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**18 April 2011**

Dear Sir/Madam

**FSB response to:**

**CONSULTATION ON THE MODERNISATION OF EU PUBLIC PROCUREMENT POLICY**

The Federation of Small Businesses (FSB) would like to take the opportunity to respond to the above-named consultation.

The FSB is the UK's leading business organisation. It exists to protect and promote the interests of the self-employed and all those who run their own business. The FSB is non-party-political and, with 210,000 members, it is also the largest organisation representing small and medium-sized businesses in the UK.

Small businesses make up 99.3 per cent of all businesses in the UK, and make a huge contribution to the UK economy. They contribute up to 50 per cent of GDP and employ over 59 per cent of the private-sector workforce.

The FSB is looking forward to the review of EU procurement rules. We think that the current rules are too strict and we would welcome more practical and flexible rules, rather than the complex regime that is in place now. However, more flexibility should be coupled with a higher level of transparency.

Please find below our response to questions 44–52 and 100–102.

We trust that you will find our comments helpful and that they will be taken into consideration.

Yours sincerely

Tina Sommer

Chairman for EU and International Affairs

Federation of Small Businesses



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# **FSB response to the Commission consultation on the modernisation of EU public procurement policy**

**April 2011**



## CONSULTATION ON THE MODERNISATION OF EU PUBLIC PROCUREMENT POLICY

In general, we think the thresholds for public tendering should be raised significantly. This would allow for greater flexibility within procurement processes, which should in turn reduce bureaucracy. Red tape resulting from strict rules for authorities is often passed on to bidding companies. In addition, the current level of the threshold can lead to artificial packaging of contracts in order to get round the limitations imposed by the thresholds.

We acknowledge that higher thresholds will mean reduced safeguards. Therefore, they should be met by greater transparency requirements for public contracts, and contracting authorities should be required to apply the European Code of Best Practices, facilitating access by small businesses to public procurement contracts.

### Question 44

**Do you think that contracting authorities should have more opportunity to exert influence on subcontracting by the successful tenderer? If yes, which instruments would you propose?**

First, if contracting authorities are to have more opportunity to exert influence on subcontracting, it should be through payment procedures. The policy instrument we envisage would be the inclusion of a clause in the contract with regard to payment. Introducing a clause into all European, national, regional and local government contracts would guarantee that the speedy fashion in which Government pays the lead contractor is passed down the chain to all subcontractors. This would help the cash flow of small subcontractors and reassure small businesses that they will be paid on time. Where lead contractors are failing to adhere to the social clause and paying subcontractors late, they should be fined and given warning that persistent failure will lead to loss of contracts in the future. While this will not completely stamp out the late payment problem, it would slowly help to change the behaviour of businesses.

Secondly, we are not in favour of *imposing* sub contracting. However, we have the following suggestions for non-binding instruments:

- Use portals to advertise sub-contracting opportunities;
- Hold market awareness days (similar to Meet the Buyer – but more focused on contracts);
- Insist on subdividing into smaller lots;
- Encourage SMEs to bid as a group;
- Sub-contractors – commit to certain level of local sub-contracting;
- Social clauses ie. Leading to local employment of suitable unemployed, young people, etc.;
- Payment clause – ensure sub-contractors are paid with the same speed in which the contracting authority pays the lead contractor.

### Question 47

In 2008 the Commission published a European Code of Best Practices facilitating access by small businesses to public procurement contracts. The code points out the possibilities in the directives for enhanced access for small businesses to public procurement. For example:



- Subdividing contracts into lots;
- Select multiple contractors;
- Allow contractors to bid as a group;
- Improve visibility of opportunities;
- E-procurement;
- Training for small businesses and procurers;
- Keeping selection criteria proportionate;
- Proportionate financial guarantees;
- Output-based specifications.

**Would you be of the opinion that some of the measures set out in the Code of Best Practices, such as subdivision into lots, should be made compulsory for contracting authorities (subject to certain caveats)?**

The 2008 Code of Best Practices is largely ignored in the UK. Although compulsion in these matters looks to be impracticable, it might be possible to require authorities to demonstrate that they have complied with the code to the extent that was practicable in the circumstances of the tender. For example, the subdivision into lots of an IT contract is much less feasible than it would be for a contract for a major building project. There are a number of examples where tenders have been subdivided yet preference is still given to one supplier who wins all the lots.

#### **Question 48**

**Do you think that the rules relating to the choice of bidder entail disproportionate administrative burdens for SMEs? If so, how might these rules be amended without jeopardising guarantees of transparency, non-discrimination and high-quality implementation of contracts?**

It should be open to each authority to choose the process by which they qualify bidders in the individual circumstances of the bid, provided that it can be shown to comply with the obligations of transparency and non-discrimination. External imposition of rules is inevitably suboptimal and reduces value for money for the taxpayer.

To increase access for small businesses to the selection process, the following could be done:

- Promotion of, and easier access to, existing advice and support services;
- Easy-to-find information on tenders;
- Free access to websites where public contracts are advertised;
- A single website where public contracts are advertised;
- Authorities could consider how they can make their procurement processes more straightforward and streamlined;
- Information provided by bidders should be logged so that there is no need to provide it again in future bids;
- Contracting authorities should demonstrate better responsiveness (allow ample response time, updates on the process, transparency, constructive feedback);
- Contracts should include outcome-based tender specifications.



#### **Question 49**

**Would you be in favour of a solution that would require submission and verification of evidence only by shortlisted candidates/the winning bidder?**

The FSB would be in favour of a solution that would require submission and verification of evidence only by shortlisted candidates. However, it should be made very clear that being unable to provide evidence when asked could lead to penalties.

We should also bear in mind that for many SMEs, they will need to find a way to be able to compete and differentiate themselves at the PQQ stage. So they should be able to provide sufficient evidence at the PQQ stage to achieve this.

#### **Question 50**

**Do you think that self-declarations are an appropriate way to alleviate administrative burdens with regard to evidence for selection criteria, or are they not reliable enough to replace certificates? On which issues could self-declarations be useful (particularly facts in the sphere of the undertaking itself) and on which not?**

Self declaration should be possible on the accuracy of their

- Financial information;
- References and testimonials;
- And capabilities and resources.

#### **Question 51**

**Do you agree that excessively strict turnover requirements for proving financial capacity are problematic for SMEs? Should EU legislation set a maximum ratio to ensure the proportionality of selection criteria (for instance: maximum turnover required may not exceed a certain multiple of the contract value)? Would you propose other instruments to ensure that selection criteria are proportionate to the value and the subject matter of the contract?**

Excessively strict turnover requirements for proving financial capacity are a huge barrier to SMEs (or, more specifically, Micro and Small Enterprises) in bidding, and are often out of proportion to the risk involved. Nevertheless, the FSB recognises that certain requirements with regard to turnover are in some cases necessary. For some situations having a turnover percentage can be helpful to the SME, so that they are not overwhelmed by winning too large a project.

However, financial guarantees should be proportionate to the value of the bid. We would not like to suggest a percentage, as the same number would not fit all contracts. For example, there is a difference in risk level between a contract to develop software and a contract for building a bridge. Therefore, we do not want to see nominal turnover requirements imposed on contracting authorities. However, we would



welcome a requirement for authorities to demonstrate that they had complied with the European Code of Best Practices, which should contain a provision on proportionality.

#### **Question 52**

**What are the advantages and disadvantages of an option for member states to allow or to require their contracting authorities to oblige the successful tenderer to subcontract a certain share of the main contract to third parties?**

A requirement for subcontracting is not always necessary. If contracting authorities are to have more opportunity to exert an influence on subcontracting, it should be in relation to payment (see Question 44). It is more important to look at how the bidder winning the contract is treating its subcontractors.

However, there are good examples, for example Transport for London and others have very good subcontracting practices. There are a lot of PQQs specifically for suppliers for their sub-contracting policies. So if the prime contractor has a robust sub-contracting policy, they should be able to implement it.

There are also bad examples. For example, there is evidence of some organisations (particularly in property maintenance) placing low bids in order to 'buy' business. They then squeeze their small subcontractors by offering contracts on a 'take it or leave it' basis, or by delaying payment for months, after which they offer to settle with a significant settlement discount. This practice shows that a social clause is vital in subcontracting arrangements in order to prevent damage to smaller subcontracting companies.

Procurement rules should be flexible enough to allow and stimulate subcontracting where possible, but should not become a requirement. Instead, subcontracting needs to be addressed in the Code of Best Practices.

#### **Question 100**

**Do you share the view that procurement markets are exposed to a risk of corruption and favouritism? Do you think EU action in this field is needed, or should this be left to member states alone?**

Favouritism is a problem, and the best way to combat it is through transparency measures. Contracting authorities should be completely open about whom they gave the contract to and why. Businesses that think they could have offered better value can then challenge the contracting authorities.

Small businesses, however, will have fewer resources to submit a complaint and challenge a contracting authority through to the end. One option is that the relevant public-sector ombudsman be charged with the task of challenging contracting authorities on their behalf after a valid complaint is submitted and upheld.

SMEs get really concerned when they see very short time-scales e.g. for responding to bidding processes. This creates an impression that the preferred supplier is already decided. As a result procurers may not get the best value solutions. There is also ample evidence (OGC reports) to suggest that incumbent suppliers



do not necessarily provide best value. We have also seen recent situation (Housing Associations) where favourite large company suppliers have been awarded contracts – even when they are known to be in financial difficulties and have subsequently gone into administration eg.

**Question 101**

**In your view, what are the critical risks for integrity at each of the different stages of the public procurement process (definition of the subject matter, preparation of the tender, selection stage, award stage, performance of the contract)?**

For many procurement teams there is still considerable secrecy concerning evaluating the bids (PQQ and ITT stage). Often the teams refuse even to provide appropriate data during the standstill period.

**Question 102**

**Which of the identified risks should, in your opinion, be addressed by introducing more specific/additional rules in the EU public procurement directives, and how (which rules/safeguards)?**

We don't think the risks should be addressed by introducing more specific/additional rules into the EU public procurement acquis. Again, more transparency is the answer, as well as visible adherence to the Code of Best Practices.



## **Conclusion**

With regard to the review of EU public procurement rules, the FSB is of the opinion that the Commission should look at how procurement rules can be made more flexible. Less regulation and 'more market' should modernise public procurement within the EU. Instead of strict rules, strong transparency requirements and a sound Code of Best Practices should be adequate to correct the market. For small businesses, an ombudsman could act as an intermediary should procurement decisions be challenged.

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## **For further information**

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