



Modernisation of public procurement: ensuring better access for SMEs

ESBA position on the Proposal for a Directive of the European parliament and of the Council on public procurement, replacing Directive 2004/18/EC ([COM 2011/896](#))

Key ESBA recommendations on the modernisation of public procurement:

- Every technical specification, selection criterion and award criterion required by the contracting authorities has to be strictly linked to the subject matter of the contract.
- In order to improve SMEs' access to public procurement, ESBA calls for:
 - Splitting contracts into lots;
 - Allowing SMEs to form consortia of enterprises;
 - Confidentiality;
 - Self-declarations and the European Procurement Passport;
 - Full implementation of the late payment directive;
 - Training for and provision of timely information to SMEs by the Commission;
 - E-procurement;
 - Minimum levels for the amount of tenders reserved for SMEs;
 - Reciprocity regarding third country access to public procurement.
- In order to improve SMEs access to public procurement, ESBA cautions against:
 - The exclusive use of the MEAT as an award criterion;
 - Reducing the time limits for tenderers to submit a bid;
 - Limiting subcontracting.

Background

Modernisation of public procurement has been identified as one of the **12 key priorities of the Single Market Act**.¹ The revision of the Directive aims at underpinning a balanced policy between pushing for sustainable and innovative procurement, establishing simpler and more flexible procurement procedures for contracting authorities and providing easier access for companies, especially SMEs. **Encouraging access to public procurement for SMEs is one of the four main goals of this revision.**

Considering that **public procurement represents 18% of the EU GDP**,² the revision of the Directives is an opportunity to exploit the untapped potential of SMEs across the EU to foster growth and jobs. To do so, it is essential to create appropriate conditions for SMEs to have access to public procurement.

ESBA Position

Public procurement should aim at **providing the best value for tax payers' money.**

¹ To read the Single Market Act, please click [here](#).

² *Ibidem*, p 17.



In so doing, it is essential that technical specifications, selection criteria and award criteria are **strictly linked to the subject matter of the contract** (the product or the service itself). An interpretation of technical specifications that is too broad implies taking into account many other aspects: this would be time consuming and it would require a strong expertise from both contracting authorities and tenderers. Due to their limited resources, this would constitute a **prohibitive burden for SMEs** that would be penalised compared to larger companies.

When setting requirements to be fulfilled by tenderers, **ESBA warns against the use of terms with no legal basis** such as “socially sustainable production process and lifecycle” and “global impact on society”. Without legal certainty, any decision by the contracting authority could be contested.

Splitting contracts into lots would enable a multiplication of the amount of contracts that SMEs would be able to tender. Dividing contracts into lots should be the default procedure for contracting authorities. If contracting authorities decide not to do so they should provide justifications.

SMEs should be allowed to form consortia of enterprises - without any specific condition to be required by contracting authorities – and they should be compared to an individual tenderer. Thereby, SMEs would be able to submit a tender for bigger contracts.

Confidentiality would keep contracting authorities from disclosing any information concerning tenders and tenderers. As a result, any economic operator would feel free to submit its tender without the risk of being subjected to any retaliation by other companies. This would imply a gain for SMEs but also for contracting authorities in terms of lower prices.

Self-declarations from economic operators should be accepted by contracting authorities during a tender. In order to eliminate an unreasonable burden for companies, requests for evidence should be limited to the awarded tenderer at the end of the process.

Extending the validity of the European Procurement Passport from six months to one year will also contribute to eliminating unjustified burdens which would constitute an obstacle to the access to public procurement for small businesses.

Full implementation of the Late Payment Directive would better allow SMEs – which do not have the financial capacity of large companies – to participate in tenders. The current state of affairs creates obstacles for SMEs’ access to public procurement.

Considering the limited resources and technical skills that SMEs have, it is desirable to make the Member States and the Commission responsible for providing **training and timely and appropriate information** to local authorities and SMEs.

E-procurement is a tool to make procurement procedures faster, simpler and less expensive. However, SMEs do not have the same financial resources as large companies, so they need time to



adapt to e-procurement. ESBA welcomes a gradual approach to the mandatory use of e-procedures in order to guarantee fair competition for SMEs.

Fixing a minimum level of national public procurement reserved for SMEs would be an instrument in tune with the objective of simplifying and favouring SMEs access to public procurement. According to this objective and considering the role that SMEs can play in reducing the local impacts of the economic crisis, it is appropriate to ask to the Member States to document whether the involvement of SMEs in national public procurement is lower than 50% and notify which initiatives are in place to raise this rate.

ESBA welcomes the participation of companies from third countries to European tenders – which would enhance competition and market efficiency – but only on the basis of the application of the **reciprocity principle**, allowing European companies to access third countries markets.

The exclusive use of the MEAT as award criterion would have negative consequences for SMEs. In the Commission proposal a contracting authority can award a contract on the basis of the **lowest cost criterion** (price or life-cycle cost) or considering the **MEAT** (most economically advantageous tender), enabling the contracting authority to take into account the price along with other criteria. ESBA supports the idea of **setting requirements upstream and then choosing the cheapest bid among the successful applicants**. ESBA does not welcome the idea of making the MEAT the sole basis to award a contract, as it would make the procedure rigid and unnecessarily convoluted. It is important to keep in mind that the revision of the Directives aims at simplifying the procedure for both contracting authorities and tenderers. Moreover, **tenders from SMEs tend to be the lowest**, so eliminating the lowest cost criterion would give an advantage to larger companies.

Deadlines for submitting a bid should not be shortened compared to the current Directives. This would give an advantage to the largest companies, as they have more administrative resources to submit a relevant bid within a short period.

It is essential to take into account that **SMEs are highly concerned by subcontracting**. ESBA warns against regulating subcontracting at the European level.

ESBA warns against establishing the notion of **joint liability** in cases of subcontracting. SMEs are not capable of checking or controlling the actions of a bigger company that grants a subcontract.

The **number of subcontractors should not be limited in the Directives** as it would reduce the access of SMEs to public procurement. Therefore, setting a rigid limit at the European level would prevent local contracting authorities from taking into account the specificities and the needs of each contract and each market.