

LOW VALUE PROCUREMENT AND TRANSPARENCY: SQUARING CIRCLE

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ABSTRACT. Contracts between €6.000 and €60.000 in the UK are routinely awarded through request for quotes and without open competition. SMEs have noted their interest in these contracts and would like them to be more widely advertised. Increasing transparency by advertising low value contracts through the import of the practice developed in larger contracts increases transaction costs for all involved making it inadequate. It is proposed to increase advertising of low value contracts while keeping transaction costs low for all parties involved through a number of different solutions, such as adopting a simplified open procedure. In addition, some suggestions are made to render the procurement process of low value contracts fairer (though not friendlier) for SMEs.

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INTRODUCTION

Within the European Union, public procurement is governed by two major sets of rules. To all public contracts with a cross-border interest, the Treaty provisions of freedom of movement of goods, services and establishment, as well as the principles of non-discrimination and equal treatment,² transparency³ and proportionality are applicable. Certain contracts, are subject, however, to specific additional rules. In general, works, services and goods contracts over specific threshold values⁴ are subject to secondary regulation through the Directive 2004/18. For the utility sector, contracts over specific threshold values⁵ are regulated by the Directive 2004/17.

The EU public procurement Directives work as harmonizers of procurement legislation in the different Member States. This harmonizing effect is, however, limited to the contracts within their scope of application and is not extended to contracts not covered by it. For contracts outside the scope of the Directives, except for the leverage provided by Treaty regulations and EU principles, Member States never had to harmonize their legislation. In consequence, the division in different subsets of rules applicable to contracts leads to different practices within Member States. Even in the same country, different legal systems do not regulate those contracts identically. For example, within the United Kingdom, in England all contracts between €12,000 and the applicable thresholds tendered by central Government⁶ have to

² Treaty on the Functioning of the EU (TFEU) article 18.

³ After the *Telaustria* sentence by the Court of Justice of the European Union (CFJEU), C-324/98, *Telaustria*, [2000] ECR I-10745. In *Telaustria*, the Court considered that public services concessions, which are excluded from the public procurement Directives scope, are nonetheless bound by the Treaty positive obligations.

⁴ For 2012 the threshold value for works is €5.000.000 and for goods or services €130.000 or €200.000 (depending on the contracting authority), Regulation EC 1251/2011.

⁵ For 2012 the thresholds are €5.000.000 for works and €400.000 for goods or services, Regulation EC 1251/2011.

⁶ Cabinet Office, (2011) "Procurement Policy Note – further measures to promote Small Business procurement", Information Note 05/11. These requirements are applicable to all central government departments and agencies, as well as non-departmental public bodies, NHS bodies and

be advertised on the Contracts Finder website since 2011. In Wales, however, contracting authorities are still free to adopt their own internal guidelines.⁷

Public procurement rules in Europe were created to foster the implementation of the European common market. In practice, however, the reality for the contracts covered by the Directives and advertised on the Official Journal of the EU is that 98.4% are awarded to national firms and 96.5% of the total contract value stays in the country of the contracting authority.⁸ If for large contracts the numbers are so skewed in favour of national firms, it does not seem farfetched to assume that for contracts not deemed worthy of being covered by the Directives the situation is equally as bleak.⁹ In fact, the situation may be even worse due to the proliferation of non-transparent procurement procedures such as request for quotes (UK) or direct awards (Spain and Portugal). The “price” being paid in those contracts is limited competition.

For SMEs¹⁰ the possibility of winning contracts over EU the thresholds is enticing but for many it is a step too far, particularly for micro companies or startups.¹¹ Research carried out in Wales has shown that SMEs in general and these two subtypes in particular are interested in smaller value contracts but do not want to be overburdened with paperwork.¹² These are contract that are not subject to the EU directives rules and consequently are not subject to advertising. Without advertising it is impossible for the

trading funds. Local authorities, however are excluded from this obligation.

⁷ Welsh Assembly Government, (2009) “Barriers to Procurement Opportunity Report”, p.17.

⁸ European Commission, (2011) “Cross-border Procurement Above EU Thresholds”, p.36.

⁹ Research has shown that in the UK only 9 to 14% of the total contracts reported on the Tenders Electronic Daily for goods and services have a value underneath the EU thresholds, European Commission, (2011) “Public Procurement in Europe – Cost and Effectiveness”, p. 72.

¹⁰ According to the EU Recommendation 2003/361, an SME is a company with less than 250 employees and a turnover under €50 million.

¹¹ Welsh Assembly Government, (2009) “Barriers to Procurement Opportunity Report”, p.17.

¹² Welsh Assembly Government, (2009) “Barriers to Procurement Opportunity Report”, p. 35.

companies “outside the loop” to know about those business opportunities.

This paper builds upon research previously carried out in Wales that led to the Barriers to Procurement Opportunity Report highlighted above. It reflects the preliminary work carried out within the Winning in Tendering project, an INTERREG funded project where one of its work packages aims to investigate if it is possible to achieve three distinct goals: i) make low value procurement more transparent; ii) without encumbering all parties involved, iii) while making the process fairer for SMEs.¹³ The solutions proposed in this paper are the starting points for two pilots that will be run with Welsh contracting authorities in 2012 where it is anticipated the solutions here suggested will be tested.¹⁴

DEFINITION OF LOW-VALUE PROCUREMENT

The EU procurement thresholds are the defining boundary between contracts subject to secondary legislation and the contracts subject only to EU principles and treaty provisions. Contracts over those thresholds are bound by all sets of rules, whereas contracts underneath them are still subject to the EU principles and treaty provisions in case they have a cross-border interest.

The present research is focused in low value contracts, that is contracts with a value inferior to the procurement thresholds. In England the Government has mandated all central purchasing bodies to advertise all contracts over €12.000. In Wales, contracting authorities are advised to advertise all contracts over

¹³ The difference between SME *fair* and SME *friendly* can be defined with the first being composed of changes to the procurement process that level the playing field without violating the non-discrimination principle and would thus be incompatible with EU law, whereas the second presupposes the need to treat differently SMEs from other companies. For a more detailed view, Burgi, M. 2007 “Small and Medium-Sized Enterprises and Procurement Law – European Legal Framework and German Experiences”, *Public Procurement Law Review*, 4, p.284-294.

¹⁴ It is anticipated that it will be possible to present at the conference preliminary findings of how these solutions were applied in practice on the pilots in Wales.

€30.000,¹⁵ but practice is very fluid as that is not a mandatory obligation.¹⁶ Each contracting authority defines its own internal guidelines regarding the minimum value to tender contracts openly.

For the purposes of this paper, the upper boundary of low value procurement is set at €60.000 for services and goods contracts and the lower boundary at €6.000. The upper boundary is the double of the suggested by the Welsh Government and the lower boundary is equivalent to half of the value defined by the Government Procurement Service for contracts to be advertised in England by central purchasing bodies. This lower boundary is justified also by trade associations in Wales confirming to the author this as being a value low enough that most SMEs will be comfortable tendering on. The practice in the country, however is not to advertise these contracts¹⁷ but to award them either through request for quotes or directly. This preference for request for quotes implies that only some well informed companies will be able to be invited to tender.

Covering the €6.000 to €60.000 bracket in Wales is thus covering a number of contracts that are either interesting for SMEs or have been considered to be relevant enough for the market to warrant the decision by the UK Government for advertisement.

ISSUES SURROUNDING ADVERTISING LOW VALUE CONTRACTS

As mentioned in the introduction, the main issue addressed here is to make low value procurement fairer for all types of companies involved in the procurement process. This entails tackling two specific problems. The first is increasing advertising and transparency for these contracts, as without it it will be im-

¹⁵ Welsh Assembly Government, (2008) "Opening Doors the Charter of SME Friendly Procurement", p.3.

¹⁶ Welsh Assembly Government, (2009) "Barriers to Procurement Opportunity Report", p.17.

¹⁷ A check on the Sell2Wales portal on March 17th, where such contracts would be expected to be advertised yielded only 57 hits.

possible to give any company in the market a fair chance at winning the contract. The second is how to address the first without increasing transaction costs for both companies and public procurers. If one would just simply import the practice developed for open and restricted procedures, the consequence would be that the cost of the procurement process might be disproportional to the value of contract being tendered. It has been seen that those costs can reach 30% of the contract value for contracts close to the EU thresholds.¹⁸

To understand the problems posed one needs to consider two additional points.

Firstly, why are contracting authorities not advertising these contracts already? On the literature, the obligation of transparency applicable to contracts with cross-border interest not covered by the EU Directives has been thoroughly analysed.¹⁹ In addition, it can be argued advertising these contracts and undertaking an open procedure simply implies too much of a financial cost if one includes the time needed to prepare the tender documents, assess the tenderers suitability and then the bid.²⁰ Furthermore, due to the two stage nature of procedures such as the open or restricted procedure, the timescales involved will have to be longer by necessity. Finally, contracting authorities may be weary of

¹⁸ European Commission, (2011) "Public Procurement in Europe – Cost and Effectiveness", p. 91.

¹⁹ Brown, (2008) 'The obligation to advertise betting shop licences under the EC principle of transparency: Case C-260/05 Commission v Italy' *Public Procurement Law Review*, 1, Brown, (2007) 'Seeing through transparency: the European Court's Case Law on the requirement to Advertise Public Contracts and Concessions under the EC Treaty' 1 *Public Procurement Law Review*, McGowan, (2007) 'Clarity at last? Low value contracts and transparency obligations', *Public Procurement Law Review* 4, Hordjik and Meulenbelt, (2005) 'A Bridge Too Far: Why the European Commission's Attempts to Construct an Obligation to Tender outside the Scope of the Public Procurement Directives should be Dismissed', *Public Procurement Law Review* 3, Treumer and Werlauff, (2003) 'The leverage principle: secondary Community law as a lever for the development of primary Community law' *European Law Review* 24 and Braun, (2000) 'A Matter of Principle(s) - the Treatment of Contracts falling outside the Scope of the Public Procurement Directives' (2000) *Public Procurement Law Review* 9.

²⁰ Welsh Assembly Government, (2009) "Barriers to Procurement Opportunity Report", p.17.

receiving too many bids and may prefer to deal with suppliers they have already been happy with in the past.²¹ In other words, the transaction costs involved with advertising a low value contract may function as an incentive to contracting authorities not to advertise such contracts.

Secondly, it is necessary to ponder the potential benefits for a contracting authority of such a move. Three different potential benefits can be pointed out. Firstly, by advertising those contracts the contracting authority can widen their supply base. Allowing any potential supplier the possibility of deciding to submit a bid instead of selecting a few in advance has the potential of exposing the authority to new suppliers. The second potential benefit is the increase in competition. By allowing any supplier to come forward this has the potential to exert some force over existing suppliers to keep providing competitive bids. The last potential benefit is less obvious but still relevant. If a contracting authority decides to use the same supplier(s) repeatedly on procedures where only the same selected few are invited to tender, it is just a question of time until the conditions are set for the creation of a cartel. Advertising those same contracts and exposing regular suppliers to external competition has the potential to minimise such risk.

To solve the two problems identified and achieve the ultimate aim, it is thus necessary to look at the procurement process and make it as lean as possible. In other words, reducing time frames and also the costs (financial, transactional and opportunity) for all involved parties. Can the circle be squared?

We will now analyse what practical solutions can be given to increase transparency without making the procurement process too cumbersome and at the same time take the opportunity to make the procedure fairer for SMEs.

INCREASING TRANSPARENCY

Informing market in advance

²¹ Ibidem.

Departments within contracting authorities are subject to the need of defining budgets regularly. Although the duration of the budgetary period may vary, it is safe to assume it exists in general. If this rule of thumb is applied to procurement it implies contracting authorities have at least a rough estimation where they will be spending their money on. Not all procurement spend can be forecast in advance, particularly when it has a reactive nature as in building maintenance.

In the UK it is not common practice to filter the information of contracts on the pipeline to the market.²² For instance, in the TED website the number of contract notices published in 2011 dwarves that of the prior information notices²³ by a factor of ten. Although not all procurement can be planned enough in advance or warrant a prior information notice, the reason for this difference are perhaps due to a fear by contracting authorities of being held to account for contracts that were planned but never tendered.

Outside the EU, in Mexico, public bodies are mandated to publish a yearly procurement plan with the contracts they may consider to be of interest for SMEs.²⁴ PEMEX, for instance, publishes on its website²⁵ its yearly procurement plan.

The purpose of making such information available well in advance for the market to have time to prepare and plan for that procurement. Giving this information well in advance allows companies to plan ahead and decide what contracts they want to go for. This is especially important for SMEs as by nature they have

²² At least for contracts over the EU thresholds, it has been seen that only less than 500 Prior Information Notices have been posted on the Tenders Electronic Daily website, European Commission, (2011) "Public Procurement in Europe - Cost and Effectiveness", p. 62. The period analysed is not clear, however.

²³ Total numbers for 2011 were 10512 contract notices and only 1242 prior information notices.

²⁴ Purchases, Leases and Services of the Public Sector Law 2009, article 21. According to this article, Mexican contracting authorities have to publish by the end of January in every year their procurement plan.

²⁵ Available at <http://www.pemex.com/index.cfm?action=content§ionID=149&catID=13424>, accessed March 30th, 2012.

limited human resources thus benefiting from this advanced notice to prepare their participation. Insufficient time to prepare bids has been pointed out by SMEs as a key barrier to their participation in public procurement.²⁶

The market could be informed in advance by the two different ways mentioned above. Publishing prior information notices in one of those procurement portals leads to an extra cost for the contracting authority, particularly if we are talking about a large number of small value contracts but increases the likelihood of the market at large being well informed of such upcoming contracts.

The alternative with the lower transaction cost for the contracting authority would be to simply put a file with the information of those contracts online on their website. Although this would be easier to achieve than the first option, it would be of use for a more local supplier base, namely suppliers that either already have had tendering experiences with that entity or are actively looking at that possibility. The price to pay on this option is to widen the market of potentially interested to national suppliers without a net benefit on foreign companies.

There may be, however, a risk with informing the market in advance as the clear definition of what contracts a contracting authority is considering tendering on a certain time frame may facilitate the operation of cartels. In a sense, the risk is similar to the one faced by contracting authorities when they divide a contract in to lots. It can be argued as a defence that the possibility of new suppliers coming into the market for these contracts may function as practical deterrent against such cartels. Without conducting empirical research it is impossible at this stage to know if this is a real risk and if so for what sectors and countries.

Advertising

The second measure towards increasing transparency of low value procurement is by advertising the existence of con-

²⁶ European Commission, (2011) "SMEs' Access to Finance – Survey 2011", p. 1–3 and OECD (2012) "2012 Edition of Financing SMEs and Entrepreneurs: An OECD Scoreboard," 2012 p. 20-21.

tracts. If companies do not know the contract opportunities, exist, how can they take part in the procurement exercise?²⁷ Publication of contract notices should be made in the appropriate international sources, such as the Tenders Electronic Daily or national sources such as ContractsFinder, Sell2Wales, Public Contracts Scotland or Northern Ireland Procurement Portal. It can be argued that online portals such as the ones mentioned are the easiest way for both contracting authorities publicising their contracts and companies finding the contracts of interest. Furthermore, both parties are used to use this resources anyway for contracts of higher values. The exception to this rule are companies without experience in tendering procedures which need to be helped differently, perhaps through business development agencies.

As mentioned in the introduction the UK government adopted in 2011 a policy of advertising all contracts over €12.000 with the stated aim of increasing the percentage of spend going to SMEs. In 12 months the government reckons it is on track to double from 6.5% to 13.7% the percentage of its procurement spend awarded to SMEs and achieve 25% by 2015.²⁸ It is unclear at this stage, however if this increase due to the increased advertising or if it is due as well to the targets themselves imposed in 2011 and that may be influencing procurers in England.

Open procedure

Adopting the open procedure is the final measure to increase transparency in low value procurement. By using the open procedure – or more specifically, a simplified version of it – contracting authorities open their contracts wide to competition instead of just a selected few companies.

With an open procedure all bidders achieving a minimum technical and financial level are invited to present their bids. In consequence, the numbers of bidders at the tender stage are not

²⁷ European Commission, (2010) “Evaluation of SMEs’ Access to Public Procurement Markets in the EU”, p. 49–51.

²⁸ Cabinet Office, (2012) Making Government business more accessible to SMEs – One Year On” p. 4.

limited in advance and the number of bids will depend on the number of companies interested in the contract that have the necessary financial and technical ability. In consequence, the contracting authority has no control over the numbers and may be faced with more bids than it is comfortable with as all those bids will need to be evaluated and marked. This does not mean one should defer to such risk. Having identified a potential problem with advertising low value contracts and tender them through an open procedure it is relevant to check if it is possible to avoid the issue and minimize the transaction costs.

It could be argued that the restricted procedure could be used as an alternative but that has two drawbacks. Limiting the field of play to the selected means only a restricted number will be able to actually submit their bids. In addition, the selection of viable candidates implies the need to have a thorough selection stage for assessing the tenderers capabilities as to select the best ones. This increases the transaction costs for both the companies which will have to submit a detailed questionnaire and the contracting authority as well.²⁹ The contracting authority will have to draft such questionnaire (or just use a template, which may not be specifically tailored to the contract) and analyse all submissions to select the most suitable tenderers.

Plain language documents

Although advertising a contract and using an open procedure appear to be the most obvious ways to increase transparency of low value procurement, their usefulness to achieve such aim would be limited if the documents are not easy to understand. Transparency is also necessary at the level of the information asked and supplied. It cannot be argued an open procedure is transparent if the documents cannot be understood by prospective tenderers. For the same reason empirical research methods devote attention to the way questions are posed to participants due to bias or the possibility of influencing the answers, for open procedures a similar care is necessary.

²⁹ European Commission, (2011) "Public Procurement in Europe – Cost and Effectiveness", p. 92.

The impact of difficult to read tender documents on competition may go either way. On the one hand, it may increase the number of companies taking part in the procedure due to the ambiguity in the information supplied.³⁰ On the other hand, that same ambiguity may lead to companies not wanting to incur in costs of preparing a bid without knowing in detail what is on offer. Clear questions and information make the life easier for companies wanting to make a decision on submitting a bid or not.³¹ Furthermore, providing clear information and instructions helps bidders tailor the information they provide more precisely.

In addition, documents with procurement specific jargon may be perfectly understandable for companies with experience in procurement but may function as a barrier to new entrants. By design, SMEs and start ups are staffed with limited numbers and probably will not have staff specialized in public procurement.³²

MINIMIZING TRANSACTION COSTS

If one only adopted the traditional open procedure as a way to procure low value contracts, the consequence would be that the costs involved would constitute a large proportion of the contract value. The measures here suggested may contribute to reduce the transaction costs of advertising these contracts thus making the open procedure a viable alternative to increase the transparency on low value procurement. Minimizing transaction

³⁰ European Commission, (2011) "SMEs' Access to Finance - Survey 2011", 2011 p1-3 and OECD, (2012) "2012 Edition of Financing SMEs and Entrepreneurs: An OECD Scoreboard," p. 74.

³¹ SMEs have been found to argue lack of clarity functions as a barrier to their participation in public procurement, European Commission, "Evaluation of SMEs' Access to Public Procurement Markets in the EU", 2010 p. 49-51.

³² Welsh Assembly Government, (2009) "Barriers to Procurement Opportunity Report", p. 36-37 and European Commission, (2008) "European Code of Best Practices Facilitating Access by SMEs to Public Procurement Contracts", p. 12-13.

costs has been found to be particularly important to enable SME access to the market.³³

Using the request for quotes as a starting point to design a simplified open procedure

As mentioned above, there is a major issue with using the open procedure to award low value contracts, that is the bureaucracy involved and the ensuing higher transaction costs for all involved. If one decides to use a traditional open procedure to award these contracts, the additional work involved it would impose a significant cost counterbalancing the benefits of increased transparency. Therefore, the key question is: does an open procedure need to be complex and cumbersome or can it be made into a more flexible procedure? For the author, the answer resides in using a different starting point to create an open procedure tailored for low value procurement.

By default, requests for quotes are very informal with the contracting authority requesting a limited amount of information from the tenderer and with the spotlight on the bid they are being asked to present. Starting with the request for quotes, which is a procedure used by contracting authorities when tendering low value contracts and adding only the necessary elements, instead of trying to take out bits of existing open procedure tendering documents seems to be a reasonable compromise.

In effect, the author is suggesting an "opt in" system, where elements need to be added instead of an "opt out" model, where elements need to be taken out from a pre-existing template. The effects of inertia and aversion to loss have been well researched in other fields³⁴ and should be taken into account in procurement as well. The price of standardizing documents is to make them good enough for most procedures and completely un-

³³ European Commission, "Evaluation of SMEs' Access to Public Procurement Markets in the EU, 2010 p. 49-51.

³⁴ For all, Ert, E., & Erev, I. (2008). The rejection of attractive gambles, loss aversion, and the lemon avoidance heuristic. *Journal of Economic Psychology*, 29, p. 715-723 and Tversky, A. & Kahneman, D. (1991). Loss Aversion in Riskless Choice: A Reference Dependent Model. *Quarterly Journal of Economics* 106, p.1039-1061.

suitable for a few. In other words what works and makes sense for a high value – high risk contract is unsuitable for low value – low risk contracts.

By using the request for quotes as a starting point, it is expected that each and every selection question will be vetted before being added to the tender documents. This should ensure that all and every question asked in the tender is relevant for the contract being awarded. This solution has the added cost, however, of forcing the contracting authority to the added cost of reflecting and considering what extra information to include in this procedure. This is a cost the procurer does not incur if adopting the request for quotes.

Electronic procurement

To further reduce transaction costs, the procedure should be carried out fully by electronic means, per opposition to the traditional paper based exercise. Adopting electronic procurement saves the contracting authority from manually producing copies of tender documents and to send them out to prospective tenderers. It also avoids companies having to fill documents in their computer, print them off and then posting the documents to the contracting authority. The consequence of carrying out a paper based open procedure is added bureaucracy and higher transaction costs for all parties involved. In addition, it has been argued that the use of electronic procurement benefits disproportionately SMEs as they provide easy and timely access to information.³⁵

Not applying Pre-Qualification Questionnaires (PQQs)

³⁵ European Commission, (2011) “SMEs’ Access to Finance – Survey 2011”, p1-3, OECD (2012) “2012 Edition of Financing SMEs and Entrepreneurs: An OECD Scoreboard,” p. 73 and European Commission, (2010) “Evaluation of SMEs’ Access to Public Procurement Markets in the EU”, p. 68.

The UK Government introduced in 2011 the obligation of central government's procurement entities not to impose PQQs on any contract between €12,000 - €120,000³⁶ as to increase the desirability of procurement for SMEs. PQQs allow the contracting authority to select a pre-defined number of candidates by marking their responses to a series of questions related with their technical and financial ability. Companies are then graded according to their answers and only the best are invited to the tender stage. The remaining companies are eliminated at this stage. PQQs tend to be very detailed to allow for the grading to be done.

The reason for the new policy imposed by the UK Government is due to the transaction costs imposed on SMEs by PQQs. Research in Wales has shown that SMEs complain that PQQs are costly and just a way for contracting authorities to limit the number of tenders they have to analyse.³⁷ Not having a PQQ may help contracting authorities expand and diversify their supplier base by receiving tenders from companies that have in the past not been interested in the bureaucracy a PQQ entails.

For startups without a relevant track record in the area of the contract the use of PQQs implies it will be very hard to get to the submission stage. On the long run this weeding out process may lead to an impoverished field of potential contractors as only a limited number of new companies will ever pass the "acid test".

PQQs are appropriate for certain contracts, namely high risk, high value contracts where the complexity of the contract justifies extra caution with the quality of the tenderers reaching the tender stage.

If one wants to reduce the transaction costs for companies, not applying a PQQ and in consequence not restricting competition on a low value procurement procedure will go a long way. The flipside is that contracting authorities may be faced with a lot more tenders than they were expecting as they lose the PQQ filter. This fear can potentially be mitigated by the other changes to the procedure that try to reduce the transaction costs for the contracting authority.

³⁶ Cabinet Office, (2011) "Procurement Policy Note – further measures to promote Small Business procurement", Information Note 05/11, p.2.

³⁷ Welsh Assembly Government, (2009) "Barriers to Procurement Opportunity Report", p.36-37 and 48.

Self declaration of technical and financial ability

On a regular open procedure, tenderers have to submit information and documentation assuring their technical and financial capacity for their bids to be admitted. All tenderers documents are then checked for compliance by the contracting authority. However, in practice, this work is only relevant for the company that actually will be performing the contract. The effort made and cost borne by the remaining candidates and also by the contracting authority is simply wasted. There is no tangible benefit of analysing the documentation of all candidates if an open procedure is used, as the test should simply be a pass/fail exercise.

The above can be achieved by requesting a declaration where the tenderer states its compliance with financial and technical requirements and the availability to supply the necessary information within a certain timeframe in case of winning the contract. On the current EU procurement Directive proposal, the Commission has included a similar rule of requesting self declarations from the tenderers at the start of the procedure and confirming the data from the winner only.³⁸

There is, however, one risk associated with checking the information of the winning tenderer only, that is, that although he has the obligation to comply with the requirements and supply supporting evidence, in case he does not do so there is no leverage over him apart from excluding him from getting the contract and awarding it to second best tenderer. A possibility to avoid this problem is either to consider the tendered is bound by that declaration in the same way he is by the content of the tender. A second alternative is to request a bond applicable only to the statement produced. In this scenario, the tenderer would lose the bond in case it did not comply with the technical or financial requirements set forth in the tender documents. It can be argued though, this suggestion may be excessive for low value contracts as it increases the tendering cost for the companies.

³⁸ Proposal for a Directive of the European Parliament, SEC(2011) 1585 final, article 57.

Words limits in tender sections

Currently, when submitting a bid for open procedures, companies can write as much as they want to answer each question or section of the tender. This may have a negative effect on the way companies draft their answers as they have no benchmark to guide them on the amount of information they are supposed to supply. This may lead to a pre-conception that if an answer is not extensive, then they are not addressing it well. The unnecessary text leads to extra work not only for the companies but also for the procurers as they are forced to go through irrelevant information on each question. Limiting words forces companies to think on what are the key messages they want to convey to the procurer instead of adding text because the marginal cost for it is close to zero.

MAKING LOW VALUE PROCUREMENT FAIRER FOR SMES

As mentioned in the introduction, the third pillar of this paper is to try and make low value procurement fairer for SMEs, that is reducing the perceived barriers that make it harder for this type of companies to take part in public procurement. In addition to reducing the paperwork and the administrative burden,³⁹ it is possible to conceive a few other practical options to lower those barriers without violating the EU principle of non-discrimination.

Prompter payment

The difficulties in SMEs accessing finance in various countries are well known⁴⁰ and may have a measurable impact in their

³⁹ European Commission, (2011) "Evaluation of SMEs' Access to Public Procurement Markets in the EU", p.74.

⁴⁰ European Commission, (2011) "SMEs' access to finance - Survey 2011", p1-3
and OECD (2012) "2012 Edition of Financing SMEs and Entrepreneurs:

survival rate. In procurement, payment terms tend to be longer rather than shorter thus compounding the issue for the SMEs involved. Furthermore, payment terms have been pointed out as a barrier to the entry of SMEs into public procurement.⁴¹ To make the low value procurement more appealing for SMEs contracting authorities should bear in mind the financial implications of longer payment terms and be advised to use more flexible payment terms or methods. For instance, e-invoicing should be encouraged⁴² and prompter payment could be tied to the use of electronic procurement. In the UK, for instance the Government introduced the Government Procurement Card in association with VISA to simplify high-volume and low value transactions, thus speeding up the payment process for lower value procurement.⁴³

Reducing financial requirements

Research has shown SMEs have more trouble with high turnover requirements than larger companies due to their size. In low value, low risk contracts the financial requirements should not be used as a barrier to entry. Furthermore, in the case of new companies if the contract demands a certain turnover on the previous years it is simply impossible for them to win any business.

It is understandable the need for procurers to feel secure about the financial standing of the company they are awarding the contract. However, financial requirements should be reduced to an absolute minimum especially for contracts on the lower end of the scale, perhaps replaced by a credit check (as done by some contracting authorities in Wales). Companies could also be given

An OECD Scoreboard," 2012 p20-21.

⁴¹ European Commission, (2011) "Evaluation of SMEs' Access to Public Procurement Markets in the EU", p.74 and European Commission, (2010) "Evaluation of SMEs' Access to Public Procurement Markets in the EU, p. 49-51.

⁴² Electronic platforms and services such as Tradeshift or Basware could be used to achieve this aim.

⁴³ According to a case study the Advisory, Conciliation and Arbitration Service was able to find efficiency savings of around €500,000 per annum since introducing this payment type, <http://www.buyingsolutions.gov.uk/categories/eCommerce/casestudies/>, accessed March 30th, 2012.

the opportunity to just produce recent (last 6/9 months) cashflow records, for instance.

In addition, contracting authorities should avoid requiring multiple years of audited accounts and should consider alternative methods for companies to justify their financial standing. Asking for accounts does not have an impact on well established SMEs but are an unsurmountable barrier for startups in case the contracting authority is not flexible in the requirements and accepts, for instance, a statement or letter from the bank or accountant as means of evidence.⁴⁴

Reducing insurance requirements

As with the financial requirements discussed above, insurance levels may have an effect on the ability of a SME to take part in a procurement procedure. Insurance is costly and leaves SMEs at a disadvantage regarding larger companies as it affects a larger proportion of their earnings. In addition, it may be argued that contracting authorities are very keen in checking the risk and demanding appropriate insurance cover in contracts tendered through open procedures but do not perform the same tests if the same contract is tendered through a request for quotes. It would thus seem the risks are worth checking depending not on the contract itself but the procurement method employed.

As above, insurance levels should be considered and weighted depending on the risk/value of the contract. Insurance requirements should be reduced to an absolute minimum especially for contracts on the lower end of the scale. An alternative would be for companies without the necessary insurance levels to declare their agreement to purchase the required insurance level if the contract was awarded to them.

CONCLUSION

⁴⁴ Welsh Assembly Government, (2009) "Barriers to Procurement Opportunity Report", p.12.

We have seen that the lack of transparency in low value procurement (defined as the €6.000 to €60.000 bracket) affects the ability of SMEs entering the public procurement market, as contracting authorities in the UK tend to prefer the adoption of procedures such as request for quotes without advertising them widely to the m

arket. Some solutions to increase SME participation in procurement have been proposed before, such as using electronic tendering or ensuring prompt payments. However, to increase transparency on low value procurement without increasing the transaction costs to a point that would drive SMEs away, it is necessary to re-think the way the open procedure should be run for the award of these contracts. It has been proposed the use of a simplified open procedure and a number of other solutions to increase transparency at the process level and make it fairer for SMEs without violating the principle of non-discrimination imposed by EU law. The solutions herewith proposed will be piloted in practice with two Welsh contracting authorities during 2012.

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