

EBC position on the implementation of Public Procurement in the European Union

About EBC

Established in 1990, the European Builders Confederation (EBC) is a European professional organisation representing national construction employer associations of micro, small and medium-sized enterprises. EBC is a member and partner of SMEUnited, the European association of SMEs, and Small Business Standards (SBS), the European association representing SMEs in standardisation.

The construction sector is of vital importance to the European economy. With 3.4 million enterprises and a total direct workforce of 18 million, the construction sector contributes at around 9% to the GDP of the European Union. 99.9% of the European construction sector is composed of micro, small and medium-sized enterprises.

General remarks

Every year a substantial part of public investment in our economy is spent through public procurement, accounting for more than EUR 1.9 trillion yearly or about 14% of Europe's GDP¹, which makes it a major driver for economic growth, job creation, and innovation. On the grounds of its high economic importance, it is a significant opportunity for the development of micro, small and medium-sized enterprises (SMEs).

However, although SMEs make up about 99.8% of the enterprises in the European Union, they are only involved in about 45% of the value of public contracts² (either directly, as a joint bidder or a subcontractor), giving them a secondary role in public procurement compared to large enterprises. This is a situation that can severely hamper the growth of regions, because SMEs are the backbone of the European economy, employing about 66.4% of all people in the European Union and generating about 56.8% of the added value³. Furthermore, SMEs are strongly connected with local/regional economies and societies, resulting in their economic growth bringing direct economic benefits to where they are situated, in particular in terms of job creation. Hence, SMEs are not only important economic players, but also essential agents of social cohesion and integration.

Especially sectors that are strongly dominated by SMEs, such as construction where 99.9% of the enterprises are SMEs, do not fully exploit the growth potential of public procurement because of this disequilibrium. Thus, reduced access of construction SMEs to public procurement is a missed opportunity for greater local employment and competition.

In particular the Covid-19 pandemic, which dramatically changed our way of life by bringing economic activity and with it public procurement to a complete standstill in many countries, showed the importance to ameliorate the resilience of public procurement and to enhance its functioning. Administrative burdens need to be further diminished and processes improved not the least to make public procurement more accessible to construction SMEs and to counteract those difficult situations that lead to dramatic drops of demand and thus endanger a large amount of these enterprises. **Following this, EBC calls for further implementation**

¹ European Commission (2017). European Semester Thematic Factsheet Public Procurement. Retrieved from https://ec.europa.eu/info/sites/info/files/file_import/european-semester-thematic-factsheet-public-procurement_en_0.pdf

² European Commission (n.d.). Public Procurement Strategy. Retrieved from https://ec.europa.eu/growth/single-market/public-procurement/strategy_en

³ European Commission (2018). Annual Report on European SMEs 2017/2018. Retrieved from https://ec.europa.eu/growth/smes/business-friendly-environment/performance-review_en

guidelines for public authorities and an improved exchange of best-practices in order to increase and improve the direct participation possibilities of SMEs in public procurement.

EBC proposals

The implementation of Directive 2014/24/EU on Public Procurement differs greatly between Member States. One reason is that many parts of the public sector still do not take full advantage of the possibilities that can be created through public sector procurement, leading to a situation in which construction SMEs find it tough to win public sector work. To better use these possibilities and increase the participation of SMEs in public tenders, further guidance for public authorities is needed. Therefore, EBC proposes to put specific attention on the following points:

a. Access to and quality of relevant information

Equal competition in tenders requires that all enterprises wishing to participate have the same information at their disposal, meaning that no enterprise is precluded from accessing relevant information about the tender. Essential for this is that public authorities provide the same level of information to all participants in an easy-accessible manner, e.g. through public procurement online platforms which facilitate procedures⁴ and allow to disseminate information in public contracts in a transparent and non-discriminatory manner. However, it is important that those public procurement platforms avoid administrative burdens for tenderers, publish all relevant administrative documents and solve their technical challenges (e.g. double-signature requirements, system operability problems), because SMEs still often face problems to find tenders, access all information required and upload the relevant documents to participate in the tender. Vague information, inaccurate or scattered among a myriad of documents, webpages and legislative texts, and technical problems do not facilitate comprehensibility and access to the application or bidding process and are a serious obstacle to the participation of SMEs. In addition, infrequent online publishing and a variety of different platforms used to publish the tender display a serious burden.

Recommendations

- Establish a user-friendly and technically easy-accessible national online procurement platform that publishes all public tenders and all related documents at the national, regional and local level to facilitate access to tender information.
- Supply of e.g. easy understandable summary tables or overviews with all public tenders to guarantee that also enterprises with less experience can easily understand and interpret the requests and technical specifications of the procured work or service.
- Development of public procurement training courses for enterprises in order to increase their knowledge on how to participate in a public tender and to update them on the legislative framework related to the world of public procurement.
- Ensure that the EU data protection rules are met in all processes concerning public procurement.
- Guarantee that public procurement platforms are accompanied by updated, clear and specific guides and instructions on how to use them.

⁴ In Italy the platform "[MePA](#)" ([Mercato elettronico della Pubblica Amministrazione](#)) is used to procure public works lower than the EU threshold and offers the possibility for public administrations to consult an electronic catalogue of economic operators and thus to compare goods and services offered by qualified suppliers and their requests for offer. At the same time, the MePa platform offers economic operators the possibility to "showcase" themselves and their services and directly consult calls for tender.

b. Technical pre-requisites

Technical requirements are designed to ensure that enterprises, wishing to participate in a public tender, are able to meet minimum quality requirements and have sufficient knowledge to ensure a proper execution. However, often these requirements can be excessively discriminatory making it difficult for SMEs to participate. As an example, public authorities frequently take past experience of enterprises in public tenders as a reference point for defining the technical capacity of participants. This is based on the assumption that enterprises which provided good quality in the past are likely to do the same in the future. However, this means that enterprises with little experience in a given procurement type have difficulties to meet the pre-requisites for the project although the quality of their work is as high or even higher than that of competitors with experience in public tenders, which is particularly true for newly created enterprises. In addition to this, the work of enterprises undertaken as subcontractors is often disregarded when assessing economic requirements of tenderers, strongly reducing the chances of SMEs or SME consortia to win public tenders.

Recommendation

- Encourage public authorities to take into account the different possibilities to assess technical pre-requisites as mentioned in annex XII of the Public Procurement Directive.
- Ensure that all technical pre-requisites are proportionate and related to the subject matter of the contract.
- Verify that enterprises are capable of executing the works (e.g. technical capacity, human resources) when evaluating the offers.
- Ensure that public authorities include works done by an enterprise in the frame of subcontracting when assessing economic requirements to participate in a public tender.

c. Administrative burdens related to tender documents

The documents required to participate in a public tender are often complex and long, making them difficult to understand, in particular for SMEs, because they seldom have a person with in-depth expertise on the issue. In addition, many public authorities oblige enterprises to resubmit their qualification documents for each public tender although the European Directive calls upon public authorities to refrain from requesting supporting documents and information if these can be obtained by the public authority free of charge (prequalification, national procurement register etc.). Another problem is that dependent on which public authority is responsible for the procurement, different documentation and procedural requirements apply, which makes the application complicated and very time consuming. As a result of these administrative burdens and requirements, that are often unproportioned to the chance of obtaining the contract, SMEs shy away from directly participating in public tenders or restrict their participation to a limited number of tenders each year.

Recommendations

- Develop harmonised public tender documents within a country to decrease administrative burdens for enterprises.
- Ensure that the principle to only require a document once is applied at all levels of administration and that bidders are exempt from attaching numerous administrative and supporting documents in the first step of the tender evaluation.
- Enforce the principle that bidders can meet the obligations to participate in a public tender through a self-declaration stating compliance with the requirements so that only the successful tenderer needs to provide the supporting documents.
- Make sure that public authorities at the local, regional and national level refrain from requesting documents of enterprises which they can access themselves to reduce the burdens and costs of responding to a public tender.

- Establish a uniform national qualification procedure that applies to all public tenders at the local, regional and national level.

d. Preparation time for tender documents

Short bidding times can display a real obstacle in SMEs access to public procurement. The main reason for this is that small enterprises often possess fewer workforce and financial resources to invest in the preparation of tender documentation. A too tight deadline, especially for complex tenders, can thus be a clear obstacle for the SMEs ability to participate. Therefore, deadlines should take into account the need of SMEs to free capacity to apply for the tender and to e.g. prepare a common bid with a temporary group of enterprises.

Recommendation

- Indicate a deadline for enterprises to reply to a public tender which takes into account e.g. the complexity of the work to be carried out and the information and documents requested from the enterprises.

e. Extensive environmental and social criteria

The idea of green and social procurement is to reduce the environmental impact and to take social considerations into account in procurement. However, if used in the wrong way, e.g. through a system that introduces environmental and social measures as part of the tenders' award criteria, the criteria favours those enterprises that have a strong capacity to invest e.g. in a more environmentally friendly machinery outfit, making investment force an advantage in competition and harming SMEs that usually have less investment power.

Recommendations

- Ensure that if environmental and social criteria are included in the contract, they constitute a "condition to execute the contract" and not a "criteria for the evaluation of the offer", to allow SMEs to properly assess their chances to win the contract from the start.
- If specifications require green criteria in a tender, ensure that SMEs are not discriminated by criteria which artificially foreclose the market.
- If social criteria are required in a tender, make sure they aim at reducing the skills and labour shortage in construction, e.g. by supporting the involvement of apprentices, and do not discriminate SMEs.
- Public authorities shall ensure that tenderers and possible sub-contractors comply with the national labour law of the place of performance (or place of construction) e.g. regarding working conditions.

f. Tender award criteria

Abnormally low tenders remain a serious problem in the European Union, especially since some public authorities still seem to underestimate the hazards related to choosing an abnormally low tender for example in terms of lower quality, non-performance, extra costs or the avoidance of social, labour and environmental obligations. Above all, they constitute a serious threat to fair competition. Except for the unsolicited decision of public authorities to choose an abnormally low tender, there are also situations in which public authorities face problems with detecting abnormally low tenders and properly evaluating explanations of low bidders, which is why a stronger focus should be put on training public authorities in these issues.

Recommendations

- Develop extensive guidelines to support public authorities in the spotting and assessment of abnormally low tenders and ensure sufficient in-house human resources are available for the price analysis.
- Public authorities shall not exclude enterprises from participating as a subcontractor if these enterprises also directly participate to the public tender, because this will discourage SMEs to directly apply for public tenders.

g. Division of public contracts into lots

The value of a public tender and its volume of work to be tendered may hinder the participation of SMEs. This is based on the fact that as the value of the tender increases, the possibility of SMEs to meet the participation requirements and/or to be able to complete the work in accordance with the obligations of the contract declines. Indeed, the activity of a construction SME can be organised around the work of a general contractor and around a speciality (e.g. tiling, electricity, plumbing). Therefore, a contract that is not divided into lots often represents an obstacle to the direct participation of SMEs and reduces their participation to becoming a subcontractor. The same applies when an SME has the competence to carry out the work but the value exceeds its means. On account of this, the centralization of procurement, for example, bears the risk that relatively low-value contracts executed by local contracting authorities may be aggregated and carried out centrally, reducing the chances of SMEs to win the contract and negatively affecting their participation. In contrast the allotment of a contract is in the very interest of the contracting authority, because it benefits from a greater number of competitive offers.

Recommendation

- Encourage Member States to continue/increase the division of large contracts into smaller lots with values accessible to SMEs at all administrative levels, provided the nature or object of the contract so permits and there is no risk of unjustifiably restricting competition. Moreover, Member States should ensure that exceptions to the allotment of a public contract are limited, detailed and duly.
- Encourage public authorities to divide tenders into small lots by trade and ensure that exemptions to this are duly justified.

h. Training of public authorities

A big problem with public procurement is the unequal application and enforcement of the rules at the national, regional and local level as well as between different regions and local authorities, which is often related to a lack of training of contracting authorities on how to apply the rules. In addition, public buyers tend to lack knowledge on how to procure in the most coherent and inclusive manner possible, e.g. not being aware of best practices in regard to SME-friendly procurement, which is essential to ensure a fair and competitive procurement environment.

Recommendation

- Increase the professionalization of public buyers as well as experts involved in awarding public contracts and train them in SME-friendly procurement methods.
- Support the creation of national help desks to which public authorities can turn in order to get instruction and advice on public tenders.

i. Regular monitoring of public procurement

SMEs dominate the business environment in the European Union and a stronger involvement of them in public procurement would bring numerous economic and environmental benefits. In order to better assess SME participation and to increase awareness on best/worst practices, more knowledge around how the public sector procures should be gained. To ensure the most accurate comparison, it is important to develop a standardised data capturing and presentation approach. In addition to this, it should be monitored whether Member States fulfil their obligations by providing appropriate information on tendering documentation, e.g. in regard to the [e-Certis platform](#), which allows contracting authorities to check which supporting documents can be requested and which documents issued in another Member State can be accepted.

Recommendations

- Ensure the comparability of data through common EU guidelines on how to capture and present information on how public authorities procure.
- Require Member States to publish detailed statistical data once a year on the value and proportion of work awarded by sector down to the local level, including enterprises size, amount of contracts awarded in lots or other forms, and if existent, best/worst practices.
- Monitor the application of the public procurement directive in cooperation with respective national bodies and use the results to further guide implementation.
- Check and ensure that each Member State complies with the obligation to provide and maintain information on the e-Certis platform about those document and certificates that are accepted as means of proof for the fulfilment of tender requisites.

j. Role of public authorities regarding late payment

A publicly procured construction project usually involves a large amount of enterprises and rather long supply chains, often significantly delaying payment, especially at the end of the value chain. In order to ease this problem, the public procurement directive explicitly allows public authorities, at the request of the subcontractor and where the nature of the contract so allows, to transfer due payments directly to the subcontractor for services, supplies or works provided to the economic operator to whom the public contract has been awarded. However, this tool is rarely used by public authorities although it can play an important role in absorbing the effects of late payment, a serious problem in particular for micro and small enterprises.

Recommendation

- Encourage public authorities to use the tool of directly paying subcontractors more frequently in case of undue payment by the economic operator to whom the contract has been awarded and ensure that the public authority duly justifies if it decides against direct payment of the concerned subcontractor(s).