



12- 16 Proposed changes to the EU public procurement framework March 2012

To all APSE main contacts in England, Wales, Scotland and Northern Ireland

Key issues;

- The EU procurement rules have been subject to review and the European Commission has announced its intention to implement a new Public Procurement Directive
- Local authorities need to be mindful of existing obligations but should consider how the proposed changes may impact upon future procurement exercises
- When considering future service delivery options local authorities need to consider the potential changes to the EU public procurement rules

1. Introduction

Local authorities need to be mindful of European public procurement rules in both procuring goods and services and in some cases awarding work, for example to in-house trading companies. Some consider the current rules to be challenging and inflexible and in many areas they are considered to be complex, leading to uncertainty in procurement processes. However, many also view these as necessary rules to ensure transparency and fairness of trade between European nations and to ensure public value in the award of public contracts, using public money.

On 20 December 2011 the European Commission published legal proposals to revise the existing EU public procurement rules and this represents the first widespread review of European public procurement rules since the passing of the 2004 Directive. The European Commission, in launching the proposed changes, sought to represent the current European Court of Justice (ECJ) judgements and clarify or codify certain provisions and case law.

As well as a proposed new public procurement directive there are also proposals relating to new Directives for Utilities, and the letting of Health and Social Care contracts. There is also a separate, all new Directive covering concession contracts.

2. What are the main proposed changes?

The aim of the new public sector Directive is to simplify the procurement rules and make them more flexible. The proposal is that this is done by introducing various changes including:-

- I. **Removing the distinction between 'Part A' and 'Part B' services.** Part A services are those which are currently subject to full procurement rules whereas 'Part B' services are those which are subject to more limited regulations such as cultural, education and health and social care. The reasons for these changes are that some Part B services still attract interest on an across border basis and therefore it is argued these should logically be subject to the same level of rules. However as referenced above there is a specific proposal for 'light touch' regulation in relation to Health and Social Care.
- II. **Small to medium enterprises:** European governments have been concerned for some time that the current EU rules discourage participation in public procurement from SMEs and the third or social enterprise sector. The new proposals therefore potentially would prohibit local authorities from requiring minimum turnover levels that would *exceed three times the contract value*. This is purposeful to encourage the division of larger contracts into small lots.
- III. **Negotiation in procurement:** The new Directive aims for procurement to be a driven by best outcomes, by providing a less regulatory framework for negotiations that will ensure issues such as environmental matters, social matters, such as inclusion and equalities, can be taken into consideration [Link to Public Services (Social Value) Act 2012 (royal assent 8/3/12)]. There is a specific proposal that relates to a new '*competitive negotiated procedure*' which is not the same as the existing competitive dialogue procedure and one governing '*innovation partnerships*'. Whilst many procurement professionals may welcome these changes there will undoubtedly be some concerns regarding less transparency and regulation over the award of multi-million pound public sector contracts. The prospect of challenge from unsuccessful parties should also be interesting. It is proposed that the negotiated procedure be modified to ensure safeguards against discrimination and unfair treatment are observed.

- IV. **Reduce the administrative burden on suppliers:** Relaxation of the rules governing the use of IT and there is a further relaxation of rules governing both the negotiated procedure and competitive dialogue. These proposed changes are presented as providing more opportunities through use of negotiation in contract awards, an opportunity to simplify public tendering and to reduce the administrative burden on suppliers.
- V. **Framework agreements:** The proposed directive also provides some further rules on framework agreements and the extent to which these can be used by a local authority which is not, for example, an original party to that framework agreement.
- VI. **Codification of the *Presstext* case law:** This governs the situation where changes to a contract, for example in volume, terms or length are so significant that those changes amount to a new contract requiring a fresh procurement exercise to take place. In a similar way to the 'Teckal' changes highlighted below the aim is to clarify what ought to be done to ensure compliance with the EU public procurement regulations. This is an area for local authorities to be particularly mindful of where they intend to extend a services contract for example.

3. What about concession contracts?

Concessions are public contracts where the operator utilises a facility and is able to exploit this for business / commercial reasons but assumes risk, for example a car parking concession. Previously concession contracts have created confusion and the new Directive is attempting to establish some certainty about the scope of EU procurement rules in the letting of such contracts and to ensure that all businesses within EU member states have access to this particular market.

4. Award of work to in-house service providers.

Within local government councils have broad powers to carry out services directly and there are no regulations to prevent this happening at either a UK or EU level. It is a matter of local determination how services are provided. However this issue becomes more complex when work is awarded to an arms-length public sector organisation, often to companies formed and known as 'Teckal' companies or Trading Companies – for example under Section 95 of the Local Government Act 2003 or using new powers to form a trading company for commercial trading under the provisions of the Localism Act or indeed much earlier powers provided by statute.

Case law has built up over a number of years on the award of contracts to arms length public bodies and on the basis of inter-authority awards. The new Directive seeks to codify these matters.

Codification of the '*Teckal*' exemption for 'in-house' contracts is the most significant for APSE member authorities. Teckal is simply the name of a particular legal case which established the ability for a local authority to award a contract, on an uncontested basis, to its arms length organisation, providing that it could meet certain criteria which is briefly that its:-

- "in-house" company is subject to the same/similar control to in-house services and that
- The Company performs an "essential part" of its activities for the controlling authority

The new directive proposes that an 'essential part' of its activities is at least 90% - or in other words 10% or less of work for private clients. Nevertheless the new proposal may be welcomed in that it makes it clear that procurement law is inapplicable to genuine co-operation between authorities, the award of local authority work to a wholly owned arms length trading organisations or where local authorities are simply jointly discharging public functions.

5. Health and social care contract awards

Many local authorities are in the process of considering how they respond to a number of current policy matters in health and social care including:-

- Retaining local capacity and some immaturity of markets in response to adult care services and the personalisation agenda and direct payments
- Clinical / GP commissioning as part of the Health and Social Care Bill currently passing through Parliament
- The return of public health responsibilities to local authorities and
- Some have developed arms-length trading arrangements to ensure local market capacity and safeguard vulnerable people at a local level from the vagaries of a more marketised approach to the delivery of adult social care.

All of these issues should now be considered in the context of the new proposals on the treatment of contracts for health and social care. Whilst in-house / arms length trading

companies would still need able to operate within the Teckal framework there will potentially be lighter touch requirements for the letting of health and social care contracts in the future. For example, whilst there will still be a requirement to ensure transparency and equal treatment, after the initial basic advertising requirements have been met, the new regulations may allow for a more flexible approach to procuring these services. This may also mean that there is more certainty and clarity around, for example, the joint commissioning of services by the NHS and local authorities or GP consortiums. However these changes are subject to further and on-going consultation.

6. APSE comment

Many member authorities will be mindful of the need to be aware of and plan for these changes to the EU public procurement rules. Whilst it is not anticipated that the changes will take effect until May/June 2014 it should nevertheless be a consideration in, for example, business plan developments of arms-length trading organisations. In the current climate many services will be mindful of the risk of services being subject to EU procurement requirements when in different forms the cost and burden of procurement would not need to be considered. For example if services were simply provided on an in-house basis (albeit through service improvement planning and transformation approaches to the services delivered).

The Directive however does make it clear that there should be lighter touch requirements for non-central government contracts which could substantially differentiate between those contracts let by a local authority to those of central government. The European Commission's view is that there should be a simplified procedure, such as avoiding the need to publish a full OJEU notice, where there has been a prior information notice already placed. This will be interesting to watch in terms of the reaction of private companies (for profit) who may, whilst welcoming the reduced burden of compliance, also view this as less transparent. It could conversely be welcomed by third sector providers or cooperatives and mutuals under the Government's 'Big Society' agenda.

The Directive does leave some areas of uncertainty – for example in the codification of the Pressetext case where there are still questions about contract award when a contractor has gone out of business or is taken over by another contractor. This has been a regular area of

contention for APSE members authorities who have attempted to deal with issues such as contract novation where a contractor's business has collapsed, mid-contract delivery, such as the very recent cases of those delivering building maintenance contracts in social housing.

Whilst there are merits to revising and modifying the Directives, there is an equal necessity to safeguard the manner in which contracts are awarded using public money to ensure fairness, transparency and value for money including the 'MEAT' criteria of most economically advantageous tender.

APSE would advise its member authorities to seek appropriate competent advice in the context of potential changes to public procurement rules, particularly when planning for service changes, or new models of service delivery, and being mindful of the impact of these changes.

APSE will continue to review this proposed Directive through its advisory group structures and [training services](#), including forthcoming masterclasses and through [APSE solutions](#). For details about these please contact Mo Baines on mbaines@apse.org.uk

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