

RECOMMENDATIONS

COMMISSION RECOMMENDATION (EU) 2018/624

of 20 April 2018

on cross-border market access for sub-suppliers and SMEs in the defence sector

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 292 thereof,

Whereas:

- (1) The European Council, in December 2013, set the objective of achieving a better integrated and more sustainable, innovative and competitive defence technological and industrial base (EDTIB), which is needed to develop and sustain defence capabilities and strengthen Europe's strategic autonomy and its ability to take action in cooperation with partners. In this context, it underlined the importance of cross-border market access for small and medium-sized enterprises (SMEs), called on the Commission to investigate the possibility of additional measures to open up supply chains to SMEs from all Member States, and noted that SMEs are a major component of the defence supply chain, a source of innovation and key enablers of competitiveness ⁽¹⁾.
- (2) The European Defence Action Plan (EDAP) of 30 November 2016 announced that the Commission would make recommendations to facilitate cross-border market access for SMEs and intermediate companies in the defence sector. This was also confirmed in the Commission Communication 'Launching the European Defence Fund' ⁽²⁾, adopted on 7 June 2017.
- (3) The Commission considers competitive cross-border supply chains to be a crucial component of a better integrated and more competitive EDTIB, and believes that the European defence equipment market should provide opportunities for European companies irrespective of their size and location.
- (4) This Recommendation has been developed with input from the Commission's advisory group on cross-border access for SMEs to defence and security contracts, which completed its work and published its final report in November 2016 ⁽³⁾, and from Member State experts. It is part of a broad range of Commission initiatives and activities designed to support SMEs active in the field of defence.
- (5) The work done by the European Defence Agency (EDA) ⁽⁴⁾ in the areas of defence procurement, skills, funding and SME capacity has been taken into account in developing this Recommendation ⁽⁵⁾.
- (6) Since industry players, especially prime contractors, play a key role in defence, the Commission, in addition to developing this Recommendation, also started a dialogue with industry stakeholders with a view to identifying and finding common agreement on possible further actions aimed at creating the conditions for competitive cross-border defence supply chains.

⁽¹⁾ This recommendation tackles issues directly related with the cross-border participation of SMEs and intermediate companies in defence procurement contracts, but does not tackle issues that might have a significant but indirect influence on them, in particular the intra-EU transfers of defence-related products, standardisation and certification.

⁽²⁾ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Launching the European Defence Fund (COM(2017) 295 final).

⁽³⁾ <http://ec.europa.eu/DocsRoom/documents/20354/>

⁽⁴⁾ <https://www.eda.europa.eu/>

⁽⁵⁾ For an overview of EDA's activities in this domain: <https://www.eda.europa.eu/procurement-biz/information/eda-market-industry-policies/>; [https://www.eda.europa.eu/what-we-do/activities/activities-search/small-and-medium-sized-enterprises-\(smes\)](https://www.eda.europa.eu/what-we-do/activities/activities-search/small-and-medium-sized-enterprises-(smes)).

- (7) Member State action could significantly improve cross-border market access for SMEs and intermediate companies in the defence sector. This Recommendation should therefore list types of action that could remedy some of the problems facing SMEs and intermediate companies or help integrate them into defence supply chains.
- (8) Obtaining early information on future armament plans and projects could enable SMEs and intermediate companies to better anticipate market developments and possible participation in defence projects and contracts.
- (9) Advertising contracts of a value below the threshold established by Articles 8 and 9 of Directive 2009/81/EC of the European Parliament and of the Council ⁽¹⁾ would enhance competition. It would also encourage SMEs' participation in the defence sector. Contracting authorities should not limit such advertising to their own Member State.
- (10) The complex nature of the information in procurement documents made available to tenderers or potential tenderers by the contracting authorities could deter new, smaller businesses from entering the public procurement market. Such information must therefore be relevant and well-structured.
- (11) The scale of defence procurement tenders and the related requirements on suitability to provide services constitute further obstacles to SMEs and intermediate companies. Concluding separate smaller contracts grouped into lots within a single public procurement procedure could help address this issue.
- (12) Allowing longer periods of time for submitting bids would benefit SMEs and intermediate companies by giving them more time to identify business opportunities and organise their participation.
- (13) The possibility of relying on the capacities of other economic operators, including subcontractors or other participants in consortia or groups, facilitates access to the procurement market, especially where particularly large purchases are concerned. Economic operators interested in obtaining public procurement contracts should be aware of these opportunities from the outset.
- (14) Extensive and complex tender documents as well as the need to provide evidence and certificates are aspects that could deter companies, especially SMEs and intermediate companies, from entering the defence procurement market. To facilitate access to that market, contracting authorities should, wherever possible, agree to evaluate the qualitative selection criteria at the tendering stage on the sole basis of the preliminary evidence provided by the tenderers. They should require the submission of supporting documents and certificates proving the fulfilment of those criteria just before the signature of the contract. Preliminary evidence concerning the fulfilment of qualitative selection criteria could take the form of a standardised self-declaration, the European Single Procurement Document (ESPD) ⁽²⁾.
- (15) Regional cooperation across Member States and clustering of businesses are other options that could help boost smaller firms' market position.
- (16) Innovativeness is the main asset that SMEs could bring to the defence industry. All initiatives supporting research and technology (R&T) should thus take particular account of SMEs and secure their effective participation as far as possible.
- (17) Developing skills for which the defence industry has a particular need could enable new players to enter the European defence market,

⁽¹⁾ Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (OJ L 216, 20.8.2009, p. 76).

⁽²⁾ European Single Procurement Document (ESPD) as defined by Commission Implementing Regulation (EU) 2016/7 of 5 January 2016 establishing the standard form for the European Single Procurement Document (OJ L 3, 6.1.2016, p. 16) by virtue of Article 59 of Directive 2014/24/EU.

HAS ADOPTED THIS RECOMMENDATION:

1. TERMINOLOGY

For the purposes of this Recommendation, 'SME' is to be understood as defined in Commission Recommendation 2003/361/EC ⁽¹⁾, while 'intermediate company' means a firm larger than an SME, but which is not the main contractor in a contract for the supply of complex defence systems.

Throughout the text of this Recommendation, references to 'contracting authorities' are to be understood as encompassing both contracting authorities, as defined in Article 2(1) of Directive 2014/24/EU of the European Parliament and of the Council ⁽²⁾ and contracting entities, as defined in Article 4 of Directive 2014/25/EU of the European Parliament and of the Council ⁽³⁾. The recommendations addressed to contracting authorities or entities relate to the award of contracts in the fields of defence and security pursuant to Article 2 of Directive 2009/81/EC.

2. PUBLIC PROCUREMENT

2.1. Long-term plans and priorities

Member States should provide, whenever possible and appropriate, early information about their future long-term plans with regard to armaments (capability and research and technology (R&T) requirements and priorities). This can be done by: publishing planning documents; organising targeted events open to businesses (prime contractors, SMEs and intermediate companies) from different Member States; and providing information in a transparent and non-discriminatory way to the defence industry, including the AeroSpace and Defence Industries Association of Europe (ASD), National Defence Industry Associations (NDIAs), and other defence and security business organisations (e.g. clusters), to ensure that the relevant information is disseminated throughout the Union. Care should be taken to ensure that such action does not result in any distortion of competition or in a violation of the principles of non-discrimination and transparency.

2.2. Voluntary publication and transparency measures

Contracting authorities should use, to the greatest possible extent, pre-procurement advertising tools such as Prior Information Notices (PIN) ⁽⁴⁾ and organise targeted events on advance procurement plans and specific projects. Such events should target businesses (prime contractors, SMEs and intermediate companies) from different Member States. The relevant information could be disseminated across the defence industry, including the ASD, NDIAs and other defence and security business organisations (e.g. clusters). When using these tools, contracting authorities should take care to comply with the principles of transparency and non-discrimination, and clarify the provisional nature of the procurement plans at stake.

Contracting authorities should seek to advertise procurement opportunities as widely as possible, going beyond the applicable legal requirements. This implies, for instance, advertising the information in the contract notice as widely as possible once it has been sent for publication in the Supplement to the *Official Journal of the European Union* (Tender Electronic Daily (TED)), and providing a mechanism for economic operators interested in future calls to subscribe to mailings about published notices.

Contracting authorities should, whenever possible, advertise procurement opportunities for contracts below the threshold established by Articles 8 and 9 of Directive 2009/81/EC ⁽⁵⁾ through voluntary publications on relevant portals and websites (not necessarily in TED) and send requests for information or requests for quotation to potentially

⁽¹⁾ See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:124:0036:0041:en:PDF>

⁽²⁾ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ L 94, 28.3.2014, p. 65).

⁽³⁾ Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ L 94, 28.3.2014, p. 243).

⁽⁴⁾ Article 30(1) of Directive 2009/81/EC.

⁽⁵⁾ Estimated value of contracts and of framework agreements calculated in line with Article 9. Thresholds in Article 8 are biannually updated; overall information about current procurement thresholds is presented at: https://ec.europa.eu/growth/single-market/public-procurement/rules-implementation/thresholds_en

interested businesses across the Union. Care should be taken to ensure that such actions do not distort competition or violate the principles of non-discrimination and transparency. The contracting authorities should also hold simplified competitive procedures for low-value contracts, even if this is not formally required by national rules.

2.3. Quality of information

Contracting authorities should provide the market with meaningful and accurate short items of information (e.g. a description of the procurement in contract notices published in TED). This enables businesses to screen and identify opportunities, and to make informed decisions on whether they have an interest in submitting a bid.

Whenever possible, they should provide a courtesy translation of such information into English or one of the other languages commonly used in the defence trade, either on the website of the procurement authority or for publication in TED.

2.4. Division into lots

Contracting authorities should consider the possibility of sub-dividing contracts into lots. They could also consider tendering in separate lots, while requiring the companies that bid successfully for these lots to work with the economic operator which has been awarded the contract for coordination of the whole project (the general contractor).

2.5. Preparation and conduct of procedures

Article 33 of Directive 2009/81/EC obliges contracting authorities, when fixing the time limits for receipt of requests to participate and tenders, to take particular account of the complexity of the contract and the time required for drawing up tenders, without prejudice to the minimum time limits laid down in that Article. Contracting authorities should, whenever possible, allow more time than required by the rules of that Article to submit offers. This extended time period will give industry, especially SMEs, more time to decide whether to tender, to prepare and to submit the tender, and to make the necessary arrangements to form consortia or organise subcontracting.

Electronic procurement, especially the submission of bids by electronic means, helps streamline procedures and reduces red tape and administrative costs. This can reduce market access hurdles (bidding costs), especially for smaller firms with limited administrative resources. Wherever possible, bearing in mind the contract subject-matter and, in particular, the need to protect classified information, contracting authorities should use electronic procurement.

In the contract notice, contracting authorities should consistently draw potential tenderers' attention to the possibility of relying on the capacity of other parties, including subcontractors ⁽¹⁾ or members of the same consortium or group ⁽²⁾, to fulfil the suitability criteria, in accordance with Article 41(2) and (3) and Article 42(2) and (3) of Directive 2009/81/EC.

Contracting authorities should seek to alleviate the administrative burden arising from the procurement procedure. For example, they should, as far as possible, avoid holding numerous negotiation meetings and request only the information or documentation necessary for the specific procedure in question.

2.6. Qualitative selection

Contracting authorities should keep selection criteria proportionate and avoid setting requirements that are not strictly necessary. In the case of technical and professional capacity, they should opt for selection criteria enabling them to ascertain whether a tenderer has the capacity required for the contract in question, not to assess its general capacity. As regards economic and financial standing, the minimum yearly turnover required should not exceed twice the estimated contract value.

⁽¹⁾ See Article 1, point 22 and Article 21 of Directive 2009/81/EC.

⁽²⁾ See Article 1, point 13 and Article 5(2) of Directive 2009/81/EC.

Security of supply (SoS) and security of information (SoI) requirements, as non-mandatory exclusion grounds, selection criteria or contract performance conditions, should also be kept proportionate and in line with the needs of the individual procurement. Specifically, where such requirements are applied, care should be taken to limit them to what is necessary to achieve the particular aim pursued, and to ensure that they do not unduly restrict competition. Member States should make sure that, where security clearance is required and the contracting authorities are confronted with candidates whose security clearance was issued by another Member State, appropriate and timely steps are taken to assess, with due regard to Article 22 of Directive 2009/81/EC, whether such security clearance is equivalent to that issued under the national law of the contracting authority⁽¹⁾. Member States should make efforts to ensure that fulfilment of the SoS and SoI requirements of other Member States by their defence-oriented enterprises is possible and credible.

Article 38 of Directive 2009/81/EC requires verification of the suitability of candidates, in line with the criteria and by means of proof set by the contracting authorities in accordance with the Directive. Such proof may include certificates. However, the contracting authorities are not obliged to require certificates and other forms of documentary evidence to be submitted at the same time as the bids. To facilitate participation in the tendering procedures, the contracting authorities should consider accepting, as preliminary evidence at the time when bids are submitted, self-declarations on:

- the tenderer's personal situation (Article 39 of Directive 2009/81/EC),
- the tenderer's suitability to pursue the professional activity (Article 40 of Directive 2009/81/EC),
- the tenderer's fulfilment of the criteria regarding economic and financial standing and technical and professional ability (Articles 41-44 of Directive 2009/81/EC),

requiring submission of relevant evidence and certificates only at the award stage, i.e. before the signing of the contract, but after evaluation and choice of winner. In this context, Member States should consider allowing economic operators to submit or reuse a self-declaration through the standardised self-declarations (ESPD, known from general public procurement law, Article 59 of Directive 2014/24/EU), where necessary supplemented by information not covered by the ESPD.

There is nothing to prevent the contracting authorities from requesting further information, including some or all of the supporting documents, should they have any doubts at any point in the procedure, to ensure its proper conduct. There may be a particular need for this if a contracting authority decides to limit the number of candidates to be invited to tender or to conduct a dialogue (Article 38(3) of Directive 2009/81/EC). When making such requests for information or supporting documents, contracting authorities should always ensure compliance with the principle of non-discrimination.

Contracting authorities should not require tenderers to supply supporting documents which are already in their possession, or which they can easily obtain by directly accessing a national database, in any Member State, that is available free of charge.

Whenever possible, contracting authorities should use the option of granting candidates that do not yet hold security clearance (if such clearance is required) additional time to obtain it (third subparagraph of Article 42(1)(j) of Directive 2009/81/EC). As a general principle, contracting authorities should always avail themselves of the possibility of asking economic operators to provide missing documents and certificates relating to exclusion and selection criteria, or to clarify such documents and certificates if they are unclear (Article 45 of Directive 2009/81/EC).

Member States should facilitate cross-border use of documentation and certificates. In particular, they should ensure that information on certificates and other forms of documentary evidence for tendering under Directive 2009/81/EC are entered in e-Certis⁽²⁾ and regularly updated. When carrying out procedures under Directive 2009/81/EC, contracting authorities should use the e-Certis online repository.

⁽¹⁾ The last subparagraph of Article 22 of Directive 2009/81/EC provides that 'Member States shall recognise the security clearances which they consider equivalent to those issued in accordance with their national law, notwithstanding the possibility to conduct and take into account further investigations of their own, if considered necessary'. See also paragraph 12 of the Guidance Note on Security of Information: <https://ec.europa.eu/docsroom/documents/15411/attachments/1/translations/en/renditions/native>

⁽²⁾ See: <https://ec.europa.eu/growth/tools-databases/ecertis>

2.7. Procurement training and capacity building

Member States should organise training for procurement officers, provide opportunities to share experience, as well as guidance materials. They should provide dedicated training to highlight the specific characteristics of SMEs and their inherent operational constraints (financial flows, human resources, intellectual property rights management, etc.).

Member States should also organise training and prepare information materials for suppliers, service providers and contractors. Such materials should be generally accessible (or at least available to all businesses interested in defence procurement contracts). This would be particularly beneficial to SMEs and intermediate companies.

3. INDUSTRIAL POLICY

3.1. Funding

Member States' local and regional managing authorities should support SMEs and intermediate companies that are or could be active in defence supply chains. Member States can raise awareness among managing authorities and potential beneficiaries (such as SMEs, intermediate companies, research institutes or academia) about the use of European Structural and Investment Funds in the area of defence. They are encouraged to use the specific guidance which the European Commission is currently drawing up in this respect ⁽¹⁾.

Member States should consider opening up existing national funding instruments to defence-related SMEs and intermediate companies, if that is not already the case.

Member States should consider other types of possible support for SMEs, e.g. targeted State guarantees for SMEs and intermediate companies joining in cross-border European defence projects of an innovative nature. Such guarantees could partially or fully cover the business risk of smaller companies participating in such endeavours or of banks financing such projects ⁽²⁾.

Member States should inform and advise SMEs about funding opportunities at national and European level by making use of fora, platforms and other tools in the defence sector or other economic sectors.

Member States are encouraged to propose smart investment projects for future Test & Evaluation (T&E) requirements. This should open up T&E facilities to SMEs and intermediate companies, helping them to certify their products and benefit from their contribution to European defence qualification and certification efforts.

3.2. Databases

Member States could endeavour to map or review their national defence industrial base and to support the dissemination of information on the capacity of their industry. This could be done by, for instance, establishing new databases or contributing to existing ones through entities such as National Defence Industry Associations (NDIAs).

Member States are encouraged to support action to improve existing databases and projects on defence-related companies, their capabilities and available funding schemes and opportunities. This should entail, in particular, linking up existing national databases, NDIAs directories and other existing relevant sources (e.g. lists of members of defence-related clusters). Such tools could also include information on companies' technological capabilities. At a further stage, such databases could enable SMEs and intermediate companies to link their descriptions with Member States' information on future programmes or published procurement notices. Thus, prime contractors could immediately associate a description of an SME with a particular type of project or business opportunity.

⁽¹⁾ E.g. the 2017 Commission brochure 'Dual use technology in the EU'. See: http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=9255

⁽²⁾ The Member State establishing the guarantee scheme should make sure that it does not constitute State aid (in this regard, see the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC0620%2802%29&from=EN>) or notify the measure to the Commission.

3.3. Clusters

Member States should support the development of world-class competitive regional clusters of excellence in the area of defence and encourage them to cooperate across regions and Member States. Other specific forms of cooperation should be encouraged in clusters by boosting the proactive involvement of technology centres and science parks, 'living labs', finance providers or project-purpose groupings, to boost technology cooperation across sectorial boundaries and foster growth opportunities for defence-related SMEs.

Member States should encourage domestic clusters to seek engagement in European Strategic Cluster Partnerships ⁽¹⁾ supported under the EU programme for the Competitiveness of Enterprises and Small and Medium-Sized Enterprises (COSME). The purpose of such partnerships is twofold: to enable firms to access non-EU markets, and to boost smart specialisation investments within the Union. Member States should also encourage clusters to try to engage in cooperation within the Union under the relevant Horizon 2020 calls ⁽²⁾.

Member States are encouraged to target the defence sector when developing and implementing policies and measures in support of (regional) clusters. To that end, they can make use of existing tools and networks at Union level, such as the European Network of Defence-Related Regions ⁽³⁾. They should also promote the European Cluster Collaboration Platform (ECCP) ⁽⁴⁾ widely, as a tool that can help connect their clusters with over 500 cluster organisations, thereby initiating cooperation within and beyond Europe, to the benefit of their SME members.

3.4. Innovation, R&T

Member States are asked to provide specific support to SMEs with innovative concepts and technologies that may have defence applications. In addition, dedicated networks of National Contact Points should supply information on the rules of participation in research projects and the award of research grants. They should also organise brokerage events and services.

Member States should seek to design research projects to be SME-friendly. In addition, their defence research institutes should examine to what extent it is possible to involve SMEs in their projects.

Member States should ensure that information on intellectual property rights management is available within defence procurement authorities (e.g. through the contact details of appropriate institutions or booklets available in the authorities' facilities).

Member States should support open reference architectures for modular defence systems, enabling SMEs to design and commercialise subsystems and components independently and competitively.

3.5. Skills

Member States should have an overview of the national situation as regards the skills needed by their defence industry.

Member States should take advantage of the recently adopted New Skills Agenda for Europe and the opportunities it is opening up at Union, national and regional levels to address their skills gaps ⁽⁵⁾.

Member States should encourage cooperation between their industry, education and training institutions and other relevant organisations, to pursue concerted action to match supply and demand more satisfactorily and encourage the use of EU tools and instruments to achieve these goals. Member States should consider using the European Structural and Investment Funds ⁽⁶⁾ (ESI Funds), in particular the European Social Fund (ESF) ⁽⁷⁾, to address skills gaps.

⁽¹⁾ European Cluster Collaboration Platform: <https://www.clustercollaboration.eu/eu-cluster-partnerships>

⁽²⁾ For general information on Horizon 2020 see: <https://ec.europa.eu/programmes/horizon2020/en/what-horizon-2020>

⁽³⁾ See: <https://www.endr.eu/>

⁽⁴⁾ See: <https://www.clustercollaboration.eu/>

⁽⁵⁾ In particular the Blueprint for Sectoral Cooperation on Skills initiative under the New Skills Agenda for Europe, addressing the defence sector.

⁽⁶⁾ See: https://ec.europa.eu/info/funding-tenders-0/european-structural-and-investment-funds_en

⁽⁷⁾ See: <http://ec.europa.eu/esf/home.jsp?langId=en>

3.6. SMEs capacity

Member States should disseminate information about cross-border success stories to encourage SMEs and sub-suppliers to bid cross-border. They should also support the organisation of cross-border supplier conferences (B2B events and direct meetings with prime contractors) to improve SMEs' understanding of prime contractors' requirements, way of working and the industrial competences and capabilities sought; and provide platforms and opportunities for cross-border contacts between SMEs.

This can be done, for example, by awarding grants to event organisers in proportion to the level of participation by SMEs and start-ups. Such grants could cover various defence sectors in a balanced way. This could help SMEs take part in international B2B meetings, business missions abroad, and other international events.

Member States should also make more systematic use of existing tools at Union level to support SMEs' cross-border activities, notably through match-making services provided, for example, by the Enterprise Europe Network ⁽¹⁾.

Done at Brussels, 20 April 2018.

For the Commission
Elżbieta BIENKOWSKA
Member of the Commission

⁽¹⁾ See: <http://een.ec.europa.eu/>