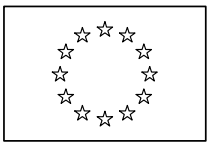

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COMMISSION STAFF WORKING DOCUMENT

EUROPEAN CODE OF BEST PRACTICES FACILITATING ACCESS BY SMES TO PUBLIC PROCUREMENT CONTRACTS

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Executive summary

The overall objective of this 'European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts' is to allow Member States and their contracting authorities to fully exploit the potential of the Public Procurement Directives in order to ensure a level playing field for all economic operators wishing to participate in public tendering.

Indeed, stakeholders who were consulted during the preparation of this Code of Best Practices about the difficulties that SMEs encounter in accessing public procurement stressed that what is most needed in order to facilitate SMEs' access to public procurement is not legislative changes in the Public Procurement Directives, but rather a change in the contracting authorities' procurement culture.

An increased involvement of SMEs into public purchasing will result in higher competition for public contracts, leading to better value for money for contracting authorities. In addition to this, more competitive and transparent public procurement practices will allow SMEs to unlock their growth and innovation potential with a positive impact on the European economy.

Therefore, the purpose of this document is twofold: 1) providing Member States and their contracting authorities with guidance on how they may apply the EC legal framework in a way which facilitates SMEs' participation in contract award procedures, and 2) highlighting national rules and practices that enhance SMEs' access to public contracts. These elements, gathered for the first time in a single 'Code', will be illustrated by useful experiences taken from different Member States.

This 'Code of Best Practices' takes as starting point the main difficulties actually encountered and reported by SMEs and their representatives, and, draws the attention of Member States and their contracting authorities on available solutions to overcome these difficulties under the following headings/clusters:

– Overcoming difficulties relating to the size of contracts

– Ensuring access to relevant information

– Improving quality and understanding of the information provided

– Setting proportionate qualification levels and financial requirements

– Alleviating the administrative burden

– Putting emphasis on value for money rather than on price

– Giving sufficient time to draw up tenders

– Ensuring payments on time

This 'Code of Best Practices' will therefore help public authorities to develop ‘strategies’, ‘programmes’ or ‘action plans’ with the specific aim of facilitating SMEs’ access to public contracts.

This Code of Best Practices is an indicative document of the Commission services and cannot be considered binding to this institution in any way. It should also be noted that the Code is subject to the evolution of the relevant national and Community legal framework and practice.

Introduction

The market for public procurement in the Member States amounted to some €1 800 billion in 2006, corresponding to 16% of EU GDP[1]. The purpose of EC Public Procurement Directives[2] is to open up the public procurement market for all economic operators, irrespective of their size. However, special attention needs to be paid to the question of access by small and medium-sized enterprises[3] (SMEs) to those markets: SMEs are generally considered to be the backbone of the EU economy, and in order to make the most of their potential for job creation, growth and innovation, SMEs' access to public procurement markets should be facilitated. Following a request to this effect by the Competitiveness Council[4], the Commission has conducted a further analysis based on an economic study and an extensive consultation of stakeholders.

Economic analysis

A study carried out in 2007 on behalf of the European Commission estimated that, in 2005, the proportion of the value of public procurement above EU thresholds secured by SMEs was 42%, which corresponds to 64% of the number of contracts[5]. Obviously, these figures relate only to public contracts above the thresholds set by the Public Procurement Directives and do not take account of subcontracts of all sizes awarded to SMEs.

However, while the share of medium-sized companies in the total value of public procurement contracts above the EU thresholds is very positive as compared to their importance for the economy, the analysis suggests that situations differ considerably from one Member State to the other: SMEs' shares of public procurement above the EU thresholds range from 78% and 77 % in Slovenia and Slovakia to 35% and 31% in France and the UK[6]. While such discrepancies might be explained in part by the relatively high share accounted for by large enterprises in the economy of certain Member States, a comparison between the respective combined company turnovers generated by SMEs in the EU economy as a whole (58%) and the value of the public contracts above the EU thresholds won by SMEs as prime contractors (42%) suggests that there is still room for improvement.

Consultations of stakeholders

Stakeholders who were consulted during the preparation of this Code of Best Practices about the difficulties that SMEs encounter in accessing public procurement stressed that what is most needed in order to facilitate SMEs' access to public procurement is not legislative changes in the Public Procurement Directives, but rather a change in the contracting

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1 These estimates were based on data provided by National Statistical Institutes to Eurostat for National Accounts and from annual reports and other sources for the Utilities sector.

2 Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (30.04.2004) and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (30.04.2004).

3 SMEs are referred to in this document as defined under Commission Recommendation 2003/361/EC published in the Official Journal of the European Union L 124, p. 36 of 20 May 2003.

4 See Council Press Release 6964/06 (Presse 65), p.10.

5 Evaluation of SME Access to Public Procurement Markets in the EU, Final Report by GHK and Technopolis, available at: http://ec.europa.eu/enterprise/entrepreneurship/public_procurement.htm

6 See page 48 of the Report referred to in footnote 5.

authorities' procurement culture. In this context, stakeholders have reported the following main difficulties[7]:

– difficulties in obtaining information (as they are unable to allocate sufficient resources to information collection);

– lack of knowledge about tender procedures;

– excessive administrative burden;

– large size of the contracts;

– too little time to prepare the tenders;

– the cost of preparing the tenders (since many costs are fixed, SMEs face disproportionately high costs in comparison with larger enterprises);

– disproportionate qualification levels and certification requirements;

– excessive requirements for financial guarantees;

– discrimination against foreign tenderers /favouring of local or national enterprises[8];

– finding cooperation partners abroad;

– late payments by contracting authorities.

This leads to the conclusion that there is a need to develop a more SME-friendly approach to public procurement among contracting authorities by promoting the possibilities offered by the Public Procurement Directives to facilitate access by SMEs to public procurement opportunities, and by making known the relevant best practices in Member States. While EC public procurement law ensures the opening up of markets for all economic operators, without distinction between SMEs and other types of economic operators, there are some provisions which are particularly important for SMEs, as they provide solutions for problems faced by SMEs or mainly by SMEs. In addition, certain rules and practices in Member States provide additional or more specific solutions in this field.

Purpose and content of the 'Code of Best Practices'

Against this background, the **purpose of this document** is twofold: providing Member States' contracting authorities[9] with general guidance on how they may apply the EU legal framework in a way which enables SMEs to participate in contract award procedures, and

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7 See in particular the Report referred to in footnote 5, the synthesis report of the SBA public consultation closed on 30 March 2008 available at http://ec.europa.eu/enterprise/entrepreneurship/docs/sba_consultation_report_final.pdf, and the European Network for SME Research (ENSR) 1999 survey available at http://ec.europa.eu/enterprise/enterprise_policy/analysis/doc/ensr_6th_report_en.pdf**,** and the specific contributions from European business organisations such as UEAPME and BusinessEurope available on their respective websites.

8 The problems eventually met by SMEs in terms of discrimination on the basis of nationality in favour of local or national enterprises relate to clear infringements to EC public procurement law. As such, those violations must be addressed in the context of remedies provided for in accordance with Directives 89/665/EEC and 92/13/EEC, or, as concerns contract awards not or not fully subject to the provisions of the Public Procurement Directives, in the light of the rules and principles of the EC Treaty. On the latter point, the Commission has adopted and published in 2006 an interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (see OJEU C-179, 1.8.2006, p.2).

9 In this document the term 'contracting authority' covers both contracting authorities within the meaning of Article 1(9) of Directive 2004/18/EC and contracting entities within the meaning of Article 2 of Directive 2004/17/EC.

highlighting a number of national rules and practices that facilitate access to public contracts by SMEs. These rules and practices, gathered together for the first time in a single 'Code', will be illustrated by useful experience taken from different Member States[10].

However, until now, only a small number of Member States have adopted and implemented a country-wide 'strategy', 'programme' or 'action plan' with the specific aim of enhancing SMEs' access to public contracts. This explains why only a few Member States have reported a full set of initiatives in this field, while the vast majority of Member States reported only sporadic or limited specific actions over recent years. Such a situation reinforces the need for stepping up the exchange of practices between Member States' policymaking departments, and for doing more to share the lessons learned from previous experiences with all stakeholders.[11]

This 'Code of Best Practices' will deal with possible solutions to the main difficulties encountered and reported by SMEs and their representatives[12], under the following headings/clusters:

– Overcoming difficulties relating to the size of contracts

– Ensuring access to relevant information

– Improving the quality and understanding of the information provided

– Setting proportionate qualification levels and financial requirements

– Alleviating the administrative burden

– Placing emphasis on value for money rather than on price

– Giving sufficient time to draw up tenders

– Ensuring that payments are made on time

Together with the other actions mentioned in the Commission Communication on a "Small Business Act" for Europe, this Code of Best Practices is therefore an operational response to the Competitiveness Council's invitation to the Commission.

1. OVERCOMING DIFFICULTIES RELATING TO THE SIZE OF CONTRACTS

SMEs interested in public contracts often complain that they are excluded *de facto* from public procurement contracts simply because they do not have the capacity to tender for the whole contract. While the characteristics of a large contract may justify the award to a single

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10 References made to Member States' rules and practices should by no means be regarded as an approval by the Commission of each and every detail of the rules and practices concerned. References to Member States' legislation and practices are set out as understood by the Commission services. Indeed, having collected the latter mostly through replies to questionnaires addressed to representatives of contracting authorities and suppliers, the Commission cannot guarantee that each measure at stake is, in fact, as set out in national legislation and implemented by national authorities, fully compliant with EC public procurement law. In addition, contributions received from stakeholders show that, while a number of similar rules and practices exist in a number of Member States, many of these rules and practices have differing features that could not be fully reflected in what should remain an indicative 'Code of Practices'.

11 To enable this to happen, the Commission will further encourage the collection and exchange of practices through the Public Procurement Network (PPN), which is a co-operation network of Member States' enforcement authorities, enlarged to a number of other European countries (www.publicprocurementnetwork.org).

12 See footnote 5.

contractor, the following possibilities can always be considered by large contracting authorities, including central purchasing bodies.

1.1. Sub-dividing contracts into lots

The Public Procurement Directives allow contracts to be awarded in the form of separate lots[13]. The sub-division of public purchases into lots **clearly facilitates access by SMEs, both quantitatively** (the size of the lots may better correspond to the productive capacity of the SME) and **qualitatively** (the content of the lots may correspond more closely to the specialised sector of the SME). Furthermore, sub-dividing contracts into lots and thereby further opening the way for SMEs to participate, broadens competition, which is beneficial for the contracting authorities provided that this is appropriate and feasible in the light of the respective works, supplies and services concerned.

Against this background, contracting authorities should keep in mind that, while they are allowed to limit the number of lots tenderers can bid for, they must not use this possibility in a way which would impair the conditions for fair competition[14]. In addition, making it **possible to tender for an unlimited number of lots** has the advantage that it does not discourage general contractors from participating and the growth of enterprises.

The following national provisions and practices should be mentioned in this context:

National law

According to Austrian law, **contracting authorities have the freedom to decide whether to award a global contract or to sub-divide it into separate lots**. When taking such a decision, they have to take into account economic or technical aspects.

In France, in order to attract the widest possible competition, the **general rule is to award contracts in the form of separate lots**. **However, contracting authorities have the freedom to award global contracts** if they consider that the sub-division into lots would, in the given case, restrict competition, or risk to render the execution of the contract technically difficult or expensive, or if the contracting authority would not be in a position to ensure the co-ordination of the performance of the contract.

The promotion of the sub-division of contracts into lots is accompanied in some Member States (Hungary, Romania) by provisions of national law which specify that the **selection criteria must be related and proportionate to the individual lots** and not to the aggregate value of all lots.

Practices

In Ireland, as in other Member States, it is the practice of many contracting authorities when advertising large construction contracts to advertise and award contracts for some of the specialist aspects (electrical services, mechanical services, specialist fitting contracts, etc.) separately to economic operators who are required to work together with the economic operator which has been awarded the contract for the co-ordination of the whole project. This practice facilitates participation by SMEs, while the contracting authority does not have to deal with the challenges that arise from co-ordinating the execution of the different lots.

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13 Article 9(5) of Directive 2004/18/EC and article 17(6)(a) of Directive 2004/17/EC.

14 Furthermore, contracting authorities need to take into account the total estimated value of all lots for the determination of the advertising requirements to be complied with and the procedure to be followed.

In Lithuania, the public procurement office carries out an ex-ante analysis of contract notices before they are sent for publication in the TED-database and, as part of this analysis, it recommends to the contracting authority to consider sub-dividing the contract into lots.

1.2. Taking advantage of the possibility for economic operators to group together and rely on their combined economic and financial standing and technical ability

Public Procurement Directives[15] allow an economic operator to **rely on economic and financial capacities and on technical abilities of other companies**, regardless of the legal nature of the links which it has with them, in order to prove that it complies with the level of capacities or abilities required by the contracting authority. The economic operator must, nonetheless, prove that it will have at its disposal the resources necessary for the execution of the contract.

In the case of groups of economic operators, it is now clearly stated in the Public Procurement Directives that the **group may rely on the capacities of all the participants in the group**. In addition, the **group may also rely on capacities of other entities not belonging to the group**.

Contracting authorities are required by Community law to accept these forms of co-operation between SMEs. In order to facilitate the widest possible competition, it is advisable that contracting authorities **draw attention to this possibility in the contract notice**.

Furthermore, given that establishing these forms of co-operation between SMEs takes time, contracting authorities should make use of the possibility to prepare the market for future procurements by publishing **prior information notices** which **give economic operators enough time to prepare for joint bidding**.

All these provisions and practices obviously **make it easier to constitute groups of independent SMEs** to be tenderers or candidates in big public procurement contracts, especially in the case of complex contracts involving a variety of skills.

The following national practices should be mentioned in this context:

Practices

SMEs may benefit from the advice and support of the easily accessible members of the **Enterprise Europe Network (EEN)** located in Member States. Launched in 2008, the EEN offers support and advice to businesses across Europe and helps them make the most of the opportunities in the European Union. Its services are specifically designed for SMEs but are also available to all businesses, research centres and universities across Europe. It provides information on EU legislation, **helps find business partners**, offers possibilities to participate in innovation networks and provides information on funding opportunities (see: http://www.enterprise-europe-network.ec.europa.eu/index_en.htm*)*.

[15] Article 47(2) and (3), article 48(3) and (4) and article 52(1)(third subparagraph) of Directive 2004/18/EC and article 53(4) and (5) and article 54(5) and (6) of Directive 2004/17/EC.

1.3. Making use of the possibility to conclude framework agreements with several economic operators and not just with a single supplier

The Public Procurement Directives offer contracting authorities the possibility to conclude a **framework agreement with several economic operators**[16] and to organise '**mini-competitions**' for parties to the framework agreement as actual purchasing needs arise for the contracting authority. In comparison to a traditional tendering arrangement, where a contracting authority advertises for one supplier to deliver all the goods for a given period, which may favour bigger undertakings, the former possibility may give SMEs a chance to compete for contracts which they are in a position to perform. This is particularly the case where a framework agreement includes a high number of economic operators and is itself sub-divided into lots, or where contracts based on such framework agreements are awarded in the form of lots.

In any event, contracting authorities need to ensure, especially by keeping selection criteria proportionate, that SMEs, who often believe that the scope of a framework agreement precludes their involvement and that the bidding procedure is more complex and prolonged, are not deterred from taking part.

The following national practices are worth mentioning in this context:

Practices

In Romania, the issue of how to ensure that the process of being included into a framework agreement with several economic operators is proportionate has been addressed by way of a guidance document, which points out that the **minimum levels of ability** required when awarding a framework agreement **must be related and proportionate to the largest contract due to be concluded**, **and not to the total amount of contracts planned for the entire duration** of the framework agreement.

The UK has produced guidance which advises contracting authorities, even if they have a framework agreement in place, to consider how best value for money can be obtained, including the possibility to buy outside the framework agreement[17] if:

- short-term market conditions (e.g. an unexpected decrease of the price of a certain product) mean contracting authorities could get better value;

- innovative goods or solutions are not represented in the existing framework agreements.

In Germany, experience shows that SMEs are well represented in framework agreements that are used to cover recurring needs of contracting authorities for small-scale services or supplies (e.g. printing services).

A case study from the UK illustrates how a framework arrangement for suppliers of office furniture was set up that included large and small enterprises. Large furniture suppliers were able to achieve economies of scale for standard office furniture, and SMEs were able to provide flexibility in meeting requirements for special items, such as reception and conference room furniture and specialist seating. The latter items are typically specified to a higher standard and will vary from order to order. In this way the contracting authority achieved value for money in both standard and specialist items of furniture.

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16 Article 32 of Directive 2004/18 and Articles 14 and 40(3)(i) of Directive 2004/17/EC.

17 Subject to the terms of the framework agreement in question and following a different public procurement procedure, where necessary.

1.4. Making sub-contracting opportunities more visible and ensuring equal terms for sub-contractors

The optimum situation for economic operators is obviously to win contracts themselves, since sub-contracting opportunities are usually regarded by economic operators as offering lower profits. However, in the case of large contracts, where SMEs are not in a position to be a prime contractor or to bid jointly with other SMEs, sub-contracting may still provide them with good opportunities, particularly where SMEs can provide added value in the form of specialised or innovative products or services.

The following national practices are worth mentioning in this context:

Practices

The UK advises contracting authorities to make subcontracting opportunities more visible to SMEs. Contracting authorities are encouraged to ensure there is visibility of the supply chain by taking a number of measures, such as:

- Publishing, on the contracting authority's website, the names of companies acting as prime contractors in a procurement and details of awarded and upcoming contracts;

- Where appropriate, contracting authorities are encouraged to ask their main suppliers to demonstrate their track record in achieving value for money through the effective use of their supply chain, including how SMEs can gain access to their subcontracting opportunities.

In addition, contracting authorities may, subject to national legislation, include a provision in the contracts they conclude to the effect that main contractors must not deal with their sub-contractors on less favourable terms than those agreed between the contracting authority and the main contractor.

The following national provisions are worth mentioning in this context:

National law

According to German law, the contracting authority has to stipulate in the documentation that the **successful tenderer may not impose less favourable conditions on its subcontractors** than the conditions agreed on between him and the contracting authority, especially as far as payment arrangements are concerned.

2. ENSURING ACCESS TO RELEVANT INFORMATION

Ensuring easy access to all the relevant information on business opportunities in public procurement is of key importance for SMEs.

2.1. Improvements offered by e-procurement

E-procurement promotes competition, as it allows easier access to the relevant information on business opportunities. It may be particularly helpful to SMEs by enabling **cheap and quick communication**, e.g. downloading the contract documents and any supplementary documents without incurring copying or mailing costs. The specific provisions of the Public Procurement

Directives in relation to e-procurement provide the necessary legal framework for operations in this relatively new area.[18]

All the Member States have introduced or are planning to introduce national public procurement websites containing a number of features which promote e-procurement. While it is possible in all Member States to search for contract notices via web portals, in many of them the number of such web portals being used by the government and by regional and local authorities makes it difficult for tenderers to maintain an overview. Furthermore, the practical usefulness of these web portals (allowing undertakings to create a profile to receive alerts on corresponding business opportunities, to directly download tender documents, and submit bids electronically etc.) is highly variable.

Without prejudice to the actions mentioned in the Commission Communication on a Small Business Act for Europe, the following possibilities could be further developed:

– Publication of public procurement notices online;

– Use of **a single centralised website**, especially in federal or large countries;

– **Free access** to the notices;

– Multi-functional search engine;

– Possibility for undertakings to create a profile to receive alerts of corresponding business opportunities;

– **Direct downloading** of contract notices and accompanying documentation;

– **Electronic tendering facility**, enabling contracting authorities to receive bids electronically in conformity with the requirements of the Public Procurement Directives regarding the integrity of information, confidentiality, appropriate access etc.

It is worth noting that some Member States are looking into the possibility of **making their websites available in other Community languages** so as to enable better and direct access for tenderers from other Member States. Such measures would significantly facilitate cross-border procurement.

The following national practices are worth mentioning in this context:

Practices

In Latvia, all public tender notices are published on a **single web portal** which is accessible **free of charge** and offers **daily news service**.

In Estonia, there is a single online public procurement register for all contract notices which is the **sole medium for publishing** at national level.

Lithuania also uses a single web portal for all contract notices; this offers the possibility for **multi-criteria search** as well as user interfaces available in Lithuanian and English.

[18] Article 1(7) and (13), article 33, article 42(1), (4) and (5) and article 54 of Directive 2004/18/EC. Article 1(5), (6) and (12), article 15, article 48(1), (4) and (5) and article 56 of Directive 2004/17/EC.

2.2. Information centres

Personalised assistance can be very helpful for SMEs.

At European level, SMEs can enjoy easy access to advice and support from the members of the **Enterprise Europe Network (EEN)**, described above, on page 8.

At national level, the following practices should be mentioned in this context:

Practices

Many Member States (such as Germany, Ireland and Lithuania) have set up information centres which provide general information on public procurement law, information on award procedures and offer consultation and training. In Germany, the various 'Bundesländer' maintain procurement information centres ("Auftragsberatungsstellen") which offer information and consultation services to economic operators and contracting authorities, as well as training in public procurement law.

Bulgaria maintains telephone lines through which experts of the national Public Procurement Agency can be consulted regarding the different possibilities the national procurement website offers, the filling in and sending of notices, the legal framework and the problems encountered by contracting authorities and economic operators in the application of the relevant legislation. In 2006, more than 2,500 phone calls were received. Questions received from undertakings related mainly to the documents that they had to present, to the participation and performance guarantees as well as to the possibilities for review of the decisions of the contracting authorities.

In Italy, the central purchasing body (CONSIP) is developing a project called 'Sportelli in rete' aimed at creating, in co-operation with partners, local desks and structures that help enterprises, particularly SMEs, to increase their participation in award procedures and to improve their familiarity with e-procurement tools.

2.3 Feedback to tenderers

In addition to ensuring easy access to all the relevant information on business opportunities, giving feedback to economic operators who have participated in an award procedure is also essential. In order to prepare for future bids, it is very helpful for a tenderer to see which aspects of its bid were considered strong by the contracting authority and what the weaknesses were.

Being an application of the principle of transparency, the obligation to give feedback to tenderers is also ensured by the Public Procurement Directives.[19]

3. IMPROVING THE QUALITY AND UNDERSTANDING OF THE INFORMATION PROVIDED

3.1. Training and guidance for contracting authorities

The lack of sufficient, relevant and clear information means that it is not easy for economic operators to **understand the needs of the contracting authority** and to formulate the right bid. This should be addressed through **training and guidance for contracting authorities/entities**, **by putting special emphasis on** the **situation of SMEs** and on how to

[19] See Article 41 of Directive 2004/18 and Article 49 of Directive 2004/17.

design an award procedure in a way that ensures that SMEs can participate on an equal footing with large enterprises. Indeed, on the basis of the various consultations carried out in preparing this Code of Best Practices, which led to the conclusion that facilitating SMEs' access to public procurement requires a **change in the procurement culture of contracting authorities**, it appears that there is major scope for improving SMEs' participation in contract award procedures through increasing **professionalism in procurement**.

Issues that could usefully be dealt with in this context might include not only how to apply the existing legal framework in a way which ensures that SMEs can participate in award procedures on an equal footing with big businesses, but also management issues, such as how to deal with more complex bidding procedures and contractual relations where contracts are sub-divided into lots.

The following national practices are worth mentioning in this context:

Practices

In Austria, the central purchasing body has established a "procurement competence centre" which provides help for contracting authorities in drawing up their tenders. This centre also pools experience in dealing with SMEs.

In Ireland, the National Public Procurement Policy Framework now requires public bodies to adopt a more innovative approach to the purchasing of goods, supplies and services. The main objective of the Policy Framework of 2005 is to promote a strategic and professional approach to the public procurement function, which involves building the necessary capacity and expertise within contracting authorities. To promote the level of competency and professionalism required to implement the Public Procurement Policy Framework, the NPPPU endorses a **postgraduate MBS course in Strategic Procurement**, at Dublin City University Business School, which commenced in September 2006. In addition to that, a new Certificate in Strategic Procurement has been introduced by the Institute of Public Administration, a public sector educational and training body. In 2005/2006, **60 officials from 40 organisations** underwent training in corporate procurement planning.

In the Netherlands, the Ministry of Economic Affairs set up a dedicated agency, **PianoO**, which is trying to help public authorities become more professional in their procurement. The agency operates a website providing useful and up-to-date information on public procurement legislation and practice, facilitates the exchange of best practices between contracting authorities and organises seminars for procuring authorities on a regular basis.

Two examples of guidance documents for contracting authorities specifically aimed at facilitating the access of SMEs to public procurement contracts may be found at (see footnote 10): http://www.ogc.gov.uk/documents/CP0083_Small_supplier_better_value.pdf, *AND*, http://www.bercy.gouv.fr/directions_services/daj/oeap/publications/documents_ateliers/pme_commande_publique/acces_guide.htm

3.2. Training and guidance for SMEs on drawing up their tenders

SMEs usually do not have large or specialised administrative capacities that are well-acquainted with public procurement language and procedures. They tend to encounter greater difficulties than large enterprises when looking for relevant business opportunities and drawing up tenders. The majority of Member States organise conferences, seminars and training sessions, and maintain a helpdesk service. However, there appears to be a need for further promotion and development of ad hoc guidance and training in this area for businesses, including SMEs.

The following national practices should be mentioned in this context:

Practices

In France, a detailed practical guide has been published for SMEs on how they can better exploit the possibilities offered by the public procurement market ("*Guide pratique pour la réponse des PME à la commande publique*" http://www.pme.gouv.fr/essentiel/vieentreprise/guidepratique-050208.pdf). It provides guidance for SMEs on how they can access information on business opportunities, how to familiarise themselves with the relevant regulatory framework, how to understand the real needs of contracting authorities on the basis of the published tender documents, how to evaluate whether they have the capacity to actually execute the contract and how they can adopt a strategy for bidding.

In Austria, the central purchasing body prepared a check-list that can be used and published as an annex to contract notices relevant for SMEs and which is aimed at preventing the most common mistakes made by SMEs when submitting a bid.

The UK developed an SME training programme, which was delivered to over 3000 SMEs and 820 contracting authorities regionally in 2005-6. The aim of this training was to give SMEs the knowledge required to tender for public contracts, and to raise awareness of contracting authorities to the barriers facing SMEs. Following the success of this training, The UK has recently produced an online course for SMEs called "Winning the Contract". It gives practical advice to help businesses find out about public sector opportunities and provides a step-by-step guide to the bidding process.

4. SETTING PROPORTIONATE QUALIFICATION LEVELS AND FINANCIAL REQUIREMENTS

4.1. Keeping selection criteria proportionate

The EC Public Procurement Directives explicitly confirm the European Court of Justice's case law according to which criteria on financial and economic capacities and on technical abilities need to be **related and proportionate to the subject-matter of the contract**.[20]

Keeping selection criteria proportionate is of **core importance for SMEs**, since contracting authorities that fix too high capacity and ability levels exclude *de facto* a high proportion of SMEs from participating in tender procedures.

There are many possible selection criteria and various documents that can be chosen as evidence of fulfilling these criteria. A decision has to be made on which criteria are **appropriate for the kind of purchase involved and its value**. All selection criteria must be clear, non-discriminatory and proportionate to the contract in question.

In the case of technical and professional capacity, the contracting authority should opt for selection criteria which enable it to determine whether a tenderer has the capacity required for the contract in question, rather than the general capacity of tenderers. However, care should be taken that this does not unduly narrow down the field of eligible applicants.

In addition, selection criteria should not be worded in such a way that they narrow the field of competition by addressing irrelevant matters. For example, a requirement that only experience

[20] Article 44(2)(third subparagraph) of Directive 2004/18/EC.

acquired in dealing with the public sector will be taken into account is, as such, irrelevant and limits competition.

The following national provisions and practices should be mentioned in this context:

National law

In contract award procedures in France, the mere fact that a candidate or a tenderer cannot provide evidence that he has performed contracts of the same kind may not be a reason for the elimination of the candidate or tenderer and does not exempt the contracting authority from checking the professional, technical and financial standing of the candidate or tenderer concerned.

Practices

For low-value procurements, the UK government advises contracting authorities to **request only two years of accounts** or, if these are not available for objective reasons (i.e. start-up, etc), other appropriate information, such as management accounts.

In Latvia, the procurement monitoring bureau advises contracting authorities to refer, in the qualification criteria relating to the required experience of the tenderer, to the experience of the tenderer's staff's rather than of the company. This is because the latter criterion would probably not ensure that the contracting authority's aim with this requirement is fulfilled, and it would also be more likely to exclude young SMEs with highly qualified individuals.

The usefulness of this practice can also be illustrated by the following example from the UK. In early 2002, the UK Small Business Service (SBS) invited several companies to bid for a two-year contract, valued at £500,000 per year, for the advertising, marketing and distribution of a government programme. The SBS received six proposals, one of which was from a consultancy of six employees. This company was awarded the contract even though it was a small business that had been established only the previous year. The SBS accepted the associated risk because of the superior quality of service and commitment underlying that company's bid. The use of the government programme in question increased from 33% to 90% and the number of hits per year achieved 30,000 against a target of 9,000. This is an example of a small business drawing on the previous experience of leading individuals, being able to provide a level of innovation which exceeds that normally available from the mainstream market, combined with the special personal commitment and service which is often associated with such businesses.

4.2. Taking advantage of the possibility for economic operators and groups of economic operators to prove their combined economic and financial standing and technical ability

As already indicated above (point 1.2), the Public Procurement Directives offer the possibility for economic operators to rely on the economic and financial standing and technical capacity of other undertakings. This possibility can obviously help SMEs to cope with high qualification levels and financial requirements.

4.3. Requiring only proportionate financial guarantees

Disproportionate financial guarantees required by contracting authorities (e.g. bank guarantees to cover risks related to the award procedure and the performance of a contract, even those which are beyond the control of the undertaking) constitute an obstacle to the participation of SMEs in public procurement. Furthermore, **unjustified and prolonged retention of the resources** (e.g. participation guarantee) of the economic operators **should be**

avoided and a decrease of financial guarantees according to the performance of the contract should be encouraged. Besides, contracting authorities might consider not to require financial guarantees automatically, but on the basis of considerations relating to risk assessment.

The following national provisions and practices are worth mentioning in this context:

National law

According to Bulgarian law, the amount of the participation guarantee may not exceed 1 per cent of the value of the procurement contract, and the amount of the contract performance guarantee may not exceed 5 per cent of the value of the said procurement. Furthermore, the participation guarantee is released, in the case of rejected candidates, within three days of the expiry of the deadline for review of the decision of the contracting authority on the qualification, and in the case of selected candidates, within a period of three days from the expiry of the deadline for review of the award decision.

German legislation provides that financial guarantees can only be required subject to certain conditions, particularly the condition that the principle of proportionality is observed. For works contracts, financial guarantees can be required as from a contract value of € 250,000. For service contracts this threshold is € 50,000.

In Malta, the bank guarantee requirement has been abolished for tenders below the EU thresholds. Since a large number of SMEs bid for such contracts, this has been seen as an important step in reducing the barriers to SMEs.

In many Member States experience has shown that the burden on SMEs can be reduced if a performance guarantee for the total value is not required in a single certificate, and it is possible to furnish guarantees for separate stages of the performance in separate documents instead.

5. ALLEVIATING THE ADMINISTRATIVE BURDEN

Time-consuming paperwork is among the most common complaints voiced by SMEs. Therefore, as SMEs normally do not have large and specialised administrative capacities, **keeping administrative requirements to a minimum** is essential. In that respect, the following considerations may be taken into account:

The Public Procurement Directives provide that contracts shall be awarded **after the suitability of economic operators has been checked** by contracting authorities against the personal situation of the candidates or tenderers, their suitability to pursue the professional activity concerned, and their technical or professional ability.

In particular, the Public Procurement Directives list a number of cases where contracting authorities are bound to exclude candidates and tenderers that have been subject of a conviction by a final judgment[21], and allow Member States, within certain limits, to exclude from participation economic operators falling under another set of situations[22]. As regards verification of the suitability of candidates and tenderers to pursue the professional activity

[21] Article 45(1) of Directive 2004/18/EC refers to well-defined cases of participation in a criminal organisation, of corruption, of fraud to the financial interests of the EC, and of money laundering.

[22] Article 45(2) of Directive 2004/18/EC refers to cases of bankruptcy, offences concerning professional conduct, non-fulfilment of obligations relating to the payment of taxes or social security contributions, and serious misrepresentation of certain documents.

concerned, and examination of their technical or professional ability, the Directives also **set limits** within which these verifications are carried out.

However, in all cases, the Public Procurement Directives leave it for the Member States to specify, in accordance with their national law, the implementing conditions of those exclusion and suitability checks. In particular, **it is for Member States to decide on the details** of the documentary evidence to be submitted by candidates and tenderers in the context of public procurement procedures, including on how and when such documentary evidence shall be submitted to the contracting authorities before the award of the contract.

For instance, in compliance with Public Procurement Directives, Member States may ensure that the contract will only go to a suitable tenderer as follows: for all or part of the substantiating documents concerned, candidates or **tenderers may be invited to declare on their honour** that they fulfil each and every condition required of suitable candidates or tenderers; it would then be **only for the tenderer who has made the best offer to issue all the relevant original certificates** within a fixed time-limit. However, for such a formula to comply with the objective set by the Public Procurement Directives – i.e. that the contract will only go to a suitable tenderer - Member States must provide for an effective, proportionate and dissuasive penalty system to be applied in all cases where the tenderer who made the best offer is ultimately unable to issue the relevant documentary evidence before the deadline or, worse, is found not to fulfil one or more of the conditions required from suitable candidates or tenderers. In any event, if the tenderer who made the best offer fails to issue the relevant documentary evidence, the contract would not be awarded to him, but could be awarded to the next best tenderer if this latter possibility was specified in the tender documents.

Nevertheless, **in cases where the contracting authorities decide to limit the number of suitable candidates** they will invite to tender, to negotiate or to conduct a competitive dialogue - as they are allowed to in restricted procedures, in negotiated procedures with publication of a contract notice and in competitive dialogue procedures - they must ensure that a minimum number of suitable candidates is available, in accordance with the relevant provisions of the Directives[23]. In other words, contracting authorities may not invite to tender, start negotiations nor conduct a competitive dialogue until they have selected the minimum number of suitable candidates provided for in the Directives. Indeed, those specific provisions of the EU Directives were introduced in order to ensure genuine competition in such cases between a sufficient number of suitable candidates.

Besides, **contracting authorities may usefully be allowed to waive the obligation** for candidates and tenderers **to submit** part or all of the **documentary evidence** required **if such evidence has already been submitted** to them recently for another procurement procedure and provided the relevant documents were issued within a fixed reasonable time period and are still valid. In such cases, the candidate, tenderer or applicant concerned could be invited to declare on his honour that the documentary evidence has already been provided in a previous procurement procedure - to be specified - and to confirm that there has been no change in the situation. In this case, too, Member States must provide for an effective, proportionate and dissuasive penalty regime to be applied in cases where the tenderer who made the best offer was ultimately shown not to have provided the relevant documentary evidence.

[23] See in particular Article 44(3) and (4) of Directive 2004/18/EC.

In addition, **short and simple standardized forms and certificates** may definitely help SMEs to provide the relevant information to the contracting authorities in time.

The following national provisions are worth mentioning in this context:

National law

In a number of Member States, including the Netherlands, Belgium, Italy and Hungary, contracting authorities are not - or will not in future be - allowed to request tenderers to provide facts or data which the contracting authority can verify easily and free of charge in an authenticated, electronically accessible database (e.g. company data).

6. PLACING EMPHASIS ON VALUE FOR MONEY RATHER THAN ON PRICE

6.1. Creating more scope for qualitative solutions thanks to the possibility of awarding contracts on the basis of the economically most advantageous offer

The public procurement directives offer the possibility to award contracts either on the basis of the lowest price or on the basis of the **economically most advantageous offer**[24]. This latter option allows contracting authorities to take account of various elements relating to the subject-matter of the contract, like e.g. **quality**, technical merit, functional characteristics, **running costs, cost-effectiveness,** after-sales service and technical assistance etc. This gives contracting authorities the opportunity to **evaluate not only the direct costs of a purchase, but also its life-cycle costs**. It gives economic operators an incentive to provide real added value to the contracting authority and has a positive impact on innovation, as it represents an incentive for economic operators to develop better and sustainable products. This is particularly important for the SME sector, which is a source of innovations and important R&D activities.

In order to ensure that, when awarding a contract, the life-cycle costs of the purchase are taken into account and the criterion of the **economically most advantageous offer is applied in an efficient and consistent way**, the contracting authority's staff should be organised in such a way that the people who will ultimately use the purchased product are actively involved in the preparatory phase to the procurement procedures.

6.2. Providing more scope for innovative solutions thanks to the possibility of defining technical specifications in terms of performance or functional requirements

While the Public Procurement Directives give contracting authorities full freedom to procure the goods and services that meet their needs, contracting authorities should take care not to limit the possibilities of participation by undertakings that provide new, innovative solutions which may offer better value for money.

The technical specifications drawn up by contracting authorities must allow public procurement to be opened up to competition. To this end, it ought to be possible to submit tenders which reflect the **diversity of the technical solutions available in the marketplace**. To this end, the Public Procurement Directives establish that the technical specifications of a contract may be defined in terms of performance or functional requirements.[25] This is a new

[24] Article 53(1) of Directive 2004/18/EC and Article 55(1) of Directive 2004/17/EC.

[25] Article 23(3)(b), (c) and (d) of Directive 2004/18/EC and article 34(3)(b),(c) and (d) of Directive 2004/17/EC.

approach compared to the former directives, in which the technical specifications had to be defined in terms of standards.

This output-oriented approach enables contracting authorities to concentrate on their actual purchasing needs, e.g. the functional requirements of a product they would like to have, but it leaves tenderers the freedom to develop new, innovative goods or services which might better correspond to the actual need of the contracting authority. Thus, this new approach benefits SMEs and, in particular, **innovative SMEs** who might face difficulties in meeting the technical specifications approved by the recognised standards bodies, but who produce supplies, provide services or use materials, methods or techniques of high technical and/or environmental value and are able to meet the performance requirements or the functional requirements laid down by the contracting authorities. On the basis of feedback received from Member States, this may be a particularly interesting option in fields such as IT equipment.

In addition, the Public Procurement Directives offer the possibility for contracting authorities to allow tenderers to submit variants. Indeed, as contracting authorities might not always have an up-to-date knowledge of what goods and services the market may offer, the authorisation of variants may also allow tenderers to come forward with innovative solutions. In this case, contracting authorities making use of this possibility have to state in the contract documents what are the minimum requirements to be met by the variants and any specific requirements regarding how to present them.

The following national practices are worth mentioning in this context:

Practices

While contracting authorities generally have a good appraisal of what their needs are, they do not necessarily know which are the most suitable solutions available to satisfy those needs. In this regard, a good knowledge of the market is a clear advantage. However, it is easier for contracting authorities to think of already well-known suppliers and products. In this context, a **better flow of information between contracting authorities and innovative SMEs** may help. This is the aim of a French programme (entitled: "[met]") where, in the course of a half-day presentation, some 20 SMEs present their innovative products or solutions to contracting authorities in a given technological field.

Adopting a similar approach, the UK has issued several guidance documents that describe a number of tools and techniques for **early market engagement**, including exploring new solutions, market research, market creation, **events where potential tenderers can get to know better the needs of contracting authorities**, use of websites and trade journals to advertise forthcoming opportunities, publishing prior information notices, running 'competition of ideas' initiatives, etc.

Furthermore, the Public Procurement Directives offer various possibilities to link R&D and public purchasing.

In particular, contracting authorities may award public supply contracts through a negotiated procedure without prior publication of a contract notice in the Official Journal of the EU, when the products involved are manufactured purely for the purpose of research, experimentation, study or development.[26] While this cannot extend to quantity production to establish commercial viability or to recover R&D costs, it can include limited production in

[26] Art. 31(2)(a) of Directive 2004/18/EC.

order to incorporate the results of field testing and to demonstrate that the product is *suitable* for quantity production or supply to acceptable quality standards. As such, depending on the level of the qualitative requirements imposed by the contracting authority before confirming the purchase of this 'first production', this particular 'public supply contract' may legitimately be regarded as a first listing on which the winning tenderer can rely in subsequent 'traditional' procurement procedures. This may be of particular interest to SMEs that devote substantial budgets to R&D.

A similar margin of manoeuvre exists for contracts for R&D services, except for contracts where the benefits accrue exclusively to the contracting authorities for their own use in the conduct of their own affairs and under which the service provided is wholly remunerated by the contracting authority.[27]

However, for any procurement which would go beyond the 'limited production or supply' described above, the Public Procurement Directives would need to be applied. In this context, both the recent communication on pre-commercial procurement[28] and the Guide on dealing with innovative solutions in public procurement[29] also contain useful information.

7. ALLOWING SUFFICIENT TIME TO DRAW UP TENDERS

SMEs typically have little, if any, specific administrative capacity to deal with the preparation of tender documents. Contracting authorities need to be aware of this when setting time limits, so that they can maintain the broadest possible basis for competition.

The Public Procurement Directives offer the possibility to use **prior information notices** on a voluntary basis in order to allow potential tenderers to prepare themselves to bid in time for the contracts announced.[30] **This is particularly important in the case of large and complex contracts, where SMEs might need time to find partners for joint bidding**.

When contracting authorities make use of the possibility to reduce deadlines following the publication of a prior information notice, they should take care to ensure that the prior information notice is sufficiently detailed to actually allow economic operators to prepare for the project.

8. ENSURING THAT PAYMENTS ARE MADE ON TIME

The reporting by stakeholders of difficulties regarding payments by contracting authorities has triggered a general review of the current provisions of Directive 2000/35/EC on combating late payment in commercial transactions. The on-going assessment of this Directive may lead to a proposal for an amending Directive which may strengthen discipline in this area.

In the meantime, however, much can already be done by Member States and contracting authorities to improve payment terms. In particular, as the existing provisions of Directive 2000/35/EC definitely alleviate the financial burden of SMEs, by providing for a 30 days' payment deadline as a default, default level of interest for late payments and recovery procedures for unchallenged claims, it is important to make the most of these facilities.

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27 Art. 16(f) of Directive 2004/18/EC and Art. 24(e) of Directive 2004/17.

28 COM(2007) 799, 14.12.2007.

29 SEC(2007) 280.

30 Article 35(1) of Directive 2004/18/EC and article 41(1) of Directive 2004/17/EC.

As regards payment of sub-contractors, **contracting authorities** may **also include clauses in contractual documents to ensure that their suppliers pay their subcontractors on time** (see section 1.4) and that payments flow down the supply chain.

The following national provisions and practices are worth mentioning in this context:

National law

Hungarian law requires the contracting authority to pay the tenderer within not more than 30 days following performance. Where it is verified that the tenderer has performed the contract and the contracting authority has not paid within the deadline, the tenderer is entitled to collect the money directly from the authority's bank account.

Practices

A recent study in France suggested that contracting authorities should take the following steps to mitigate the problems arising from late payment:

– Simplify the documents necessary for making a payment, use electronic tools;
– Do not suspend payment without a valid reason;
– **Enhance the use of electronic payment**;
– Simplify controls; and
– Do not postpone payment until the end of the year.

In the UK, the government departments and their agencies are required to monitor their payment performance and to publish the results in their departmental or annual reports. The table lists, by department, the proportion of bills paid within 30 days, or another agreed credit period, on receipt of a valid invoice. Furthermore, contracting authorities are advised to consider whether staggered or **interim payments** (linked, for example, to work done) are appropriate.