EU Policy Update (EU2012.04):

Modernising EU Public Procurement Directives

Background

Introduction

On 20 December 2011 the European Commission published its **proposals for new Directives governing public procurement in the European Union**. The Commission is hoping for adoption of the Directives by the end of 2012, leading to a deadline for Member State implementation of 30 June 2014.

The proposals have been the subject of scrutiny in the National Assembly for Wales by the Procurement Task and Finish Group of the Enterprise and Business Committee, chaired by Julie James AM.

The Commission published a further legislative proposal, in March 2012, for a regulation on access by third countries to the the EU's internal market for public procurement.[1]

The Legislative Packagage

The main package is composed of three proposed directives:

- Proposal for a directive on public procurement, replacing Directive 2004/18 (henceforth referred to as "PPD");
- Proposal for a directive on procurement by entities operating in the water, energy, transport and postal services sectors, replacing Directive 2004/17;
- New proposal for a directive on concessions.

Context

In its communication of 13 April 2011 on *The Single Market Act: Twelve levers to boost growth and confidence (IP/11/469)*, the Commission included the modernisation of the public procurement legislative framework among its twelve key priority actions to be adopted by the EU institutions before the end of 2012.

The Commission committed itself to adopt a legislative proposal for a

> ..revised and modernised public procurement legislative framework, with a view to underpinning a balanced policy which fosters demand for environmentally sustainable, socially responsible and innovative goods, services and works. This revision should also result in simpler and more flexible procurement procedures for contracting authorities and provide easier access for companies, especially SMEs.[2]

Summary of main points in the proposals

Simplification of the rules

The Commission has proposed a number of simplification measures, some of which would appear to make bidding for work easier for SMEs. These include:

- A **reduction of documentation requirements** (PPD, Article 57). Contracting authorities will be compelled to accept self-declarations as preliminary evidence that bidders fulfil criteria that are a pre-condition for tendering. Only the winning bidder will be required to back this declaration up

[1] European Commission, **Proposal for a regulation establishing rules on the access of third-country goods and services to the European Union's internal market in public procurement and procedures supporting negotiations on access of European Union goods and services to the public procurement markets of third countries** [Accessed 20 April 2012]

[2] Europa, ***Commission proposals to modernise the European public procurement market - Frequently Asked Questions*** **[Accessed 13 April 2012]**

with documentary evidence.

- Contracting authorities **must not ask a bidder to re-submit a certificate or other documentary evidence** that has previously been submitted in the preceding four years (ibid).
- **European Procurement Passport** (PPD, Article 59). National authorities shall issue, at the request of an economic operator meeting the necessary conditions to bid for a contract, a "European Procurement Passport". This passport shall be a standardized document to be accepted by contracting authorities as proof of its conditions for participation.

The Commission has proposed changes to procurement procedures, which it suggests will make the process simpler and more flexible:

- An **increased use of negotiation** (PPD, Article 24). The Commission states that the proposals allow for a greater degree of negotiation between contracting authorities and bidders.
- **Simplified procedures for sub-national contracting authorities**: (PPD, Article 46) Scope for regional and local contracting authorities to replace the publication of individual contract notices with the publication of a general notice for planned procurement for the coming year. This means that they would not have to publish a separate contract notice before launching the procurement procedure.
- **E-procurement**: A number of changes are proposed to enable suppliers to take part in online procurement activities. The directives impose a switch to fully electronic communication in all procurement systems within a transition period of two years. In April 2012 the European Commission adopted a **communication** setting out a strategy to fully implement the use of e-procurement in the EU by mid-2016.

Better access to the market for SMEs

A number of the Commission's proposals (including some of those mentioned above) are intended to provide SMEs with a better experience of the procurement regime. These proposals include:

- Contracting authorities are invited to **subdivide contracts into homogenous or heterogeneous "lots", or smaller contracts** (PPD, Article 44). Where they choose not to split a contract of a value greater than the standard threshold, but not less than EUR 500,000, into lots they must explain their rationale for not doing so. Furthermore, contracting authorities can limit the number of lots awarded to a tenderer, for example to preserve competition and security of supply.
- **Turnover requirements are to be limited** to three times the estimated value of the contract being bid for (except in exceptional circumstances) (PPD, Article 56).
- Member States will be able to provide that, in particular circumstances, **subcontractors will be paid directly by the contracting authority**, rather than by the main contractor (PPD, Article 71).

Thresholds

Despite representations from many stakeholders (including the Welsh and UK Governments), **the thresholds at which the procurement directives apply have not significantly changed** in the proposals (though the Commission has introduced a new threshold for "social and other specific services"). The Commission has stated that an agreement with the World Trade Organisation prevents it from increasing the thresholds. A review clause in the proposals enables the thresholds to be re-evaluated at a later date.

Innovation Partnerships

This is a new process introduced in the proposals. It enables an economic operator to enter into a **structured partnership with a contracting authority** with the end of developing an innovative product, service or works, with the subsequent purchase of the outcome.

The pursuit of social and environmental policy objectives

A number of proposals are intended to advance the EU's Europe 2020 strategy objectives for a greener, more social, innovative and inclusive economy. These include:

- Contracting authorities are able to calculate cost using a **"life-cycle" concept**, taking into consideration internal costs and monetised external environmental costs (PPD, Article 66-7).
- Contracting authorities may refer to factors directly linked to the **production process** of the product or service in the technical specifications and award criteria of the contract (PPD, Article 66). These factors must remain linked to the subject-matter of the contract.
- Contracting authorities may require that environmental, social or other characteristics required of goods, works or services are **certified as such by a specific label** (specifying, for example, particular environmental or social characteristics, such as the European Eco-label) (PPD, Article 41).
- The proposals include **an extension of the existing option that Member States have to reserve certain contracts for "sheltered workshops".** It is extended to economic operators whose main aim is the social and professional integration of disabled and disadvantaged workers and sheltered employment programmes where 30 per cent of the employees are disabled or disadvantaged workers (the figure is currently 50 per cent).
- The proposals seek to **clarify the extent to which social and environmental clauses may be used in the award of contracts**. The introduction to the PPD states that contract performance conditions may, for example, "be intended to favour on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, the fight against unemployment, protection of the environment or animal welfare".

Social and other services

The current procurement regime provides for a distinction between "part A" and "part B" services. Part A services are those deemed of interest to bidders in other Member States, and as such subject to the full procurement rules. Part B services were interpreted as of localised interest, and so only subject to general obligations such as transparency, equal treatment and non-discrimination.

The **proposals abandon this distinction between Part A and B services**. The procurement rules will therefore apply to all services, with specific exemptions. However, special dispensation is provided for "social and other specific services *(including health and education services)*" (PPD, Articles 74-76), which are subject to a softer regulatory regime.

Governance arrangements and knowledge centres

- The proposals state that Member States shall appoint a single independent **National Oversight Body** responsible for the monitoring, implementation and control of public procurement. This proposal has been opposed in the National Assembly for Wales and in the UK Parliament (see below);
- The proposals state that Member States shall provide **technical support structures** for contracting authorities, and also ensure that appropriate assistance can be obtained for economic operators, in particular SMEs, to enable

them to access public procurement.

Relevance to Wales

The EU Procurement Directives set out the legal framework for public procurement within the EU. They apply when public authorities and utilities seek to acquire supplies, services, or works (e.g. civil engineering or building).

The Directives have been implemented into national law in the UK by Regulations. One set of Regulations covers England and Wales, with another for Scotland.

As well as managing its own procurement activity, the Welsh Government provides procurement services to help contracting authorities within Wales with their procurement processes.

Value Wales (the Welsh Government procurement arm) manages a range of collaborative public procurement frameworks and supports the practical adoption of standard e-procurement tools through the XchangeWales programme.

The **Welsh public sector spends over £4.3 billion**, or around one third of its budget, on external goods and services. 50 per cent of this total reportedly goes to SMEs – compared to 35 per cent in 2003.[3] According to the Welsh Government, **99 per cent of businesses in Wales are SMEs**.

The Welsh Government has stated the following:

> A review of £3.5billion of public sector expenditure has shown that Wales based suppliers are winning contracts – nearly 60 per cent of the 3,400 suppliers winning direct work worth between £150,000 and £5 million per year were SMEs and 1800 or 51 per cent were based in Wales.[4]

[3] Welsh Government, *Welsh Government supports home-grown entrepreneurs in tough times, 17 August 2011* [Accessed 25 May 2012]
[4] Welsh Government, Cabinet Statement, *Public Procurement in Wales*, 18 February 2011 [Accessed 25 May 2012]

Responses to the proposals

UK Government position

The UK Government published, on 16 January 2012, an Explanatory Memorandum setting out its reaction to the Commission's proposals.[5]

The Government states that it "welcomes many of the proposals to simplify the rules and provide more flexibility for purchasers" and is pleased that "many of the UK-proposed measures have been included in the Commission's proposals".

However, the Government expresses a number of concerns with the proposals as they stand:

- The Commission has failed to make a sufficient case to justify the abolition of the Part A/Part B services distinction. Furthermore, the Government is not convinced of the merits of the proposed new regime for social services.
- Proposals for the provision of legal, training, advisory and other functions by Member States would require a substantial overhaul of the current system in the UK, where such services are often delivered by private suppliers.
- As per the views of the House of Commons and the National Assembly for Wales, the proposals for National Oversight Bodies breach the subsidiarity protocol, in their proposed ability to seize jurisdiction from national law bodies.

[5] This document does not appear to have been published on the Cabinet Office website.

Welsh Government position

The Welsh Government has written to the UK Government in an effort to influence the UK's Negotiating Line on the Commission's proposals.[6] It notes a shared view with the UK Government, that the public procurement rules should be simplified to facilitate economic growth. Further points include:

- A shared Welsh and UK view that procurement thresholds should be raised;
- A shared Welsh and UK view that the proposals do not provide sufficient flexibility to allow for the "in house" provision of services;
- Opposition to the removal of the Part A/B services distinction. Instead, the range of Part B (those excluded from the full procurement regime) should be broadened;
- Opposition to the proposed National Oversight Body arrangements;
- Opposition to the proposed reduction of time-scales for expressions of interest and tender return, on the ground that this could cause poor procurement planning and disadvantage SME/consortia bidding;
- A fear that the welcome flexibility introduced in the proposals may not be realised as a result of challenges against contracting authorities by economic operators using the Remedies Directive. The Remedies Directive should therefore be reviewed in conjunction with the new proposals;[7]
- Support for a number of the Commission's proposals, including: measures designed to improve SME involvement; promotion of wide social objectives and wellbeing; extension of reserved contracts; increased ability to engage in dialogue with suppliers, the ability to include life-cycle costing as part of the award, along with factors linked to the production process, and the six techniques and tools intended for aggregated and electronic procurement;
- A call for more clarity on the extent to which the proposals support sustainable procurement, provided this enables contracting authorities to support sustainable development objectives;
- Furthermore, the Welsh Government notes that, in addition to the criteria used by the UK Government, its assessment of the proposals includes the extent to which they "support our economic and social policy".

[6] The Welsh Government has not made these documents publicly available.

[7] The Remedies Directives, substantially amended in 2007, were intended to ensure that a rapid and effective means of redress is available in all EU countries in cases where bidders consider that contracts have been awarded unfairly.

Related Assembly activity

Enterprise and Business Committee Procurement Task and Finish Group

The public procurement proposals have been the subject of detailed discussion in the Procurement Task and Finish Group, established by the National Assembly for Wales Enterprise and Business Committee.

Following a meeting with officials from the UK Government Cabinet Office, the Committee wrote to the Welsh Government expressing its concern that the directives, as proposed, allow Member States to partially transpose the range of procurement procedures, therefore potentially limiting the flexibility of public procurement in Wales. The Welsh Government subsequently voiced this concern with the UK Government.

The group, chaired by Julie James AM, published its **report** in May 2012. Further information is available on the Assembly's website **here**.

Constitutional and Legislative Affairs Committee

Following concerns raised by the Enterprise and Business Committee Procurement Task and Finish Group, the National Assembly for Wales Constitutional and Legislative Affairs Committee laid a report, agreed by the Assembly, raising concerns that the proposed procurement directives breach the subsidiarity protocol, in respect of their proposals for National Oversight Bodies.

The subsidiarity principle states that the EU shall only act where its intended effects cannot be achieved at a sub-EU (Member State, regional or local) level.
The Report raises two specific concerns:

- The proposals for National Oversight Bodies breach the principle of subsidiarity by requiring an administrative body to carry out functions that would normally be carried out by the courts in the UK (a view shared by the UK Government);
- Furthermore, by proposing a single body per Member State the proposals do not have regard to the principle of devolution in the UK.

The report forms the basis of representations made to the relevant committees of the House of Commons and the House of Lords.

House of Commons response

The UK Parliament House of Commons has issued a Reasoned Opinion (submitted to the Presidents of the European Parliament, the Council and the Commission) stating that the proposed procurement directives breach the subsidiarity protocol, in respect of their proposals for National Oversight Bodies.[8]

The Reasoned Opinion quotes from the National Assembly for Wales' Constitution and Legislative Affairs Committee's report, and reiterates the specific concerns raised in the Assembly about the proposal for National Oversight Bodies not respecting devolution within the UK.

Other stakeholders' responses

NHS

In discussions with the Assembly's Procurement Task and Finish Group NHS Wales said that efforts to simplify and make the procurement directives more flexible were helpful. However, officials raised several concerns, including those regarding the nature of the proposed National Oversight Bodies, and that the thresholds remained too low.[9]

Welsh Local Government Association (WLGA)

With local government elections having taken place on 3 May 2012, the WLGA has stated that it will not be able to provide an overview of its views regarding the procurement proposals for some time.

Pending this document, the following views can be ascertained from the **WLGA response to the European Commission consultation last year** (though it should be noted that this position has not been endorsed by the current political leadership of Welsh local government):

- The WLGA stated that consideration should be given to extending the principle of "reserved contracts" (whereby bids are reserved to certain organisations, such as Remploy-type bodies) to SMEs. There are no such measures in the proposals.
- The WLGA invited "a greater ability to freely negotiate contracts". The proposals do allow for

[8] House of Commons, **Reasoned Opinion concerning Public Procurement and Procurement by Public Entities, 6 March 2012**

[9] **National Assembly for Wales, Enterprise and Business Procurement Task and Finish Group, 2 February 2012 meeting**

more negotiations between contracting authorities and economic operators.

- The WLGA invited the EU to "set up and promote tools for structured knowledge sharing, training and for the promotion of models of good practice". The proposals include new "knowledge centres" that could fit this bill.
- Although noting that it was not specifically part of the review, the WLGA invited the Commission to consider the impact of the Remedies Directives on procurement practice.

National Council for Voluntary Organisations

NCVO is the largest general membership body for voluntary and community organisations in England. In January 2012 it responded to a UK Government Cabinet Office consultation on the proposed directives.[10]

Its response included the following points:

- Support for increasing the threshold for exemptions from procurement rules for social service contracts up to 500,000 Euro, enabling many smaller organisations to access funds with a much lower administrative burden. However, NCVO states that it is important that wider social clauses are not lost from these contracts;
- Support for the proposal to encourage contracting authorities to divide large tenders into smaller lots, which it hopes would enable smaller organisations to make use of public contracts;
- Inviting clarification of the proposed Innovation Partnerships;
- Support for the proposal for independent National Oversight Bodies.

Federation of Small Businesses (FSB) in Wales

The FSB in Wales gave evidence to the National Assembly for Wales' Procurement Task and Finish Group, and has made its written evidence available on its website.[11]

It supports measures designed to help SMEs, such as:

- Self-declaration for bidders;
- The encouragement for contracting authorities to divide contracts into lots ;
- Limiting turnover requirements for bidders.

It states that it is "ultimately sceptical over the need for additional national oversight structures/ knowledge centres."

BusinessEurope

BusinessEurope is an EU network of bodies like the CBI (UK) and its equivalents in other Member States.

In December 2011 it stated that,

> An overhaul of the current legislative framework is unnecessary given that the main problems lie in poor enforcement of the rules at national level and a lack of training amongst contracting authorities over how to apply the rules correctly.[12]

EU National Parliaments

Details about scrutiny of the procurement dossier taking place in national parliaments across the EU are available on the IPEX (Inter-Parliamentary EU Information Exchange) website **here**.

The Swedish Parliament has issued a Reasoned Opinion stating that the proposals for National Oversight Bodies and knowledge centres breach the

[10] NCVO, **We are pushing for simpler EU procurement rules, January 2012**

[11] Federation of Small Businesses, **National Assembly for Wales inquiry into the modernisation of EU Procurement 17 February 2012**

[12] BusinessEurope, **Public Procurement: BusinessEurope calls for better enforcement and more legal uncertainty, December 2011**

subsidiarity principle. No other Reasoned Opinions were submitted, though subsidiarity concerns have been raised in other Member States, and sub-Member State bodies.

Progress of dossier in EU institutions

The EU Public Procurement Directives will be adopted through the 'ordinary legislative procedure' (also referred to as 'co-decision') which requires agreement between the Council of Ministers (Member State governments) and the European Parliament in order for the text to be adopted as EU law.

It is possible to track the proposal through the EU decision-making process on two web-links:

- **Pre-Lex** (the database on inter-institutional procedures that follows the major stages of the decision-making process between the Commission and the other institutions);
- **European Parliament Legislative Observatory** (the European Parliament's database for monitoring the EU decision-making process).

NB. Both of these links are for the Public Procurement Directive.

European Parliament

Within the European Parliament the **Internal Market and Consumer Protection Committee**, chaired by UK Conservative MEP Malcolm Harbour (from the same political group as Welsh MEP Dr Kay Swinburne) is the lead committee. There are no Welsh MEPs on this committee; however, its lead rapporteur for the dossier, Belgian MEP Marc Tarabella, is from the same political group as Welsh MEP Derek Vaughan, whilst Welsh MEP Jill Evans is one of the shadow rapporteurs.

The first exchange of views in the Internal Market Committee took place on 29th February 2012, and on 20 March 2012 the Committee held its first public hearing into public procurement. Issues raised included governance issues, including the proposal for National Oversight Bodies.

The Committee considered the draft report 30-31 May 2012. The draft report focused on two key themes of procurement reform, namely: (i) how to make the most of using strategic, notably social, procurement criteria; and (ii) how to achieve procedural simplification and flexibility, including the promotion of e-procurement.

Other priorities for the Rapporteur are possible exemptions from procurement rules for cooperation between public authorities; access of SMEs and strengthened oversight in the form of national enforcement bodies.

The indicative plenary sitting date for the first reading is 10 December 2012.

The lead rapporteur Marc Tarabella has identified four "priority clusters", areas of the proposals he would like to see examined more closely (out of ten clusters, all of which are discussed in his **draft opinion**):

- **Wider choice of procedures**: the rapporteur would like to develop safeguards to accompany the extension of the competitive procedure with negotiation, and eliminate the criterion of the lowest price only award criteria for all procedures;
- **Strategic use of procurement**: a number of changes are suggested, including developing a more comprehensive concept of life-cycle costing, including both environmental and social sustainability criteria; making exclusion grounds for non-compliance with social, environmental and labour law mandatory and building into the proposed new regime for social services contract-award principles relating to affordability and vulnerable users.
- **SME access**: suggested changes include clarifying the proposal to encourage division of contracts into lots, further reviewing financial capacity requirements of SMEs and reviewing e-

procurement and the proposed "e-procurement passport" from the perspective of SMEs.

- **E-procurement**: in addition to reviewing various aspects of e-procurement in light of SMEs' requirements, the rapporteur asks that data protection aspects are clarified.

Council of Ministers

An orientation debate was held on the proposals in the Competitiveness Council on 20 February 2012. The UK Government was represented by Norman Lamb, Parliamentary Under-Secretary of State for Business, Innovation and Skills).

At the meeting Mr Lamb pushed for greater flexibility in the procurement rules, and called for the retention of the current distinction between part A and part B services. Specific to the UK, he also called for the Commission to consider whether fledgling mutuals should be subject to full EU rules from the outset, and whether it might be appropriate to introduce a time-limited exemption.[13]

The Council's discussions were focussed on two main aspects of the proposals:

- **The degree of flexibility that should apply in the use of competitive procedures with negotiation**. A majority of delegations stated that a wider use of negotiated procedures in public contracts should be possible and that certain safeguards should also be put in place to ensure equal treatment for tenderers.
- **Rules for certain categories of services: social, cultural, health, etc**. Many delegations emphasised that the new system should strike the right balance between promoting efficiency through competition in contract awards and delivering on the objective of lighter public procurement rules for certain services.[14]

A second Council debate took place on 30-31 May 2012.Discussion centred on two main aspects of the dossier:

- **E-procurement**, and the Commission's stated aim to push for full use of e-procurement by mid-2016;
- **Governance**, and whether monitoring issues – which the Commission proposed should be dealt with by prescribed National Oversight Bodies – should be dealt with individually by Member States.[15]

Committee of the Regions: subsidiarity monitoring

The Committee of the Regions monitors potential breaches of the subsidiarity principle in EU proposals. Statements from EU regional representatives regarding subsidiarity issues in the procurement proposals are available on this page of the Committee of the Regions **Subsidiarity Monitoring Network** website.

This page includes submissions from the National Assembly for Wales, Scottish Government and English Local Government Association, all of whom raise concerns about the Commission proposals for National Oversight Bodies.

The Committee of the Regions is also drafting an opinion on the draft public procurement proposals, and the rapporteur for this is Swedish politician Catarina Segertsen Larsson. A **public hearing** to inform the opinion took place on 21 May.

[13] **HC Deb 28 February 2012 c19WS** [Accessed 21 June]

[14] Council of the EU website, **Press release 3147th meeting of the Competitiveness (Internal Market, Industry, Research and Space) Council, 20-21 February 2012** [Accessed 24 May 2012]

[15] **Note from Danish Presidency to the Council: Proposal for a Directive of the European Parliament and of the Council on Public, 11 May 2012** [Accessed 25 May 2012]

Further information

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