

Procurement Policy Note - European legislative proposals on third country access to the EU public procurement market

Information Note 03/12 5 April 2012

Issue

1. The European Commission has published a legislative proposal for a new EU Regulation, which would enable the EU to close its markets to those countries whose markets are not reciprocally opened. The aim of the instrument is to give the Commission extra leverage in international trade negotiations.
2. This PPN cascades the announcement to UK stakeholders, and Cabinet Office welcomes any comments. The Commission's announcement and the text of the proposal are available at:

http://ec.europa.eu/internal_market/publicprocurement/modernising_rules/international_access/index_en.htm

Dissemination

3. Please circulate this PPN within your organisation, agencies, non-departmental public bodies (NDPBs), and any other bodies for which you are responsible, drawing it to the particular attention of those with a purchasing role.

Contact

4. For further information and any general enquiries please contact the Service Desk: 0845 000 4999 service.desk@cabinet.office.gsi.gov.uk

Background

5. PPN 11/11¹ announced the Commission's legislative proposals for reform of the public procurement directives, with 3 separate proposals² being published on 20

¹ <https://update.cabinetoffice.gov.uk/resource-library/procurement-policy-note-legislative-proposals-revised-procurement-directives>

December 2011. It also highlighted that a 4th proposal on 3rd country access to the EU market would follow in 2012 – this announcement completes the package of legislative proposals.

About the Proposed Regulation

6. The Commission has proposed this legislation as a regulation because they consider that this is the best means of ensuring uniform action by the European Union as a whole in the field of common commercial policy. This is because a regulation is a legislative act of the EU that becomes immediately enforceable as law in all member states simultaneously. Regulations can be distinguished from directives which, at least in principle, need to be transposed into national law. Regulations can be adopted by means of a variety of legislative procedures depending on their subject matter.
7. So-called “third countries” are countries that are not part of the EU, and with which the EU has not concluded an international agreement in the field of public procurement that includes market access commitments. International agreements of this kind have been concluded in the World Trade Organisation’s Government Procurement Agreement³ and in EU Free Trade Agreements⁴
8. The EU market is currently open to all countries, including 3rd countries, so in practice any supplier in the world can tender for a UK/EU contract, by looking for opportunities in the Official Journal of the European Union. However, some 3rd country markets are not open to the EU, meaning that EU suppliers cannot compete for tenders in those countries.
9. The Commission wants to negotiate further reciprocal market-opening in such countries, but believes its negotiating hand is weakened by the openness of the EU market. The Commission believes this new regulation will strengthen its hand, giving it more power to open markets using the threat of EU market-closure as a negotiating lever.
10. The main points in the proposal are as follows:
 - Scope:
 - It applies to above threshold public contracts, utilities contracts, and concessions
 - Defence and security public contracts are not in scope.

² A revised public procurement directive, a revised utilities procurement directive, and a new concessions procurement directive

³ The WTO GPA signatories are: Armenia; Aruba; Canada; Hong Kong China; Iceland; Israel; Japan; Liechtenstein; Norway; Singapore; South Korea; Switzerland; Chinese Taipei; and the US

⁴ EU Free Trade Agreements have been concluded with: Mexico; Switzerland; Chile; Former Yugoslav Republic of Macedonia; Croatia; Montenegro; Albania; and South Korea.

- **New power for contracting authorities** to exclude tenders which have more than 50% third country content. Only applies to contracts valued at €5M or more, and any exclusion must be approved by the Commission.
- **New powers for the Commission** to restrict access to EU market where third countries do not offer reciprocal access to their own markets. These powers include:
 - Excluding tenders which have more than 50% third country content; and/or
 - Imposing a mandatory price penalty [scale not defined] on the tender value of the third country content.
- Contracts awarded in breach of exclusion measures adopted by the Commission are to be declared ineffective under the Remedies Directive.
- A limited range of exceptions are available.

UK Government's Position

11. The UK Government is strongly opposed to any closure of EU markets where third countries do not offer reciprocal access to their own markets. We believe any closure of EU markets is likely to lead to tit-for-tat protectionism and will harm the prospects for boosting trade, which is necessary for future growth. The regulation could, in practice, discourage market opening by third countries or even trigger further market closure in third countries which would impede, not improve, the Commission's objective of improving market access.
12. The Government is also seriously concerned about the potential impact on the public procurement process. The proposal compromises the overarching policy objective of achieving value for money in public procurement. In practice this could mean that the bidder with the best value for money offering is prevented from bidding because they are from a third country. Alternatively it could limit the number of effective bidders in a competition, and so undermine value for money that way.

Next Steps

13. Cabinet Office is working closely with the Department for Business, Innovation and Skills in developing the UK's negotiation position, working closely with likeminded Member States. We will keep stakeholders updated as the negotiations progress, but it is likely to take some time, so there is no immediate cause for concern in respect of procurement exercises involving 3rd country tenders.
14. We welcome comments from any UK stakeholders, especially those with recent experience of procurement involving tenders from 3rd countries.