

CECOP position on European Commission's "Green Paper on the modernisation of EU public procurement policy. Towards a more efficient European Procurement Market"

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CECOP – CICOPA Europe (European Confederation of Worker Cooperatives, Social Cooperatives and Social and Participative Enterprises) is a European confederation grouping national organisations in 16 countries which in turn affiliate over 50.000 cooperative and participative enterprises in industry and services. The vast majority are SMEs, while some of them are second-degree enterprises of SMEs. They employ 1.4 million workers across Europe. Among the main sectors of activity, we find metal industries, mechanical industries, construction and public work, wood industry and furniture, white goods, textiles and garments, transport, media-related activities, social services, education and culture, environmental activities, etc. Finally, more than a thousand worker cooperatives in the CECOP network were born as business transfers to employees of conventional enterprises in crisis or without heirs.

WHAT ARE PUBLIC PROCUREMENT RULES ABOUT?

We consider the current structure of the material scope, with its division into works, supplies and services contracts as being appropriate. Its modification would increase additional costs harmful for contracting authorities and tenderers. (Q2) There is no need to review or simplify the definition of "works contract". (Q3) However, we consider that the distinction between A and B services should be reviewed. (Q4)

Public Procurement Directives should apply to all services possibly on the basis of a more flexible standard regime, except for social services. According to their specificity, social services should remain out of the Directives scope, except for already existing provisions and non-derogatory principles of the Treaty. (Q5)

We consider that the thresholds for the application of the EU Directives should be raised moderately, in order to reduce the difficulties for small contracting authorities (high costs and administrative burdens). Proportionality between thresholds and procedural costs has to be ensured. (Q6)

There is a need for EU rules on public procurement in the water, energy, transport and postal services sectors. (Q10)

IMPROVE THE TOOLBOX FOR CONTRACTING AUTHORITIES

Specific instruments for small contracting authorities

Smaller contracting authorities very often do not have experienced staff for public procurements, thus the full public procurement regime should be more appropriate for their needs. Exemptions from the full regime - non-discriminatory and without restricting to competition - should be applicable. Support structures/services should be put in place in order to help smaller contracting authorities, like it is the case in Italy with the SUA (*Stazioni Uniche Appaltanti*), common structures for several local authorities, which manage their procurement procedures in a centralized fashion. (Q27)

Aggregation of demand (Q34)

The aggregation of demand has advantages (economies of scale) and disadvantages in some

specific sectors (excessive simplification). It should be voluntary for Member States and should be applied:

- permanently, by the central purchasing bodies as already stated in Directive 2004/18/EC
- occasionally, for each single tender, based on a simple mandate between contracting parties

Negotiated procedure

When it comes to ordinary sectors, Member States should be able to use, on a voluntary basis, the negotiated procedure with prior publication. This should be the object of a gradual implementation by sectors and contract values, with the possibility to carry it out in an experimental way (Q68). Generalizing the use of the negotiated procedure would entail certain risks of abuse and discrimination. (Q21)

In case that Member States allow the recourse to the negotiated procedure with prior publication, they should:

- prohibit the criterion of lowest price for the award of contracts
- reduce the place given to the sole economic criterion based on the most economically advantageous proposal

The negotiated procedure should be applied for health and social services. In fact, dialogue between the contracting authority and the tenderer is the best guarantee to adapt the service to the users' needs. (Q20)

Simplification of the selection process

A voluntary and progressive European system of mutual recognition of certificates and prequalification should be established (Q56).

A MORE ACCESSIBLE EUROPEAN PROCUREMENT MARKET

Improving access for SMEs

SMEs face difficulties in taking part in public procurements, especially high value ones. Very often the relation between the tender value and the financial requirements for participation are disproportionate and thus discourage SMEs from important opportunities. Small and medium cooperatives face the same problems in different Member States. Specific measures need to be adopted in order to facilitate access and ensure better participation to public procurements by small economic actors like SMEs (Q46):

- support services in order to help SMEs overcoming the administrative burdens during the selection phase
- support services in order to help SMEs create horizontally integrated inter-SME collaborative networks and peer groups such as the ones that already exist across Europe under the cooperative form (consortia, cooperative groups, SME cooperatives). At the same time, while enabling SMEs to take part in tenders in which they could otherwise not take part, those networks considerably reinforce the innovation capacity and the sustainability of the SMEs through shared costs and services. The contracting authorities should, however, still consider those networks as being SMEs and not large enterprises.
- in case of grouped bidders, the contracting authority should take into account the horizontal structure of peer groups organized democratically among SMEs.
- considering the political disagreement at European level for measures like the fixed procurement quotas reserved exclusively for SMEs participation (like in the USA),

alternative measures could be put in place by contracting authorities in order to guarantee SMEs increased participation in public procurements.

- contracting authorities should be asked to justify weak or non-existent participation of SMEs in public procurements

The above mentioned measures should in no case create discrimination based on the size factor of the enterprise.

In case of subcontracting, contracting authorities should require from the successful tenderer to specify the identity of the third parties already during the selection phase. They should also require from the successful tenderer to subcontract a given share of the contract value to third parties that are not companies controlled by the successful tenderer. (Q44) Division into lots in public procurements should be properly adapted to SMEs, with contextual limitations on subcontracting (eg. the French Code, which requires contracting authorities to justify the non-recourse to this measure in term of economic and technical convenience). (Q47)

Preventing anti-competitive behaviours

The criterion of the economically most advantageous offer should prevail over the criterion of the lowest price in order to limit anti-competitive behaviours and dumping, especially in the labour intensive sectors. (Q59)

STRATEGIC USE OF PUBLIC PROCUREMENT IN RESPONSE TO NEW CHALLENGES

Public administrations should also be encouraged to integrate more often social considerations in public procurements. The European Commission's guide "*Buying social. A guide to taking account of social considerations in public procurements*" is already an important first step in that sense, but considering the current situation of public deficits and eventual fear for spending public budgets, stronger measures should be put in place by the European Commission. For example, a Communication should be adopted by the European Commission on socially responsible public procurements in order to spread a stronger political message to Member States' contracting authorities.

In order to achieve objectives such as the protection of the environment, promotion of social inclusion, improving accessibility for disabled people and enhancing innovation, enterprises should be encouraged to submit bids that go further than the level set in the technical specifications. Allowing the use of the negotiated procedure with prior publication as a standard procedure could help take policy-related considerations better into account. (Q68)

The criterion of the economically most advantageous offer is the most appropriate because it helps to take into account social and environmental aspects of the offer. The "advantageous" component should also be considered in its long-term dimension. Quality and the "advantageous" dimension of the service are better ensured when the service is seen in a long-term perspective.

A third possibility of award criteria (Q70) should be introduced: the proportionality between the cost of the offer on the one hand, and the middle/long-term impact on the contracting authorities' budgets on the other. Public authorities indeed need to consider cost-saving measures in their public budgets as a whole and in a medium to long term perspective, not just within the narrow framework of a specific tender. Characteristics linked to the economic, social and environmental sustainability of the enterprise, such as the following elements, which should be specified in the status of the enterprise, tend to reinforce this criterion, and should thus be taken into consideration:

- employment durability
- investment in employees training
- social and environmental balance sheet of the enterprise

- systemic accumulation of capital

This third criterion should be compulsory in case of public procurements for social services.

Contract performance clauses are the most appropriate stage of the procedure at which to include social considerations relating to the employment and labour conditions of the workers involved in the execution of the contract. Nevertheless, they could be already specified during the selection process, in order to avoid discrimination between enterprises. (Q74).

We suggest that contracting authorities should require from tenderers to specify, in contract performance clauses, the level of employment sustainability in the contract performance clauses (eg. percentage of permanent and non-permanent contracts, full time and part time contracts, percentage of volunteers, etc.) as well as budget dedicated to the employee training. (Q74) Certain general contract performance clauses, in particular those related to employment and labour conditions of the workers involved in the execution of the contract in labour intensive sectors should be specified at EU level, in collaboration with the concerned stakeholders. (Q76)

Contract performance clauses reinforce, *inter alia*, the third type of award criteria proposed above, as they can help contracting authorities reduce public costs in the middle to long-term thanks to their positive effects like long-term employment, social inclusion of disadvantaged groups, local development, etc.

Sheltered workshops

Even if not mentioned in the Green Paper, it would also be essential to clarify Art.19 of Directive 2004/18/EC¹. Although Art.19 has to do with public tenders at European-level, the first concrete cases of application of this article brought to CECOP's knowledge tend to demonstrate that its implementation is extremely difficult, if not impossible, to be done at European level, and that, in practice, the tenderers are national. Indeed, the notion of "sheltered workshops" has disappeared from virtually all national legislations and has not been defined at the EU level: thus, without any further definition of the term "sheltered workshops", there is the risk that such reserved public contracts will, de facto, remain national, as national legislation needs to be used to fill in the legal void. Therefore, this provision which was established to further the internal market seems to act against its own purpose. Another risk is that such lack of a clear definition can favour "opportunistic tenderers" which, in order to win the tender, hire disabled and disadvantaged persons without ensuring them long-term employment prospects, and do not necessarily have such goals in their core mission. Based on its experience with thousands of cooperatives employing disabled across Europe, CECOP however, consider appropriate to maintain a provision establishing reserved markets for the disabled. However, in order to limit the above-mentioned risks, and to stick to the spirit of Art.19, CECOP recommends that the EC encourage public authorities to see to it that the tenderers are enterprises in which the disabled are workers with long-term contracts and in compliance with the national labour law, and which can show that the long-term integration through work of disabled and disadvantaged persons is part of their core mission.

Social services

Directives should allow the possibility of reserving contracts to non-for-profit actors (like cooperatives and other social economy actors) providing social services. However, the reason for it should not be their non-for-profit structure *per se* but in as much as services provided by those entities are often more in compliance with service user's needs. (Q97) In many European countries cooperatives have proved their capacity to provide services with such characteristics. In this sense, restrictions to local or regional suppliers could be justified by legitimate and objective reasons that are not based on pure and short-term economic considerations. (Q67)

¹ "the 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 (...)"

When it comes to social services, the criterion of lowest price should be prohibited (Q97.1.1.) and the economically most advantageous offer criterion should be applied. The latter should take into consideration the following characteristics that are consubstantiate with the interests of citizens:

- geographical accessibility of the service and its affordability;
- its capacity to last over the long term;
- the involvement of the stakeholders (service beneficiaries, employees/service providers, in some cases public authorities) in the monitoring of the entire process of service provision;
- the democratic ownership of the stakeholders over the the service provided.

Indeed, and again based on the experience accumulated by thousands of our enterprises specialized in social services across Europe, this participatory component - in the way that members/stakeholders have the control on the service provided and on the enterprise that provide such service - is a guarantee that the service provider exercises its missions of general interest in the best interest of the citizens. This is even reinforced when those for whom the services are delivered are members, eg. disadvantaged workers in type B social cooperatives , etc.