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NOTE

from: General Secretariat
to: Working Party on Public Procurement

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Subject: Proposal for a Directive of the European Parliament and of the Council on
public procurement
- Cluster 5: SME Access

Delegations will find in the Annex a non-paper prepared by the Commission services (DG Internal Market) on Cluster 5 of the above proposal.

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Cluster 5

SME access

Changes to the substance are highlighted in **bold**; minor modifications or purely linguistic adaptations are not highlighted.

1. Division into lots

Article 44

Division of contracts into lots

1. Public contracts may be subdivided into homogenous or heterogeneous lots.

This paragraph clarifies the existing possibility to split contracts into lots, including that fact that lots may be homogenous (purely quantitative splitting of the purchased good, works or service, e.g., 3 lots of 500 identical supplies) or heterogenous ("thematic" lots with different purchases, e.g. one lot for planning of a building, one lot for the construction, one lot for interior design, etc.).

For contracts with a value equal to or greater than the thresholds provided for in Article 4 but not less than EUR 500 000, determined in accordance with Article 5, where the contracting authority does not deem it appropriate to split into lots, it shall provide in the contract notice or in the invitation to confirm interest a specific explanation of its reasons.

This provision aims at incentivising splitting into lots (generally considered an efficient measure to enhance SME participation in public contracts) for high-value contracts, through an "apply or explain" rule: Where contracting authorities do not split such a contract into lots, they have to provide an explanation for this choice.

This provision does not establish any obligation to split into lots, nor any judicial control of the reasons put forward by the contracting authority; it simply aims at obliging contracting authorities to at least consider a splitting into lots.

The explanations indicated in the contract notice will also help to assess, in the context of future policy work, in which cases splitting into lots is a useful instrument and in which situations it is not appropriate.

Contracting authorities shall indicate, in the contract notice or in the invitation to confirm interest, whether tenders are limited to one or more lots only.

Already today, contracting authorities are free to limit participation to one or several lots per economic operator; they may have a legitimate interest to avoid having only one supplier for all the lots (maintain a broader supplier base to avoid emergence or strengthening of dominant suppliers; concerns of security of supply, ...).

Under the current Directives, this possibility appears only from the rules on the information to be included in notices (see Annex VII A, CONTRACT NOTICES, point 7). For reasons of legal certainty and clarity, it seems appropriate to include this rule explicitly in the text of the Directive.

- 2. Contracting authorities may, even where the possibility to tender for all lots has been indicated, limit the number of lots that may be awarded to a tenderer, provided that the maximum number is stated in the contract notice or in the invitation to confirm interest. Contracting authorities shall determine and indicate in the procurement documents the objective and non-discriminatory criteria or rules for awarding the different lots where the application of the chosen award criteria would result in the award to one tenderer of more lots than the maximum number.**

This rule gives an additional instrument to contracting authorities to refine their procurement strategy.

Instead of limiting from the outset the possibilities to tender to one or several lots (as indicated in paragraph 1, in fine), contracting authorities may also let all economic operators tender for all lots, but limit the number of lots that may be eventually awarded to one single tenderer (e.g., maximum 3 lots out of 5).

In order to guarantee a transparent and fair award procedure, contracting authorities must indicate beforehand the criteria on the basis of which they will decide which lots will be "cut off" if one operator presents the best offer for more lots than the maximum number set beforehand (e.g., a ranking of the lots in order of preference by the economic operators themselves).

Example

Total number of lots: 5

Maximum number of lots to be awarded to one single tenderer: 3

Objective criterion: Ranking by tenderers

If tenderer A indicates his order of preference as follows: Lots 3, 4, 1, 2, 5 and presents the best offer for lots 4, 1, 2, 5, he will be awarded the contracts for the three lots 4, 1 and 2. Lot 5 will be awarded to the tenderer presenting the second best offer for lot 5. Lot 3 will of course be awarded to the tenderer presenting the best offer for lot 3.

- 3. Where more than one lot may be awarded to the same tenderer, contracting authorities may provide that they will either award a contract per lot or one or more contracts covering several or all lots.**

Contracting authorities shall specify in the procurement documents whether they reserve the right to make such a choice and, if so, which lots may be grouped together under one contract.

Contracting authorities shall first determine the tenders fulfilling best the award criteria set out pursuant to Article 66 for each individual lot. They may award a contract for more than one lot to a tenderer that is not ranked first in respect of all individual lots covered by this contract, provided that the award criteria set out pursuant to Article 66 are better fulfilled with regard to all the lots covered by that contract. Contracting authorities shall specify the methods they intend to use for such comparison in the procurement documents. Such methods shall be transparent, objective and non-discriminatory.

Splitting contracts into lots should not entail ultimately higher prices being paid by contracting authorities. Contracting authorities should therefore have the possibility to award a single contract for several lots or even all lots if they receive a global offer for these grouped lots which is cheaper (or in the case of MEAT, "better") than the sum of the best offers for each lot.

This allows contracting authorities to reap the full benefits of possible economies of scale that economic operators could pass on when being awarded a contract for several or all lots.

Of course the possible use of this tool must be indicated beforehand in the procurement strategies, so that economic operators can adapt their tendering strategies accordingly (subparagraph 2).

Where the contract is based on the criterion of the most economically advantageous offer, the "adding up" of the offers for the individual lots, in order to compare them to the overall offer for the grouped lots, may be more complex than in cases where the award is based on the sole price or cost criterion. It is therefore indispensable that an objective and non-discriminatory method for this comparison is clearly indicated in the procurement documents as well (subparagraph 3).

Example

Contract split into 3 lots.

Winning bid for lot 1 (tenderer A): 200 000 EUR; winning bid for lot 2 (tenderer B): 150 000 EUR; winning bid for lot 3 (tenderer B): 250 000 EUR (sum: 600 000 EUR).

At the same time, tenderer A offers to perform all the three lots for only 525 000 EUR.

Hence the contracting authority will be allowed to award all three lots to tenderer A (if possible use of this possibility announced beforehand).

- 4. Contracting authorities may require that all contractors coordinate their activities under the direction of the economic operator to which has been awarded a lot involving the coordination of the entire project or its relevant parts.**

The subdivision into lots can be a source of complexity for the management of the contract by the contracting authority; the proposal now explicitly mentions the (existing) possibility that contracting authorities "outsource" the coordination function via a separate "coordination lot".

2. Direct payments for subcontractors

Article 71

Subcontracting

[Directive 2004/18/EC: Article 25]

1. In the procurement documents, the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in its tender any share of the contract it may intend to subcontract to third parties and any proposed subcontractors.
- 2. Member States may provide that at the request of the subcontractor and where the nature of the contract so allows, the contracting authority shall transfer due payments directly to the subcontractor for services, supplies or works provided to the main contractor. In such case, Member States shall put in place appropriate mechanisms permitting the main contractor to object to undue payments. The arrangements concerning that mode of payment shall be set out in the procurement documents.**

Bad payment practice by prime contractors is a serious concern in particular for SMEs, that often participate in public procurement as subcontractors. To remedy this problem, the proposal now explicitly enables Member States to foresee direct payments to subcontractors.

This instrument is optional for Member States. No specific rules are set out for the implementation, except for the obligation to indicate the modalities of such direct payments beforehand in the procurement documents, and a basic safeguard for the rights of the prime contractor, who must be given the possibility to object undue payments, to avoid loss of receivables.

For the rest, the implementation will be governed entirely by national contract law.

3. Paragraphs 1 **and** 2 shall be without prejudice to the question of the principal economic operator's liability.

3. Turnover cap

Article 56

Selection criteria

[...]

3. With regard to sufficient economic and financial standing, contracting authorities may require economic operators to have adequate financial and economic capacity. For that purpose, they may require that economic operators have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract and an adequate professional risk indemnity insurance. [Discussed in cluster 3]

The minimum yearly turnover shall not exceed three times the estimated contract value, except in duly justified circumstances relating to the special risks attached to the nature of the works, services or supplies. The contracting authority shall indicate such exceptional circumstances in the procurement documents.

Experience shows that contracting authorities often set turnover requirements which are disproportionate to the value of the actual contract and the risks at stake. Such disproportionate turnover requirements narrow down the number of selected candidates and are particularly detrimental to SME participation.

The current, more general principle of proportionality of selection criteria in Article 44 (2), 2nd sentence, is not sufficient to remedy this problem; the principle needs to be translated into an easily applicable number.

It is therefore proposed to clearly state the principle that turnover requirements shall not exceed 3 times the yearly contract value. (The following subparagraphs 3 and 4 of Article 56.3, already included in Cluster 3, explain how this cap must be calculated in cases of lots and framework agreements*).

In certain, exceptional cases where the contracting authority has legitimate need of particularly high security of supply and the supplier cannot be easily replaced (e.g. sensitive IT structures, basic public services), higher turnover requirements may however be justified in order to better secure the contracting authority against a default of the supplier.

*[Where a contract is divided into lots this Article shall apply in relation to each individual lot. However, the contracting authority may set the minimum yearly turnover by reference to groups of lots for the event that the successful tenderer is awarded several lots to be executed at the same time.

Where contracts based on a framework agreement are to be awarded following a reopening of competition, the maximum yearly turnover requirement referred to in the second subparagraph of this paragraph shall be calculated on the basis of the expected maximum size of specific contracts that will be performed at the same time, or, where it is not known, on the basis of the estimated value of the framework agreement.]