EDITORIAL

Strategic Public Procurement in the EU and Its Member States

EU Member States have benefited from the reform agenda carried by the 2014 Public Procurement Directives through the need for simplification and through the positive influencing of the strategic application of the new rules. Public Procurement is regarded as essential lever for the EU 2020 Growth Strategy.

In order to strengthen the Single Market and as part of the continuous effort to stimulate investment in the EU and its Member States, a policy initiative has been launched to carry out procurement more efficiently through digital technologies and in a sustainable manner from socio-economic perspective. The policy package was introduced by the EU Commission on the 3rd of October 2017 where six priority areas have been earmarked for Member States to develop a strategic approach to procurement. These include greater uptake of innovative, green and social criteria in awarding public contracts; professionalization of public buyers; improving access by SMEs to procurement markets in the EU and by EU companies in third countries; increasing transparency, integrity and quality of procurement data; digitisation of procurement processes; and finally more cooperation among public buyers across the EU.

To safeguard the benefits arising from the 2014 EU Public Procurement Directives, the soft law package of the EU Commission initiated on 3rd October 2017 reinforce without the need of further legislation the principles of transparency and accountability in public procurement and introduce an *incentive-based regulation* to Member States to apply a system which increases outputs towards the socio-economic optimum while preserving the incentive for efficiencies and innovation through public contracts. The 2017 Public Procurement Package epitomises the above challenges by enacting a Communication on Making Public Procurement work in and for Europe which sets the priorities for action; a Communication on voluntary ex-ante assessment of the procurement aspects for large infrastructure projects, which ensure compliance and finally a Resolution on the Professionalisation of Public Procurement.

Strategic procurement is promoted in the six priorities set out by the Commission for improvement in the area of public procurement both at the Member State and EU level, focusing on: Greater uptake of innovation, green and social criteria in awarding public contracts, professionalization of public buyers, improving access by SMEs to procurement markets in the EU and by EU companies in third countries, increasing transparency, integrity and quality of procurement data; digitisation of procurement processes, and more cooperation among public buyers across the EU.

Strategic procurement can be pursued in the following phases of the public procurement process:

Strategic procurement can be pursued during the pre-procurement phase where contracting authorities can explore multiple options in their procurement strategy by setting out their innovation or strategic procurement requirements without the risk of conflict or discrimination. The pre-procurement phase has high relevance in raising awareness, market intelligence, market testing, business case development and supply side engagement for the innovation partnership procedure.

Strategic Procurement is also reflected upon the option to pursue joint and cross-border procurement, which covers the ability and freedom on the part of contracting authorities for the procurement of products or services and the design and execution of work contracts to be awarded jointly. The decision to award contracts jointly must be determined by qualitative and economic criteria, which may be defined by national law.

Strategic procurement can be pursued by the division of contracts into lots and disaggregation to allow better market access to SMEs.

Strategic procurement can be pursued during the phase of the selection and qualification of candidates. The selection and qualification of candidates phase involves the drafting of the specifications for the contract, the establishment of technical specifications, the determination of standards, the acceptance of labels and the validation of certification for products and services. Contracting authorities have a wide margin of discretion in drawing specifications and determining standards, provided they both fulfil the subject matter of the contract. The selection and qualification of candidates phase provides contracting authorities' discretion in drawing contract specifications and determining standards taking into account products and services features and their functionality and performance as legitimate determinants of specifications.

Strategic procurement can be pursued in the award phase of the contract. The award phase covers the award procedures and the award criteria. Contracting authorities have discretion to use the Innovation Partnership procedure, allow the submission of variants and alternative specifications and apply the Best Quality Price Ratio (BPQR) and most economically advantageous tender (MEAT) as award criteria.

The most economically advantageous criterion and the Best Price quality ratio as award criterion can legitimately cover socio-economic and environmental policies. Life cycle costing as an award criterion covers all production stages of a product of a service including research and development, transport, use and maintenance, disposal, clearance and end of service or utilisation.

In variant offers of tenderers, if such option is provided by contracting authorities during the award stage of the contract, the pursuit of socio-economic or environmental objectives is legitimate, provided such variant offers are linked with the subject matter of the contract.

Strategic procurement and procurement objectives which support horizontal policy objectives must be contained within the subject matter of the contract in order to avoid discrimination of bidders and economic operators.

There are significant obstacles to the application of strategic procurement. Aggregation of contracts by contracting authorities may pose barriers to entry for SMEs and dissuade them from public procurement due to high levels of financial and economic standing criteria. The higher the value of a contract, the more difficult is for SMEs to participate in the award procedures.

In the selection and qualification stage of economic operators, the tenderer turnover to contract value ratio may pose barriers for SMEs. The minimum required annual turnover of economic operators shall not exceed two times the estimated contract value, except in cases where special risks attached to the nature of the works, services or supplies may require higher turnover to contract value ratio.

The lowest price award criterion may not be conducive to strategic procurement and procurement which promotes environmental and socio-economic objectives as well as innovation, since it deprives contracting authorities from taking into consideration qualitative features in the award process including, running costs, cost-effectiveness, technical merit, product or work quality, aesthetic and functional characteristics, after-sales service

and technical assistance, commitment with regard to spare parts and components and maintenance costs, security of supplies.

Strategic procurement will benefit from the professionalization of public buyers and the acquisition of business skills, technical knowledge and commercial application of public procurement rules. The high expectation of the public procurement reforms will be met by enhancing the governance of public procurement and raise the professionalization and standards in both public and private sectors. The 2014 EU Public Procurement Directives offer to Member States several methods to pursue "strategic" procurement. Strategic procurement is procurement by Member States and contracting authorities which promotes sustainable and socio-economic goals as well as harnessing innovation.

The policy package builds on modernisation and procedural efficiencies and on streamlining the application of the substantive rules. The challenge of the reforms will test the relation of market integration for the public and utilities and concession sectors in the EU with the need for market access from third countries and sheltered markets for small and medium enterprises.

Strategic procurement in the EU embraces the pivotal importance of the SMEs in achieving economic growth. The new regime deals effectively with sub-contracting issues, prompt payments and the promotion of SMEs in the selection and qualification procurement phase and the award of public contracts. The value of public contracts is one of the major factors that influence the extent to which SMEs can access these contracts. The larger a contract, the less likely it will be awarded to SMEs. Other factors which influence adversely SMEs' access to public contracts are the type of award procedures and award criteria utilised by contracting authorities.

Innovation in the delivery of public services is a priority for procurement regulation and will be achieved through the new procedure of innovation partnerships and the new award criterion of life cycle costing.

Responsible procurement takes into account socio-economic nature of public service delivery through services of general economic interest and incorporates environmental protection as a component of public procurement regulation.

Efficient procurement promotes systems such as electronic procurement and electronic invoicing which attempt to reduce bureaucracy and costs and allow for a more streamlined process in the delivery of public services.

Innovation in the delivery of public services is a priority for procurement regulation and will be achieved through the new procedure of innovation partnerships and the new award criterion of life cycle costing. Innovative, socio-economic and environmental considerations are legitimate award criteria in public procurement, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with the fundamental principles of European Law.

Efficient procurement promotes systems such as electronic procurement and electronic invoicing which attempt to reduce bureaucracy and costs and allow for a streamlined process in the delivery of public services. Efficient procurement has significant links with strategic procurement. The Digital transformation of procurement envisaged the extension of the scope of the e-Certis and the European Single Procurement Document, as well as the introduction of uniform e-Invoicing systems.

The high expectation of the public procurement reforms will be met by enhancing the governance of public procurement and raise the professionalization and standards in both public and private sectors. Specifically, the priority of the professionalisation of procurers

could materialise through the Network of National Innovation Procurement Centres and the establishment of a European competence framework for public procurement.

The European Union public procurement system has two fundamental challenges: first, to introduce strategy and innovation in traditional public contracts; secondly, to capture the outcomes of innovation and strategic procurement and allow them to influence the award of public contracts.

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