

ENNA Position Paper

Public Procurement Policies in Europe Making it easier to achieve social impact



ENNA Position Paper - Public Procurement Policies in Europe, Making it easier to achieve social impact:

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Who we are

The European Network of National Civil Society Associations (ENNA) was founded in Belgium in 2011, following a series of successful transnational projects led by its founding members. The young network brings together national associations, platforms, umbrella, and civil society support structures spread across 21 European countries that are members of the European Union (EU), the European Economic Agreement (EEA) area, or applying to the EU. Our members represent an estimated 80.000 local, regional, and national civil society organisations.

ENNA's mission is to support our members to develop their activities and better support their own grassroots members by influencing favourably the environment in which they work. Each civil society organisation (CSO) operates in an environment which is affected by legal and policy frameworks set by government, funding realities influenced by a number of revenue sources, and societal expectations about the role CSOs play in contributing to society.

ENNA's role is to ensure that at the European level, a supportive environment is created by EU laws and funding, and that best practice and initiatives are better disseminated. To be able to influence the complex machine that is Europe, our members have chosen to cooperate so that a common perspective and joint strategies can be developed. Consequently, one of our core missions is to support our members in reaching a common voice, so that our shared experiences and views can better inform EU decision-makers. This common voice is expressed through our position papers.

Scope of the position paper

This position paper outlines the views of our working group on procurement following a close study of the European Commission's proposals to revise the European public procurement legal framework. Our position paper also takes into consideration the proposals outlined by the European Parliament's rapporteur.

The paper limits itself to commenting the Commission proposal and the rapporteur's observations and amendments from the perspective of our membership base: not-for-profit civil society organisations that fulfil key societal roles on a daily basis.

ENNA has a critical role to play in assisting to capture local, regional, and national cases where public procurement has been used inappropriately but also exploring what forms of legal advice, training, clarification and reassurance that could be brought to bear to assist changes to practice on the ground. It outlines remedies to the unexpected side-effects created by overly cautious implementations of the legal framework and the adoption of approaches that effectively disqualify small, local community organisations from benefiting from calls for tenders.

ENNA welcomes the Commission's proposals revising public procurement

ENNA welcomes the European Commission's proposals for the new Public Procurement Directives, published on 20 December 2011. It is useful to remember that public procurement was established primarily as a means of encouraging the development of a single market driven by the ethos of fairness, open competition as a means to drive down costs; it was never intended to regulate the delivery of services of general social interest. Nonetheless, we understand the need for a pragmatic approach to the current proposals to review the framework and that the proposals precisely aim to rebalance the situation. We believe the proposals reflect many of the concerns highlighted by civil society organisations in the consultation phase throughout 2011, and will provide much-needed improvements to current procurement procedures undergone by civil society organisations in the delivery of public services.

Public procurement is a rapidly changing field, and the review has provided a major opportunity for civil society to become more involved in the direct delivery of public services. This is reflected in European legislation focus from competition and corruption issues, and looking towards opportunities for innovation and positive social and environmental impact through public contracts.

In keeping with the European Parliament's rapporteurs approach, the paper groups its comments on the basis of thematic clusters that is helping to inform the drafts of the European institutions.

CSO perspectives within the thematic clusters

1. Cluster 1 - "Wider choice of procedures"

We support proposals that encourage the use of negotiated procedure

Negotiated procedure is especially valuable in designing welfare service provision, of which many civil society organisations are involved. In current practice, the negotiated procedure is often under-used, especially in the procurement of health and social services.

In the past, many CSOs delivered services on a grant-operated basis, relying on key stakeholder relationships with public authorities and the local communities. As these services are increasingly procured, voluntary organisations need technical support to better navigate the new contractual landscape, and effectively engage with processes such as the negotiated procedure in order to successfully bid for contracts.

We are concerned about proposed shortened time limits

Most civil society organisations are characteristically SMEs and therefore shorter deadlines are habitually unrealistic when considering reduced workforce capacities to complete quality submissions within tight timeframes.

Within the current regime, the use of accelerated procedures has already proved problematic for the sector and has not always been appropriately applied in some Member States. Although the Commission proposes setting minimum time limits, in practice this is often taken as guidance for standard practice. We are concerned that this will create barriers to market entry for SMEs and the non-profit civil society sector, and therefore hope that the European institutions promote and monitor smart and appropriate use of this specification.

2. Cluster 2 - “Strategic use of public procurement”

We support building links to the EU2020 Inclusive Growth Agenda where possible

Ensuring public undertakings serves the interests of the EU2020 Inclusive Growth Agenda should be a key objective of the procurement reforms proposed. The strategic use of procurement, however, should not be used to limit social clauses to exclusively serve the EU2020 Inclusive Growth Agenda, but rather complement broader social objectives alongside those explicitly mentioned in the EU2020 Agenda. We therefore propose that social and environmental considerations within public procurement procedures (including social clauses) should be supported in the first place and then linked to strategies (e.g.: 2020 Inclusive Growth Agenda) where appropriate.

We encourage including social value as one of the factors (alongside financial and environmental impact) to be taken into account when taking award decisions by public purchasers based on life-cycle costs of the products, services or works. As highlighted in Cluster 2, “the costs to be taken into account do not only include direct monetary expenses, but also external environmental costs if they can be monetised and verified.” Social value can be verified using tools in existence (e.g. SROI ‘Social Revenue on Investment’). This would allow public purchasers to estimate social impact (or its lack) of services/work/products purchased and incorporate - besides external environmental costs - social responsibility matters into public procurement procedures. It is crucial for the social value to be measured, where possible, for the complete proposed supply chain; successful bidders should not simply be judged by their actions but also by the actions of their supply sources, so as to reduce risks of EU money being used to finance socially questionable practices outside EU borders that would be viewed as unacceptable within.

We further recommend providing both clarity and reassurance to public authorities with regards to their legal exposure when applying innovative approaches to achieve objectives that are concurrent with EU2020 Inclusive Growth objectives; this should

include actively encouraging increased use of clauses which favour applications that demonstrate social value and a commitment to social inclusion.

Such an approach would enable our sector to continue providing high-value and localised employment in the areas where public investments are being channelled. Indeed, research conducted by our EU2020 Policy Working Group highlighted that currently, our sector is estimated to provide over 4 million full-time jobs across the Union.

We therefore fully support calls for:

1. The explicit inclusion of social and environmental considerations- encouraging innovative procurement to meet social and environmental targets within and outside EU2020, encouraging qualitative selection in contract awards, promoting sustainable development, supporting research and development.
2. The explicit ability for governments to apply bonuses in the form of social clauses that enable contracting authorities to credit applications providing real social value above and beyond lowest cost

We support the development of separate procedures for social services

ENNA supports the principle of a more simplified and appropriate process. The proposals reflect growing recognition and evidence that current regulations do not account for the distinct characteristics of social services, and have minimal effect on competition and cross-border interest.

Current public tendering processes engage in a ‘tunnel vision’ which reduces the social impact public tendering could have. Current rules fail to take into account the broader mission of non-profit civil society organisations beyond mere service delivery. CSOs fulfil critical societal missions such as empowerment of communities, promotion of social inclusion, advocacy and representational roles that cannot be taken into account favourably during the tendering process despite these being of public interest and often of direct relevance to the contracting authority. It is the execution of these missions that enable these organisations to service their communities effectively, but few contracting authorities ensure their tendering processes facilitate access to these CSOs of public general interest.

We support the introduction of higher thresholds as a means to alleviate bureaucratic burdens on service providers and contracting authorities alike

Currently, the social economy sector and contracting authorities alike redirect limited resources from front-line service delivery in order to fulfil disproportionate administrative and reporting obligations. Procurement procedures should be able to shift focus from compliance to more appropriate assessments of social criteria and service design. The introduction of a new specific regime for purchasing social, health and education services would bring clarity and create a useful distinction between these and other categories of service to better ensure appropriate application of the directive according to contract type, rather than applying a more convenient “one-size-fits-all” approach.

Mechanisms should allow for necessary flexibility to enable the development of tailored services to users with complex needs. Whilst it is understood that contractors need to ensure value for money, doing so through overly rigorous and prescriptive procurement of social care services for such users can stifle engagement with local service providers and discourage jointly produced services that offer the highest quality. Therefore, the proposed move away from public contracts towards different forms of financing of these services would enable local authorities and service providers alike to develop innovative and responsive social services in keeping with the aforementioned recommendations of this policy paper.

We support a consistent definition for services falling under special regimes and recommend including community support services in the new specific social services regime

We are concerned by the lack of consistent definitions of which social, health and education services should be subject to the special regime.

While ‘social services’ - described as “services to the person” - are subject to a specific lighter regime, community support services previously within Part B will be moved upwards to the Part A category. This includes,

- Provision of services to the community
- Civic betterment
- Community Action Programme

We strongly recommend that these community support services are treated similarly to ‘social’ ‘services to the person’, as they are often delivered at the local level, lacking cross-border interest, and fit within the SSGI definition of social and welfare service. This would represent a proportionate treatment of community services, and recognition of both the role of SMEs and the civil society sector in the provision of such services.

3. Cluster 3 - “Reducing documentation requirements”

We support procedures which are cost-effective for all parties concerned

In current practice, procurement processes and frameworks often apply rules that require extensive administrative obligations and are disproportionate to the value of the contract. They require significant investment of limited personnel and financial resources to compete with a low chance of return for SMEs and not-for-profit organisations.

Civil society organisations are by their nature composed of individuals who donate their free-time to a cause of general public interest. They often develop unique expertise and knowledge of the local communities which public tenders seek to strengthen. As their primary concern is the achievement of their cause, CSOs that are otherwise perfectly suited to deliver the tender will decline the offer as a result of their cost-benefit analysis. Our members have echoed studies in Flanders which demonstrate that bureaucratic burden is one of the main reasons civil society organisations face a high-turnover rate of volunteers which can have a negative impact on our shared societal objectives.

The provisions made in Article 57 commit to this simplified and more economically viable approach, allowing acceptance of self-declarations as preliminary evidence of technical ability, and removing the requirement to resubmit documents from previous or multiple bid applications. This will allow CSOs to make more effective use of their limited resources and encourage increased bidding for contracts.

We support mechanisms which allow past performance to inform selection criteria

ENNA supports enabling contracting authorities to apply professional judgement and methods to better assess the specificities and competence of applicants gained in past experience of relevant work as evidence of technical ability. Indeed, many CSOs have provided services independently and successfully within communities, before moving to more formal contractual arrangements with public authorities.

4. Cluster 5 - “SME access”

We support procedures that provide for fair treatment of consortia bids for tenders

As highlighted previously, civil society organisations provide a high social value but suffer from limited capacities to engage successfully with the tendering process. An innovative solution to this problem has been the establishment of tender-specific consortiums which bring together the expertise of groups of civil society organisations thereby increasing critical expertise whilst sharing risk amongst the organisations in the bid. We believe these efforts towards joint-working is both recognised and encouraged within the review by providing for fairer rules to treat consortium bidders fairly and equally like independent providers (Article 16).

We view the proposals on financial standing as positive for the sector

We welcome the proposal for contracting authorities to measure financial standing on the basis of the contract value not exceeding three times the yearly turnover of the organisation (Article 56). These proposals will help to adjust the emphasis on proportionality of the contract and reduce the temptation for contracting authorities to decide selection criteria in a risk-outsourcing exercise. .

We support efforts to render contract sizes better defined and transparent

Contract sizes have been identified as a main barrier to market entry for smaller organisations, and therefore this measure would allow a greater role for some CSOs and SMEs in service delivery in full accordance with EU2020 priorities.

Moreover, contracts in “lots” also open up opportunities for innovation in service delivery outcomes and along the supply chain, and so it is in the interest of contracting authorities to tender for smaller contracts, where possible.

We support the Commission’s proposal that all commissioning bodies must explain why letting contracts worth more than €500,000 haven’t been split into smaller lots (Article 44).

However, these explanations of contract sizes should meet a standard of response in order to ensure that transparency, accountability and democratic principles are upheld. Suppliers should have routes to complain about prohibitive and inappropriate scaling up of contracts, and contracts overturned if deemed unsuitable. This is to ensure fair competition and optimal service outcomes for users.

Nevertheless, the sector should be more involved in the commissioning process of local social services before procurement stages, to better insure contract sizes are appropriately determined according to need and service type.

5. Cluster 9 - “Governance”

We support mechanisms which train, provide legal advice, and reassure contracting authorities concerning public procurement and the choices of procedure available

Several discussion groups highlight that the frameworks governing public procurement allow for much greater flexibility than is currently being applied across the EU. This difference in appreciation is creating some significant differences between how public procurement is delivered from one country to the next thereby placing serious question marks around fairness and uniform application across the Union.

Part of this can be explained to risk-averseness prompted by prior stories of EU ‘claw-backs’ which lead to contracting authorities protecting themselves needlessly. This leads to defensive bureaucratic procedures that are both costly to manage for the contracting authority but also for the service providers who have to assign valuable staff resources to managing paperwork. We therefore support addressing these issues within the contracting authorities through additional training programmes that enable contracting authorities to regularly compare best practice and innovative approaches to public procurement, ideally with case studies involving providers and contracting authorities alike.

Concretely, our members highlight that it sometimes can take months for voluntary organisations to receive responses to questions as simple as ‘how many price offers should be collected before sub-contracting’ highlighting that all parties would benefit from a resurgence of efforts to standardise knowledge of the rules. This is particularly the case for voluntary organisations who struggle with high turnover of staff and volunteers when executing projects and activities as part of a tender.

We support considering the development of specific training and guidance on the Social Business Agenda

The Social Business Agenda will be significantly impacted by public procurement rules moving forward. Recognising links and ensuring cohesion between various EU policy agendas within the Single Market Act and Social Business Initiative would demonstrate political commitment to the market success of social business. Therefore it is critical for a comprehensive review of these implications from a public procurement perspective and if necessary, for resources to be allocated to provide additional and specific training and guidance for contracting authorities to be able to support the development of innovative social business whilst still remaining within the boundaries set by EU procurement rules.

We call upon decision-makers to ensure new procedures actually tackle these domestic inequalities rather than reinforce or cement existing practice

Whilst it is laudable that the European Union seeks to approach private companies and civil society organisations equally, we call upon decision-makers not to consider these actors as benefitting from an equal operating framework. We are concerned that as a result, applying new rules which do not take this element into account will only serve to further cement an operating situation where private companies, due to their structural make-up and the emphasis on low-cost rather than quality criteria will be left in a competitive advantage.

We support stricter governance and guidance measures to clarify uncertainties in the processes

Uncertainty pervades current procurement practice for both contracting authorities and economic operators. There is acute need for better clarification, information and support for the appropriate interpretation and implementation of the Directives intended. The lack of clarity is leading to abuses with an unnecessary market developing of ‘consultants’ and ‘experts’ who provide expensive and often erroneous guidance to the sector highlighting the need for an authority source for information.

Although the stricter governance proposals are not wholly appropriate, there is still value in these measures. Better understanding of the Directives and consistency of good practice across contracting authorities are vital for opening up markets and facilitating growth.

It is important to recognise that robust monitoring and evaluation of procurement activity is increasingly necessary, when greater flexibility is being afforded through other measures in the Directives. This would ensure that abuse of fair regulation or bad practice is deterred.

In conclusion

As highlighted in this position paper, the ENNA Working Group on Public Procurement hereby endorses the following positions:

1. We support proposals that encourage the use of negotiated procedure
2. We are concerned about proposed shortened time limits
3. We support linking to the EU2020 Inclusive Growth Agenda where appropriate and not to the exclusion of other social objectives
4. We support the development of separate procedures for social services
5. We support the introduction of higher thresholds as a means to alleviate bureaucratic burdens on service providers and contracting authorities
6. We support a consistent definition for services falling under special regimes and recommend including community support services in the new specific social services regime
7. We support procedures which are cost-effective for all parties concerned
8. We support mechanisms which allow past performance to inform selection criteria
9. We support procedures that provide for fair treatment of consortia bids for tenders
10. We view the proposals on financial standing as positive for the sector
11. We support efforts to render contract sizes better defined and transparent
12. We support mechanisms which train, provide legal advice, and reassure contracting authorities concerning public procurement and the choices of procedure available
13. We support considering the development of specific training and guidance on the Social Business Agenda
14. We call upon decision-makers to ensure new procedures actually tackle these domestic inequalities rather than reinforce or cement existing practice
15. We support an independent national oversight body to clarify uncertainties in the processes.
16. We support stricter governance and guidance measures to clarify uncertainties in the processes