

## Strategic public procurement: quality services for citizens as a tool for industrial policy

### The power of public procurement.

Public procurement represents 14% of EU GDP. Many public purchases concern goods produced or services delivered by industries in the remit of industriAll Europe: office equipment, equipment for the health sector, transport equipment, building maintenance, paper and printing services, wood products, clothing and other textiles, energy (production, heating and cooling), construction (materials such as steel or glass, insulation), ICT products and services. Therefore, public procurement should become a key element of any industrial policy strategy for many sectors covered by industriAll Europe. Indeed, public procurement can be an important lever to support investments in the real economy, stimulate demand for innovative products, pursue industrial policy objectives, create quality jobs or promote the transition to a resource and energy-efficient circular economy. The demand-pull from the public sector is a most important instrument to develop new markets for new products and services as public buyers can be important launching customers.

The high economic importance of public procurement gives the public sector a significant market power that can also be used for wider societal and political purposes, besides the provision of high-quality public services to citizens. Indeed, public procurement could support broader societal goals by procuring goods and services that foster innovation, respect the environment, combat climate change, improve social conditions, support industry and employment. In this way public procurement contributes to the implementation of SDG 12 on the promotion of sustainable consumption and production (especially SDG 12.7 on the promotion of sustainable public procurement procedures). In addition to the significant environmental role of public procurement there has also been a growing policy interest for promoting social policy considerations in taking public procurement decisions. Socially responsible public procurement can be a lever in support of employment opportunities (for youth, migrants, disabled persons), decent work, compliance with social and labour rights (equal opportunities, collective agreements), social inclusion (promoting sheltered workshops or social enterprises), fair trade, commitment to CSR.

Over time the rules governing public procurement have been adapted to the evolving needs of societies and accordingly, the focus of public procurement has been widened and public procurement procedures have been rendered more sophisticated. In the EU the rules governing public procurement were originally designed to create an internal market for public procurement, to foster competition, to allow for open and transparent procedures, and to arrive at the technically and financially optimal solution (while also trying to frustrate subjective decisions depending on the personal connections and interests of decision makers). They also aimed to further the opening of national procurement markets to European-wide competition, to eliminate “buy national”-policies and to promote free trade. Derived from the Treaty provisions, several general principles have entered the public procurement scene such as equal treatment, transparency, proportionality and non-discrimination.

Traditionally, the most important award criterion has been the price, which can easily be communicated and compared between tenderers. This also helps to meet one of the chief objectives of contracting authorities: to provide the required goods and services at minimum cost.

### Recent history

The purpose of EU procurement rules, underpinned by the Treaty, is to open the public procurement markets and to ensure the free movement of goods and services within the EU. They also reflect and support the

value for money principle which requires that all public procurement must be based on the best mix of quality and effectiveness for the least outlay.

As an outgrowth of the “EU 2020”-strategy for smart, sustainable and inclusive growth (2010), the EU has started to address not only economic objectives, but also social and environmental goals as well as innovation aspects. In this respect the Commission stressed the importance of “greener” public procurement to support the shift towards a more resource-efficient and low-carbon economy. In the resulting flagship initiative “An industrial policy for the globalisation era” the Commission proposed a modernisation of public procurement as part of a renewed approach of horizontal industrial policy. It resulted in a Green Paper on the modernisation of public procurement (January 2011) and concrete proposals in the 2012 communication on industrial policy called ‘A Stronger European Industry for Growth and Economic Recovery’.

In 2014 the revision of the Unions’ public procurement legislative framework was concluded. The new directives (replacing the 2004 directives) provide the member states with the tools to modernise public buying, creating a culture of integrity, digitally transforming public procurement (over the full cycle of the procurement process) and moving from simply regulating public procurement to implementing strategic public procurement. The modernised directives introduced new elements in the following areas:

- promoting sustainable development by:
  - o introducing the notion of life-cycle costing (which not only covers the costs borne by the contracting authority or other users, but also external costs related to environmental factors);
  - o promoting eco-innovation by requiring bidders comply with environmental labels
  - o supporting social responsibility in public procurement: social inclusion, respect for social and labour laws, transparency in the supply chain.
  
- supporting innovation by:
  - o introducing the new ‘competitive procedure with negotiation’. This procedure requires authorities to engage with suppliers for purchases which require a negotiation on desired solutions for contract award. The use of this procedure is justified based on the complexity or the legal and financial make-up of a project, or if the product/service cannot be purchased ready-made off the shelf;
  - o promoting “innovation partnerships” for purchases of goods/services that are not available on the market yet (pre-commercial procurement): structured partnership between tenderers and authorities will allow for R&D, pilots and the purchase of new products/services/work. It involves risk and benefit sharing.
  
- modernising the rules: eProcurement will be generalised and become mandatory; faster, less costly and with more flexible procedures; creating a culture of integrity;
  
- easing access for SMEs (e.g. option for dividing tenders into lots, simplification of procedures).

But the most important novelty of the updated directives is the introduction of the MEAT (Most Economically Advantageous Tender) principle as part of the award criteria. Contracting authorities will have the choice between the most economically advantageous tender or the lowest “cost” as a basis. MEAT is a method of assessment that allows authorities to award contracts on aspects other than just price. It is based on the integration of non-price criteria into the tender specifications such as quality, life-cycle costing, technical merit, social, innovative and environmental characteristics, with each of them given a relative weighting. In this way, MEAT gives member states the possibility of choosing the best price-quality ratio, to spur eco-innovation, and to address societal challenges by choosing socially responsible goods. Nevertheless, the MEAT-principle also requires that price/cost considerations be part of the award criteria, while “lowest-price awards” are ever possible.

The new rules were officially introduced in April 2016 (after the transposition of the Directives into national law). To support the application of the new rules in practice, the Commission presented in 2017 the communication ‘Making public procurement work in and for Europe’ in which it identified six priorities for action: ensuring systematic application of strategic public procurement, professionalising public buyers, improving

access to procurement markets for SMEs, increasing transparency, integrity and better data, boosting the digital transformation of procurement, cooperating to procure together.

IndustriAll Europe welcomed the new directives and related communications as they provide an updated toolbox enabling member states to make more efficient and strategic use of public procurement. In this respect the main achievement of the new directives on public procurement and the introduction of the MEAT-principle is undoubtedly the integration of all the various strands of strategic public procurement: environmental aspects (green public procurement), social aspects (socially responsible public procurement), industrial policy objectives (innovation, life-cycle costing). However, today there is no clear picture or full overview of how the directives are transposed and implemented in the different member states.

## A myriad of challenges.

Although the new directives came into force in 2016, to date the use of strategic public procurement is still quite limited in scale across Europe. MEAT-tenders based on a cost effectiveness approach that may include social, environmental, innovative, life cycle-based criteria are still limited. This has many explanations:

- **Strategic public procurement is a much more demanding and complex procedure** than just looking at the lowest price. Strategic public procurement affects all stages of the public procurement cycle: identification of needs, engaging with providers of innovative solutions (often at a pre-commercial stage), measuring carbon footprint/ performance or social impact of proposed solutions, qualitative assessments, follow-up throughout the life-cycle of the assets bought. It needs to be supported by exchange of good practices, guidance, methods for life-cycle calculation, setting standards, benchmarks and criteria. Therefore, strategic public procurement is very challenging in terms of technical implementation and requires a high level of ambition and commitment of politics, administrations and businesses
- **It is much easier to buy already existing products at the lowest price**, while strategic public procurement represents also a greater workload for public procurers. Contracting authorities tend to rely on traditional procurement processes which rest on competition and price and they are reluctant to exhaust the possibilities provided by the directives. Off-the-shelf public procurement is a relatively straight-forward process as compared with strategic public procurement which may demand advanced technical skills and insights in rather complex solutions.
- Strategic public procurement is often **perceived as more expensive** because of greater up-front expenditures while the available budgets are by definition limited (especially in times of austerity).
- **Public procurement is often treated as a purely financial and administrative task** which is hard to align with broader policy objectives. Purchase units are often disconnected from policy objectives and the departments dealing with sustainable development, social policies, innovation. Often, they lack awareness, knowledge and experience with innovations and new technologies.
- Strategic public procurement is **inherently riskier** as it involves purchasing goods and services that have limited testing on the market, while risk-aversion holds back the buying of innovative solutions from companies public buyers are not familiar with
- The **strong fragmentation of public procurement markets** is hindering a strategic approach
- The introduction of non-price criteria creates more room for discretion for authorities which could negatively impact **the integrity of tender procedures** as well as the costs of their administration (especially in countries where there are already shortcomings in the proper functioning of the public procurement system).
- There are also **legal uncertainties** related to the application of strategic criteria (e.g. environmental criteria) which may not comply with European law (this will require European harmonisation of this criteria).

## Our vision

IndustriAll Europe fully supports the use of public procurement as a strategic tool for good governance and therefore supports the integration of secondary policy objectives (innovation, green growth, investments, social objectives) into public procurement as a policy lever, in addition to the primary procurement objective (which is providing high quality services to citizens). Therefore, industriAll Europe welcomes the integrated approach of the Commission which includes innovative, green or social criteria at every stage of the procedure. This will definitely lead to better results.

In order to create the right conditions to promote the wider uptake of strategic public procurement, industriAll Europe proposes the following:

1. Authorities should **set targets** for the share of strategic public procurement to signal its priority and to raise awareness and to promote a more systematic application of the MEAT-principle. These targets can be voluntary or mandatory, specific for certain sectors or products, or just operational (e.g. training of procurement staff). Those sectors where the impact of strategic public procurement is most effective, should be prioritised.
2. Make the most of the potential of public procurement for the development and market take-up of new/better products by authorities acting as **launching customer** (creation of lead markets). In this respect **the use of alternative procedures** such as the ‘competitive procedure with negotiation’ or the ‘innovation partnerships’ needs to be promoted.
3. **Systematically mainstream** strategic public procurement into overall policies/the management of funds to avoid it remaining an isolated policy
4. **Increase the use of life-cycle costing** as for many products costs incurred during use and disposal can be significant.
5. Develop (and use) **clear and ambitious European-wide environmental criteria** for products and services (i.e. the EU Eco-label, the Ecodesign directive). These criteria provide bidders with harmonised information about the award criteria and the intentions of the contracting authorities. They can be formulated as minimum technical requirements that all bids have to comply with or as non-mandatory environmental award criteria to stimulate additional environmental performance
6. **Pay special attention to the social dimension of public contracts in order to avoid social dumping and to ensure workers’ rights are respected**
  - a. In order to remove labour costs being used as an element of competition among bidders, all bidders (also subcontractors as well as for concessions) must respect locally established minimum standards regarding labour costs and standard clauses in public contracts must ensure that wages and working conditions are not less favourable than those established for the same work in the area where the work is being done by collective agreement, national laws or regulations (ILO Convention 94)
  - b. Closely monitoring (and exclusion) of “abnormally low bids” because they do not comply with obligations in the field of social and labour law or environmental laws
  - c. All along the subcontracting chain sustainability conditions, labour rights and collective bargaining agreements need to be respected (by holding the main contractor responsible). Cascaded subcontracting should be restricted.
  - d. In order to create a fair level playing field reference should be made to the respect of international labour and environment convention.
  - e. Mandatory exclusion of bidders in case of non-compliance with social, labour or environmental law
7. In general public procurement should foster the **European social model** by the inclusion of social criteria. The consideration of social criteria should become a core principle in a contemporary public procurement policy. Socially responsible procurement may include a wide range of issues: decent

work, employment opportunities, respect for social and labour rights, social inclusion, CSR, ethical trade

8. Public procurement is a key economic activity of governments that is particularly vulnerable to mismanagement, fraud and corruption. This holds even more for strategic public procurement which is much more complex and creates more room for contracting authorities to misuse their discretion or applying discrimination. To support **the integrity of the procurement process**, it is needed to establish robust checks and balances and appropriate risk assessment tools to identify and address threats to the proper function of the public procurement system, ensure that internal and external controls and audits are coordinated and sufficiently resourced
9. Increase the capabilities of the public sector to negotiate with the private sector. As a result of austerity and privatisation the capacity of public organisations to be strong procurement actors has been weakened. This means developing **professionalism** and increasing the **technical ability of procurers** to deal with strategic public procurement (by increasing their skills, exchange of good practices, a network of national public procurement centres, improving their market knowledge, helpdesks, manuals, templates, guidelines, technical assistance (e.g. the ex-ante assessment of large infrastructure projects))
10. **Increase transparency and reduce complexity**
  - a. Reduce complexity by introducing common standards, clear regulations and standardised procedures at EU level to avoid the risk to distort competition (followed by lawsuits)
  - b. Strive for a **rapid digital transformation** of the procedures. This would facilitate automatic data collection and monitoring, increase transparency and ease contract management
  - c. Promote the establishment of **publicly accessible contract registers**
  - d. **Monitor and assess consistently** the results of the procurement process and develop indicators to measure performance, effectiveness and savings of the public procurement system. As comprehensive data on the purchases of the public sector are often lacking, it would be appropriate to set up a European system and methodology to gather standardised and harmonised data
11. **Better coordination and communication** between states, cities and regions can be a driver to carry out more efficient processes. Joint procurement provides economies of scale and reduces procurement costs, will allow to achieve savings, through bulk buying, reduced administrative costs, and pooling knowledge (environmental, technical, market)
12. An **international level playing field is needed**
  - a. Rapid adoption of the 'international procurement instrument' as this instrument would allow, if discrimination of EU companies in procurement markets is proven, to consider goods and services from the country concerned as offering a higher price (up to 20% more) than the one they have put forward, thus providing European goods and services a competitive advantage
  - b. Encourage non-EU countries to sign-up to the plurilateral WTO Agreement on Government Procurement
  - c. Improve access to third-country public procurement markets based on reciprocity. Indeed, 85% of the European public procurement market is open to outside bidders in comparison with 32% in the US and 28% in Japan (Commission Press Release, Frequently asked Questions, 21 March 2012). The markets in emerging countries continue to be closed.
13. The award criteria should take into account the **share of added value that is generated inside the EU**. In this respect member states should make use of the possibility to reject bids if more than 50% of the value added is outside the EU.
14. Finally, **restore the share of public investments** to its historical level (2,1% today, 2,5% before the financial crisis and 4,5% historically)

## Conclusion: make public procurement a fully-fledged tool for industrial policy.

For industriAll Europe strategic public procurement has the potential to steer markets towards higher quality in terms of environmental or social standards or innovative products, while at the same time underpinning Europe's industrial policy strategy. It allows to reconcile the principles of free trade and the internal market with new areas of public policy such as the environment, innovation, social conditions. It should bring together smart contractors and smart suppliers. This means that public authorities should move away from the lowest price criterion to increase the share of strategic public procurement based on the MEAT-principle, a better use of the pre-procurement phase and promotion of the new innovation partnership procedure.

Yet, the instrument is not being utilised to its full potential. Too often public procurement is seen as an administrative obligation or a back-office function. Too often the notion of "value for money" is reduced to "cheapest price". Therefore, industriAll Europe insists on creating the necessary political will, to raise awareness of all procurement staff (as well as those that will be affected) and to develop the necessary supportive tools in order to foster the systematic use of strategic criteria that are transparent, ambitious and feasible at the same time. Strategic public procurement could be a powerful tool for driving markets towards more sustainable production and consumption patterns and to deliver on the goals governments are pursuing on behalf of their citizens: good jobs, low-carbon transition, innovation to address societal challenges.