



Changes to the EU procurement rules What lies in wait?

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An analysis of the implications of the proposed
draft European directive on public procurement.

Changes to the EU procurement rules

What lies in wait?

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THE BACKGROUND

The European Commission published proposals for three new draft directives on public procurement in December 2011.¹ These were a revised directive on public works, supplies and services contracts, a revised directive on procurement in the water, energy, transport and postal services sectors and a new directive on concessions, which have until now only partly been regulated at EU level. This booklet is a summary of the draft directive on works, supplies and services contracts.

Following a process of negotiation with Member States, a revised text was approved by the Commission in June 2013 and by the European Parliament on 15th January 2014.² Following publication in the Official Journal of the European Union, Member States will have two years in which to implement it.

The procurement rules, designed to achieve fair competition for public sector work across the EU, began to take shape in 1971 and the most recent directive on procurement dates from 2004. It is generally believed to have encouraged competition and transparency but is often considered to be too rigid and bureaucratic.³

According to the preamble to the new directive, it has two main objectives. These are, first, to increase the efficiency of public spending leading to improved value for money. This, it is said, will require greater “simplification and flexibilisation” of the existing rules (i.e. making them simpler and more flexible). The main aim of this is to help small and medium-sized businesses to gain a larger share of the public sector market.

The burdensome nature of the procurement process is widely believed to be a factor in the dominance within the public sector market of large and well-resourced companies. The second important objective is to increase the scope for procuring authorities to use the rules as a means of promoting social and environmental objectives.

One of the most striking features of the new directive is that it is longer and more complex than the directive it is intended to replace. Rules have been added to cover situations which were not governed by specific rules before. Where the Court of Justice of the European Union has pronounced on an important point which was not mentioned in the earlier directive, then the conclusions of the court have been incorporated in the directive, often virtually unchanged. New procedures with impressive-sounding names have been added. This is, on the face of it, a curious way to go about streamlining the regime.

Before publishing the proposal, the Commission undertook research to evaluate the effects of the procurement directives.⁴ It found there had been considerable savings as a result of the competition requirements, substantially outweighing the costs of carrying out the procurement.⁵ It found though that there had been little market penetration by providers in this field of other national markets. The Commission speculate that this is because of the nature of the activities largely provided within the public sector, which makes them unsuitable for trans-national tendering.

¹ Proposal for a Directive of the European Parliament and of the Council on public procurement COM (2011) 896 final

² Presidency text / compromise version 12878 / 12 MAP 50 MI 514 CODEC 1972, 24 July 2012 and Presidency compromise text / consolidated version 14418/12 MAP 54 MI 558 CODEC 2268 2 October 2012 and 16725/12MAP 70 MI 772 CODEC 2794 27 November 2012.

³ This is reflected in the reasons for embarking on this exercise and in the response to the consultation.

⁴ EU Public Procurement Legislation: Delivering Results Summary of Evaluation Report.

⁵ It is estimated that the additional cost of compliance with the EU procurement rules (i.e. in addition to procurement costs which would have been incurred in any event) is €1.68 billion per annum and the savings in the region of €20 billion. The research provides support for the view that for smaller contracts the costs of compliance can be disproportionate. It is estimated that for a contract with a value of €125,000 the procurement costs can amount between 18 and 29% of the contract value.

In some cases, such as public administration and education, this is undoubtedly true, but in others where services are fundamentally similar across the EU, it is more surprising that cross-border tendering is so limited.

The Commission also undertook extensive consultation on the proposed changes.⁶ There was universal support for simplifying the procedures and making them more flexible as well as strong support for reducing administrative burdens related to the choice of bidder. There was less support for the notion of using the rules as a means of achieving societal goals, with businesses in particular reluctant to see the procurement rules used to achieve other policy objectives.

Summary

- The existing rules are seen as too rigid and the main aim of reform is to provide a simpler and more flexible regime
- This should open up more public sector work to small and medium-sized businesses
- There should be greater scope for use of the rules to promote social and environmental objectives

⁶ Green Paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market COM (2011) 15 final

THE REVISED DIRECTIVE

Procurement between public authorities

Procurement between public authorities, a fertile subject for litigation in recent years, is the subject of new specific exclusions.

It frequently happens that a public authority enters into a contract with another public authority for the performance of some of its functions. In addition, public authorities have often set up companies to undertake work for them and awarded contracts directly to them.

The question is whether these types of contract fall within the ambit of the procurement rules. The preamble to the new directive states that this needs clarifying. In fact this has, to a large extent, already been clarified, by the CJEU in the cases of *Teckal*⁷ and subsequent cases dealing with companies controlled by local authorities and in the cases of contracts awarded between authorities, the case of *Commission v Germany*⁸ and the Commission Staff Working Paper dated 6 October 2011.⁹ The new proposals are set out in Article 11 of the new directive. These reproduce the principles of the case-law but add very little that is new.

The first paragraph sets out the *Teckal* principles with one significant difference. The paragraph provides that a contract awarded by a contracting authority to another legal person falls outside the scope of the directive when the following cumulative conditions

are satisfied:

- the contracting authority exercises over the legal person concerned a control which is similar to that which it exercises over its own departments;
- at least 80 per cent of the activities of that legal person are carried out for the controlling contracting authority or for other legal persons controlled by the contracting authority;
- there is no private participation in the controlled legal person.

The only change to the established *Teckal* principles is where a percentage is applied instead of the rather more flexible test developed by the CJEU to the effect that the company must carry out the “essential part” of its activities with the contracting authority.

In the case of *Commission v Germany* four German local authorities had agreed to supply waste to an incinerator owned by the City of Hamburg. The CJEU agreed with Germany that this fell outside the scope of the EU procurement rules as being an example of inter-authority cooperation and the joint fulfilment of public interest functions. In these circumstances, the arrangements did not adversely impact on the main object of the procurement rules, namely the free movement of services, so there was no need for a competitive

⁷ *Teckal Srl v Comune di Viano, Azienda Gas-Acqua Consorziata (AGAC) di Reggio Emilia* (Case C-454/06)

⁸ *Commission v Germany* (Case C-480/06)

⁹ However, a contract cannot simply be awarded to another public authority without complying with the rules. A contract of this nature is not excluded from the operation of the rules, even if the payments are only to cover costs and do not include a profit element: *Piepenbrock Deinstleistungen GmbH & Co v Kreis Düren* (Case C-386/11)

procurement process. This principle is now to be enshrined in the directive. Article 11(4) provides that agreements between two or more contracting authorities are not public contracts for the purposes of the directive provided that the following conditions are fulfilled:

- the agreement establishes a genuine cooperation between the participating contracting authorities aimed at carrying out jointly their public service tasks and involving mutual rights and obligations of the parties;
- the agreement is governed only by considerations relating to the public interest;
- the participating contracting authorities do not perform on the open market more than 20 per cent in terms of turnover of the activities which are relevant in the context of the agreement;
- the agreement does not involve financial transfers between the participating contracting authorities, other than those corresponding to the reimbursement of actual costs of the works, services or supplies;
- there is no private participation in any of the contracting authorities involved.

The first two of these criteria should normally be easy to establish. Provided this is not in the nature of a commercial joint venture, these two requirements will be fulfilled. The meaning of the third is not at first sight easy to grasp. The “activities relevant in the context of the agreement” presumably refers to the subject matter of the contract. If the contracting authority is undertaking this activity and provides it both as a public service and as a commercial venture, then the commercial venture cannot comprise more than 20 per cent of the total turnover. However, this test could be difficult to apply in the context of local authorities. For instance, are leisure services “performed on the open market”? Presumably they are, since they are open to any member of the public who wishes to use them.

Depending on the circumstances, an authority may make a profit from them, though making a profit is presumably not critical in determining whether an activity is performed on the open market.

The fourth criterion should again be easy to establish. If there is a profit element in the payments, then it needs to be treated as a public contract and awarded to another contracting authority only if that authority has won it in open competition.

The fifth criterion effectively limits the use of this exemption to public authorities.

Principles of procurement

The well established principles governing public procurement are now included within the directive. Article 15 provides that:

“Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.”

The article goes on to provide that procurement must not be designed with the intention of excluding it from the directive or of artificially narrowing competition. Artificial narrowing means that there is an intention of unduly favouring or disadvantaging certain economic operators.

Another new provision is the requirement on member states to take appropriate means to ensure that in the performance of a public contract, economic operators comply with applicable obligations in the fields of environmental, social and labour law, whether enshrined in EU law, collective agreements, national law or one of the applicable international charters. This is not a ground-breaking provision. What member states consider to be appropriate is very much a matter for them.

The directive does not contain any specific requirements such as requiring clauses to this effect to be included in contracts. In addition, it only refers to compliance with existing requirements. This provision will not oblige contractors to do anything other than obey the terms of collective agreements and obey the law.

New procedures

Public authorities already have a choice of four procedures that they can use for procuring work: the open, the restricted, the negotiated and competitive dialogue procedures. The open and restricted procedures can always be used. The negotiated procedure can be used only in very limited circumstances and, under the terms of the current rules, the competitive dialogue can only be used for “particularly complex” contracts.

The proposal is to add two new procedures: the competitive procedure with negotiation and the innovation partnership procedure. In addition there will no longer be a requirement for contracts procured under the competitive dialogue process to be “particularly complex”. In future, it will be possible for any old contract to be procured under the competitive dialogue procedure.

What is the difference between the competitive procedure with negotiation and the competitive dialogue procedure? The distinction lies in the purpose of the negotiation. In the competitive procedure with negotiation, the purpose of the negotiation is “to improve the content of the offers in order to better correspond to the award criteria and minimum requirements”. The obligation of authorities in the competitive dialogue procedure, however, is to “open ... a dialogue the aim of which shall be to identify and define the means best suited to satisfying their needs”.

Since “needs” and “requirements” are to all intents and purposes synonymous, the distinction is rather a fine one. The intended difference appears to be this: in the case of the competitive procedure with negotiation the authority knows exactly what it wants; it can specify its requirements but is allowed to negotiate with a view to ensuring that the bid is an

improvement in terms of meeting them. In the case of competitive dialogue the authority knows what its needs are but does not have a specific set of requirements setting out the means by which those needs can be fulfilled.

And what of the innovation partnership? The purpose of this procedure is to establish “a structured partnership for the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works”. The article requires the partnership to be “structured in successive stages following the sequence of steps in the research and innovation process, possibly up to the manufacturing of the supply and the provision of the services.” The procedure though is the same as the competitive procedure with negotiation. Contracting authorities will only be able to use this procedure if there is not a solution on the market.

Allowing for more dialogue and negotiation in procurement may produce greater flexibility but will need to be carefully handled. In the HM Treasury review of the competitive dialogue process one of the main criticisms of public authorities was that competitive dialogue was used too frequently and often in situations where it was inappropriate.¹⁰ It can be tempting for authorities to use competitive dialogue since at the outset it saves the hard work of deciding exactly what its requirements are and how they should be specified. However, anyone who has participated in a competitive dialogue can testify that the process of discussion of the solution carried on with a number of bidders – often at least three until quite a late stage – can be very time-consuming. Because a number of different solutions are being developed it can also be complex and wasteful.

Unless it is used sparingly, there is clearly potential for both the competitive dialogue and the competitive procedure with negotiation to generate more discussion and correspondence than solid progress.

It must be questionable whether the new innovation partnership procedure is needed at all. There is nothing inherently problematic about drafting a contract which allows for a solution or product to be developed in successive stages in accordance with set milestones. For instance, ICT solutions contracts are drafted on this basis. There is nothing in the current EU procurement rules which prevents or inhibits this procedure being incorporated in contracts. The problem here is the assumption that the introduction of a procedure will encourage innovation which is assumed to be a good thing. It depends though, what you mean by innovation. Innovation in the sense of a new discovery or breakthrough is relatively rare and is more likely to be achieved through a process of research and development than because somebody has written a requirement in a contract. The development of a solution, whether for a product or a service, cannot accurately be described as innovation.

The Commission advises that contracting authorities should not use the innovation partnership procedure in such a way as to prevent, restrict or distort competition. It then goes on to suggest that in certain cases, establishing a series of parallel innovation partnerships could contribute to avoiding such effects. This is very difficult to understand. If these different partnerships are for different solutions then it would seem to be irrelevant to the issue of competition. If they cover the same ground then they would seem to have a larger role in creating duplication than avoiding competition.

¹⁰ HM Treasury Review of Competitive Dialogue November 2010

Revised requirements for public service contracts

In the 2004 directive there are two types of public service contracts. Contracts for part A services, which include telecommunications, financial services and ICT services, are subject to the full rigours of the procurement rules. Contracts for part B services, which include health services and legal services, require only very limited requirements to be fulfilled.

The distinction was eroded – some would say thrown into confusion – by the 2006 Commission Interpretative Communication which stated that, although contracts for part B services with values below the relevant threshold were not subject to the advertising requirements of the directive they nonetheless needed to be publicised and the procurement process dealt with in such a way as to ensure an appropriate level of openness and competition.¹¹ Exactly what public authorities needed to do to comply with this requirement was left unhelpfully vague, but cautious authorities have since that date treated above threshold part B contracts in a similar way to part A contracts.

The distinction is now to be abolished and all services contracts will have to be advertised and procured in accordance with the requirements of the directive. However, many of the types of contract which were previously subject only to part B requirements will now fall within the new “light touch” regime for services where there is thought to be limited cross-border interest. For such services there is a separate and much higher

threshold of €750,000. The reasoning behind this is said to be that contracts below this level will not typically be of interest to providers from other member states. This regime will require only observance of the basic principles of transparency and equal treatment and making sure that service providers can be selected by applying specific quality criteria. The services to which this new regime applies are listed in Annex XVI of the directive and broadly fall into the following categories:

- health and social services;
- educational and cultural services;
- social security and benefit services;
- religious services;
- hotel and restaurant;
- legal services;
- administrative and government services;
- services to the community; and
- public security and rescue services.

¹¹ Commission Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (2006/C 179/06)

Better access to the market for SME's and start-ups

One of the difficulties with a set of complex and inflexible rules is that this makes it more likely that the market will be dominated by large companies which have the resources to invest in the tender process and will not have difficulty in fulfilling the relevant requirements for participation.

The European Commission accepts that small and medium-sized enterprises (SMEs) have considerable potential for generating jobs and growth so barriers to their participation in the market should only exist if they are essential.

The Commission has been alive to this problem for some time and in 2008 published a staff working document setting out ways in which SMEs could be encouraged to participate in public procurement. The new directive includes other initiatives which are intended to lower the bar for participation by SMEs. These are:

- simplification of information obligations - putting together information for pre-qualification questionnaires can be a time-consuming paperchase. For selection processes, self-declarations will be regarded as prima facie evidence that the requirements have been met;
- division into lots - public authorities will be invited to divide public contracts into lots to make them more accessible for smaller businesses and if they do not do so, they will be asked to provide an explanation;
- limitation on requirements for participation - only conditions for participation set out in the directive will be allowed. In order to be imposed, conditions will have to be restricted to those that are appropriate to ensure that the candidate has the capacity and abilities to perform the contract; and
- direct payments to subcontractors - there will be a right for subcontractors, often SMEs, to request direct payments from contracting authorities.

Shortlisting and award criteria

The distinction between the criteria used for selecting companies to be invited to bid (i.e. the shortlisting process) and the criteria used for evaluating the winning bid have for long been a source of confusion.

The shortlisting criteria must be related to the bidder itself. The current directive refers to the company's "economic and financial standing" and its "technical and professional ability". However, the criteria for choosing the winning bid had to be focused on the characteristics of the bid rather than the company that submitted it. A public authority that mixed up these two stages and used criteria related to the company as contract award criteria was liable to have its decision declared unlawful and to be compelled to undertake the procurement process again, as happened in the case of *Lianakis*.¹²

The preamble to the proposed new directive indicates that there is a need to clarify this, but in fact the changes are not far-reaching. The conditions for participation are now listed as:

- suitability to pursue the professional activity;
- economic and financial standing;
- technical and professional ability.

This does not really represent a change, simply a recognition of the fact that a significant number of contracts involve the provision of professional services.

Turning to contract award criteria, these now have to be designed to identify "the most economically advantageous tender". This is a change from the current position where a contracting authority can choose between the use of criteria designed to identify the most economically advantageous tender or the tender which offers the lowest cost.

Marc Tarabella, the EU Rapporteur for Public Procurement says that "The new criteria will put an end to the dictatorship of the lowest price and once again make quality the central issue." This is not entirely accurate. If this had been the aim then the expression "most economically advantageous" should have been changed. A reading of the article shows that the "central issue" is neither price nor quality but value for money. The article goes on to say that the most economically advantageous tender:

"shall be identified on the basis of the price or cost, using a cost-effectiveness approach such as life-cycle costing in accordance with Article 67 and may include the best price-quality ratio which shall be assessed on the basis of criteria including qualitative, environmental and/or social aspects linked to the subject matter of the public contract in question."

The reference to social aspects is new. However, since these must be connected to the subject matter of the contract, this does not give contracting authorities the power to use procurement

¹² Emm. G. Lianakis AG v Dimos Alexandroupolis (Case C-532/06)

as a means of promoting social improvement generally. For instance it would not be lawful to discriminate against contractors who had business links with a government of which the contracting authority disapproved.

There is also now more detail on the factors which can be used in assessing which tender is the “most economically advantageous”. For service and design contracts these now include “the organisation, qualification and experience of the staff assigned to performing the contract”. This allows public authorities to require that “such staff may only be replaced with the consent of the contracting authority, which must verify that replacements ensure equivalent organisation and quality”. This can be a reasonable requirement if it prevents contractors from ceasing to use the staff who drew the employing authority to their bid. However, it appears to overlook the fact that there is a free market in labour. Employees who are able to command higher salaries elsewhere are free to up sticks and leave. A requirement that they have the permission of a client to do so is difficult to include in contracts of employment.

The real issue here is that, as part of the contract award process, a contracting authority is unable to take into account the quality and experience of the organisation. Apart from the references to staff, this has not changed.

Dynamic purchasing and electronic catalogues

A dynamic purchasing system is an electronic system for the purchase of commonly used goods, works or services.

The system remains open throughout its term to the contractors who have satisfied the authority’s selection criteria and have submitted an indicative tender complying with the

authority’s specification. It is, in effect, an electronic framework agreement. However, this procedure has not been widely used. Under the existing rules it is much less flexible than a framework agreement since each individual call-off under the system has to be the subject of a separate notice in the Official Journal. This requirement is to be removed, which should increase the take-up of this procedure.

Authorities will also be able to require the submission of electronic catalogues i.e. lists of goods or services with prices attached. This power is not restricted to situations where the authority is using a dynamic purchasing system.

Central purchasing bodies and electronic communications

The directive contains a number of provisions designed to increase the speed and efficiency of the procurement process.

This includes an ability for all contracting authorities to purchase through a central purchasing body and requires Member States to provide for the possibility of contracting authorities being able to use central purchasing bodies established in other Member States.

All procurement by central purchasing bodies will have to be undertaken by electronic means from the date on which the directive takes effect.

Quality assurance and environmental management standards

Considering that one of the purposes of the whole exercise of rewriting the procurement rules was to look at ways in which the rules could be used to achieve desirable objectives such as reducing damage to the environment, the proposed directive is distinctly light in this area.

Contracting authorities may insist on participating bidders achieving certain standards for quality assurance (including access for disabled people) and environmental management.

Where there are such requirements there will be an obligation to accept as evidence of fulfilment, certificates attesting to the requirements met by the relevant body. Apart from this the rules remain essentially unchanged.

Framework agreements

In the preamble to the proposal, framework agreements are said to be “considered as an efficient procurement technique throughout Europe”. It goes on to say that certain concepts need to be clarified, particularly the conditions for the use of a framework agreement by contracting authorities which are not themselves party to it. This is a question which has never been satisfactorily resolved.

Clearly, a public authority cannot use a framework agreement unless it was listed in the OJEU notice which advertised the framework agreement. However, it is not clear whether an authority needs to be a party to the framework agreement entered into at the beginning or whether it can choose, as it were, to join the party when it feels the need to do so. The new proposals governing framework agreements appear to endorse the latter approach. It provides that the procedures for calling off under a framework agreement

“may be applied only between those contracting authorities clearly identified for this purpose in the call for competition or the invitation to confirm interest and those economic operators originally party to the framework agreement.”

This is really a statement of the obvious. Clearly a public authority cannot appear out of nowhere and use someone else’s framework agreement. This would be an obvious breach of the rules. What it does not say is that the contracting authorities using the framework need to have been a party to that agreement. This allows some scope for abuse. Large numbers of authorities could be named on the notice. To allow one of these to use the framework some years later when it has not joined at the beginning looks like evading the requirement to seek competitive tenders for the work.

Abnormally low tenders

The new directive contains provisions about the circumstances in which a contracting authority is obliged to investigate a tender which appears to be low.

The new obligation is as follows: “contracting authorities shall require economic operators to explain the price or costs proposed in their tenders where tenders appear to be abnormally low.”

It is therefore clear that there is an obligation to investigate even if the authority is planning to accept the tender.

The new rule goes on to provide that “the bid may only be rejected where the evidence supplied does not satisfactorily account for the low level of price or costs proposed.”

Rejection is mandatory if the low price is because of non-compliance with laws relating to environmental, social or labour law. It would seem to require a substantial degree of naivety on the part of a contractor to be rejected on this basis.

Contract changes

Another vexed question has been the extent to which a contracting authority can change the terms of a contract which has been let under the procurement rules. Clearly most, if not all, major contracts require a degree of flexibility and to prohibit changes would be impracticable. At the other extreme, a public authority cannot be allowed to carry out a tendering exercise, award a contract and then change it into a completely different contract. The question is where, between the two extremes, the line should be drawn.

There was nothing governing this in the 2004 directive so the rules were laid down by the CJEU in the case of *presstext*¹³ which provided that a substantial change to the contract would necessitate a new award.

The new directive allows changes during the course of the contract for a number of specific reasons:

- it is provided for in a review clause;
- there is a need for additional works, services or supplies;
- the need results from unforeseen circumstances;
- there is a replacement contractor;
- the modification is not substantial;
- it is below a certain value.

Inevitably, these reasons are subject to conditions.

As regards review clauses these must be in clear, precise and unequivocal terms. They must state the “scope and nature of possible modifications or options as well as the conditions under which they may be used”. This means

that review clauses are going to be difficult to draft. Those preparing them will need to provide for the precise circumstances in which the contracting authority may need to change the contract. This involves an element of looking into the future so there is a danger that such clauses will fail to provide for the unexpected event which necessitates a contract change.

For additional works, services or supplies the contract can be amended to allow these to be ordered if a change of contractor cannot be made for economic or technical reasons and would cause significant inconvenience or substantial duplication of costs. Any increase in price must not exceed 50 per cent of the original contract price. This is calculated cumulatively.

If an authority is relying on unforeseen circumstances the need must have been brought about by circumstances which a diligent contracting authority could not foresee and the modification must not alter the overall nature of the contract. There is obviously considerable scope for argument about both these conditions. In addition the increase in price must not exceed 50 per cent of the original contract price.

A change of contractor is permitted when this is in accordance with a review clause, a succession of a new contractor to the position of the initial contractor as a result of a corporate restructuring provided that the successor contractor fulfils the original selection criteria or if the authority itself assumes the main contractor’s obligations towards its subcontractors.

¹³ *presstext* Nachrichtenagentur GmbH v Austria (Case C0454/06)

Staff mutuals

For a change not to be substantial it must not:

- introduce conditions which, if they had formed part of the original procurement procedure, would have allowed the admission of other contractors or the acceptance of a different offer;
- change the economic balance of the contract in favour of the contractor in a manner not provided for in the initial contract;
- extend the scope of the contract considerably.

This is essentially the *presstext* test, now set out in the directive.

Lastly changes are permitted if their value is below both the threshold for the applicable type of contract and below 10 per cent of the original value in the case of service and supply contracts and 15 per cent in the case of contracts for works. The percentage must be assessed on a cumulative basis. In addition the change must not alter the overall nature of the contract.

Whilst there is potential for debate about some of the tests which have to be applied, on the whole the new article provides a sensible and workable set of rules governing contract variations.

Certain types of contract (essentially in the fields of culture, health and social services) may be reserved for particular organisations, generally referred to in the UK as “staff mutuals”.

In order to qualify, such an organisation must have the following characteristics:

- it must have a public service mission;
- its profits must be reinvested rather than distributed to shareholders;
- there needs to be an element of staff involvement.

In order for a contract to be awarded in accordance with this provision, there must have been no award from the same contracting authority during the previous three years. This means that staff mutuals will not have to face competition from the moment they are set up.

Public oversight, assistance and reporting

Another conclusion of the Commission's evaluation was that compliance with the public procurement rules was, in many Member States, left to the individual public authorities. There was in many countries no national authority charged with overseeing and monitoring the implementation of the rules. Nor did public authorities or participating companies always receive the assistance they needed in ensuring compliance with the rules.

It was proposed that there should be a requirement to appoint a single independent body responsible for the oversight of the implementation of the public procurement rules. This proposal has now been dropped and it will remain a matter for individual Member States how they manage the monitoring and reporting requirements. However there will need to be a single point of contact for each Member State.

There will also be a new obligation on Member States to make available "support structures" which will provide legal and economic advice, guidance and assistance to contracting authorities and an obligation to ensure that economic operators can obtain appropriate assistance. The first of these requirements is slightly odd. Although some contracting authorities may be small entities in need of assistance, generally public bodies are capable of obtaining the advice and help they need. To ensure that appropriate information is available for contractors, who may be SMEs may be regarded as another way of helping to open up the market to smaller businesses.

Contracting authorities will also have to prepare a report on each individual procurement exercise. This is not intended to be onerous and ought not to involve much more work than the preparation of the contract award notice.

UK government position and implementation

The government is very pleased with the contents of the new directive and has congratulated itself on the effectiveness of its lobbying.¹⁴ The important “wins” as far as the government is concerned are:

- the provision allowing contracts to be reserved for staff mutuals;
- the encouragement and help for SMEs. This is a priority for the government which aims for 25 per cent of government spend on contractors to be with SMEs by 2015;
- the streamlining of the procedures and reduction in red tape.

Whilst the period for transposition is two years, the government is proposing early implementation. There is to be less redrafting for the purposes of the regulations and more of the wording taken directly from the directive.

Summary of proposed changes

- The distinction between part A and part B services will be abolished.
- The procedure for procuring a dynamic purchasing system is simplified.
- Contracts between authorities are excluded provided the relevant conditions are observed.
- There are new systems to encourage innovation allow more flexibility in developing solutions.
- Contract changes are allowed subject to the observance of quite stringent conditions.

¹⁴ See for instance the Cabinet Office press release dated 15th January 2014 entitled “EU to open up public procurement following UK government lobbying.

IMPLEMENTATION

Prepare ahead

There is still a long time before the new directive will come into effect. Once the directive is enacted, it will be transposed into UK law by means of regulations. The period before implementation provides an opportunity for authorities to make the decisions and put in place the procedures which will enable them to be ready once the new rules come into force.

The abolition of the distinction between part A and part B services will need to be taken on board. Authorities which previously took the view that it was unnecessary to follow the rules for part B contracts will now need to ensure that their procedures require all contracts above the relevant thresholds to be let in accordance with the provisions of the directive.

For the rest, there are opportunities for authorities both to simplify their procurement by the increased use of dynamic purchasing systems and frameworks and for the process to become more rigorous, which will also mean that it will become more demanding. The difficult task for authorities will be finding the right balance. If procedures can be made simpler and formalities reduced without this adversely impacting on quality and competition, then this is to the benefit of everybody. Nobody gains from bureaucracy. At the same time, for large and complex projects, if there is a procedure which allows for the development of a solution without resorting to creative interpretation of the rules, then this is helpful. It remains to be seen if the new procedures will genuinely foster innovation or whether their impact will mainly be felt in longer and more costly procurements.

Authorities will need to give some thought as to their policy on the use of new procedures. The competitive dialogue procedure, the competitive procedure with negotiation and the innovation partnership all provide flexible means for procuring complex contracts. However, if not used sparingly they could involve authorities in significant extra costs and burdens. Authorities may often find it more advantageous to restrict the scope for discussion and negotiation.

In terms of equality and diversity and the use of the procurement rules as a means of achieving higher environmental standards, the changes do not add very much. It will be for authorities to find a strategy for promoting these aims against a background which is broadly sympathetic but which does not include any provisions that would enable authorities to ensure that adherence to a high standard in these areas was a condition of being shortlisted for a public sector contract.

The new rules are intended to give significant encouragement to SMEs undertaking more public sector work. Authorities will need to consider how they are going to facilitate the involvement of SMEs, in particular in deciding whether to divide individual procurements into smaller lots. It will be necessary to ensure there is a clear process for decision-making about these types of issues since authorities will need to prepare reports which will include the justification for their decisions.

Action plan

Implementation - summary

- Authorities will need to ensure that contracts for what were formally part B services are advertised and awarded fully in accordance with the procurement rules unless they.
- Consideration will need to be given to the use of new procedures both in terms of whether certain types of procurement can be simplified and the extent to which the new procedures can be used as a means of driving innovation.
- Changes to existing contracts will need to be carefully monitored to ensure they do not fall foul of the restrictions on changes.
- Authorities will need to consider how to encourage the greater involvement of SMEs.

Short /medium term

- Ensure ICT systems are able to deal with procurements exclusively by electronic means.
- Changes to existing contracts will need to be carefully monitored to ensure they do not fall foul of the restrictions on changes.

Long term

- Consider how authorities will need to ensure that contracts for what were formally part B services are advertised and awarded fully in accordance with the procurement rules.
- Consideration will need to be given to the use of new procedures both in terms of whether certain types of procurement can be simplified and the extent to which the new procedures can be used as a means of driving innovation.
- Consider how to encourage the greater involvement of SMEs.

OUR CREDENTIALS

Public procurement is absolutely central to the work that we do at Sharpe Pritchard.

Many of our lawyers are trained procurement experts. We have a detailed and practical understanding of EU and UK procurement law, including an in-depth understanding of the Public Contracts Regulations and the surrounding case law.

As such, we are ideally placed to guide our clients through all of the EU procurement procedures to avoid breaching the Public Contracts Regulations. This includes:

- preparing all contract documentation;
- helping to build and road-test evaluation criteria;
- advising at each stage of the competitive process;
- debriefing unsuccessful bidders; and
- assisting with all governance and compliance requirements.

The risk of a challenge to procurement decisions is increasing as the costs of tendering drive contractors to question unfavourable decisions.

Timing is often critical in these situations, and the Sharpe Pritchard team is available to act on short notice to support public authorities who may be required to respond at urgent notice.

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