

3 Public procurement

(33586) 18966/11 + ADDs 1–2 COM(11) 896	Draft Directive on public procurement
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<i>Legal base</i>	Articles 53(1), 62 and 114 TFEU; co-decision; QMV
<i>Document originated</i>	20 December 2012
<i>Deposited in Parliament</i>	23 December 2012
<i>Department</i>	Cabinet Office
<i>Basis of consideration</i>	EM of 16 January 2012
<i>Previous Committee Report</i>	None
<i>To be discussed in Council</i>	May 2012
<i>Committee's assessment</i>	Legally and politically important
<i>Committee's decision</i>	Not cleared; further information requested; recommended for debate on the Reasoned Opinion

Background

3.1 Expenditure by public bodies (“contracting authorities”) and utilities (“contracting entities”) on works, goods and services within the EU now amounts to more than €1 trillion a year, and in 2009 accounted for about 19% of the Union’s GDP. It therefore plays an important role in the EU’s overall economic performance, and is a key element in the Europe 2020 strategy. However, the Commission has noted that, although the two main legal instruments in this area — Directive 2004/17/EC (which coordinates the procurement procedures of entities in the water, energy, transport and postal services sectors which have been granted special or exclusive rights) and Directive 2004/18/EC (which coordinates procedures for award of public works contracts, public supply contracts and public service contracts) — seek to ensure that economic operators from across the Single Market can compete freely for such contracts, one of the twelve key priorities in its Communication in April 2011 on the Single Market Act included the need to revise and modernise that framework in order to make this process more flexible.

The current proposal

3.2 The Commission also produced in January 2011 a Green Paper on the modernisation of EU public procurement policy, and it has since carried out an evaluation exercise on how the existing rules were working. In the light of the conclusions drawn from these two exercises, it has now put forward two proposals, one¹ addressing the issues covered by Directive 2004/17/EC, whilst this document deals with the more general rules governing public procurement, and would thus replace Directive 2004/18/EC.

3.3 The Commission says that, whilst recognising the need to maintain the present broad approach to procurement, the proposal nevertheless aims to increase the efficiency of spending

¹ (33585) 18964/11 + ADDs 1–2: see chapter 1 of this Report.

by simplifying the existing rules and making them more flexible, and to allow procurement to better support common goals, such as the protection of the environment, energy efficiency, combating climate change, and promoting innovation, employment and social inclusion. It seeks to do so by addressing the following five areas.

Simplification of procurement procedures

Clarification of the scope of the Directive

3.4 The Commission says that the basic concept of “procurement” has been newly introduced in order to better determine the scope and purpose of procurement law, and to facilitate the application of various thresholds. Also, certain definitions² which determine the scope of the Directive have been revised in the light of the case law of the Court of Justice, whilst at the same time an attempt has been made to retain aspects which have been developed over the years and are thus familiar. However, the Commission proposes that current distinction under which non-priority (Part B) services³ unlikely to attract cross-border interest are subject to only certain provisions of the Directive (covering technical specifications, and contract award notices) should be removed.

A toolbox approach

3.5 Member States would be able to give purchasers more choice over which procedure to use in addition to three basic forms provided for under the current Directive (open restricted, and negotiated), and also permit them to make use of six specific techniques and tools, which have been improved and clarified to facilitate e-procurement — framework agreements, dynamic purchasing systems, electronic auctions, electronic catalogues, central purchasing bodies and joint procurement.

Lighter regime for sub-central contracting authorities

3.6 In line with the World Trade Organisation (WTO) Government Procurement Agreement, there would be a simplified regime for purchases by local and regional authorities under which they would be able to use a prior information notice as a means of calling for competition, in which case they would not have to publish a separate contract notice before initiating the procurement procedure. Also, they would be able to set certain time limits in a more flexible way by mutual agreement with participants.

The promotion of e-procurement

3.7 The Commission says that the use of e-procurement can deliver significant savings, and that, in order to help Member States to achieve the necessary change, it is proposing the mandatory transmission of notices in electronic form, the mandatory electronic availability of procurement documents and that the switch to fully electronic communication should take place within two years. The proposal would also streamline and improve dynamic purchasing systems, and provide for the use of electronic catalogues.

² Such as “body governed by public law”, “public works” and “service contracts” and “mixed contracts”.

³ These currently include hotel, rail and water transport, legal and recreational services.

The modernisation of procedures

3.8 The proposal would introduce a more flexible approach by shortening time limits for participation and the submission of offers so as to allow for quicker and more streamlined procurement; by making the distinction between the selection of tenderers and award stages of the contract more flexible; and by enabling the quality of the staff assigned to the contract to be taken into account, where relevant, at the award stage. In addition, contracting authorities will be able to exclude suppliers which have performed persistently or significantly badly in the past, but will also be able to accept those who would otherwise have been excluded from bidding because of convictions for bribery and certain other offences, if they have taken “self-cleaning” measures to remedy the consequences of their actions.

Strategic use of public procurement in response to new challenges

3.9 The Commission says that the draft Directive is aimed at enabling contracting authorities to procure goods and services, in line with Europe 2020 strategic goals, through, for instance, fostering innovation and respecting the environment. It would enable them:

- to take into account in the awarding of contracts the life-cycle costs of what is being purchased, covering all the stages of the existence of a product or works, or provision of a service (including not only direct costs, but also external environmental costs where these can be monetised and verified);
- to refer in the technical specifications and in the award criteria to all those factors which are directly related to the specific production or provision of the good or service purchased;
- to take into account innovative character in assessing the most economically advantageous tender, so long as it is linked to the subject matter of the contract;
- to require that works, supplies or services bear specific labels certifying environmental, social or other characteristics, provided that they also accept equivalent labels (for example, European eco-labels); and
- to exclude economic operators from a procedure, if they have identified infringements of obligations established by EU law in the field of social, labour or environmental law, or of international law provisions.

3.10 The Commission notes that, although social, health and education services are currently covered by the “Part B” services rules, they have only a limited cross-border dimension, and are provided in a context which varies widely between Member States. In view of this, it says that Member States should have a very large discretion to organise service providers in these areas, and the proposal would introduce a specific regime for contracts above a threshold of €500,000⁴ which would impose only the basic principles of transparency and equal treatment. Also, in order to enable contracting authorities to buy innovative goods and products, the proposal includes provisions for a new procedure for their development and subsequent purchase.

⁴ According to the Commission, contracts below this threshold typically have no cross-border interest.

Better access to the market for SMEs and start-ups

3.11 The Commission observes that small and medium sized enterprises (SMEs) have a huge potential for job creation, and that easy access to procurement markets can help to unlock this potential, whilst at the same time enabling contracting authorities to broaden their supplier base. It says that the proposal seeks to build on the European Code of Best Practice⁵ it published in 2008 by providing concrete measures to remove barriers for market access to SMEs. These include:

- a general simplification of information requirements, enabling self-declarations to be accepted as prima facie evidence for evaluating the capacity and capability of tenderers, with provision of documentary evidence being facilitated by the European Procurement Passport, a standardised document which would serve as proof that there are no grounds for mandatory exclusion;
- inviting contracting authorities to divide contracts above certain values into “lots” enabling smaller firms to bid (and requiring a specific explanation where there is no such division);
- a limitation on participation requirements so as to avoid unjustified involvement of SMEs, with turnover requirements being limited to three times the estimated contract value; and
- enabling Member States to allow subcontractors (which are often SMEs) to request direct payment from contracting authorities.

Sound procedures

3.12 The Commission says that the financial interests at stake and the interaction between the public and private sectors make procurement a risk for unsound business practices. It therefore proposes improved safeguards against conflicts of interest, illicit conduct (such as improperly influencing procurement decisions, or conspiring with others to manipulate the outcome), and the granting of unfair advantages to any market participants who have advised the contracting authority or been involved in the preparation of the procedure.

Governance

3.13 The Commission says that the evaluation carried out showed that not all Member States systematically monitor the application of the procurement rules, and it proposes that they should designate a single national authority to be in charge of this. In addition to monitoring, such a body would provide legal advice on the interpretation of the rules and their application to specific cases; issue guidance on questions of general interest and difficulty pertaining to the rules; establish indicator systems to detect conflicts of interest and other irregularities; draw attention to specific violations and systemic problems; examine complaints about the application of the rules in specific cases; monitor the decisions taken by national courts and authorities following a ruling by the European Court of Justice or findings by the European Court of Auditors where funding by the EU is involved; and report to the European Anti-Fraud Office

⁵ SEC(2008) 2193

any infringement of procurement procedures in such instances. Member States would also be obliged to empower the body to “seize” the jurisdiction of the courts to review decisions by contracting entities where it has detected a violation in the course of its monitoring and legal advisory work.

3.14 In addition, Member States would be required to provide support to contracting entities, in the form of legal and economic advice, guidance, training and assistance, which it sees as being particularly relevant where contracting authorities do not have the internal expertise to deal with complex projects. It adds that these requirements should not generate an additional financial burden for Member States, as they would be able to use the existing mechanisms and structures to fulfil the functions in question.

The Government's view

3.15 In his Explanatory Memorandum of 16 January 2012, the Minister for the Cabinet Office (Rt Hon Francis Maude) says that the Government welcomes the publication of this proposal to revise the existing public procurement rules under Directive 2004/18/EC, adding that the UK's response to the Commission's Green paper supported the aim of simplifying and modernising the procurement rules, so as to make the award of contracts more flexible for the benefit of purchasers, SMEs and other suppliers.

3.16 The Government therefore welcomes many of the simplification proposals, which it says include a number proposed by the UK, notably reduced timescales, allowing greater freedom to use the competitive negotiated procedure, improving dynamic purchasing systems, enabling the quality of staff to be taken into account at the award stage, allowing past performance of economic operators to be taken into account, and allowing contractors to take into account self-cleaning measures taken by contractors convicted for bribery who would currently be automatically excluded from bidding. It adds that, if these measures can be maintained through the negotiating process, there will be less need for various thresholds to be raised, pointing out that the Commission has in any case indicated that these will be reviewed (a process which the UK hopes can be completed before the projected date of 2017).

3.17 In addition, the Government:

- supports the greater use of e-procurement as likely to increase SME access and the level of cross-border procurement;
- welcomes the encouragement of advanced electronic communication, subject to certain safeguards ensuring that this does not hinder cross-border bidding;
- is in favour of clarifying how social and environmental matters can be taken into account, and — subject to careful examination of the detail during the negotiations — regards as helpful the provisions concerning life cycle costs and enabling account to be taken of various factors related to the production process as long as these are linked to the subject matter of the contract;
- welcomes the introduction of a procedure designed to encourage innovation;
- welcomes the more general measures designed to provide better access for SMEs.

3.18 On the other hand, the Government does have concerns about the removal of the distinction between Part A and Part B services, noting that this will mean that some areas, such as Legal Services, will become subject to the full rules. It suggests that, although the Commission has stated that the current distinction is no longer valid, it has not made a clear cut case that such services should be subject to the full rules, and nor is it convinced about the benefits of the approach now proposed for social services. Also, although the Government is in favour of sound procedures, it generally considers that these issues are best dealt with at the Member State level, rather than being explicitly covered in the Directives, and it takes a similar view concerning the provision of legal, training, advisory and various other functions to authorities and suppliers.

3.19 However, the Government's main concerns relate to the proposed requirement for national oversight bodies to be able to 'seize' the jurisdiction of the Courts, which the Minister notes had not been foreshadowed in the Commission's Green Paper or otherwise subject to consultation, but which he considers may infringe the principles of subsidiarity and/or proportionality. He describes this as a truly judicial function, the exercise of which could affect the rights of second and third parties as well as the contracting entity (these may include not only an unsuccessful complaining supplier, but a successful supplier with which the utility has entered into a contract, as the jurisdiction would enable such a contract to be declared 'ineffective').

3.20 He further notes that the various other functions of the oversight body appear to be primarily administrative or regulatory, thus requiring the UK to combine in a single body a mixture of judicial and other functions, with the power to take over, in particular cases, the jurisdiction which currently rests, in England and Wales and Northern Ireland, with the High Court as regards the legislation implementing in the UK the Directive (92/13/EEC) which addresses remedies for breach of the procurement rules. He adds that the Directive in question respected the diversity of legal traditions within the EU by allowing each Member State the flexibility to determine the bodies it regards as suitable to exercise the judicial function of resolving disputes between suppliers and utilities.

3.21 By contrast, the Minister says that the new proposal seems to be unjustifiably intrusive in requiring judicial and non-judicial functions to be combined in a particular way within a single body, and in requiring that this body should be able to pre-empt the role of the courts to which the UK has entrusted the remedies functions under Directive 92/13/EEC. He also says that the proposal may in this respect call into question the practical viability of continuing in the UK to confer a role on the courts concurrently with the proposed hybrid oversight body. More widely, this aspect of the proposal may set an unwelcome precedent of interference with how Member States structure their judicial systems in accordance with national legal traditions. In particular, it may accord insufficient respect for the Common Law tradition in which judicial and administrative/regulatory functions tend to be more clearly separated than in some other traditions which prevail in other parts of the EU.

3.22 The Minister also says that this concern gives rise to a lesser, but related, issue under the European Convention on Human Rights (ECHR). In particular, he believes that the current drafting of this aspect of the proposal fails to lay a clear foundation for the UK to implement it in a way which avoids a risk of infringing article 6(1) of the ECHR (the right to a fair hearing in the determination of civil rights and obligations), and would appear to oblige the UK to allow the oversight body to seize jurisdiction, even where the nature of its previous advisory relationship with the contracting entity over the procurement in question may prevent it from acting

judicially without a suspicion of bias, bearing in mind that the rights of suppliers as well as the contracting entity may be affected by the exercise of this jurisdiction.

3.23 The Minister's Explanatory Memorandum is accompanied by an Impact Assessment. This notes that the public bodies ("contracting authorities") in the UK comprise central government, local authorities, and other organisations, such as NHS authorities and educational establishments, and that, whilst the utilities ("contracting entities") covered by the proposal replacing Directive 2004/17/EC are in the energy, water, transport and postal services sectors (power generation, energy supply and generation, and oil and gas exploration in the UK having already been exempted from that Directive because they operate in competitive markets).

3.24 The Assessment also points out that, between 2005 and 2009, the value of contracts awarded by UK public purchaser and utilities was some €420 billion, covering a wide range of works, supplies and services provided by a large number of economic operators, with some 216,000 different operators supplying central government in 2010–12, including all sizes of firm.⁶ It notes that the main costs arising from the proposal relate to the bidding process, some of which would have been incurred regardless insofar as public purchasers follow a competitive process in order to obtain the best price: but, based on the Commission's estimates at EU level, it suggests that the additional cost within the UK would be £480 million a year. In addition, it puts the annual costs arising from the full application of the Directive to Part B services at about £14 million. However, it says that these costs would be significantly outweighed by the benefits, estimated at around £4.15 billion a year, from the improved performance of economic operators and better value for taxpayers' money which would result from the more transparent competition resulting from the proposals. In addition, it points out that the proposed simplification of the rules would reduce costs for both public purchasers and economic operators, although it has not proved possible at this stage to quantify these.

Letter from the National Assembly for Wales

3.25 We have also received from the Chairman of the Constitutional and Legislative Affairs Committee of the National Assembly for Wales a letter of 23 February 2012. He says that his Committee shares concerns over whether the proposal that the national oversight body should exercise functions normally carried out by the courts in the UK complies with the principle of subsidiarity, and would therefore support an objection to the requirement for such a body because it would breach that principle in this way. He adds that his Committee is also concerned that the proposal fails to have regard to the principle of devolution, in that, even if such a body were to be established, it should enable Member States to take into account their own constitutional arrangements by incorporating the degree of flexibility in this respect provided for elsewhere⁷ in the proposal).

⁶ The Assessment also notes that, between 2006 and 2006, SMEs at EU level won 34% by value, and 60% by number, of contracts covered by Directive 2004/17/EC.

⁷ For example, Article 87 enables Member States to appoint a single body or several bodies or administrative structures to provide assistance to contracting authorities and businesses.

Conclusion

3.26 Like the Government, we support the over-arching objective of this and the two related procurement proposals⁸ to simplify and modernise EU procurement rules. So there is much in the contents of this proposal that we welcome.

3.27 However, we also share the Government's concerns with the removal of the distinction between Part A and Part B services, and with the national oversight body being able to seize the jurisdiction of the courts.

3.28 On the latter, we fully agree with the Minister that this aspect of the proposal is unjustifiably intrusive in requiring judicial and non-judicial functions to be combined in a particular way within a single body, and in requiring that this body should be able to pre-empt the role of the courts to which the UK has entrusted the remedies functions under Directive 92/13/EEC. We also agree that this combination of functions may prevent the oversight body from acting judicially without a suspicion of bias, contrary to Article 6(1) ECHR.

3.29 We note that this aspect of the Commission's proposal was not included in the Commission's Green Paper, and so was not consulted upon; and that it was not included in the Commission's impact assessment, and so is not substantiated by qualitative and quantitative indicators which demonstrate why giving a judicial function to the oversight body is necessary to achieve the EU's objective. We therefore conclude that this aspect of the proposal amounts to an unwarranted interference in the domestic legal order of the UK, in which administrative and judicial powers have traditionally been exercised separately, and so infringes the principle of subsidiarity.

3.30 Accordingly, we recommend that the House adopt the draft Reasoned Opinion in the annex to chapter 1, which relates to both this and the proposed Directive on procurement by public entities.⁹ The Reasoned Opinion is to be sent to the Presidents of the Commission, Council and European Parliament on or before 8 March.

3.31 As requested, the Committee has appended to its Reasoned Opinion the conclusions of the Constitutional and Legislative Affairs Committee of the National Assembly for Wales. It would be grateful if the Government would also respond to them.

3.32 Meanwhile, the draft Directive remains under scrutiny pending a further update on the negotiations.

⁸ Reported in the preceding and subsequent chapters of this week's Report.

⁹ (33585) 18964/11 + ADDs 1–2: see chapter 1.