



**Mo Baines**

# **The New EU Procurement Directive**

# Context....



In the UK:-

- Public Service Reform
- 'Rebalancing' the economy
- Public sector spin-outs

At EU level:-

- Removing cumbersome regulatory processes
- Retaining the principles free trade
- On-going support for alternative public service delivery



## What doesn't change?

- No change in the bodies covered by the regulations – i.e. the 'contracting authorities'
- Current thresholds of application of the Directive.... but due the Commission committed to a review by 2019 - could be increased
- As now authorities must comply with principles of transparency, non-discrimination, equal treatment and proportionality (Treaty of Rome)
- No changes to remedies
- They say ... 'The regulations will continue to provide a transparent process aimed at maximising opportunity for suppliers whilst allowing achievement of value for money by authorities'

# Public to Public Contract Exemptions



- Exemptions for ‘public-public’ contracts
- •A number of judgments by the Court of Justice of the European Union in the series of cases following the ‘Teckal’ case (C-107/98) have identified circumstances where a contract between two public bodies can be exempted from the EU rules
- The new directive codifies these conditions, which must all be met
- Where the authority exerts on the ‘supplying authority’ a control similar to that which it exercises over its own departments and
- Where 80% of the activities of the ‘supplying authority’ are for the ‘buying authority’ or other bodies controlled by it and
- Where there is no direct private capital participation in the ‘supplying authority

# And codifies



- A judgment by the Court of Justice of the European Union in the ‘Hamburg’ case (C-480/06) identified other circumstances where a contract between two public bodies can be exempted from the EU rules

The new directive also codifies these conditions, which must all be met

- The participating authorities co-operate to perform public services they must provide, meeting common objectives and
- The co-operation is for public interest reasons only and
- The participating authorities perform less than 20% of the activities on the open market

# What about coops and mutuals and the public sector spin-outs?



- Reservation of certain contracts for mutuals and social enterprises

The directive provides that certain services contracts (mainly social, health and educational) can be reserved to organisations that meet all of the following conditions

- Has as its objective the pursuit of a public service mission linked to the delivery of these services and
- Reinvests profits to meet this objective (where profits are distributed this should be based on participatory considerations) and
- Owned/managed on the basis of employee ownership/participatory principles or the active participation of employees, users or stakeholders and
- Not have been awarded a contract for the services concerned by the contracting authority concerned pursuant to this reservation within the past three years.

# Reservation of certain contracts for mutuals and social enterprise



- The duration of the contract to be reserved must not exceed 3 years
- Such 'reserved' contracts must be open to all relevant suppliers with rights under the directive and must be awarded using the procedures in the directive, including a call for competition in OJEU
- The contracts will be awarded using the 'light touch' regime described later (this applies to mainly health and social services contracts listed in Annex XIV of the directive)
- The OJEU call for competition for the contract must make reference to the relevant article of the directive.

## Merging Part A and Part B services..



- The distinction between part A and part B services will be abolished thus the normal rules will apply to many former Part B services contracts, formerly subject to a very light regime
- However some services defined by CPV code in Annex XIV (mainly social and health services) will be subject to a new 'light touch' regime to reflect their limited cross-border interest (e.g. they relate to legal services in the context of national law) or are sensitive (e.g. services to the person)
- These contracts will only be covered by the directive if their value exceeds 750,000 Euro (a much higher threshold than for other services)
- Contracts below this threshold are assumed to be of no cross border interest, so no OJEU advertising is necessary.



# What about these ‘minor’ contracts?



- The directive requires that authorities award contracts for these services in the following way:
- Publication in OJEU of a call for competition (either a contract notice or prior information notice - PIN)
- Publication in OJEU of a contract award notice (or quarterly submission of batches of contract award notices)
- The directive also requires Member States to establish their own rules for the award of these contracts, within the framework of Treaty obligations

# Context for Building Maintenance



- Involving SMEs
- Pre-market consultation exercises
- Social and environmental considerations
- Call off frameworks

# Involving SMEs



- Division of lots
- Allowed to award more than one lot to one SME / supplier
- Designed to bring in further SMEs into the public sector market place
- Links to the Social Value Act

# Pre-market engagement



- The new rules explicitly allow prior discussions with suppliers and expert bodies prior to starting a procurement procedure both to inform suppliers and to allow the authority to seek advice in the planning and conduct of the procurement procedure
- They say ‘Government has for some time encouraged this ‘pre-market engagement’ as the current rules do not prevent such discussions and such engagement has been found to increase the number of SMEs applying for contracts, widening competition and improving value for money’
- Care must however be taken to ensure such contact does not distort competition or violate the transparency and non-discrimination principles
- Remember – the Treaty principles still apply!

# Social and Environmental Considerations



- Are permitted as part of specification, award criteria or terms and conditions as proof of compliance with a requirement with specific characteristics that *are linked to the subject matter of the contract* (e.g. working conditions of the employees producing coffee to be supplied to the authority)
- However, suppliers must be allowed to offer compliance with equivalent labels or offer other proofs (e.g. technical dossiers) where the label cannot be obtained within the relevant time limits
- Labels must also, as now, meet certain conditions such as being based on transparent and non-discriminatory criteria and awarded by a body independent of the supplier applying for the label

# Call-off Frameworks



- The UK 'has secured a major simplification': the old EU rules required an OJEU notice for DPS call-offs of any value, which was unnecessarily burdensome and made DPS unattractive.
- In the new rules, the process is much simpler. Once a DPS is established the authority must allow a supplier to apply to join it at any time - a decision to admit it must generally be made within 10 days (or within 15 days where verification is needed or additional documentation needs to be assessed)
- To award a contract the authority must seek tenders from all suppliers admitted to the DPS (or to an appropriate category within it) - minimum time limit for receipt of tenders is 10 days
- The contract must be awarded on the basis of the award criteria in the OJEU notice, where appropriate formulated more precisely in the invitation to tender
- Notices for each contract awarded under the DPS must be sent to OJEU within 30 days (although these can be grouped in quarterly batches)

# Framework rules and central purchasing bodies



- Minor changes to rules for frameworks
- The new directive makes it explicit that only authorities clearly identified in the OJEU notice may use a framework to award contracts and that contracts awarded under frameworks may exceed the length of the framework itself
- Where a framework allows the authority a choice between applying the terms of the framework or re-opening competition within the framework the choice must be made by applying objective criteria set out in the procurement documents for the framework (e.g. quantity, value or characteristics of the works/supplies/services involved)
- The new directive makes it clear that authorities take legal responsibility for applying the rules set by a Central Purchasing Body when using their frameworks to award contracts

# New procedure: Innovation Partnerships



- Innovation partnerships
- New procedure allowing authorities to encourage suppliers to develop works, supplies or services not currently available on the market, through long term partnerships
- Awarded to one or more suppliers using the competitive procedure with negotiation – authority must disclose required selection information and minimum requirements for tenders as well as award criteria
- Procedure may be constructed in phases to match the research/innovation process – authority could reserve right to terminate process or reduce the number of partners
- Authority must make clear the position on property rights and must not disclose suppliers' confidential information without agreement



# Other changes worth a note...



- E-procurement
- Documents to be available via the Internet
- Negotiation without prior OJEU notice matters of urgency – contract without competition
- Shorter minimum time limits for tender and award
- Where turnover used as a measure of financial capacity this must not exceed twice the value of the contract except in justified cases (e.g. where high risk) - reasons must be declared in procurement documents or authority's reports

# Challenging abnormally low tenders



- Authorities will be required to seek explanations from suppliers that submit a tender which 'appears' to be abnormally low
- Examples of 'explanations' that could be accepted include the economics of the method of construction to be used and the technical solutions chosen. The authority may reject the tender where the evidence supplied is not satisfactory
- If the authority has established that the low price is the result of a breach of social and environmental law listed in Annex X the authority shall reject the tender
- If it is discovered that the low price is the result of State Aid the authority may reject the tender if the supplier is unable to prove that the aid is compatible with the rules of the EU Treaty

# Any questions...



## Thank you

**LOCAL SERVICES**

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