

Item 5b.

New European Procurement Legislation – Summary of current understanding

1. Introduction:

1.1 The new EU Procurement Directives were formally approved by the EU in April 2014. The UK is still in the process of transposing these into UK law/regulations but despite stating that it intends to implement them before the end of 2014, it is more likely to be early 2015. This is in advance of the 2 year implementation period within the Directives.

1.2 These notes are a high level summary and interpretation of the new EU Procurement Directives at this time but may change depending on what is transposed into UK Law.

2. Changes and implications: New Utilities Directive:

2.1 Whilst most if not all Utilities in the UK are now private sector organisations their procurement is still highly regulated under the EU Procurement Directives. The changes are very similar to those applicable to the public sector and have imposed more regulation on the Utilities sector to bring it very much more closely aligned with the Public sector regime.

3. Changes and implications: New Concessions Directive:

3.1 This is a totally new Directive covering both the Public sector and Utilities sector. A 'Concession' is the offer of a licence to operate a specific activity, it does not involve payment for the service but could include an income stream for the public sector organisation.

Examples would be a licence to operate a café in a council owned park or a licence to operate an annual cultural event in a city.

3.2 Previously concessions were not covered by EU Directives but best practice guidance advised that advertising and award of such contracts should follow procurement methodology to ensure fair and equal treatment of bidders and transparency of process.

4. Changes and implications: Public Procurement Directive:

4.1 Procurement Procedure timescales (General):

Note that time limits for each stage have been shortened, including for whether eProcurement systems are being used or not.

4.2 When external procurement is not necessary (Article 12):

The Directive incorporates two important case law outcomes - 'Hamburg' covers joint co-operation arrangements between Contracting Authorities (i.e. shared services), 'Teckal' covers In-house contracts. An example of an in-house contract would be:

- Contracting Authority sets up a wholly controlled Legal Services Company and transfers its own Legal Department into it so that it can bid for external work (limited to 20% of activity)
- Contracting Authority then awards this company its own legal services contract

The process of defining whether external procurement applies or not is an up front strategy consideration before embarking on procurement.

4.3 eProcurement (Article 22 plus others):

The aim is to move to fully electronic procurement by all buying organisations.

4.4 Conflict of Interest (Article 24):

This new regulation incorporates current best practice in that Contracting Authorities must take appropriate measures to prevent, identify and remedy any conflicts of interest. This includes:

- As a minimum there must be safeguards to ensure that staff involved do not have an interest which would then be seen to compromise impartiality and independence
- Failure to remedy the conflict is grounds for exclusion.

4.5 New Competitive Negotiated and Competitive Dialogue Procedures (Articles 26, 29 and 30):

- More freedom for Contracting Authorities to use these new procedures especially when a contract cannot be awarded without negotiation due to the nature, complexity, risk, legal or financial situation.

4.6 Innovation Partnership Procedure (Article 31):

- New procedure for innovative products, services or works not available in the market. The definition of Innovation covers a wide range of areas including production, marketing, operational practices etc.
- The procedure is similar to Competitive Negotiation but has specific requirements around managing R&D and IPR issues and subsequent purchase of these rights.
- May negotiate until final tenders submitted.

4.7 Frameworks (Article 33):

- Frameworks may only be used by Contracting Authorities clearly identified in the advertisement. This would mean for example that a general reference to the NHS, Local Authorities or the Public sector would not be acceptable but the addition of a link to a list of the specific organisations which make up these categories would then be acceptable.

4.8 Dynamic Purchasing Systems (DPS) (Article 34):

- The rules have been simplified that ANY qualifying bidder that submits a request to participate has to be allowed to take part, this may result in far larger numbers of bidders.
- Still has to be a separate call for competition for each call off.

4.9 Central Purchasing Bodies (Article 37):

- This refers to Central Government Purchasing bodies e.g. Crown Commercial Service (formerly GPS). They must carry out all procurement electronically.

4.10 Market Consultation (Articles 40 and 41):

- It is acceptable that Contracting Authorities can seek external advice and views from the market, independent consultants etc prior to a procurement exercise. This must be totally open, involving all interested parties without any form of discrimination.
- It can be used for planning procurement provided that there is no distortion of competition, discrimination or lack of transparency.
- All information obtained must be freely available.
- If there is any view or suggestion that an organisation has obtained unfair advantage through this process they must be given the opportunity to prove otherwise. They can be excluded to ensure equal treatment.

4.11 Measures to encourage SME (Small, Medium Enterprises) (Article 46, 58):

- There is a simplification of information requirements, see section re Single European Procurement Document (ESPD), covered later.
- May limit the number of lots awarded to a single tenderer.
- UK Government has the option of requiring that contracts are split into lots – view not yet known.
- Exclusion based on proportion of turnover have been relaxed.
- Allows Contracting Authority to pay sub contractors direct.

4.12 Changes at Selection stage – Exclusions (Article 57):

- There are now new grounds for mandatory exclusion around binding judgements/decisions relating to:
 - Child labour and human trafficking
 - Failure to pay taxes or social security contributions
- There are extensions of grounds for discretionary exclusion relating to:
 - **Poor performance on previous contracts if this resulted in termination or damages or similar**
 - Undue influence on procurement decision making process
 - Other circumstances which would distort competition e.g. conflict of interest, collusion, prior involvement
- A bidder can 'self clean' the exclusion if they can show that they have paid compensation in respect of damages due to poor performance. This would be reviewed in the light of the seriousness of the situation and can not be done when there is a judgement pending.

4.13 Changes to technical capability (Article 58):

- Can require sufficient level of experience to perform a contract to an appropriate quality standard. Can use references from previous contracts.
- Can assume a supplier does not have the required capability if it can be established that the supplier has conflicting priorities.
- Can ask for educational and professional qualifications of staff but general principle applies that can only evaluate the same information once in the whole process.

4.14 Simplification of information provision – Single European Procurement Document (ESPD)(Article 59):

- The ESPD is to be a standard EU form of supplier self certification. This will provide basic defined key information about each supplier and will indicate how to obtain supporting documents and evidence.
- This must be used by Contracting Authority as evidence for eligibility, financial standing and technical capability but supporting documents and evidence can be requested at any stage and must be checked before award. If the contracting authority can obtain this evidence direct through a central database then it must do so.
- A current issue is that the ESPD has not yet been designed and may not be in place by the time that the UK proposes to implement the new directives.

4.15 Changes to Award Criteria (Articles 67, 68):

- All contracts awarded must be based on MEAT (Most economic advantageous tender): This can be based on price or cost using methods such as life cycle costing. Price/Quality ratios may be used, can have for instance a fixed price and only competition on quality.
- Member states can prohibit the use of price alone but it is highly unlikely that the UK will opt for this as it wants to limit the number of restrictions.
- Any quality criteria must be relevant to the particular procurement and can cover labour arrangements, social considerations and fair trade for example.
- Competitive Dialogue and Innovation Partnership procedures MUST use both price and quality criteria.
- There are specific rules if life cycle costing is used such as the procurement document clearly spelling out which costs to be included for all organisations involved in the process.

4.16 Abnormally low tenders (Articles 69):

- There must be investigation/explanation for tenders which appear abnormally low. However there is still no definition of what constitutes abnormally low – a difference of 25% is deemed as abnormal but this is still too broad brush.
- May reject a bid if there is no satisfactory explanation.
- May reject if the price is so low because they are breaching environmental, social or labour law.

4.17 Modification and termination of contracts (Article 72,73):

- The original procurement process and contract should define any areas of expected modification up front, for example any areas of potential extension.
- A retender is necessary if there has been a substantial modification or material difference in the character of the contract, for example:
 - Change of contractual partner
 - New conditions which would have allowed other bidders to compete or would have changed the award outcome
 - Scope extended considerably
 - Changes to balance in favour of the contractor which had not been provided for

4.18 Light Touch regime (Article 74-77):

- Previously the directives consisted of Part A – full rules apply and Part B – which were specific activities excluded from the rules. Procurement best practice was to apply the rigour of the rules in all cases but users within the specified areas of activity may not have applied this extra rigour. This distinction has now been removed and replaced with the compromise of a ‘Light Touch’ regime.
- The Light Touch applies to:
 - Health and social care services
 - Administrative social, educational, healthcare and cultural services
 - Welfare and religious services
 - Legal Services
 - Prison, public security and rescue services
 - International services
 - Postal services
- The new rules apply to a threshold of over 750,000 euro or circa £680k.
- There is no need to advertise in the OJEU for below threshold. Above the threshold there must be an OJEU notice or PIN (Prior Information Notice) and an award notice.
- Details of the Light Touch regime within the above criteria are to be defined by each member state but must comply with transparency and equal treatment. The UK has not yet defined this process but have said it will be ‘feather light’.
- Previously rules regarding these contracts were specified as part of Contract Procedure Rules for each buying organisation. This meant that in exceptional circumstances, there was flexibility to “waiver or exempt” such contracts from open competition. This will no longer be possible for contracts over the £680k threshold.

4.19 Procurement competition limited to Mutuals (Article 77):

- The competition for certain health, social, care, cultural and other services can be reserved for mutual organisations only and exclude all others, this is a major change from the previous regime where no entrant barriers were allowed.
- The requirements are:
 - Contract must be for a public facing service
 - Competition still required but can be limited to organisations who:
 - § Reinvest profits into service development
 - § Management/ownership is based on mutual principles/employee ownership
 - § Mutuals have not previously in the last 3 years had the specific contract
- Contracts are limited to 3 years duration.

5. Conclusions:

- 5.1 Clearly there are still a number of areas where the UK approach has not yet been defined and these areas will be watched with interest to understand the operational impact.

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