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CEMR

Response to the Green Paper on Modernisation of EU public procurement policy

Brussels, April 2011

Green Paper on the Modernisation of EU public procurement policy

COM(2011) 15 final

CEMR key messages

1. Public procurement procedures **have become too complex** and the directives have created a legally challenging environment, leading to costly and burdensome administrative procedures.
2. The result of the evaluation of the directives and the consultation should lead to a **real reform of the procurement regime**, bringing the policy back to its original objective: ensuring value for money.
3. In order to achieve real simplification, the European Commission should propose a **'light' regime**, focussing on the Treaty principles, increase the threshold levels and allow more negotiation in all procurement procedures, thus giving contracting authorities full flexibility.
4. Increased use of information technology will also play a major role in reducing administration and costs; European initiatives on **e-procurement** should therefore be aligned with the reform of the procurement rules.
5. EU public procurement legislation should be brought in line with the **WTO Government Procurement Agreement (GPA)** resulting in a 'lighter' EU framework.
6. In the light of recent CJEU jurisprudence and the European Parliament's 2010 resolution, we consider **public-public cooperation not to be subject** to the European public procurement rules.
7. In order to make public procurement more **SME friendly**, an inclusion of 'reservations' or quota could be considered, as permitted by the GPA and widely used in the USA and other WTO countries. Such an arrangement could also be considered for non-profit organisations.
8. The increasing awareness of the environmental and climate impact of products and activities requires consideration of the possibility to **favour local suppliers** and to what extent sustainability considerations can prevail in internal market rules.
9. Any attempt to address **policy goals**, such as environmental or social issues, via public procurement must remain **entirely voluntary** and be left to the local or regional authority to determine.
10. CEMR calls on the Commission to continue to **exclude service concessions** from European public procurement legislation.
11. We invite the Commission to **reconsider the remedies directives** to ensure that unsuccessful bidders require stronger grounds to challenge the legitimate award of a public contract

Introduction and general comments

1. The CEMR welcomes that the European Commission is evaluating the application of the public procurement directives and also welcome the consultation which aims to modernise European procurement policy. We consider this as being an important moment, offering the opportunity to make real changes, bringing public procurement back to its original objective: ensuring value for money.
2. Today, public purchasers face a high level of complexity when procuring services, goods or works, due to a number of reasons:
 - Different and accumulating layers of rules from different levels: European, national, regional / local;
 - Highly sophisticated legislation and jurisprudence;
 - Additional – so-called ‘strategic’ – policy objectives.
3. This has led to the following effects:
 - Losing focus on best value;
 - High amount of legal issues and challenges from unsuccessful bidders;
 - Lengthy procurement process with many administrative burdens, very little flexibility and high transaction costs;;
 - Increased risk adverse attitude and less procurement procedures having a negative impact on innovative solutions and / or new suppliers / bidders.
4. Such a detail within EU directives is contrary to the principle of freedom of choice of public authorities. CEMR advocates for a ‘freedom to procure’, which respects the principle of local and regional self-government, explicitly recognised in the Treaty.
5. The Protocol on Services of General Interest recognises the ‘wide discretion’ local and regional authorities have in how they provide, commission and organise such services. It is essential to recognise that this includes the right to assign the provision of a service to a company they own or control (“in-house”) without mandatory requirement of a public tender procedure.
6. The Commission should recognise and acknowledge this “freedom to procure” principle for local and regional authorities. This would be in line with the “freedom to contract” rights enjoyed by businesses.
7. We expect the evaluation to provide evidence that the directives have created an overly complex and legally challenging environment, leading to costly and administrative procedures. Therefore, we call on the European Commission to seize the chance to propose a ‘light’ procurement regime, focussing on the Treaty principles (equality, transparency, non-discrimination) and simplifying the procedures.
8. CEMR believes that it is necessary to return to the basic objectives and principles of the public procurement concept, in particular on ‘value for money’ and find pragmatic, manageable solutions, along the following lines:
 - A proportionate and well-balanced legal framework that provides for the basic principles, leaving sufficient flexibility for both, the public authority and the bidder;
 - Provide / allow local and regional authorities to determine their own purchasing priorities

- Focus on the Treaty principles (equality, transparency, non-discrimination) and ways to increase / strengthen their application, in particular by using new technologies
 - Reduction of legal and administrative burdens, simplifying and aligning procedures
 - Develop the full potential of new information technology and stimulate its use
 - Increase awareness and incentives to look for innovative solutions
9. The use of information technology will play a major role in reducing administration and costs and can shorten the procedures. We therefore urge the Commission to align the initiatives in the area of e-procurement and the modernisation of procurement policy.
 10. The EU's international commitments under the WTO's Government Procurement Agreement (GPA) provide an excellent model for such a 'lighter' procurement regime. The EU should therefore aim to reduce or remove the existing requirements which go beyond those outlined in the GPA regime.
 11. Finally, we believe that given the significant awareness of the environmental and climate impact of our activities, one needs to consider the possibility of favouring local suppliers and the question to what extent sustainability considerations can prevail in internal market rules.
 12. The CEMR, as a recognised Social Partner at European level, representing Local and Regional Government Administration, would like to encourage the European Commission to involve the Sectoral Social Dialogue Committees in the follow-up to the green paper, specifically regarding the impact assessment process.¹
 13. The Green Paper with its 114 questions addresses a high number of very detailed issues, which proves that the European Union has entered into micro-management of local authorities, which cannot be its role. The CEMR as European umbrella organisation of local and regional government associations expresses its view on selected questions.

¹ Decision 98/500/EC stipulates that each European sectoral social dialogue committee, for the sector of activity for which it is established 'shall be consulted on developments at Community level having social implications' general "impact assessment guidelines" drawn up by the EC from 2009" Page 16," [Part III: Annexes to Impact Assessment Guidelines](#)" European Commission

On the specific questions of the Green Paper:

A and B services (Q 4 & 5)

The distinction between “A” and “B” services should be upheld.

Existing B-services must remain and it should be possible to add other services. The ‘lighter’ provisions for “B”-services have their undisputed justification in view of their characteristics in particular as far as locally or regionally provided services are concerned in areas such as publicly run job centres, social, veterinarian, health, cultural and sports services. These services in general have no significant cross-border relevance and are not contrary to the interests of the EU.

The services, currently listed under “B”-Services should continue to comply only with the defined, limited, provisions. Furthermore, we propose to add ambulance services to the catalogue, since they provide in general a medical service and therefore qualify to be considered as health service. In ambulance services it is difficult to separate the health from the transport elements. The addition of ambulance services to the “B” Services would clarify the situation for public authorities that are responsible for the provision of emergency services (ECJ rulings C-160/08 and C-274/98).

Thresholds (Q 6)

Purchasing from suppliers in other Member States is still not very popular and evidence shows that the thresholds (around € 200,000 for supplies and services contracts) are too low to attract bids from providers based in other EU countries.

Therefore, the **thresholds should be increased to a level which makes bidding across borders commercially viable**. Doubling the thresholds to €400,000 would be a positive first step. Raising them to €5 million (in line with the thresholds for works contracts) would be even better. If this means that the EU needs to renegotiate its international / GPA commitments in this area then so be it.

Procedures (Q 14 – 22)

CEMR wants primarily a **simplification** of the rules and a reduction in the level of detail, which today is perceived by Contracting Authorities (CA) to be so burdensome that entering into contracts has become very resource-consuming and costly. The many requirements have led to tender procedures being anything but cost-effective. The rules have led to more bureaucracy rather than efficient use of resources. CEMR would like to have simplified procedures for all procurements, not just for 'widely available' goods and services.

Despite the benefits of public procurement, the implementation of EU procurement rules poses significant **administrative costs** to local and regional authorities.

In general, local and regional governments as well as companies complain about the detailed procedures and increased bureaucracy. Calculations provided by our members in 2010² on the **transaction costs** provide evidence that the costs are in general very high on both sides, the public purchaser and the bidder.

Furthermore, we observe an increasingly **litigious culture** and procurement professionals have to spend a significant proportion of their time attempting to resolve legal issues, and responding to challenges from the private sector. Dealing with legal issues often takes procurement professionals away from their core tasks.

² CEMR paper, over-reliance on public procurement as a policy instrument’, available at [CEMR’s website](#)

CEMR advocates **allowing negotiated procedures** in all procurement procedures, which would increase the possibility to obtain the best possible procurement outcomes. Contracting authorities should be given full flexibility, provided that transparency is upheld. It could be required to ensure that the CA announces in the OJEU notice its intention to build in an additional negotiation stage in which only the 2 or 3 highest scoring bidders will be invited to participate. Further safeguards to avoid abuse could be addressed through the requirements for written documentation of the negotiations. We don't see any reason why there should be any restrictions on the type and size of tenders and contracts that can be negotiated on.

The **competitive dialogue** procedure is particularly complex and costly and is not used consistently across Member States. While competitive dialogue has resulted in clearly defined solutions, it has led to additional work and incurred higher initial associated costs for bidders and local authorities alike.

In general, we wish to emphasise that the review needs to take into account that the procedures need to be implemented in the context of **increasing use of e-procurement**. CEMR is advocating a better alignment with the European Commission's initiatives on e-procurement.³

The requirements at EU level should be brought in line with the EU's international commitments under the WTO's Government Procurement Agreement. Such a regime would be much 'lighter' and effectively remedy EU 'gold plating' of its international commitments.

We expect that the current evaluation will provide conclusions and recommendations on a future simplification and consolidation of the existing procedures, including reflections on their reduction and complexity.

The EU agreement to allow temporary use of the **accelerated negotiated procedure** to tackle the economic crisis is most welcome and has significantly improved the award of contracts under that procedure. Increased efficiency and reduced timescales have resulted in real savings for local authorities. The possibility of using the accelerated procedure should be allowed on a permanent basis.

Selection and award (Q 23 & 24)

Allowing evaluation of the award criteria either before or alongside the selection criteria would reduce procurement administration costs in line with the aims of the EU revision. The Directive currently presumes that once selection has taken place all bidders are equal and therefore bids should be evaluated equally. This presumption is flawed as bidders bring differing levels of experience and skills, which must be considered alongside their bid.

The selection criteria are initially applied in order to eliminate those economic operators who manifestly lack the financial soundness or professional or technical experience to undertake the work. However, there is a **need in practice to have a second stage review** of an economic operator's capacity at the stage when the evaluation of their tender against the award criteria is being undertaken.

In reality, it is more efficient to secure references and undertake reference site inspections later on in the process so that they are done as part of the due diligence required, rather than rely only on the written references submitted as part of an initial selection process.

³ CEMR response to the consultation on e-procurement, available at [CEMR's website](#)

Previous experiences with bidders (Q 25)

In some contracts it is important to have the opportunity to take a CA's previous experience with bidders into account. In order to prevent discriminatory practices it is necessary to avoid abuse (open and transparent evaluation). During the contract period the CA should keep a record of the operator's performance. These records can thereafter be used in future competitions involving the same operator to provide evidence of a good or poor previous experience with that particular operator.

Smaller contracting authorities (Q 27 & 28)

The general aim should be to make the rules as simple as possible so that contracting authorities of all sizes can work with them. It would not be helpful to introduce different intensities of regulation for different sizes of contracting authority.

Contracts below the thresholds (Q 29)

It has been the decision that contracts below the thresholds are **excluded from the scope** of the Directives and this should not be changed. These contracts have very little or no significance for cross-border trade.

Public-public cooperation (Q 30 – 33)

In the current financial climate, cost savings through the sharing of back office or front-line functions is increasingly common practice across local authorities. Sharing services between public sector bodies is a way to organise services efficiently and innovatively in the interest of the public. It is about internal administrative organisation and not about avoiding competition.

CEMR welcomes the level of clarity on the subject of public-public cooperation reached through the judgements of the ECJ in the cases *Coditel (C-324/07)*, *Commission v Germany (C-480/06)* and *Sea (C-573/07)*. In full agreement with the European Parliament's resolution on 'new developments in public procurement' of May 2010, we therefore consider **public-public cooperation not to be subject to European public procurement rules** if the two criteria, reflecting the ECJ jurisprudence and based on the European Parliament's resolution, are respected:

- the purpose of the partnership is the provision of a public service task conferred on at least one of the public authorities concerned;
- the task is carried out solely by the public authorities concerned, i.e. without the involvement of active private capital.

Such an exclusion from the scope of a new directive should not go beyond these two criteria.

The transfer of *competences* between public sector organisations is a **matter of internal administrative organisation** of the Member States and is therefore not subject to public procurement. However, the simple entrustment of the *task* to another authority can also fall under the public-public exemptions mentioned above,

Joint procurement, framework agreements, subcontracting (Q 34 – 44)

The ability of local and regional authorities to realise significant savings through **joint procurement** activities or collaborative purchasing is of crucial importance. Such demand aggregation encourages a more strategic approach to procurement resulting not only in economies of scale, but also the ability to share procurement expertise across a group of contracting authorities working together. This could also be to the benefit of SMEs.

Despite the focus in the Green Paper on cross-border procurement between Member States, the main need at the moment is to facilitate collaborative procurement within Member States. As the Green Paper acknowledges, cross-border procurement is currently limited and 'domestic' transactions make up the vast majority of procurements. The Commission should explore new ways to exchange experiences on **collaborative procurement between contracting authorities EU-wide**. Sharing knowledge across borders is a key area where EU action can add-value and instigate real change.

Framework agreements play a valuable role. To further facilitate their use, the CEMR recommends that the maximum term for framework agreements be extended from four to six years. The new Directive should also provide opportunities for new suppliers and additional contracting authorities to join existing framework agreements,.

The **relationship between the contracting authority and the enterprise** to whom the contract is awarded is governed by national contract law. There is no role for the EU to regulate further national laws regarding cancellation of contracts etc.

The understanding of **subcontracting** possibilities, and subcontracting limitations that should be specified in public contracts, does not seem to be the same in the Member States and needs to be further clarified.

Small and Medium Sized Enterprises Q 46 & 49

If the European Union really wants to make public procurement more SME friendly, it should **consider the inclusion of 'reservations'** to allow a proportion of contracts to be specifically directed towards SMEs This is permitted by the GPA and used widely in the USA and several WTO countries. Such 'reservations' would also be of value as regards non-profit organisations.

If the EU indeed sees promoting SME access to contracts as a priority it could allow a certain quota of a Member States' procurement to be reserved exclusively for SMEs, bearing in mind that SMEs nevertheless make up the vast majority of all businesses.

Language requirements (Q 57)

Public authorities should **not have to issue documentation or receive bids in other languages**. Companies wishing to provide services or offer goods in other Member States need to equip themselves with the necessary language skills to do business there, or at least bear the cost of translation.

Favouring local suppliers (Q 67)

Local authorities are facing issues around trying to support local business and create local employment, whilst remaining compliant with the rules. Examples of best practice or guidance on how to achieve this whilst remaining compliant with the rules would be welcome. CEMR sees an increasing environmental case, for example, for **favouring local suppliers** so that goods require transportation over **shorter distances reducing traffic emissions**.

Strategic procurement (Q 90 - 96)

Local authorities are concerned about EU efforts to use procurement to address policy goals such as environmental and social issues via, for example, their inclusion as award criteria in public contracts. The choice of whether, in addition, to opt for green, or social, or innovation aspects within public contracts should be decided by the local or regional authority itself. Any EU requirements to include green, social, or other policy goals in public contracts **must remain entirely voluntary**.

However, there is a need for guidance on how local policy priorities such as supporting local businesses and promoting local employment can be included in award criteria whilst working within the scope of the Directives and the Treaty.

In relation to **innovation**, many local authorities do not have the resources to invest in research and development of products and services at a pre-commercial stage. Most solutions purchased are those available 'off the shelf'. Larger public sector bodies, (very large local authorities, national health services, defence ministries) etc. which wish to invest in research and innovation ahead of purchasing supplies or services should be encouraged to do so through flexible state aid rules.

We would like to underline that full engagement of the local and regional level is crucial to achieving the goals of the Innovation Union, as they have the necessary proximity to all those stakeholders involved in innovation. They serve as an intermediary between those various actors, the Member States and the EU.

Social services (Q 97 – 97.2)

Social services should **remain in the annex II B** as described in question 4 (see above). They are characterised by a special personalisation and need to be treated differently; the usual procedures of a classical procurement procedure cannot be applied on them; most of the social services are not provided vis-à-vis the public authority, but vis-à-vis a third party.

We believe that there is **no need for further regulation** of social services at EU-level. The EU rules governing public procurement should not reflect the special characteristics of social matters more comprehensively. Rather alternative national models which allow the non-discriminatory safeguarding of social services should be recognised as in line with European law.

National specificities in relation to social services should be accepted without the application of public procurement law (see above) and non-profit-organisations should be an option. Local authorities should have the choice to reserve contracts involving social services to non-profit-organisations.

If the Commission regards social services to be subject to public procurement law, **higher thresholds** for social and health services would be welcomed since these services in general have no relevant importance to the internal market.

Other issues to be addressed in a future reform (Q 113)

Service Concessions

Service concessions should **continue to be excluded from the scope** of European public procurement rules, because of the fundamental difference between public contracts and service concessions: in service concessions the risk is transferred to the operator. This is why they are not in the scope of the directives and should continue to be excluded.

If the Commission keeps on working on a separate set of rules for service concessions these rules should be considered as **part of the review of Directive 2004/18** and not as a separate directive, adding further to the complex legal framework for public procurement. In any event, they should not go beyond a basic advertising (or prior notification) requirement.

Remedies Directive

The Remedies Directive gives failed bidders new rights to challenge the award of a public contract. Public authorities are now forced to operate in a system that encourages litigation and is perceived to be biased in favour of the supplier, resulting in risk-averse behaviour and decreasing opportunities for innovative and locally responsive procurement solutions.

Although the Remedies Directive is not officially part of the EU's review, it is important to understand negative aspects of its impact on procurement practice, especially when combined with freedom of information provisions or the competitive dialogue procedure. With procurement processes being increasingly open to legal challenge, officers are spending more and more time on defending legal challenges and experience spiralling legal costs.

We invite the Commission to reconsider the remedies directives to **ensure that unsuccessful bidders require stronger grounds to challenge** the legitimate award of a public contract

Top three EU procurement issues to be tackled (Q114)

1. Simplification and extension of negotiation
2. Public-public cooperation
3. No binding green, social, innovation or other policy objectives ('strategic' procurement)

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