Joint Nordic position paper "Making public procurement fit for the future" – 28.6.2024

The following comments is a joint Nordic contribution from the Confederation of Norwegian Enterprise (NHO), the Confederation of Swedish Enterprise (Svenskt Näringsliv), the Confederation of Finnish Industries (EK) and the Danish Industry (DI).

Public procurement matters both for contracting authorities and companies who benefit from the single market when bidding for public contracts in their own as well as in other EU and EEA Member States. Public procurement relies on free, fair and open competition to deliver the best value for public money.

Public procurement rules are a key part of a well-functioning internal market, and the rules are intended to create equal and open competition in public procurement. Equal access for public contracts to companies is a prerequisite for a well-functioning internal market in the EU, which benefits both contracting authorities and companies. When making public procurement fit for the future, focus should be on enhancing a well-functioning internal market by removing obstacles to competition in public procurement and promoting competition, transparency and preventing discrimination. We are concerned if the future procurement rules lead to more protectionism and poorer competitive conditions to the detriment of the internal market.

The recent special report from the European Court of Auditors nr. 28/2023, the Letta report and the council conclusions from May 2024 highlight a decrease in of competition in public procurement over the last 10 years.

We acknowledge that there are challenges, and we fully support the need for a thorough in-depth analysis of the existing legislative framework on public procurement and data to better understand the root causes behind the decrease in competition. We believe understanding the root causes and improving data is essential to target both the specific challenges not only within the existing legislation but also within procurement behavior and how the rules are applied in practice.

We shall stress the importance to maintain the fundamental principles that the public procurement legislation should only regulate the procurement procedure (how you buy and not what you buy) and that all the criteria applied in tenders must be linked to the subject matter of the contract.

At present we do not see a well-documented and analyzed need to re-open and make a revision of the entire public procurement legislative package. However, in the following we will invite the Commission to explore and assess certain topics in further detail in an in-depth analysis. These issues include better data analysis of the root causes of weak competition,

more efficient remedies, professionalization of both contracting authorities and companies, IPR-issues, market dialogue, abnormally low tenders etc.

There is a low proportion of contracts awarded to SMEs throughout Europe, even though there are huge possibilities through the directive to split contracts into lots. We believe there should be a shift of mindset of the contracting entities, rather than changing the legislation. Qualification criteria, environmental criteria and social criteria should be less burdensome. Standardized environmental criteria could be easier to meet for SMEs and micro-enterprises.

Furthermore, we would invite the new Commission to make a report on the interplay between the public procurement regulation and the many sectoral legal acts containing public procurement issues.

What do companies think about public procurement?
As both the ECA-report and the Letta-report point out, there are shortcomings in competition in public procurement. However, the root causes are not clear.

Surveys carried out by our organizations show that companies are mainly dissatisfied with low prices, technical specifications that exclude potential bidders and rogue companies that are allowed to participate in public tenders. Companies that respond to surveys often write that "you can tell from the technical specification which machine they want". That trend has increased.

"*Sometimes it benefits us, sometimes it doesn't." "I have seen the requirements specification based on our brochure. In one case, they had even copied a typo and required the machine to have a dart loop (instead of a draw loop). When a competitor questioned what it was, they were told that you should know about it."*

A question that the official statistics do not provide an answer to is: "How common is it that the existing supplier wins the new contract, in public procurements?"

The confederation of Swedish Enterprise has tried to answer the question with the help of an analysis of a data set containing 328 pairs of a previous and a subsequent procurement.

The results are divided into three categories:
• Completely repeat winner
• Partially recurring winners
• No repeat winners.

It emerged from the survey that there are fully recurring winners in 35.7 percent of procurements, partially recurring winners in 29.5 percent of procurements, and the remaining 34.8 percent of procurements have no recurring winners. The sum of recurring and partially recurring winners is 65.2 percent.

This figure may indicate that the authorities are satisfied with the existing supplier and would like to see a continued collaboration, that it is difficult to change supplier, but it may also indicate that competition does not work optimally and that procurements are directed in favor of one supplier.

We would suggest that such surveys should be done at a European level. We believe that the figure is too high when a full 65.2 percent of procurements are won by existing suppliers in whole or in part (framework agreement). This makes it difficult for SMEs and innovative new companies that have ideas that can solve our large societal challenges. We want to underline the importance of an open and transparent procedure, reducing the risks of corruption and infiltration.

More data is key

In general, more data is required to know what happens at the procuring authorities/units. We know how many tenders are received, but we do not know how common it is for a tender to be rejected because it does not meet the requirements and thus is never evaluated. Why are tenders rejected and can we make it easier for suppliers to submit tenders that meet the qualification requirements?

We call on the Commission to conduct an in-depth analysis of this issue and then present proposals that make it easier for suppliers to qualify, e.g. changes in E-forms, ESPD or develop new digital tender systems.

When analyzing the data it is also important to focus on cross border competition. According to statistics from TED there is little cross border trade. But as the ECA-report underlines the cross-border exchanges can also be transacted indirectly via consortia of partners from different member states, or by the local subsidiaries of foreign companies. For example, large EU companies in the financial, energy and construction sectors have subsidiaries in most or even all member states.

Commission study on cross-border penetration over the 2016-2019 period found that indirect cross-border awards accounted for approximately 20 % of all procedures for contracts valued below €200 million while direct cross-border awards represented around 2.4 %. In the case of contracts above €200 million, indirect cross-border awards accounted for around 28 % of all procedures, and direct cross-border awards for 6 %. However, as TED data does not allow indirect cross-border awards to be identified (mainly because there is no unique identifier for economic operators), it is difficult to confirm these figures. We believe it is important to analyze this in further detail to increase cross-border procurement, which will be a benefit to the internal market and the competitiveness of European companies.

Furthermore, as the ECA report reveals, there are huge differences between member states and sectors. This underlines the importance of an in-depth analysis that considers these differences before turning to “one size” fits all solutions.

Need for a more effective remedy system

Unfortunately, neither the ECA report nor the Letta report mentions the need to revise the Remedies Directives. Access to legal remedies is fundamental for functioning competition. Unfortunately, the possibility of remedies is far too great between the various member states. We do not even have access to credible statistics on the number of appeals in the various Member States.

In some countries it is very expensive and in other countries it is difficult to get anything other than pure material errors tested. Questions about competition and proportionality are left behind. This discourages companies from participating in public procurement. The companies perceive that it is no use reporting wrongdoing or suspected corruption and therefore they give up.

We shall urge the Commission to analyze and review the remedies directives and address the current fragmentation in the different national remedy systems. When reviewing the remedy system, we would suggest deleting ex tunc, because ex tunc in case of invalidity contract in practice means a one-sided disadvantage for the suppliers.

Furthermore, we believe it would be important to address whether companies from third countries should have access to legal remedies. A thorough review should also consider the recent judgment in the Ingsteel case (C-547/22), which gives rise to many questions and considerations.

We believe many complaints might be avoided if we addressed the need for an increased professionalization of contracting authorities and companies. Hence, we suggest that procurement damages charged to procuring authorities that have committed unlawful direct wards should go to a new fund that finances competence/skills development of procurers and suppliers.

Professionalize public procurement

In the authorities, there are competing control instruments, strategies and goals that affect the priorities that the authority sets. There are also difficulties in distributing values between staff, residents, companies and society at large. There is often a lack of support, both organizationally and at policy level, to carry out changes in relation to procurement in the authorities. There is also difficulty in finding common target images. Many authorities are busy reaching the statutory minimum level, i.e. not to make unlawful direct awards.

Added value created through e.g. category management and SRM (supply relationship management) are usually not included. There are many organizational downpipes in an authority with different operational goals, different resource distribution and budget goals. It also seems to be difficult to work cross-functionally across organizational boundaries because different administrations have different missions and goals. The cross-functional way of working is also made more difficult by different responsibilities and incentives. The resources, i.e. taxpayers' money, is not utilized from a holistic perspective. There are

difficulties in jointly defining, measuring, and following up added value and identifying the potential and possible cost drivers in advance.

Category management as a concept began to emerge in private purchasing in the late 1980s. It was the answer to an increased need to meet the increasing strength of suppliers as a result of globalization. It was also a response to a growing realization that organizations can achieve benefits if they can give purchase a strategic role. The early forerunners began to develop strategic methods for purchasing and finance as well as theories about organizational structures. The category management has been refined over the years. Today there are different variants of category management, with minor differences in structure and content but with the same underlying content.

Category management is a process-based method that focuses on improvement and change. The method is not only about purchasing and procurement. For the purchasing process to achieve efficiency, the entire organization must get involved and participate actively in the work. But above all, the decision and commitment of top management is required. The result can lead to large savings and quality increases for the administrations. Category management is the solution (method) to make procurement and purchasing a strategic asset for the authority.

We therefore recommend that the Commission spread knowledge about category management. There are several European universities conducting research in purchasing that support this view.

The Commission should introduce support for universities that offer master's programs in purchasing. Without relevant university educations, it is difficult to find the required competence. Strategic purchasing/procurement is complex and requires different skills. To finance the important development of public procurement skills we suggest earmarking procurement damages to a special educational/skills fund.

Furthermore, we would urge the Commission to re-establish the Commission stakeholder expert group, because we believe that such a forum can play a key part in the professionalization of public procurement. We suggest that one task for this group could be to look at the interplay between the public procurement rules and the sectoral legal acts containing procurement provisions.

IPR in public procurement

One of the shortcomings in the public sector that we have seen is the knowledge gaps regarding intellectual property rights and how these are handled in public procurement. Intellectual property rights are central to the development of our knowledge economy. If handled incorrectly, this leads to a lower degree of competition, innovation, and renewal of the public sector. At the same time, the business world cannot develop and show its potential and do good business with the public sector.

An important principle in a rule of law is the right to property. Ownership rights must be handled in an efficient and legal manner. This also applies to intellectual property rights in public procurement.

For many companies, intellectual property rights are their main asset. Knowledge-based assets are crucial for their ability to compete in a global market. It is therefore worrying to see that the authorities in the procurement documents to a large extent demand full ownership of the intellectual property rights. In a survey carried out by Confederation of Swedish Enterprise, it appears that of 197 randomly selected procurements that were advertised in 2022 and that contained the heading "intellectual property", the authority required ownership over IPR **in 93.9 percent** of the cases (not a license or right of use).

The reason is likely that many authorities use standard templates, which are used in all kinds of situations without reflecting on the appropriateness of this.

The public procurement is based on the contracting authority setting the conditions for the deal and the supplier must accept the conditions or refrain from submitting a tender. One must ask which company really wants to give up its know-how, its intangible assets or the opportunity to compete in the global market by handing over the ownership of the rights? The consequence is that the company refrains from submitting a tender or hopes that the authority will never follow up on the requirement. In the worst case, the company does not understand what they signed up for. Improperly handled, this leads to problems for both parties. There seems to be a consensus that we need a strong innovation-driven business life. But through the requirements in public procurement, the public strangles the power of innovation and development in its infancy. By the public taking over ownership, the company has nothing left to build on.

Market dialogue is key to innovation

We would like to stress the importance of conducting a market consultation before launching a procurement procedure. A dialogue with the market is especially crucial in sustainable tenders, as the contracting authority will often move to unknown land to a greater or lesser extent. Therefore, market input for commercial solutions is key for a successful sustainable tender. We would suggest that the concept of market research in the directive is replaced with market dialogue. The concept of market research gives the appearance of a one-sided communication. What should instead be pursued is a two-way communication where procuring authorities and units continuously talk and listen to the suppliers and vice versa. It is in the dialogue between the authority and the suppliers, which should always take place, that the authority can ensure that they can have their needs met.

To encourage contracting authorities to conduct dialogue, we propose that authorities that have not conducted dialogue before a procurement are forced to extend the tender deadline by 10 days.

Companies, regardless of their form of operation, must be allowed to participate in public procurement

We believe it should be made clear in the directives on public procurement that companies may participate in public procurement regardless of their form of operation and value chain. This means that it should e.g. not be possible to distinguish between profit-making and non-profit-making companies.

It is important to safeguard the model in which services to the public sector can be provided by private actors who invest capital and take on a risk in order to make a profit. Otherwise, we will risk a reduction in competition and innovation in the market, which do not support well-functioning internal market and the competitiveness of European companies.

Buy European is problematic

It is with concern that we look at the developments in some Member States where there is a debate about the need for more protectionism against third countries. Trade with the rest of the world is a foundation for the EU, important not only for the economy but also for working towards peaceful development in the world. Protectionism leads to more expensive goods and services for both companies and consumers, reduces competitive pressure and discourages research, innovation, and development. This also applies in public procurement.

Article 25 of the classic directive (2014/24/EU) states that the WTO/GPA and other international agreements must be respected in connection with public procurement.

We are keen that these trade agreements are respected and maintained. This means that it is not permitted to demand "Buy European". Apart from the fact that it is not allowed, it would be highly inappropriate to deviate from the principles, it leads to higher costs for the taxpayers (and thus the need for higher taxes) and that we deliberately deviate from natural market economic principles that the one with the best tender should win the procurement. The latter leads to weakened competitive pressure. "Quoting in" European companies for certain procurements will not make these companies efficient, innovative or competitive.

Supplements to tenders

The principle of equal treatment and the obligation to act in an open manner prevent any negotiation (in an open procedure) between the contracting authority and a tenderer in a public procurement procedure, which means that the tender cannot in principle be changed after the that it has been submitted, either at the initiative of the contracting authority or at the initiative of the tenderer (see e.g. C-737/22).

We believe that this issue needs to be analyzed and clarified by the Commission, because an overly restrictive stance means that many tenders are rejected for small things that could easily be remedied if the supplier were allowed to supplement their tender without it coming into conflict with the principle of equal treatment and openness. The member states seem to have different attitudes to what is allowed to be supplemented.

We think a more permissive provision that accepts additions makes it easier for SME companies. We believe it should also be more explicit that it is not a unilateral decision by the procuring authority/units as to whether a supplement should be approved or not.

Abnormally low bids
On paper it may seem easy to reject low bids, in reality it is more difficult. The reason is that a supplier always has the right to price himself into the market.

We invite the Commission to analyze this in greater details considering the C-101/22 P (Commission v Supra Steria Benelux and Unisys Belgium), which gives some useful guidance in the interpretation of abnormally low bids.

First, the court notes that the analysis of whether an abnormal tender exists is done in two steps.

In the first stage, the contracting authority must only determine whether the tenders submitted contain signs that they could be abnormally low. This is especially the case when the price in a tender is significantly lower than the prices in the other tenders or the normal market price. If the tenders submitted do not contain any indication of this and thus do not appear to be abnormally low, the procuring authority may proceed with the evaluation of the tender and with the procurement procedure (p. 72).

If there are indications that a tender may be abnormally low, the contracting authority shall check the composition of the tender to ensure that it is not. To this end, the tenderer concerned must be given the opportunity to explain the reasons why it considers that its tender is not abnormally low (p. 73), in other words, the right to the adversarial procedure must be respected.

The procuring authority must then assess the explanations submitted and determine whether the tender in question is abnormally low, in which case the authority is obliged to reject it. In order to provide sufficient justification for the fact that the selected tender, after an in-depth analysis, is not abnormally low, the contracting authority must explain the reasoning that leads to the conclusion. Consideration shall be given to its mainly financial characteristics, including whether it is compatible with the legislation of the country where the services are to be performed in terms of staff remuneration, social security contributions and compliance with safety and occupational health regulations, and that it has verified that the proposed price includes all costs resulting from the tender's technical aspects (p. 74).

According to the European Court of Justice, a "detailed" justification must be given to the tenderer whose tender is not selected and who expressly requests it, about the characteristics and relative advantages of the selected tender (p. 82). It is not enough for the procuring authority to simply state that the tender selected in the award procedure is not abnormally low or to emphasize that said tender was not considered abnormally low. Furthermore, at the request of a supplier, the authority must provide information about the reasons for the decisions.

The ECJ emphasizes that the provisions aim to protect all tenderers not selected during the final stage of the procurement procedure from the arbitrariness of the contracting authority and to ensure fair competition between tenderers (p. 50). A tenderer who is not selected, and who is not in an exclusion situation and meets the selection criteria, thus has the right to request that the procuring authority state in detail the reasons why it did not consider that the selected tender was abnormally low (p. 80). See Article 84.1 c) of Directive 2014/24/EU.

Of particular interest in the case is that the court ruled that the fact that the European Commission stated the reasons for the contested decision, not to exclude a tender, only during the trial cannot compensate for the insufficient initial justification of this decision. The justification must not be given for the first time and subsequently before the court (p. 88).

Fixed price procurement

From the recital it appears that it is possible to only evaluate quality and thereby set a fixed price in the advertisement for procurement. We believe this could be useful to clarify this. We would also suggest, where there are problems with low prices, that the authority in the advertisement for procurement can stipulate a minimum price that cannot be undercut by a tenderer.

Simplifications

Proposing simplifications is difficult because all parties have to relate to the jurisprudence of the European Court of Justice, in particular the procurement cases where the court refers directly or indirectly to Articles 49 and 56 of the Treaty. In other words, if you simplify, procuring authorities and units as well as suppliers need to have a good knowledge of EU jurisprudence (including e.g. the recent caselaw of framework agreements C-216/17 and C-23/20) need to be implemented in the directives. If it instead appears from the directives, it is easier to read what applies.

Despite this, there are simplifications that can be made.

• Allow negotiated procedure without restrictions, as in the utility directive (2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sector).

• Analyze how often electronic auctions are applied. If the provision is not used, we suggest that it be removed. Our view is that this has in practice been replaced by dynamic purchasing systems.

Green public procurement

If you want to strive for simplification in the directives, our proposal is to avoid burdening the directives with environmental and social requirements as much as possible. Our basic position, as stated above, is that the directives should above all be a procedural law. Environmental and social requirements must above all be regulated in environmental and social legislation, not in public procurement. It seems that, in the lack of political action, the problems instead should be solved by public buyers. It is not a reasonable or accessible way if you want to encourage competition and more bidders. If the several thousands of procuring authorities and entities must try to come up with environmental requirements (of which they

have no in-depth knowledge), the effect is that we get thousands of unique requirements that are practically impossible to comply with for the vast majority of companies. One way to deal with the issue is to advocate industry standardized requirements.

Having said that, we would like to emphasize that innovation partnerships can be used to find new smart environmentally sustainable goods, services and contracts. We would like to see more innovation partnerships announced that are calling for solutions on sustainability issues.

Innovation partnership
According to article 31 in the classical directive the procuring authority may decide to establish the innovation partnership with one or more partners who carry out separate research and development activities. Why does the supplier have to have a separate R&D unit? Many companies are research companies or SME companies and do not separate R&D in relation to other parts of the production. We believe it would be useful to analyze and assess this in further detail.

Competitive dialogue
We believe it would be useful to analyze and assess the use and transactions costs of competitive dialogue in further detail.

Labor clauses
We are concerned about the increased political focus on tying collective agreements (or above minimum requirements) to contracts, which is a clear breach of the autonomy of social partners in several Member States. Furthermore, labor clauses impose a system of double sanctions on the contractor, both in the social partners' dispute settlement courts and the civil legal system. The recognition of the autonomy and self-government of National Systems and social partners should naturally be respected in all foreseeable future.

Procurement in the field of defense, security resilience
Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain contracts for works, supplies and services by contracting authorities and entities in the field of defense and security is partly outdated and needs to be analyzed and updated to become more compatible with the classic directive and the utility directive.

Due to the current geopolitical situation, it should be analyzed and assessed how to take into account security and resilience in classical directive. It should give due consideration to the necessity for public buyers to strengthen tools to limit risk to security. However, we still stress the importance of safeguarding free, fair and open competition.

The sector rules
There are currently about **forty** rules for decisions or have been decided on, which concern public procurement.

The problem with these is that they are not compatible with Directive 2014/24/EU Article 57 – the exclusion provisions. In the procurement directives there are provisions on, among other things, the adversarial procedure, self-cleaning and deadlines. It is unfortunate that the Commission produces legal acts that create question marks and ambiguities. We therefore call on the Commission to analyze the interplay between the procurement directives and the sectoral legal act and present a report.

In addition, we call on the Commission to analyze how the requirements found, among other things, in Article 57 can be followed up without it conflicting with the GDPR.

The comments in this position paper may be published and do not contain confidential information.

Best regards,

Ellen Hausel Heldahl
Confederation of Swedish Enterprise

Morten Qvist Fog
Danish Industry

Arnhild Dordi Gjonnes
Confederation of Norwegian Enterprise

Annaliisa Oksanen
Confederation of Finnish Industries