Small and Medium Size Enterprises (SME) and public procurement

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Abstract:
Article Small and Medium Size Enterprises (SME) and public procurement deals with the Procurement legal regulation towards Small and Medium Size Enterprises. In this relations author analyses a new public procurement regulation in the European Union. Small and Medium Size Enterprises are the base of state economies. Public contracts comprise fundamental part of state economies. Legal conditions concerning possibilities of SME to get public contracts are important. The main goal of this article is to analyses legal regulation in the field of public procurement in relation to small and medium size enterprises and based on this analyses states recommendation for increasing of their portion on public contacts.

Key-Words: small and medium size enterprises (SME), public procurement, new public procurement directives, gross domestic product, effectiveness of legal regulation in the public procurement, competition, bids, public contracts

1 Definition of SME and its portion on public procurement market

Small and Medium Size Enterprises are divided into some categories. Micro Enterprises have less than 10 employees. Small Enterprises have 10 to 49 employees. Medium-size Enterprises have 50 to 249 employees. Large Enterprises (this is not category of SME) have more than 249 employees. SMEs are consider autonomous if less than 25% of their equity is owned by another company; or 25% or more of the equity is owned by another company, but the group employs fewer than 250 persons on a consolidated basis; or 25% or more of the equity is owned by a public body, and the public body is a local authority with an annual budget of less than EUR 10m and has fewer than 5000 inhabitants; or 25% or more of the equity is owned by a public body, and the public body is a local authority with an annual budget of less than EUR 10m and has fewer than 5000 inhabitants; or 25% or more of the equity is owned by companies or institutions in line with the exceptions detailed in the Commission recommendation 2003/361/EC of 6 May 2003, article 3, paragraph 2 (i.e. venture capital funds or “business angels”, provided that they invest less than EUR 1.25m in the same company, universities or non-profit research centres, institutional investors including regional development funds).

The discussion about SME is based on the facts that economy comprises mostly SME. SME have a share in Gross domestic products of EU 52 %. On other hand they are winner just in 31 % to 38 % public contracts. Public contracts represent 17 % GDP of EC. It is clear that this share of SME in public contracts should be higher. In contrasts to Large Enterprises, SME mostly create jobs in place of seat, pay taxes and invests money in home country, not in low-cost countries as Large Enterprises [5].

2 Public procurement changes in relation to SME

The Europe 2020 strategy for smart, sustainable and inclusive growth\(^1\) sets out a vision of Europe's competitive social market economy over the next decade. The Europe 2020 strategy also stresses that public procurement policy must ensure the most efficient use of public funds and that procurement markets must be kept open EU wide. The current generation of public procurement Directives, namely Directives 2004/17/EC\(^2\) and 2004/18/EC\(^3\),

are the latest step in a long evolution that started in 1971 with the adoption of Directive 71/305/EEC⁴.

2.1 New proposal of new generation of public procurement European directives

The first objective is to increase the efficiency of public spending. This includes on the one hand, the search for best possible procurement outcomes (best value for money). Bidders must be given the opportunity to compete on a level-playing field and distortions of competition must be avoided. More efficient procedures will benefit all economic operators and facilitate the participation of both SMEs and cross-border bidders. In fact, cross-border participation in EU public procurement procedures remains low⁵.

Another complementary objective is to allow procurers to make better use of public procurement in support of common societal goals: These include protection of the environment, higher resource and energy efficiency and combating climate change, promoting innovation and social inclusion, and ensuring the best possible conditions for the provision of high quality public services.

Further developing EU public procurement law could also be envisaged to tackle important issues that are so far not sufficiently addressed, such as preventing and fighting corruption and favouritism and the question how the access of European undertakings to third country markets can be improved.

In addition, the review of the legislative framework will also be an opportunity to examine if certain basic notions and concepts should be refined to ensure better legal certainty for contracting authorities and undertakings. In this context, the review may present certain opportunities to increase convergence between the application of the EU public procurement and State aid rules [2].

2.2 New proposal of new generation of public procurement European directives and SME

The current European Directives (2004/18/EC and 2004/17EC) already provide a number of tools for the aggregation of demand, including the central purchasing bodies⁶. When we apply this tool, it is advantage for Large Enterprises. There are other instruments that are not specifically designed for aggregating demand, but may be used for this purpose, such as the possibility of concluding framework contracts to which several contracting authorities participate. Of course, contracting authorities can also coordinate their procurement activities by simply sharing their experiences or coordinating certain phases of the procurement procedure. As well as framework agreement and dynamic purchase system are more friendly to SME because requested conditions should be met just only in relation to one public contract who is procur in framework of this agreement or dynamic purchase system.

However, there is a need for a discussion of the recurring request for more specific EU-level instruments to aggregate demand, in particular cross-border joint procurement. Such instruments and mechanisms would have to strike the right balance between allowing a stronger aggregation of demand in strategic sectors, and not restricting competition in procurement markets (in particular to the detriment of SMEs), e.g. by dividing contracts into lots [9]. This is way to directly support of

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⁴ Cf. Article 1 par. 10 of Directive 2004/18/EC.
SME. This question is subject to some conference.¹

One of the foremost objectives of EU public procurement legislation is to enable economic operators to compete effectively for public contracts in other Member States. Considerable success has been achieved in this regard since the introduction of the first public procurement Directives in the 1970s. Nevertheless, there still seems to be some room for improvement to create a true European procurement market that is fully accessible to all European undertakings. This concerns, in particular, better access for SMEs and more competitive procurement markets generally.

Better access for SMEs and Start-ups

The purpose of the Public Procurement Directives is to open up the public procurement market for all economic operators, regardless of their size. However, special attention needs to be paid to the issue of access to those markets by small and medium-sized enterprises (SMEs)⁸.

SMEs are regarded as the backbone of the EU economy, and they have a huge potential for job creation, growth and innovation. Easy access to procurement markets can help them to unlock this growth and innovation potential, while having a positive impact on the European economy. Moreover, a strong involvement by SMEs in public purchasing allows contracting authorities to considerably broaden the potential supplier base, with positive effects of higher competition for public contracts and as a counterbalance to dominant market players.

In order to make public procurements of all sizes as accessible as possible to SMEs, the Commission published in 2008 the “European Code of Best Practices facilitating access by SMEs to public procurement contracts”⁹. The Code highlights and develops a number of practices within the EU regulatory framework which optimise tenders for the participation of SMEs and ensure equal chances for this bidder group.

A recent study commissioned by the European Commission¹⁰ reveals that, between 2006 and 2008, the proportion of SMEs amongst companies which won public contracts above the EU thresholds was between 58% and 61% in the EU-27. In terms of estimated total contract value secured, SMEs accounted for between 31% and 38% of public procurement while their overall share in the economy, as calculated on the basis of their combined turnover is 52%.

Against this background, it is worth analysing whether it is necessary to envisage legislative measures at EU level to ensure that contracting authorities take full advantage of the economic and innovative potential of SMEs in their procurement dealings.

Reducing administrative burdens in the selection phase

Feedback from small and medium-sized economic operators suggests that the major obstacles to SME participation in public tenders are to be found in the selection phase. On the one hand this relates to the evidence that has to be provided. The large number of certificates that are often required at the selection phase entails an administrative burden which may be difficult for SMEs to cope with, especially in a cross-border context when the certificates even have to be translated. On the other hand, the selection criteria themselves are often set so high (e.g. turnover requirements or number of required reference contracts) that it is virtually impossible for SMEs to fulfil them.

On the first issue (evidence for selection criteria), a solution that is often proposed could be to generally allow undertakings to submit only a summary of the relevant information for selection and/or provide self-declarations on the fulfilment of the selection criteria as a first step. In principle, only the successful tenderer or the tenderers admitted to the award phase would then be asked to submit actual supporting documents (certificates). However, the contracting authority would have the possibility to request the documents at any moment during or

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¹ See discussion about the Economic and Legal Aspects of Transparency and Anti-Corruption Amendment Forced from April, 1st, 2012 in the Czech Republic and Proposals of New EC Procurement Directives [7].
² See also the request of the European Parliament that the Commission should make more efforts in order to facilitate access by SMEs to procurement markets in the Report on new developments in public procurement.
even after the procurement procedure for fraud prevention purposes. This would reduce the administrative burden, particularly for small and medium sized enterprises, without compromising the guarantees for making sound choices.

On the second issue (excessively demanding selection criteria), there might be a case for introducing into the EU rules a cap on certain requirements for qualitative selection, especially on financial standing. This could avoid contracting authorities setting excessively demanding selection criteria (e.g. on turnover) which inevitably exclude SMEs. Such a measure would further develop the already existing obligation to apply proportionate selection criteria. On the other hand, it would restrict the freedom of the contracting authorities to determine which standards they deem necessary to ensure that the contract is implemented properly [4].

Other suggestions

There are exist other suggestion how to support of SMEs. Stakeholders have also sometimes suggested introducing measures of positive discrimination in relation to SMEs, such as advance fixing of procurement quotas reserved exclusively for SMEs. This is mostly possible at bellow thresholds contracts which are bot covered by European directives. Unlike some of our trading partners who have introduced such measures, the EU is not in favour of reserving markets to specific undertakings. This should be discrimination. Such actions would also be in contradiction with the principle of equal treatment of tenderers, a fundamental pillar of the EU public procurement regime anchored by the Court of Justice in the Treaty freedoms. However, internal administrative measures encouraging contracting authorities to do their utmost to improve access by SMEs to their public contracts could be a viable possibility. One idea, for instance, might be to set targets for SME shares in overall procurement. Such a system would not involve reserving specific contracts for SMEs, but they would simply provide an incentive for contracting authorities to make the best possible use of the available instruments for SME-friendly procurement [3]. Another option would be to allow contracting authorities to require the successful tenderer to subcontract a given share of the contract value to third parties. Such an obligation already exists under Directive 2004/18/EC for public works concessions (Article 60) and under Directive 2009/81/EC on procurement in the fields of defence and security (Article 21).

### Fig. Impact of new procurement directives

<table>
<thead>
<tr>
<th>Description</th>
<th>Value</th>
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<tbody>
<tr>
<td>Yearly amount of public contracts</td>
<td>420 billion EUR (3.6 % GDP EU)</td>
</tr>
<tr>
<td>Relevant economic benefit of new directives</td>
<td>20 billion EUR yearly</td>
</tr>
<tr>
<td>Relevant expenses join with application of new directives</td>
<td>5.6 billion EUR</td>
</tr>
<tr>
<td>Average expenses on procuring of one public contract</td>
<td>28 000 EUR, from this amount there are expenses procurement entity 5500 EUR</td>
</tr>
<tr>
<td>Average number of bids</td>
<td>5.9</td>
</tr>
<tr>
<td>Expenses join with taking part in one supplier</td>
<td>3800 EUR</td>
</tr>
<tr>
<td>Portion of foreign suppliers</td>
<td>Only 2 % public contracts are given to suppliers from other member states</td>
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</tbody>
</table>

Source: Commission documents, own calculation [6]

### 3 Problem Solution and conclusion

The problem was identified that the present public procurement is not friendly to SME. For example public contracts are regulated by directives which contain general aims and each member state has very different legal domestic regulation. In contrast to the opinion in the Green Paper on the modernization of EU public procurement policy I have opinion that situation should be better just by passing new procurement directives.

How was mentioned above, according to statistics in the EU mostly public contracts are given domestic enterprises (98 %) and more than 50 % contracts are given to Large Enterprises. In the Czech Republic is the situation the same. Portion of public contracts represent by domestic supplier is 99 % (statistics from 100 public contracts procure by Czech procurement law in 2012) and mostly above threshold contracts are given to bigger suppliers (not to SMEs). This should be solved by practices and by legislation.

The argument for is that after passing new procurement directives by European Parliament which should force into member states into June, 30, 2014 (it will be probably late) the possibilities how to implement procurement directives is so many that will be difference in the qualification and request of technical, economic and financing qualification that SME will be disadvantaged. De lege ferenda this should be solved by regulated European
procurement market by the regulation which brings in procurement part unique conditions. In towards to SME it is necessary states that basic qualification should be proved just by statement with possibility to prove its content. Economic and financing qualification should be solved by similar way and just winner should be obliged to prove some economic and financing stability in relation to fulfill public contract (e.g. by insurance contract or by surety bond). Other SME will be not the right opportunity to successfully compete for public contracts [8].

To improve of SMEs portion on public contracts is necessary to decrease administration at procuring, decrease expense on drawing up bid. It will be necessary to support of SMEs by these arrangements:

- Content of tender in ordinary public contracts should be appropriate to SMEs.
- Different public contracts which have not related subject should not be join in one public contract.
- Qualification of public contracts set by contracting authority should be achievable by SMEs.
- It should be forbidden given public contracts to suppliers who have unclear owners and who don´t pay to subcontractors.
- Evaluation should be clear and not very difficult given by necessity to prove quality of contracts.
- Expenses on making bids should be low.

References:


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