



European Commission Review of Public Procurement Directives– Publication of Legislative Proposals

Purpose

1. The purpose of this Scottish Procurement Policy Note (SPPN) is to alert stakeholders to the publication by the European Commission of proposals for revised Directives on public procurement and procurement in the utilities sectors and a new Directive on the award of concession contracts.

Key points

2. The key points are as follows:
- The European Commission has published proposals for revised Directives on public procurement and procurement in the utilities sectors and a new Directive on the award of concession contracts.
 - Publication of the proposals marks the next formal stage of the Commission's ongoing review of the legislation to make it better suited to dealing with the evolving political, social and economic context and to simplify procurement procedures for the benefit of buyers and suppliers.
 - Negotiations at EU level on these legislative proposals will commence in January 2012. Scottish Procurement is liaising with the Cabinet Office on the development of the UK's negotiating position and, as part of our consideration of the proposed changes to the rules, would welcome feedback from stakeholders by **20 January 2012**.

Background

3. SPPN 14/2010¹ provided information on the Commission's review of the EU Procurement Directives and intention to bring forward legislative proposals "with a view to simplifying and updating the European rules to make the award of contracts more flexible and to enable public contracts to be put to better use in support of other policies". SPPN 3/2011² alerted stakeholders to publication at the end of January 2011 of the Commission's Green Paper consultation on the modernisation of EU public procurement policy and requested feedback from stakeholders on the issues raised in the consultation document.

4. The Scottish Government formally responded³ to the Green Paper in March 2011, highlighting the issues of particular relevance to Scotland, including:

- issues relating to the market in Scotland (especially in rural areas and remote island locations), promoting the involvement of SMEs in public sector contracts and maximising local economic impact;
- simplification of procedures in order to increase flexibility and promote innovation and more effective partnership working between the public and private/third sectors;
- clarification of the scope for public bodies to contract with each other for the delivery of "shared" services; and
- clarification of the rules applying to the procurement of social services.

Legislative proposals

5. The European Commission yesterday published proposals for revised Directives on public procurement and procurement in the utilities sectors and a new Directive on the award of concession contracts. The legislative proposals can be accessed via the European Commission's website:

http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/index_en.htm. The Commission has also published two memos which provide its response to

Frequently Asked Questions on the legislative proposals.

¹ <http://www.scotland.gov.uk/Resource/Doc/116601/0110142.pdf>

² <http://www.scotland.gov.uk/Resource/Doc/116601/0113612.pdf>

³ A copy of the response has been published on the Scottish Government's website: <http://www.scotland.gov.uk/Resource/Doc/116601/0118347.pdf>

6. The changes to the rules proposed by the Commission are wide-ranging. Further information on the proposals is provided in Annex A. In the main, the degree of symmetry between the Commission's proposals and the Scottish Government's response to the Green Paper consultation is very positive.

7. Aside from social services, the Commission proposes to maintain the thresholds in the Directives at their current level. The Commission has indicated that it is not convinced by arguments in favour of increasing the thresholds. The thresholds are also aligned to the World Trade Organisation's Government Procurement Agreement.

8. In our response to the Commission's Green Paper consultation, we acknowledged the difficulties associated with raising the thresholds but stated our support for work at an international level to determine how this might be achieved in practice. We are encouraged by the inclusion in the legislative proposals of a clause to enable a review of the thresholds. We will continue to lobby for a fundamental review of the thresholds at the earliest opportunity.

Action required

9. We will continue to engage with the Commission and the UK Government as negotiations on the new Directives commence in January 2012 (the Commission is pressing for the Directives to be adopted by the end of 2012 and transposed into national legislation by June 2014). As part of our consideration of the proposed changes to the rules, we would welcome any feedback from stakeholders via our mailbox: euprocurementreview@scotland.gsi.gov.uk.

10. Please note that, although negotiations are expected to focus on the Articles of the new Directives in sequence, the UK will be called on to outline its general position at the outset. **We would therefore appreciate your feedback by 20 January 2012.** We would particularly welcome examples from your own experience to illustrate the impact that the proposed changes will have on buyers and suppliers in practice.

Dissemination

11. Please bring this SPPN to the attention of all relevant staff, including those in Agencies, Non-Departmental Public Bodies and other sponsored public bodies within your area of responsibility.

Contact

12. Enquiries about this SPPN should be addressed to Jessie Laurie, Scottish Procurement and Commercial Directorate, telephone 0141 242 5672 or e-mail jessie.laurie@scotland.gsi.gov.uk.

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Summary of Changes to the Rules in the Commission's Legislative Proposals

As indicated in paragraph 6, the changes to the rules proposed by the Commission are wide-ranging and include:

- shorter deadlines for submitting expressions of interest and tenders, reducing the length of the procurement process;
- self-declarations by suppliers at the selection stage, with only the successful bidder required to submit supporting documentation;
- greater flexibility in relation to the sequence of the selection and award stages;
- ability to take account of the expertise and experience of staff assigned to performing the contract as an award criterion;
- ability to refer to all factors directly linked to the production process in the technical specification and in the award criteria;
- ability to exclude suppliers whose performance in delivering previous contracts has been deficient;
- ability to accept suppliers if they have taken appropriate steps to rectify behaviour which would otherwise result in their exclusion;
- provision for the modification of contracts;
- introduction of "life-cycle costing" as the basis for award decisions;
- ability to require specific labels certifying environmental, social or other characteristics (or equivalent labels);
- division of contracts above €500,000 into lots, supported by a requirement to provide reasons if this is not done;
- turnover requirements limited to three times the estimated contract value, except in duly justified cases;
- potential for Member States to provide that subcontractors to the main contractor may request direct payment by the contracting authority;
- removal of the current distinction between Part A and Part B services;
- removal of current restrictions on the use of the negotiated procedure;
- a new procedure to encourage innovation – innovation partnership;
- a lighter regime for contracting authorities other than central Government;

- extension to the ability to reserve contracts to include organisations whose main aim is the “social and professional integration of disabled and disadvantaged workers”, where such workers make up more than 30% of the employees;
- rules governing arrangements between public bodies for the delivery of shared services;
- a specific regime for social services, with a higher threshold of €500,000, the ability to take into account all criteria deemed necessary in relation to quality and continuity of services and the potential for Member States to specify that award decisions cannot be based on “lowest price”;
- improvements to the mechanism for exemption provided for in Article 30 of Directive 2004/17/EC and clarification of the definition of special and exclusive rights; and
- a new regime for works and services concessions above €5,000,000.