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(Resolutions, recommendations and opinions)

OPINIONS

COURT OF AUDITORS

OPINION No 4/2011**on the Commission's Green Paper on the Modernisation of Public Procurement Policy***(pursuant to Article 287(4), TFEU)**(2011/C 195/01)***EXECUTIVE SUMMARY**

The Court welcomes the opportunity to contribute to the open debate based on the Commission's Green Paper on the modernisation of the European Union's public procurement policy, both as the external auditor of the European Union's budget, and as a public Institution acting itself as contracting authority.

The Court's experience when auditing public procurements suggests that recurrent problems of non-compliance are related to weak implementation of existing rules and that there is still substantial room for improvement at implementing level.

The Court notes the ambition of the Green Paper in terms of objectives, which are very numerous and sometimes conflicting. This profusion requires a reasoned choice to be made, taking into consideration that increasing costs and complexity may entail further risks to cost-effectiveness and legal compliance.

The Court observes that some improvements could be made to reduce administrative burdens for both contracting authorities and enterprises; but this should not be done at the expense of the key principles of equal access, fair competition and efficient use of public funds. Some loopholes, obscure or ambiguous areas in the current legal framework entail risks to legal security of all operators, and to integrity of procedures. This may require rules to be specified more clearly.

THE COURT OF AUDITORS OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 287(4) thereof,

Having regard to the Commission's Green Paper on the modernisation of the European Union's public procurement policy ⁽¹⁾,

Whereas:

The Commission has launched, on the basis of a Green Paper, a wide public consultation on the modernisation of the European Union's public procurement policy, aiming at aligning this policy to the Europe 2020 Strategy for smart, sustainable and inclusive growth ⁽²⁾.

The Court's experience when auditing public procurements suggests that recurrent problems of non-compliance ⁽³⁾, which lead to significant errors affecting the legality and regularity of transactions, are related to weak implementation of existing rules and that there is still substantial room for improvement at implementing level.

The Court welcomes, however, the opportunity to contribute to the debate and to share its experience in this area, both as the external auditor of the European Union's budget, and as a public Institution acting itself as contracting authority,

HAS ADOPTED THE FOLLOWING OPINION:

Setting clear and realistic objectives

1. The Court notes that the Europe 2020 Strategy states that public procurement should: (a) improve framework conditions

⁽¹⁾ COM(2011) 15 final of 27 January 2011.

⁽²⁾ COM(2010) 2020 final of 3 March 2010 and Council Conclusions of 17 June 2010, Part I.

⁽³⁾ Such infringements include, inter alia: non-compliance with the requirement of an adequate degree of advertising and transparency, attribution of contracts without competition in the absence of extreme urgency, application of unlawful selection or award criteria, breach of the principle of equal treatment (by negotiating with one of the bidders during the award procedure), direct award of additional works or services exceeding the limits laid down by the Directives.

for business to innovate making full use of demand side policy; (b) support the shift towards a resource efficient and low carbon economy, e.g. by encouraging wider use of green public procurement; and (c) improve business environment, especially for innovative medium-sized enterprises; in addition, the Europe 2020 Strategy 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 Court also notes that the above objectives are complemented or explained by the Green Paper which states that public procurement rules should: (a) increase the efficiency of public spending by generating the strongest possible competition and streamlining procurement procedures with targeting simplification measures meeting the needs of contracting authorities; (b) allow those to whom the rules apply to make better use of public procurement in support of common societal goals, such as protection of the environment, promoting innovation and social inclusion and ensuring the best possible conditions for the provision of high quality public services; (c) prevent and fight corruption and favouritism; (d) tackle the question of how the access of European undertakings to third country markets can be improved; and (e) better ensure legal certainty to contracting authorities and undertakings.

2. The Court observes that the Commission is aware that there may be conflicts between the various objectives which are assigned by the Green Paper to the reform, and that these different objectives 'translate into policy options which may point in different directions, and will require a reasoned choice at a later stage'. The Court finds that this Commission's remark is of utmost importance for the success of the process launched. It considers that it is essential for the Commission first to define clearly and distinctly its objectives, and then to articulate them well, or even if possible to prioritise them. The Court observes, in this respect, that the introduction of new objectives in the EU public procurement policy, as provided for by the Europe 2020 Strategy, may lead to increased complexity in the legal framework, and thus to additional difficulties in addressing other objectives set by the reform, such as ensuring better legal certainty for contracting authorities and undertakings.

3. The Court underlines that the means used to achieve the assigned objectives may, although appropriate to some of them, bring about undesirable effects against the completion of some other objectives. In this respect, it has to be noted that the generalisation of negotiated procedures considered in the Green Paper, though a relevant tool for contributing to the opening of the markets and to increasing procedural efficiency, may lead to negative effects regarding the objective of preventing fraud and corruption, by granting more discretionary power to contracting authorities. Likewise, the expansion of joint-procurement, which aims mainly at saving time and costs associated to the organisation of multiple tendering procedures by contracting authorities, is not easy to reconcile with the proposed measure to subdivide tenders in numerous lots in order to facilitate access to public procurement to small and medium-sized enterprises.

4. Legislative measures to achieve one of the objectives set may produce undesirable effects for the achievement of some other objectives. The Court underlines in this respect that it is not enough to take stock of the risks linked to the introduction of a new legislative measure, and to identify means to mitigate them. The risks should also be assessed, as to their seriousness and their probability to materialise, and, if the means to mitigate them are disproportionate, alternative solutions have to be explored.

5. It is not the Court's role to question the policy objectives targeted by the Commission through the reform process launched. The Court recalls however that, whatever these objectives may be, they should not affect the basic objectives of the public procurement legal framework, namely respect of the principles of non-discrimination, equal treatment and transparency, and the achievement for the contracting authorities and for taxpayers of the best possible public procurement outcomes for the least possible investment in terms of time and public money. The Court attaches in this context a considerable value to the achievement of the objective of legal certainty, which implies the stability of the legal framework governing public procurement. It considers, as a consequence, that any reforms to be introduced should be sustained by compelling needs which justify them.

6. Although it is not in the Court's remit to pronounce itself on to what extent public procurement procedures should be put to better use in support of other policies and societal goals (like environment protection, energy efficiency and combating climate change, promoting innovation and social inclusion), the Court considers that introducing more conditions to the legality of a public procurement procedure may increase costs and complexity, and thus entail further risks to cost-effectiveness and legal compliance. Moreover, the Court observes that the present rules, including the notion of 'economically most advantageous offer', provides some leeway to accommodate qualitative, long-run elements (like lifetime cycle and operational costs), and may be used to reduce the scope of the price criterion, without eliminating the need to base decisions on the relationship between price and quality.

7. The Court understands that particular attention may be given to the access of small and medium-sized enterprises to public procurement. It has observed an overall low level of their response to tenders, and a limited European coverage. Insufficient access to information, as well as administrative costs, represents a significant obstacle to their effective participation. Provision of training and information, or regional help desks, could encourage medium-sized enterprises' participation. However, the Court would not be in favour of obliging a successful tenderer to subcontract a share of the main

contract, as the legal and practical difficulties of such provisions would overcome their advantages.

Clarifying the legal framework and alleviating administrative burden

8. The Court considers it necessary that some concepts and basic notions be refined in order to improve the legal certainty for contracting authorities and enterprises. Rules can be simplified but also clarified by a more complete and detailed framework.

9. The Court considers that the new legal framework should incorporate 'rules' stemming from EU case-law, as indeed many proposals included in the Green Paper derive from EU Court of Justice or Tribunal rulings. The Court takes the view that contracting authorities need precise guidance based on rules which are easily accessible to everybody. In this respect, however, some analysis, as carried out by the Commission, is required before incorporating into the legal corpus any new public procurement 'rule' stemming from Court of Justice case-law.

10. The Court finds that the scope of the current Directives affects the legal security of all parties, especially in the case where private undertakings receive public grants. It considers it important to clarify, in future EU procurement rules, their domain of applicability and to avoid blurring the distinction between public procurement and subsidies. Similarly, clarification would be welcome regarding the definition of those subject to the public procurement rules, as well as the scope and criteria for public-public cooperation. Furthermore, it would be possible to review distinctions in the legislation (e.g. between works, supplies, service contracts), limitations (services A and B) or exclusions, if they are thought unnecessary.

11. The Court considers that the current range of procedural options set up in the Directives is satisfactory overall. It is important to avoid any procedures which may lead to discrimination, less transparency, or which would undermine the principle of a fair and effective competition. In this regard, accelerated procedures, as well as a possible generalised use of negotiated procedure clearly entail high risks for which a disproportionate effort could be necessary to control them. On the other hand, it is important, when choosing a procurement procedure, to take into account the supply-structure and features of the market. Thus, using open procedure may not be appropriate when the competition is de facto reduced for various reasons (technical specifications, exclusivity rights, required agreements, structure of the markets for specific goods, local market situation, etc.).

12. In the Court's opinion the Green Paper rightly points out some loopholes in the legal framework, which may entail risks to legal security, especially in the contract execution phase. The Court considers that clarifications, based on Court of Justice case-law, should be introduced into the EU legal framework, to regulate the case of 'substantial modifications' of a contract in force, as well as the changes concerning the contractor and termination of contracts. In such cases, however, when a new tender procedure has to be organised, there is no reason to justify that it might be more flexible. Procurement rules should also allow contracting authorities to limit to a certain level the possibility of subcontracting, to avoid legal and practical difficulties which may arise when a large part or the entire contract is performed by subcontractors.

13. The Court considers that alleviating administrative burden through measures such as the submission and verification of evidence only for short-listed candidates, self-declarations (to bidders' own risks), or proportionate evidence on financial capacity, would benefit both economic operators (especially small and medium-sized enterprises) and contracting authorities. Further measures to reduce the administrative burden and address more efficiently the needs of contracting authorities could include the use of simplified purchase at the

lowest price for the so-called 'commercial goods and services', more flexibility in the examination of selection and award criteria, promoting, especially for small contracting authorities, procedures already available (central purchasing bodies, framework agreement) or developing more flexible tools, such as, under a certain threshold, a negotiated procedure linked to a benchmark. However, too much flexibility in the procedures might entail risks of abuse and discrimination.

14. Regarding the integrity of procedures, the Court is well aware that public procurement is a risky area where unsound behaviours and practices, like conflicts of interest, favouritism, fraud and corruption, may occur at all stages, distort fair competition and discourage bidders. To mitigate such risks, common efforts at EU and national level are necessary. Clarifying, at EU level, some definitions (like 'conflict of interest', 'grave professional misconduct'), and introducing measures to prevent, detect and deter unsound practices (training, self-declarations, codes of conduct, automatic sanctions, protection of whistleblowers, exchange of information between Member States on the exclusion of unsound bidders, etc.) could provide an important contribution to a more level playing field in public procurement throughout Europe.

This Opinion was adopted by the Court of Auditors in Luxembourg at its meeting of 26 May 2011.

For the Court of Auditors

Vitor Manuel da SILVA CALDEIRA

President
