

Procurement Policy Note – Progress Update on the Modernisation of the EU Procurement Rules Information Note 08/12 24 August 2012

Issue

1. This PPN summarises the latest progress on the modernisation of the procurement rules, at roughly the halfway point in the main EU negotiations.

Timing

2. The timing for cascade is routine. Cabinet Office welcomes input at all times but comments received during September 2012 would be helpful for the final period of negotiations.

Dissemination

3. Please circulate this Procurement Policy Note (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. Please direct your response and any general enquiries to the Service Desk: 0845 000 4999 servicedesk@cabinet-office.gsi.gov.uk .

Background

5. In December 2011, PPN 11/11¹ announced and sought feedback on the Commission's legislative proposals² for the revised public procurement directives³

¹ [PPN December 2011 on the legislative proposals](#)

² The Commission's announcement and the text of the proposals are available at this link: [Commission proposals, press release and FAQs](#)

³ Directive 2004/18/EC (the public procurement directive); and Directive 2004/17/EC (the utilities procurement directive)

and a new concessions directive. This followed PPN 05/11⁴ in August 2011 which summarised the UK's influencing strategy.

6. PPN 3/12⁵ (April 2012) announced a further legislative proposal to enable the EU to close its markets to those countries whose markets are not reciprocally open to the EU.
7. Negotiations on the proposed procurement directives began in January and continue throughout 2012. Discussions on concessions have started but detailed negotiations will not begin until the autumn. We expect the concessions proposal to be finalised after the main procurement directive. Negotiations on the proposed market-access regulation have not yet formally commenced, but the latest position is also covered in this PPN.

Headlines – Summary of Latest Progress

8. The proposals to revise the existing public procurement rules are being negotiated through the EU Competitiveness Council. Between January and July 2012, the UK Government has participated actively in each of the 17 detailed negotiation and scrutiny meetings with other EU Member States and the European Commission, firstly under the Danish Presidency of the EU and from 1 July, under the Cyprus Presidency.
9. The Presidency has recently published a revised compromise text⁶, taking on board the progress made in the negotiations thus far.
10. Key progress in the negotiations to date include: the removal of the proposed “national oversight bodies” (a priority in the UK negotiating position); relaxing the unhelpful proposals on mandatory division into lots for SMEs (now “comply or explain”); and providing for greater access to the competitive procedure with negotiation. Importantly, we have also ensured that the many improvements which we successfully campaigned for during 2011 (see detailed section below), have been maintained and not watered down. The concessions proposal has also been substantially simplified and outside these negotiations, the UK has also successfully worked with a number of Member States to oppose the proposed market access regulation.

Detail - Report on Progress

11. The Commission's original proposal in December had already included several of the UK's main asks, following a successful UK influencing campaign in 2011. To recap, these UK-proposed changes included:
 - much more freedom for procurers to negotiate with suppliers;
 - simplification of supplier selection / prequalification process;
 - faster procurement through reduced minimum timescales

⁴ [PPN 0511 Modernising the public procurement directives](#)

⁵ [PPN on the European legislative proposals on third country access to the EU public procurement market](#)

⁶ [Revised procurement Directive text, published August 2012](#)

- simpler rules on dynamic purchasing systems
- allow assessment of past performance (selection stage)
- allow relevant skills/experience assessment (award stage)
- allow the use of emarketplaces
- clarify and improve rules on social and environmental aspects

12. During the first half of 2012, the Presidency has divided negotiations into a series of thematic 'clusters'. Progress on the main clusters is outlined below:

Increased Flexibility

13. **“Flexibilisation” of procedures** - The UK Government has pushed from the outset for flexible procedures which permit negotiation, in particular by relaxing the existing restrictions on use of the competitive negotiated and competitive dialogue procedures. The current proposal would enable negotiation for any requirements that go beyond “off the shelf” purchasing, and which if adopted should be a satisfactory outcome for the UK.

14. **Reducing minimum timescales** - The minimum timescales for responding to advertised procurements and preparing tender documents were reduced by about a third on average in the original proposal. The UK Government has supported these reductions and the further reductions agreed in the negotiations so far, such as the reduction from 40 to 35 days for receipt of tenders under the open procedure.

15. **Innovation partnerships** - The proposal for an innovation partnership procedure has been supported during the negotiations. This is a specific procedure to allow for the development of innovative solutions in a long term partnership between an authority and a supplier. This would be undertaken in a series of stages, and if ultimately successful could lead to the award of a contract for commercial delivery of the new solution. A revised recital in the Presidency’s compromise text makes clear that this procedure should be used where solutions are not already available on the market.

Strategic use of public procurement

16. **Life-cycle costing** - We are supporting moves to explicitly promote “life-cycle” costing, taking full account of whole-life costs including for example energy and recycling costs. This helps public procurement to support a sustainable economy. We agree life-cycle costs must be based on a clear methodology, understandable to suppliers. We agree that innovation and value for money will be encouraged if specifications concentrate on needs and outcomes, using performance and functional requirements, rather than concentrating narrowly on technical standards and inputs.

17. **How to buy** - We also agree that procurement rules should focus on “how to buy”, in order to support a transparent single market, and not on “what to buy”; the latter should be at the discretion of Member States and individual purchasing authorities.

18. **Part A/Part B Services** - The UK Government sees no need for the removal of the pre-existing “Part B services” provisions, which apply only minimal rules to procurement of many services, but as the Commission’s proposal is supported by a

strong majority of other Member States, it is unlikely the status quo will prevail. The Presidency has suggested a compromise position which will maintain a light-touch regime for a wider range of services than was proposed by the Commission. This is in addition to health and social services, which are recognised by all interests as a special case to which full procurement rules need not apply. We continue to press to ensure that the light touch regime is genuinely “light,” and extends as widely as possible.

Reducing documentation requirements

19. **Increasing the use of self-declarations** - There is widespread support for this proposition, whereby only the winning bidder should have to submit various certificates and documents which prove their status. Up to that point authorities must accept self-declarations of compliance from suppliers. This will reduce cost for suppliers and authorities, and encourage SMEs and wider competition. This provision is welcome and consistent with the UK Government’s reduction of pre-qualification questionnaire (PQQ) burdens.
20. **“European Procurement Passport”** - The original proposal set out that national authorities should provide when requested by suppliers a European Procurement Passport (EPP), which would set out various particulars, such as financial status, which could be requested by contracting authorities in other Member States for selection purposes. As this information is now largely going to be provided by self-declaration, with only the winning bidder submitting the documentary evidence, (see above paragraph on self-declarations the UK and other Member States argued that this was an unnecessary administrative burden. As a result, the EPP has been dropped from the compromise text.
21. **Exclusion for poor performance** - Poor performance under previous contracts is to be explicitly permitted as grounds for exclusion. This is in line with the UK Government’s view that ineffective or poorly-performing suppliers should not be awarded public contracts.

Frameworks

22. The original proposal provided restrictions on when direct call offs and mini-competitions could be used. In the compromise text, these restrictions have been removed, in line with our negotiating position.

SME access

23. SMEs and other suppliers should not face disproportionate financial turnover requirements relative to contract size. The UK has already introduced reforms to address this. To make sure that contracting authorities do not ask for excessive turnover requirements in relation to contract value, the proposal sets out that the minimum yearly turnover should not exceed three times the estimated contract value, although we do not consider that this should be regarded as a default figure.
24. **Lots** - We agree that authorities should encourage SMEs to bid by breaking requirements into lots where appropriate. However, the negotiations support the UK position that the decision whether to use lots should be left to the purchasing

authority on a case-by-case basis.

E-procurement

25. **Dynamic Purchasing Systems** – There is widespread support for the proposals to simplify the rules on “Dynamic Purchasing Systems”, which would remove the existing obligation to advertise call-off contracts made under a DPS in the Official Journal of the EU. This should greatly increase the usefulness and take-up of that procedure, which has hitherto been limited. There is also widespread support for the Commission’s proposed text which explicitly recognises electronic catalogues in the bidding process.
26. **100% electronic communication** – the proposal includes the need to switch to this within two years of the transposition deadline. Whilst the UK fully supports e-procurement, this deadline may be unrealistic; an absolute requirement for 100% e-communication could cause unnecessary problems for public bodies and suppliers, and lead to infraction proceedings against Member States for minor shortfalls. The UK Government will encourage rapid take-up of e-procurement in the UK, to achieve the undoubted benefits, whilst seeking rules and deadlines which are also practicable and realistic.

Governance

27. **“Oversight Body”** - The original Commission proposal would have required each Member States to set up or designate a single national “oversight body” to oversee the application of the public procurement rules. The oversight body proposal has been removed. We strongly felt that Member States should be free to make their own decisions on how to organise monitoring, reporting and advise on the application of the procurement rules.

Other issues

28. **Temporary exclusion for mutuals** - We wish to see the Directive explicitly allow innovative public service delivery-agents such as employee-owned “mutuals” to become established before they are subject to full competition. We continue to press the case for a time limited exemption, and Francis Maude, Minister for the Cabinet Office, has written to his ministerial counterparts in other Member States explaining the arguments for this temporary exclusion.
29. **Thresholds** - Following significant lobbying from the UK and others, the Commission now proposes to review thresholds in 2017; the UK welcomes the proposal but wants work on reviewing the thresholds to start as soon as possible. In this context, the UK has pressed the Commission to start work on reviewing the thresholds applied under the WTO Government Procurement Agreement as soon as possible in 2013.

Legislative Proposal – Utilities Procurement

30. To date the Working Group has not examined the “Utilities” proposal in detail. We will provide further updates when there is more to report.

Legislative Proposal – New Directive on Concessions

31. There has been limited discussion so far on the concessions proposal. In late May the Presidency issued a questionnaire to Member States, inviting comments on a number of the Articles specific to the draft concessions directive. We understand that a large majority of respondents consider that further clarification of definitions is needed, in particular around the concept of “risk” borne by the contractor as integral to the definition of a concession.
32. The Presidency proposed amendments to some of the concession-specific Articles. It is our aim that any directive on concessions is as light-touch as possible, and at first sight this latest version includes some welcome simplification. There may be further opportunities for more UK public sector contracts, such as some Public Private Partnerships, to be procured under the concessions regime, which should be more flexible than the main public procurement legislation. Further detail will be examined during the negotiations, to see what further improvements may be needed, and to ensure the changes do not result in restrictions to the single market when awarding concessions for water, electricity supply, or similar services.

Legislative Proposal – New Regulation on Third Country Market Access

33. This proposed Regulation would enable the EU to close its markets to those countries whose markets are not reciprocally opened. The aim of the instrument is to improve the conditions under which EU suppliers can compete for public contracts in third countries by strengthening the position of the Commission in international trade negotiations. The UK Government does not support the proposed Regulation, which could lead to a net reduction in market access and could diminish growth potential at a time when it is needed most. There has been an initial exchange of views in a Council Working Group, but negotiations have not started and the timetable is unclear.

Next Steps

34. Cabinet Office will continue to update stakeholders as we progress through the negotiations. We will also consult stakeholders during the implementation period; consultation activity is likely to begin mid 2013. The revised directives could be adopted in early 2013, but this is dependent on various factors including discussions with the European Parliament. Transposition of the revised directives will then follow; the current proposal would require member states to implement the new rules within 18 months of the new directive being published in the Official Journal of the EU.