



Proof of EU's Christmas Pudding may be a Happier New Year

Procurement – January 2012

A briefing from our Procurement team

The EU Commission issued, just before Christmas, a press release and a set of frequently asked questions on the content of its proposed modernisation of the procurement directives. Whilst the proof of this particular pudding will no doubt be in the eating, the early signs, like the smell of flaming brandy, are hopeful.

Some of the key proposals for change are as follows:

- **An increase in the possible use of negotiation** (following prior publication of an OJEU notice) - This seems to be intended to benefit larger and more complex projects and take away some of the bureaucracy which can be associated with Competitive Dialogue. The Commission envisages certain safeguards: the subject matter, award criteria and minimum requirements must be published at the outset and must not be varied during the course of negotiations. If they are varied, they must be notified to all participants who must be allowed the chance to amend and re-submit their tenders. The contracting authority will need to keep a record and make a report of the negotiations, and will be subject to the scrutiny of “a national independent body”.
- **Smaller lots** - In a change from the prevailing tide of aggregation, contracting authorities will be encouraged to consider splitting contracts up into smaller lots, and to give reasons for not doing so.

Although the flexibility of more negotiation is welcome, it is hard to see how the proposal differs from what is currently possible under Competitive Dialogue (other than by making it clear that criteria and requirements may be altered so long as the changes are notified equally to all participants and they are given the chance to respond). The requirement to maintain a record and make a report could also prove onerous.

Thus they will have to in effect show a business case for aggregating contracts so as to achieve, e.g. greater economies of scale, and if the benefits cannot be proven, will have to consider tendering smaller lots. Whilst this will be a benefit to SMEs, it could increase tendering and contract management costs for authorities.

- **An obligation to accept self-declarations from bidders in relation to mandatory selection criteria** - This is a welcome initiative to cut down on the amount of paperwork required from bidders in respect of pre-qualification requirements, including absence of certain types of conviction and financial matters. Only the winning bidder will then be asked to verify its information (and presumably may be disqualified if any of it turns out to be materially incorrect). This will represent a major saving for both public and private sector, and will be a particular benefit to SMEs.
- **Information not to be re-submitted** - Contracting authorities will be prohibited from requiring bidders to re-submit documents which have been submitted to the contracting authority in the last 4 years and which are still valid. Therefore where accounts are required for the last 3 years, for example, and a bidder has submitted these a year ago, then their submitted accounts for the later 2 years would still be valid and they would just have to submit the latest filed accounts for that year.
- **Limitation on selection criteria** - The list of permitted selection criteria will be made exhaustive, bringing much-needed clarity to this vexed area, and also, the maximum yearly turnover which may be required will be limited to three times the contract value. This is a welcome step, providing a clear threshold for contracting authorities as well as increasing opportunities for SMEs.
- **Shorter deadlines and greater recognition of e-trading** - It is proposed to introduce shorter deadlines (which will benefit contracting authorities and bidders, particularly after the derogation allowing use of the accelerated procedure to stimulate economic growth was withdrawn).

- **New, lighter regime for health, social care and education services** - The EU Commission recognises that these services are less subject to cross-border competition than other areas and propose to introduce a specific and simpler regime. This will be of benefit if it helps to clear away the uncertainty which has dogged the “Part B” procurement regime. The new procedure will only apply to contracts worth over 500,000 Euros and even then, Member States may determine the procedural rules to be followed, provided that they observe the basic principles of transparency, non-discrimination and equal treatment. The only procedural requirements which will be imposed are to publish a contract notice in OJEU at the start of the tender (which is not currently required) and a contract award notice at the end.
- **Removal of “Part B” services distinction** - The quid pro quo for the lighter regime for health, social care and education services however, appears to be the removal of the lighter “Part B” regime for other services which are currently not fully-regulated, such as legal services, hotel and restaurant services and others currently listed under Part B. This conjures up the amusing possibility of British restaurateurs serving the finest rosbif to French public sector workers – quelle horreur!
- **Greater flexibility to include social and environmental criteria** - On the environmental front, the new proposals will encourage the use of lifecycle costing in the procurement process, as well as allowing the production process for goods and services (such as carbon footprint) to be taken into account.

As regards increasing opportunity for disadvantaged persons, the current reservation for “sheltered workshops” (those employing 50% or more disabled persons) will be widened to include other disadvantaged persons (which could for example include ex-offenders or minorities). The threshold for qualifying for that reservation will also drop from 50% to 30%. These measures will mean that as well as sheltered workshops, large swathes of social enterprise may be entitled to benefit from the reservation.

- **Support for innovation** - The proposals also include a completely new partnership procedure to support the creation of partnerships between public and private sector to develop innovative new products, works or services, as well as simplifications to the competitive dialogue process.
- **Other measures** - Conflicts of interests, illicit conduct, and the limits on when changes to a contract during its performance are acceptable without new tender procedures, are specifically defined in the proposal. The latter will be particularly useful in removing the uncertainty surrounding

contract changes, following the “Presstext” judgment.

- **New enforcement measures** - The pudding served up by Our Masters in Brussels is however, not without its bitter lemon pips. The proposals include the setting up of a national independent oversight body in charge of monitoring, implementation and control of public procurement (OfProc, possibly?). These bodies will be expected to co-operate and share information on a cross-Europe basis. Whilst the new bodies are also intended to provide support and advice on best practice to contracting authorities, there is a significant risk that:
 - their existence could undermine all the sensible improvements set out above, if they take an interventionist, bureaucratic line (and the history of regulatory bodies in the UK has not been an altogether happy one in this respect); and
 - the provision of cheaper, quicker means of challenge than the Courts could increase the volume of opportunist or speculative claims, thus increasing costs and delay for contracting authorities and delaying or preventing the award of contracts to businesses which have won them fairly.

The Commission’s proposals will now pass to the Council of Ministers (comprising representatives of the Member States) and then the Parliament for negotiation and approval. If adopted by the end of 2012 (as is the current timetable), the new measures would have to come into force in the UK by [30 June 2014](#).

There is much in these proposals to cheer SMEs and social enterprises, with reduced costs, greater tendering opportunities and more flexibility for contracting authorities to use social and environmental criteria, which will tend to benefit them. For contracting authorities seeking to “buy local”, there are also much greater opportunities, with the encouragement to use smaller lots, and increased ability to use social and environmental factors including the carbon footprint of production methods.

Generally for contracting authorities however, the news is more mixed; greater flexibility and more clarity on a number of grey areas, contrasted with potentially increased costs and regulation with the obligation to consider splitting contracts into smaller lots, and the imposition of the new national oversight body. As we emerge from the festive season’s excesses and guiltily haul ourselves off to the gym, it seems appropriate that the EU proposals for modernisation seem to promise a leaner, fitter procurement regime, with an element of compulsion should we grow lax about keeping our New Year resolutions.

More information

To discuss any issues raised in this briefing, please contact Simon McCann on [029 2038 5400](tel:02920385400) or by email: simon.mccann@morgan-cole.com.