

Opinion of the European Committee of the Regions — Implementation report on public procurement

(2020/C 39/09)

Rapporteur: Thomas Habermann (DE/EPP), Head of Rhön-Grabfeld district council**I. GENERAL COMMENTS**

THE EUROPEAN COMMITTEE OF THE REGIONS

1. stresses that this opinion follows up on the CoR's commitment, in connection with the 'Task force on subsidiarity, proportionality and doing less more efficiently' and the Better Regulation agenda, to providing feedback on the implementation of EU legislation at local and regional level. The CoR and the Council of European Municipalities and Regions (CEMR) have therefore undertaken a joint EU-wide survey to assess local and regional authorities' implementation of the legal framework for public procurement, and commissioned a study on the subject; the CoR emphasises that, due to significant differences in the levels of participation from different Member States, the results of the survey cannot be seen as representative at EU level but can only indicate trends; furthermore, draws attention to the report published in July 2019 on the first consultation of the CoR's Network of Regional Hubs (RegHub) ⁽¹⁾, which essentially confirms the results of the CEMR and CoR survey;
2. notes that the comprehensive reform of the public procurement directives carried out in 2014 was transposed into Member States' national law in some cases in 2016 and in some cases considerably later; now, a maximum of three years since the entry into force of national public procurement law with direct effect, we thus have only limited insight into practical experience in implementing these laws;
3. points out that both administrative practice and economic operators have only just adapted to the new public procurement system, and in some cases are still in the process of adjusting; likewise stresses that, in many places, these adjustments involve a not inconsiderable burden in terms of training and advice, in some cases from external legal advisers; in these circumstances, firmly believes that it would not be appropriate to introduce new legislative requirements in the next few years;
4. clarifies that this opinion therefore does not focus on new legislative reforms, but addresses the difficulties that contracting authorities at local and regional level are currently facing in dealing with the regulatory framework; it also addresses specific issues that the Commission most recently raised in October 2017 in its non-legislative communication on making public procurement more efficient, sustainable and professional ⁽²⁾;
5. supports the aim and key features of the directives, in particular electronic procurement and facilitating the participation of SMEs, the new concepts for in-house procurement and cooperation between municipalities, the possibility for authorities of using strategic criteria for public procurement as part of their own policy-making processes, and promoting transparency and integrity;
6. stresses that, as the survey results show ⁽³⁾, cross-border procurement has not brought any added value for local and regional authorities. Though EU-wide procurement procedures are carried out regularly, costing considerable time and money, few if any cross-border contracts are awarded; the reason is presumably that the electronic platforms differ in each country and so act as a hurdle to companies and authorities in neighbouring countries taking part: conceived and launched in one particular country, platforms often do not provide for the use of different languages or for incorporating the administrative requirements of countries other than the one in which the contracting authority is located;

⁽¹⁾ Committee of the Regions, Subsidiarity Steering Group, Network of Regional Hubs for EU Policy, Implementation Review, Implementation Report, First Consultation on Public Procurement, July 2019.

⁽²⁾ Commission Communication on Making Public Procurement work in and for Europe, 3.10.2017 (COM(2017) 572 final).

⁽³⁾ See the consultation on assessing the implementation of the 2014 Directives on public procurement: challenges and opportunities at regional and local level, carried out by the CoR in conjunction with the Council of European Municipalities and Regions.

7. highlights the fact ⁽⁴⁾ that the correct application of the legal framework for public procurement has now become an end in itself, rather than a tool for procuring works, supplies or services;
8. highlights the need to clarify the circumstances in which local and regional authorities are permitted to promote local economic growth and local structures in the interests of sustainability and positive environmental impact, by using short supply chains (e.g. the 'Holz von hier' initiative) in line with the 'buy local' principle;
9. stresses that, in line with the principle of local self-government, the option allowed for in the 2014 reforms of taking account of green, social or innovative criteria in public service provision must remain entirely at the discretion of the local authority concerned; takes the view that any future obligation to apply strategic procurement objectives to any procurement process should be clearly rejected, in order to avoid unnecessarily overburdening the procurement procedure; points out that in many procurement procedures it is not expedient to take account of strategic procurement objectives, for example in the case of standard procedures for the supply of products;
10. stresses that increasing the number of policy goals increases both the likelihood of errors and the risk of conflict between those goals; points out that public procurement objectives can only be achieved insofar as they do not undermine the primary goal of providing the public with high-quality goods and services at a reasonable price;
11. also stresses that the 2014 reform clearly recognises the right of local and regional authorities to provide and organise their services themselves using their own institutions and businesses or public undertakings, as well as the 'in-house' concept and cooperation between municipalities. Contracting with third parties is thus just one of many alternative ways to provide public services ⁽⁵⁾. Finally, the CoR stresses that contracting authorities have the right to remunicipalise contracts previously awarded to third parties;
12. believes that the goal of increasing the thresholds beyond which public contracts must be put out to tender across Europe is appropriate, with a view to preserving the balance between transparency on the one hand and the administrative burden placed on authorities and SMEs on the other hand; calls on the Commission, in the long term, to work towards significantly increasing the thresholds in the Agreement on Government Procurement at WTO level.

II. POLICY RECOMMENDATIONS

Strategic procurement

13. takes the view that the possibility introduced in the 2014 public procurement directives for contracting authorities to take account of strategic objectives in procurement can in individual cases result in 'better procurement' from the contracting authority's perspective;
14. points out, however, that the resulting administrative burden for local and regional authorities must be proportional to the benefits that public procurement can bring for the public. Public procurement is not primarily intended to achieve policy goals regarding, for example, environmental sustainability, social inclusion or innovation, or to further specific socio-political development. However, it is increasingly being used as a vehicle for steering and achieving other policy goals. It is nonetheless important not to lose sight of the aim and purpose of public procurement: determining the best price-quality ratio in line with the principles of sound financial management and efficiency of the public administration;
15. points out that, as the results of the CoR/CEMR survey show, local and regional authorities are aware of the option of using green, social and innovative award criteria. Such criteria are, it seems, in some cases used only sparingly, sometimes because there is no need and sometimes because the increased likelihood of errors increases the likelihood of legal proceedings; local and regional authorities particularly complain of the shortage of skills needed to get more procurements of this kind up and running;
16. points out that, though they have the option of awarding contracts on the basis of various qualitative criteria, local and regional authorities often prefer the lowest price, because they see it as the most appropriate use of public money, as well as being a criterion that is easier to apply;

⁽⁴⁾ See joint CoR/CEMR survey.

⁽⁵⁾ See the European Committee of the Regions' opinion of 5.7.2018 on the Public Procurement Package, rapporteur: Adrian Ovidiu Teban (RO/EPP).

17. refers to the criticism made by the Commission in its communication ⁽⁶⁾ that 55 % of procurement procedures still use the lowest price as the only award criterion; clarifies that strategic objectives may well have been taken into account in the procurement procedures in question, since, for example, it is often just as effective to include environmental and energy efficiency criteria in the specifications, and then to award contracts consistently on the basis of the lowest price;
18. highlights the fact that, according to the survey results, the need for strategic award criteria varies widely. Thus, contracting authorities largely see no need for innovation-friendly procurement, have mixed opinions on social procurement, and are mostly in favour of environmental procurement; notes that they experience difficulties in applying all the criteria due to the complexity of the legal framework, with regard to setting the conditions for executing the contract and, in particular, assessing the equivalence of national certificates and labels used to demonstrate compliance with the criteria ⁽⁷⁾;
19. points out that, to date, the use of innovative procurement, including innovation partnerships and pre-commercial procurement, has been restricted to a few local authorities in certain Member States. The main reasons are that promoting research and development is rarely a priority, standard products are being procured, or there are budgetary restrictions. The Commission's 'Big Buyers' initiative could be a tool in promoting innovative procurement. The CoR stresses, however, that bundled procurement and purchasing groups regularly make things easier for local authorities, especially smaller ones, and help them make efficiency gains;

Access to public procurement markets for SMEs

20. recalls that promoting SMEs was one of the five priorities for the 2014 public procurement reform; notes that SMEs and start-ups still find it difficult to meet economic or technical eligibility criteria. In addition, late payments, SMEs' lack of knowledge of key aspects of public procurement, and the high potential cost of legal proceedings present significant constraints;
21. points out that the measures taken to date to increase SME participation have – as shown in the CoR/CEMR survey – not resulted in the expected degree of improvement;
22. stresses that strategic procurement objectives frequently present a significant barrier to participation in procurement procedures specifically for SMEs in comparison to professionally organised large companies, given that SMEs often lack the necessary resources to meet strategic procurement criteria; stresses that strengthening strategic procurement is potentially at odds with the appropriate and laudable goal of promoting and facilitating access to public procurement procedures for SMEs;
23. in this connection, highlights the need to revise the definition of 'SMEs' currently in use at EU level ⁽⁸⁾; points out that, under the current definition, medium-sized enterprises ('mid-caps', with up to 500 employees) are structurally very comparable with SMEs (< 250 employees and an annual turnover of ≤ EUR 50 million or a balance sheet of ≤ EUR 43 million) and yet do not get preferential treatment over large enterprises; in view of the rising tide of protectionism on key markets, stresses that it is important for the EU to take a constructive and clearly market-oriented position in terms of global competition, in the interests of the domestic European economy, and to take account of medium-sized enterprises as a strong economic factor, particularly in rural areas;
24. points out that the new regime for social and other specific services is causing difficulties for local and regional authorities, and notes that the problems encountered are linked, inter alia, to the particular nature of these services and to the specific context in which they are provided; is critical of the fact that competitive tendering is now compulsory above a certain threshold (EUR 750 000) even though the reasons for deeming this type of service to have no internal market impact still apply; points out that these rules do not always fit in with the Member States' national systems. In cases where the public authorities do not make selective choices when service providers operate within a simple *authorisation procedure* or open-house model, the Court of Justice has ruled that the Public Procurement Directive does not apply ⁽⁹⁾. However, the rules in the Public Procurement Directive do not always fit in well with the Member States' national systems and may in practice result in disproportionate administrative burdens for local and regional authorities ⁽¹⁰⁾. Moreover, the scope of the regime is not clear, due to the references in Annex XIV to CPV codes, the content of which is ambiguous;

⁽⁶⁾ Commission Communication on Making Public Procurement work in and for Europe, 3.10.2017 (COM(2017) 572 final).

⁽⁷⁾ CoR/CEMR survey.

⁽⁸⁾ Commission Recommendation 2003/361/EC, 6.5.2003 (OJ L 124, 20.5.2003, p. 36).

⁽⁹⁾ Cases C-410/14 Falk Pharma and C-9/17 Tirkkonen.

⁽¹⁰⁾ REFIT Platform opinion on the effectiveness and efficiency of public procurement (youth welfare and social support) by the Dutch Ministry of Health, Welfare and Sport, 14.3.2019.

25. takes the view that procurement in lots particularly benefits SMEs and medium-sized companies, and is therefore a good approach; points out, however, that underperforming enterprises and excessively small lots may increase the administrative and coordination burden on contracting entities;

Cross-border purchasing of goods and services

26. notes that the overall share of cross-border contracts fell from 5,95 % in 2013 to 3,4 % in 2017 ⁽¹¹⁾;
27. stresses that the concept of public procurement should be interpreted using a functional approach. However, even if it is considered from such a perspective, different types of planning services should not be added together when calculating contract value, but may instead be treated as separate contracts; explains that this is important particularly for the protection and increased participation of SMEs in public procurement procedures;
28. calls on the Commission to adopt more comprehensive guidelines on electronic public procurement procedures in order to enhance legal certainty and improve participation of SMEs in electronic public procurement;
29. points out that the exclusions specified in Article 10 (h) of the Public Procurement Directive (Directive 2014/24/EU of the European Parliament and of the Council ⁽¹²⁾) reflect the considerable importance attached to non-profit aid organisations which may emerge as a result of voluntary activities, particularly in the event of civil protection operations; takes the view that Member States may explicitly state in national law which organisations are considered to be non-profit, if national law ensures that these organisations meet the non-profit criteria laid down by the European Court of Justice ⁽¹³⁾;
30. underlines that 70 % of respondents to the CoR/CEMR survey state that cross-border purchasing brings no added value, due to a lack of tenders from other Member States, and only 24 % say that it promotes competition and offers better choices; draws attention to the findings of the RegHub report that in some sectors, particularly in social fields, there is no cross-border dimension, and that the required internal market relevance is therefore lacking;
31. agrees in principle with the Commission's objective of increasing the number of cross-border procurement procedures; points out that the reasons for the low level of cross-border contracts include the need for the procurement documents to be available in several languages, which is time and resource intensive and necessarily increases costs, as well as differences in the interpretation of the public procurement directives in the Member States;
32. notes that another key reason is likely to be the different standards and legislation applicable in the Member States, for example in the fields of labour law, occupational health and safety, and construction; these differences deter potential foreign bidders – and particularly SMEs, which often lack the necessary material and legal resources to meet the requirements of other Member States – from submitting tenders;
33. points out that it is very common for companies to create subsidiaries in other Member States so that they can be close to local markets. It is generally these subsidiaries and not the parent company that submit tenders in local and regional procurement procedures. Such transactions are not included in statistics on cross-border procurement;
34. finally, particularly highlights the difficulties encountered by bidders in dealing with the Member States' differing requirements for certificates and electronic signatures across borders; hence the need to introduce common guidelines for putting in place common regulatory and IT systems and establishing electronic platforms that enable authorities and companies based in the various bordering countries to bid;

Actions to improve implementation

35. points out that the 'professionalisation' to which the Commission refers – i.e. the training of administrative staff – lies entirely within the organisational purview of the Member States and particularly of local and regional authorities; is also concerned that further guidance and manuals from the Commission on the professionalisation of contracting authorities (such as the planned comprehensive European Professionalisation Framework (EPF)), alongside the already comprehensive regulatory framework, would probably result in additional administrative burdens for contracting entities;

⁽¹¹⁾ European Parliament, Policy Department for Economic, Science and Quality of Life Policies Contribution to Growth. European Public Procurement. Delivering Economic Benefits for Citizens and Businesses, January 2019.

⁽¹²⁾ OJ L 94, 28.3.2014, p. 65.

⁽¹³⁾ ECJ, judgment in case C-465/17 of 21.3.2019.

36. Welcomes the final action plan of 26 October 2018 by the Partnership on Innovative and Responsible Public Procurement within the Urban Agenda ⁽¹⁴⁾ and supports in particular the recommendations addressed to the EU level to consider EU funding for joint cross-border procurement, procurement of innovation, strategic procurement in particular social procurement (i.e. using social clauses and award criteria in tendering processes and contracts) and circular procurement, to the Member States' level to invest into capacity building on Innovative and Responsible Public Procurement and to both the Member States' and the city levels to increase training on circular procurement as well as on innovative and responsible public procurement;
37. considers that the EU must ensure consistency between the various European policies governing public procurement, competition and state aid, in order to ensure that the EU as a whole is strengthened as an industrial centre and that European companies are competitive in a globalised world;
38. calls on the Commission to launch a process for reliable and clear EU-wide labelling and certificates, particularly in the field of environmental sustainability, in order to create legal certainty and reduce burdens for contracting authorities on the ground;
39. draws attention to the fact that the development of in-house e-procurement systems and national public procurement portals has in some cases led to compatibility issues both within and between Member States; the development of fully compatible systems could significantly simplify and speed up public procurement procedures;
40. highlights, finally, that the directives have not fulfilled their main purpose of substantially simplifying procedures for local and regional authorities; nonetheless takes the view that, in the interests of continuity and for the reasons mentioned above, further legislative reform in the coming years would be highly inadvisable.

Brussels, 8 October 2019.

The President
of the European Committee of the Regions
Karl-Heinz LAMBERTZ

⁽¹⁴⁾ https://ec.europa.eu/futurium/en/system/files/ged/final_action_plan_public_procurement_2018.pdf