characteristics of the works, supplies or services that are the subject-matter of the contract;

b) the label requirements are based on objectively verifiable and non-discriminatory criteria;

- c)** the labels are established in an open and transparent procedure in which all relevant stakeholders, including government bodies, consumers, social partners, manufacturers, distributors and non-governmental organisations, may participate;
- d)** the labels are accessible to all interested parties;
- e)** the label requirements are set by a third party over which the economic operator applying for the label cannot exercise a decisive influence.

Where contracting authorities do not require the works, supplies or services to meet all of the label requirements, they must indicate which label requirements are referred to.

Contracting authorities requiring a specific label shall accept all labels that confirm that the works, supplies or services meet equivalent label requirements.

Where an economic operator had demonstrably no possibility of obtaining the specific label indicated by the contracting authority or an equivalent label within the relevant time limits for reasons that are not attributable to that economic operator, the contracting authority shall accept other appropriate means of proof, which may include a technical dossier from the manufacturer, provided that the economic operator concerned proves that the works, supplies or services to be provided by it fulfil the requirements of the specific label or the specific requirements indicated by the contracting authority.

1.2.4. Test reports as means of proof of specification compliance

Contracting authorities may require that economic operators provide a test report from a conformity assessment body or a certificate issued by such a body as means of proof of conformity with requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions. A conformity assessment body shall be a body that performs conformity assessment activities including calibration, testing, certification and inspection accredited in accordance with regulation (EC) No 765/2008.

Contracting authorities shall accept other appropriate means of proof such as a technical dossier of the manufacturer where the economic operator concerned had no access to the certificates or test reports or no possibility of obtaining them within the relevant time limits, provided that the lack of access is not attributable to the economic operator concerned and provided that the economic operator concerned thereby proves that the works, supplies or services provided by it meet the requirements or criteria set out in the technical specifications, the award criteria or the contract performance conditions.

1.2.5. Certification as means of proof of specification compliance

Member States may introduce certification by public or private law certification bodies established in their territory. Such certification bodies must comply with European certification standards. For any registration of economic operators of other Member States in an official list or for their certification by the competent bodies no further proof or statements can be required other than those requested of national economic operators. However, economic operators from other Member States may not be obliged to undergo such registration or certification in order to participate in a public contract.

Member States must recognize in mutual manner equivalent certificates from bodies established in other Member States and accept other equivalent means of proof relevant to the conditions required for registration or certification.

1.3. The award phase

Strategic procurement can be pursued in the award phase of the contract. The award phase covers the award procedures and the award criteria. Contracting authorities have discretion to use the innovation partnership procedure, allow the submission of variants and alternative specifications and apply the best quality price ratio (BPQR) and most economically advantageous tender (MEAT) as award criteria.

The award of the contract phase involves two features under which innovative products and services can be procured:

- 1) the utilization of award criteria which are based on the most economically advantageous tender (MEAT) such as life cycle costing and innovation features,
- 2) the permissibility of variants and alternative specifications,
- 3) the use of innovation partnership procedure.

1.3.1. Award criteria

Traditionally there have been two criteria on which the contracting authorities must base the award of public contracts: (a) the most economically advantageous tender or (b) the lowest price. The new Public Sector Directive provides for a sole award criterion the most economically advantageous tender (MEAT), which is to be assessed on the basis of:

- price, or
- cost, using a cost-effectiveness approach such as life-cycle costing, or
- the best price-quality ratio (BPQR) to be assessed on the basis of award criteria linked to the subject-matter of the contract,
- organisation, qualification and experience of the staff delivering the contract where this can significantly impact the level of performance of the contract

Member States can exclude or restrict the use of price or cost only as sole criterion. When the lowest price has been selected as the award criterion, contracting authorities must not refer to any other qualitative consideration when deliberating the award of a contract. The lowest price is a sole quantitative benchmark that intends to differentiate the offers made by tenderers. However, contracting authorities can reject a tender, if they regard the price attached to it as abnormally low.

1.3.2. The most economically advantageous tender (MEAT)

Under the most economically advantageous offer award criterion, environmental and socio-economic considerations are allowed to play a part in the evaluation process and determine the award of public contracts, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of EU law, in particular the principle of non-discrimination.

When the award is made to the tender most economically advantageous from the point of view of the contracting authority, various criteria linked to the subject-matter of the public contract in question, for example, quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost-effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion, can be taken into consideration. The above listed criteria which constitute the parameters of the most economically advantageous offer are not exhaustive.

For the purposes of defining what does constitute a most economically advantageous offer, the contracting authority must specify in the contract notice or in the contract documents or, in the case of a competitive dialogue, in the descriptive document, the relative weighting which it gives to each of the criteria chosen to determine the most economically advantageous tender. Those weightings can be expressed by providing for a range with an appropriate maximum spread.

Where, in the opinion of the contracting authority, weighting is not possible for demonstrable reasons, the contracting authority must indicate in the contract notice or contract documents or, in the case of a competitive dialogue, in the descriptive document, the criteria in descending order of importance.

1.3.3. Life cycle costing

Life-cycle costing shall, to the extent relevant, cover parts or all of the following costs over the life cycle of a product, service or works:

- a) costs, borne by the contracting authority or other users, such as: costs relating to acquisition, costs of use, such as consumption of energy and other resources, maintenance costs, end of life costs, such as collection and recycling costs.
- b) costs imputed to environmental externalities linked to the product, service or works during its life cycle, provided their monetary value can be determined and verified; such costs may include the cost of emissions of greenhouse gases and of other pollutant emissions and other climate change mitigation costs.

Where contracting authorities assess the costs using a life-cycle costing approach, they shall indicate in the procurement documents the data to be provided by the tenderers and the method, which the contracting authority will use to determine the life-cycle costs on the basis of those data.

The method used for the assessment of costs imputed to environmental externalities shall fulfil all of the following conditions:

- a) it is based on objectively verifiable and non-discriminatory criteria. In particular, where it has not been established for repeated or continuous application, it shall not unduly favour or disadvantage certain economic operators;
- b) it is accessible to all interested parties;
- c) the data required can be provided with reasonable effort by normally diligent economic operators, including economic operators from third countries party to the GPA or other international agreements by which the European Union is bound.

1.3.4. Environmental considerations as award criteria

Environmental considerations such as low emissions and noise levels of vehicles could be included amongst the factors of the most economically advantageous criterion, in order to promote certain types of vehicles that meet or exceed certain emission and noise levels.

Contracting authorities are free to determine the factors under which the most economically advantageous offer is to be assessed and that environmental considerations could be part of the award criteria, provided they do not discriminate over alternative offers, as well as they have been clearly publicized in the tender or contract documents. However, the inclusion of such factors in the award criteria should not prevent alternative offers that satisfy the contract specifications being taken into consideration by contracting authorities.

Contracting authorities must exclude any possibility of environmental considerations being part of selection criteria or disguised as technical specifications, capable of discriminating against tenderers that could not meet them. Criteria relating to the environment, in order to be permissible as additional criteria under the most economically advantageous offer must satisfy a number of conditions, namely

they must be objective, universally applicable, strictly relevant to the contract in question, and clearly contribute an economic advantage to the contracting authority.

1.3.5. Criteria related to the subject matter of the contract

The assessment of MEAT criteria for the award of public contracts must satisfy the condition that such criteria are related to the subject matter of the contract. Such condition requires the following pre-requisites for criteria related to the subject matter of the contract:

- the criteria could have an economic value or a non-economic value,
- the criteria do not necessarily have to achieve the objective pursued by the contract, so they are not a contractual condition,
- effective verification of their direct link to the subject matter of the procurement contract must exist during the entire procurement process,
- accuracy of information must be contained in the invitation to tender documents.

1.3.6. The lowest price as award criterion

When the lowest price has been selected as the award criterion, contracting authorities must not refer to any other qualitative consideration when deliberating the award of a contract. The lowest price is a sole quantitative benchmark that intends to differentiate the offers made by tenderers. However, contracting authorities can reject a tender, if they regard the price attached to it as abnormally low.

1.3.7. Abnormally low tenders

In cases that tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority must request in writing details of the constituent elements of the tender which it considers relevant before it rejects those tenders.

The clarification details may relate in particular to:

(a) the economics of the construction method, the manufacturing process or the services provided; **(b)** the technical solutions chosen and/or any exceptionally favourable conditions available to the tenderer for the execution of the work, for the supply of the goods or services; **(c)** the originality of the work, supplies or services proposed by the tenderer; **(d)** compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed; **(e)** the possibility of the tenderer obtaining state aid.

Where a contracting authority establishes that a tender is abnormally low because the tenderer has obtained State aid, the tender can be rejected on that ground alone only after consultation with the tenderer where the latter is unable to prove, within a sufficient time limit fixed by the contracting authority that the aid in question was granted legally. Where the contracting authority rejects a tender in these circumstances, it must inform the Commission of their decision.

1.3.8. Variants

Variants are alternative specifications or standards, which are offered by bidders and are expressly allowed by the contracting authority in order to compare with originally drawn specifications and traditional standards.

Variants allow for value engineering and recognize the importance of innovation in public procurement.

Contracting authorities may authorize or require tenderers to submit variants. They shall indicate in the contract notice or, where a prior information notice is used as a means of calling for competition, in the

invitation to confirm interest whether or not they authorize or require variants. Variants shall not be authorized without such indication.

Variants shall be linked to the subject-matter of the contract.

Contracting authorities authorizing or requiring variants shall state in the procurement documents the minimum requirements to be met by the variants and any specific requirements for their presentation, in particular whether variants may be submitted only where a tender, which is not a variant, has also been submitted. They shall also ensure that the chosen award criteria can be applied to variants meeting those minimum requirements as well as to conforming tenders, which are not variants.

Only variants meeting the minimum requirements laid down by the contracting authorities shall be taken into consideration.

In procedures for awarding public supply or service contracts, contracting authorities that have authorized or required variants shall not reject a variant on the sole ground that it would, where successful, lead to a service contract rather than a public supply contract or a supply contract rather than a public service contract.

Contracting authorities are encouraged to allow variants as often as possible. The attention of those authorities should consequently be drawn to the need to define the minimum requirements to be met by variants before indicating that variants may be submitted.

Contracting authorities may allow tenderers to submit variants, only where the criterion for award is that of the most economically advantageous tender.

1.3.9. Innovation partnership procedure

The innovation partnership is a new procedure which will allow a contractor to propose the development of an “innovative product, service or works” in response to an OJEU notice. This is then procured via the competitive procedure with negotiation.

Where a need for the development of an innovative product or service or innovative works and the subsequent purchase of the resulting supplies, services or works, cannot be met by solutions already available on the market, contracting authorities should have access to a specific procurement procedure in respect of public contracts. This specific procedure should allow contracting authorities to establish a long-term innovation partnership for the development and subsequent purchase of a new, innovative product, service or works provided that such innovative product or service or innovative works can be delivered to agreed performance levels and costs, without the need for a separate procurement procedure for the purchase.

The innovation partnership should be based on the procedural rules that apply to the competitive procedure with negotiation and contracts should be awarded on the sole basis of the best price-quality ratio. The best price-quality ratio is most suitable for comparing tenders for innovative solutions.

Contracting authorities should not use innovation partnerships in such a way as to prevent, restrict or distort competition or foreclose the market. Setting up innovation partnerships with several partners could contribute to avoiding such effects.

1.3.10. Reserved contracts

Member States may reserve the right to participate in public contract award procedures to sheltered workshops or provide for such contracts to be performed in the context of sheltered employment programmes where most of the employees concerned are handicapped persons who, by reason of the nature or the seriousness of their disabilities cannot carry on occupations under normal conditions.

2. OBSTACLES TO THE APPLICATION OF STRATEGIC PROCUREMENT

- Aggregation of contracts may pose barriers to entry for SMEs and dissuade them from public procurement due to high levels of financial and economic standing criteria.
- The minimum required annual turnover of economic operators shall not exceed two times the estimated contract value, except in cases where special risks attached to the nature of the works, services or supplies may require higher turnover to contract value ratio.
- The lowest price award criterion may not be conducive to strategic procurement and procurement which promotes environmental and socio-economic objectives as well as innovation, since it deprives contracting authorities from taking into consideration qualitative features in the award process.
- The award criteria used by contracting authorities to identify the most economically advantageous tender must not necessarily be of a purely economic nature.

2.1. Aggregation

Aggregation of contracts may pose barriers to entry for SMEs and dissuade them from public procurement due to high levels of financial and economic standing criteria. The higher the value of a contract, the more difficult is for SMEs to participate in the award procedures.

2.2. Contract value to turnover ratio

The tenderer turnover to contract value ratio may pose barriers for SMEs. The minimum required annual turnover of economic operators shall not exceed two times the estimated contract value, except in cases where special risks attached to the nature of the works, services or supplies may require higher turnover to contract value ratio.

2.3. The lowest offer

The lowest price award criterion may not be conducive to strategic procurement and procurement which promotes environmental and socio-economic objectives as well as innovation, since it deprives contracting authorities from taking into consideration qualitative features in the award process including, running costs, cost-effectiveness, technical merit, product or work quality, aesthetic and functional characteristics, after-sales service and technical assistance, commitment with regard to spare parts and components and maintenance costs, security of supplies.

The lowest offer as an award criterion of public contracts is a quantitative method of comparing standardised works, services and goods to the public sector. The lowest offer award criterion reflects on, and presupposes low barriers to entry in a market and provides for a type of predictable accessibility for product or geographical markets. This is a desirable characteristic in a system such as public procurement regulation, which is charged with integrating national markets and creating a transparent and homogenous market for public contracts.

Competitiveness in an industry is not reflected solely by reference to low production costs. The lowest offer award criterion for public contracts, assuming a product or service remains standardized, could threaten the viability of industries, which tend to compete primarily on cost basis.

Price competition is bound to result in depriving innovation from the relevant industries, where investment and technological improvements, cannot be recovered. The lowest offer criterion is difficult to provide the necessary stimulus in the relevant markets for innovation and strategic priorities to link the industry and public sector delivery.

Although in numerous instances the importance of the economic approach¹ to the regulation of public procurement has been reinforced by European and national institutions, the relative discretion of contracting authorities to utilise non-economic considerations as award criteria it has also been confirmed. Under the most economically advantageous offer award criterion, environmental² and socio-economic considerations³ are allowed to play a part in the evaluation process and determine the award of public contracts, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority⁴, are expressly mentioned in the contract documents or the tender notice⁵, and comply with all the fundamental principles of EU law, in particular the principle of non-discrimination⁶.

The award criteria used by contracting authorities to identify the most economically advantageous tender must not necessarily be of a purely economic nature. Contracting authority have discretion to lay down criteria that pursue advantages which cannot be objectively assigned a direct economic value, such as advantages related to the protection of the environment or the promotion of employment policies.

¹ Case C-380/98, *The Queen and H.M. Treasury, ex parte University of Cambridge*, [2000] ECR 8035 at paragraph 17; Case C-44/96, C-44/96, *Mannesmann Anlagenbau Austria AG et al. v. Strohal Rotationsdurck GesmbH*, [1998] ECR 73 at paragraph 33; C-360/96, *Gemeente Arnhem Gemeente Rheden v. BFI Holding BV*, [1998] ECR 6821 at paragraphs 42 and 43; C-237/99, case C-237/99, *Commission v. France* (OPAC), [2001] ECR I-939, at paragraphs 41 and 42.

² Case C-513/99 *Concordia Bus Finland* [2002] ECR I-7123, paragraph 69; case C-448/01, *EVN AG, Wienstrom GmbH and Republik Österreich*, [2003] ECR I-14527.

³ Case C-225/98, *Commission v France*, [2000] ECR I-7445; case 31/87, *Gebroeders Beentjes B.V v. The Netherlands*, [1989] ECR 4365.

⁴ See case 31/87 *Beentjes* [1988] ECR 4635, paragraphs 19 and 26; Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraphs 36 and 37; and *Concordia Bus Finland*, [2002] ECR I-7213, paragraphs 59 and 61.

⁵ Case C-28/86, *Bellini*, [1987] ECR 3347.

⁶ Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 73.

3. SOFT LAW AND STRATEGIC PUBLIC PROCUREMENT

- The policy package was introduced by the EU Commission on the 3rd of October 2017 where six priority areas have been earmarked for Member States to develop a strategic approach to procurement. These include greater uptake of innovative, green and social criteria in awarding public contracts; professionalization of public buyers; improving access by SMEs to procurement markets in the EU and by EU companies in third countries; increasing transparency, integrity and quality of procurement data; digitisation of procurement processes; and finally more cooperation among public buyers across the EU.
- Strategic procurement will benefit from the professionalization of public buyers and the acquisition of business skills, technical knowledge and commercial application of public procurement rules.
- Innovation in the delivery of public services is a priority for procurement regulation and will be achieved through the new procedure of innovation partnerships and the new award criterion of life cycle costing.

EU Member States have benefited from the reform agenda carried by the 2014 Public Procurement Directives through the need for simplification and positive influencing of the strategic application of the new rules. Public Procurement is regarded as essential lever for the EU 2020 Growth Strategy.

In order to strengthen the Single Market and as part of the continuous effort to stimulate investment in the EU and its Member States, a policy initiative has been launched to carry out procurement more efficiently through digital technologies and in a sustainable manner from socio-economic perspective. The policy package was introduced by the EU Commission on the 3rd of October 2017 where six priority areas have been earmarked for Member States to develop a strategic approach to procurement. These include greater uptake of innovative, green and social criteria in awarding public contracts; professionalization of public buyers; improving access by SMEs to procurement markets in the EU and by EU companies in third countries; increasing transparency, integrity and quality of procurement data; digitisation of procurement processes; and finally more cooperation among public buyers across the EU.

Strategic procurement is promoted in the six priorities set out by the Commission for improvement in the area of public procurement both at the Member State and EU level, focusing on: greater uptake of innovation, green and social criteria in awarding public contracts, professionalization of public buyers, improving access by SMEs to procurement markets in the EU and by EU companies in third countries, increasing transparency, integrity and quality of procurement data; digitisation of procurement processes, and more cooperation among public buyers across the EU.

Strategic procurement will benefit from the professionalization of public buyers and the acquisition of business skills, technical knowledge and commercial application of public procurement rules. The high expectation of the public procurement reforms will be met by enhancing the governance of public procurement and raise the professionalization and standards in both public and private sectors.

The policy package builds on modernisation and procedural efficiencies and on streamlining the application of the substantive rules. The challenge of the reforms will test the relation of market integration for the public and utilities and concession sectors in the EU with the need for market access from third countries and sheltered markets for small and medium enterprises.

Strategic procurement in the EU embraces the pivotal importance of the SMEs in achieving economic growth. The new regime deals effectively with sub-contracting issues, prompt payments and the promotion of SMEs in the selection and qualification procurement phase and the award of public contracts. The value of public contracts is one of the major factors that influence the extent to which SMEs can access these contracts. The larger a contract, the less likely it will be awarded to SMEs. Other factors which influence adversely SMEs' access to public contracts are the type of award procedures and award criteria utilised by contracting authorities.

Innovation in the delivery of public services is a priority for procurement regulation and will be achieved through the new procedure of innovation partnerships and the new award criterion of life cycle costing.

Responsible procurement takes into account socio-economic nature of public service delivery through services of general economic interest and incorporates environmental protection as a component of public procurement regulation.

Efficient procurement promotes systems such as electronic procurement and electronic invoicing which attempt to reduce bureaucracy and costs and allow for a more streamlined process in the delivery of public services.

To safeguard the benefits arising from the 2014 EU Public Procurement Directives, the soft law package of the EU Commission initiated on 3rd October 2017 reinforces without the need of further legislation the principles of transparency and accountability in public procurement and introduces an *incentive-based regulation* to Member States to apply a system which increases outputs towards the socio-economic optimum while preserving the incentive for efficiencies and innovation through public contracts.

CONCLUSIONS

Innovation in the delivery of public services is a priority for procurement regulation and will be achieved through the new procedure of innovation partnerships and the new award criterion of life cycle costing.

Innovative, socio-economic and environmental considerations are legitimate award criteria in public procurement, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with the fundamental principles of European law.

Strategic procurement in the EU embraces the pivotal importance of the SMEs in achieving economic growth. The Public Procurement Directives deal effectively with sub-contracting issues, prompt payments and the promotion of SMEs in the selection and qualification procurement phase and the award of public contracts.

One of the most important barriers to SMEs for accessing public contracts is the value of public contract itself. A major factor that influences the extent to which SMEs can access public contracts is the contract budget. The larger a contract value is, the less likely it will be awarded to an SME. Other factors, which influence the access of SMEs to public contracts are the award criteria and the award procedures, as well as the type of the contracting authority which procures the relevant supplies, works or services.

Efficient procurement promotes systems such as electronic procurement and electronic invoicing which attempt to reduce bureaucracy and costs and allow for a streamlined process in the delivery of public services. Efficient procurement has significant links with strategic procurement.

The digital transformation of procurement envisaged the extension of the scope of the e-Certis and the European Single Procurement Document, as well as the introduction of uniform e-Invoicing systems.

The high expectation of the public procurement reforms will be met by enhancing the governance of public procurement and raise the professionalization and standards in both public and private sectors. Specifically, the priority of the professionalisation of procurers could materialise through the Network of National Innovation Procurement Centres and the establishment of a European competence framework for public procurement.

The European Union public procurement system has two fundamental challenges: first, to introduce strategy and innovation in traditional public contracts; secondly, to capture the outcomes of innovation and strategic procurement and allow them to influence the award of public contracts.

The 2017 Public Procurement Package epitomises the above challenges by enacting a Communication on Making Public Procurement work in and for Europe, which sets the priorities for action; a Communication on voluntary ex-ante assessment of the procurement aspects for large infrastructure projects, which ensure compliance and finally a Resolution on the Professionalisation of Public Procurement.

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This document provides the legal and policy background for the interface of the public procurement regime with policies, which promote socio-economic and environmental objectives and allow innovative and strategic procurement to deploy its application in alignment with the European 2020 Growth Strategy.

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