



Procurement Policy Note – Further progress update on the Modernisation of the EU Procurement Rules

Information Note 05/13

25 July 2013

Issue

1. This PPN:
 - a. Summarises the main outcomes in the provisional agreement on the revised EU procurement rules
 - b. Outlines the next steps in the process to finalise the EU rules and then implement them in the UK.

The new rules are not yet live, but contracting authorities and entities should begin preparing the ground to ensure a smooth transition. Further PPNs will be issued in due course as the process continues.

Timing

2. Routine.

Dissemination and Scope

3. This PPN is directly applicable to Central Government, Agencies, Non departmental Public Bodies wider public sector, local authorities and NHS bodies.
4. Please circulate this document (for information) within your organisation, its Executive Agencies and Non Departmental Public Bodies and to all Contracting Authorities for which you are responsible, drawing it to the attention of those with a purchasing role. All contracting authorities, including those within the wider public sector, are strongly encouraged to apply this advice.

Contact

5. Enquiries about this PPN should be should be directed to the Service Desk 0845 000 4999 servicedesk@cabinet-office.gsi.gov.uk.

Background

6. The trilogue negotiations on the revised EU procurement directives concluded this month in Brussels, with a provisional agreement being reached between the EU Council, Commission and Parliament. This followed 18-months of intensive scrutiny and debate on the Commission's draft proposals, and marks a major milestone in the campaign to modernise the procurement rules which began with consultations in 2010. PPNs 8/12¹ and 5/11² trail the recent PPN history.

¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/62100/PPN-0812-Update-on-Modernisation-of-the-EU-Procurement-Rules.pdf



7. A package of 3 procurement directives has been provisionally agreed. This comprises a revised public sector directive, a revised utilities sector directive, and a new directive containing procedural rules for the award of concessions contracts.
8. The conclusion of the trilogue negotiations is a major step forward in the process. Work will continue in Brussels over the next few months to translate the texts into several other European languages.
9. The final formal stage of the EU process, when the EU adopts the package and publishes the new directives in the Official Journal of the European Union, is expected in the Autumn of 2013, subject to the European Parliament approving the package in plenary session. In the UK, there will then be a formal process (transposition) leading to the making of regulations to implement the directive, building on informal preparations. Cabinet Office is preparing an ambitious transposition timetable which we will agree with ministers.

Overview of the Main Changes

10. The revised package represents an excellent overall outcome for the UK, with progress achieved on all of our priority objectives (as set out in the UK's response to the Commission's consultation³). These changes support UK Government priorities of economic growth and deficit reduction by making the public procurement process faster, less costly, and more effective for business and procurers alike.
11. For contracting authorities, this means being able to run procurement exercises faster, with less red tape, and more focus on getting the right supplier and the best tender. And for suppliers, the process of bidding for public contracts should be quicker, less costly, and less bureaucratic, enabling suppliers to compete more effectively.
12. The basic principles of the EU Treaty have not changed, so contracts still have to be competed and awarded transparently and without discrimination. The new rules have a similar overall structure to the existing rules, but the many new flexibilities will enable better commercial outcomes to be achieved. A summary of some of the key changes is attached at Annex A. The full texts are not yet publicly available, but should be in due course via the EU Council's website.

Transposition

13. Member States are required to transpose the directive, by making national implementing regulations, within 2 years from the date of EU adoption. Cabinet Office is preparing ambitious plans for early transposition, so that the UK⁴ can take advantage of the additional flexibilities in the new rules as soon as possible. These rules would only bite on new procurement exercises commenced after the date when the new UK rules take effect. A blended learning package will be developed to support the changeover.

² <https://www.gov.uk/government/publications/procurement-policy-note-05-11-modernising-the-public-procurement-rules>

³ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61554/0707UKGPpbResponsefinal_20_2_.pdf

⁴ We use the term "UK" in this PPN for convenience, to cover only those jurisdictions to which the current Public/Utilities Contracts Regulations 2006 apply – i.e. England, Wales and Northern Ireland, but excluding Scotland which makes its own, separate implementing regulations



14. This PPN continues the longstanding programme of engaging UK stakeholders in the modernisation process. Cabinet Office encourages and welcomes such further engagement. We will adhere to the Government's policy and guidance on consultation⁵, including the need to adopt a proportionate and targeted approach, so that the type and scale of engagement is proportional to the potential impacts of the proposal.
15. There is only very limited scope for Cabinet Office and other UK stakeholders to influence the substantive content of the UK's implementing regulations. Most of the text of the directives is mandatory for Member States to transpose, so we cannot alter its substance in transposition. The only exceptions are those few instances where the directives permit a policy choice for Member States on whether or how to implement a particular provision (for example, Member States can choose whether to make the negotiated procedure available to their authorities, or choose to not make it available). In addition, the government's policies on "copy-out" of European Directives (where available) and avoidance of "gold-plating", further limit the extent to which Cabinet Office can deviate from the wording of the EU directive when casting the national UK implementing regulations.
16. We will consult on the draft implementing regulations before they come into force, to confirm that the regulations effectively implement the directive and do so in the best way. And we will be using informal, targeted consultation to inform the drafting, with parties actively interested in those issues where the directive offers a choice on how to implement. The limited scope of such issues is attached at Annex B.
17. Stakeholders with a particular interest in any of these aspects, and who wish to be involved further, should email their contact details and scope of interest to servicedesk@cabinet-office.gsi.gov.uk by 7 August 2013. Alternatively, stakeholders are also welcome to submit written comments by reply.
18. Subsequent PPNs will be issued at key milestones during the remaining stages:
 - a. When the EU adopts the package, signalling the start of UK transposition, and the UK timetable
 - b. To announce the consultation on the UK's draft implementing regulations
 - c. Upon publication of the guidance/learning package
 - d. When the UK's new regulations come into force

⁵ <https://www.gov.uk/government/publications/consultation-principles-guidance>



Annex A – Summary of key changes in the new Public Sector Directive

- i) A much simpler process of assessing bidders' credentials, involving greater use of supplier self-declarations, and where only the winning bidder should have to submit various certificates and documents to prove their status
- ii) More freedom to negotiate – constraints on using the negotiated procedure have been relaxed, so that procedure is available for any requirements that go beyond “off the shelf” purchasing.
- iii) Poor performance under previous contracts is explicitly permitted as grounds for exclusion
- iv) The distinction between Part A and Part B Services has been removed, and a new light-touch regime introduced for social and health and some other services. There will be OJEU advertising and other specific obligations for this new light-touch regime, but a much higher threshold has been agreed (EUR 750,000).
- v) The rules on “Dynamic Purchasing Systems” have been greatly simplified, with the removal of the onerous obligation to OJEU-advertise call-off contracts made under the DPS
- vi) The ability to reserve the award of certain services contracts to mutuals/social enterprises for a time limited period
- vii) Electronic marketplaces for public procurement are expressly permitted, removing any doubt as to their legality
- viii) Reduced red-tape on suppliers' response times: The statutory minimum time limits by which suppliers have to respond to advertised procurements and submit tender documents have been reduced by about a third. This flexibility could be helpful for speeding up simpler or off-the-shelf procurements, but still permits longer timescales for requirements where bidders will need more time to respond.
- ix) Review of thresholds: The directive includes a binding commitment on the Commission, to review the economic effects on the internal market as a result of the application of thresholds, which could lead to an increase in the thresholds, which have been broadly static for 20 years. The review must happen within 3 years of the directive's transposition.
- x) Legal clarity that buyers can take into account the relevant skills and experience of individuals at the award stage where relevant (eg for consultants, lawyers, architects, etc)



- xi) Improved rules on social and environmental aspects, making it clear that:
- social aspects can now also be taken into account in certain circumstances (in addition to environmental aspects which had previously been allowed).
 - buyers can require certification/labels or other equivalent evidence of social/environmental characteristics, further facilitating procurement of contracts with social/environmental objectives.
 - and refer to factors directly linked to the production process
- xii) Electronic communication / e-procurement will become mandatory following 4.5 years after the directive's adoption.
- xiii) Various improved safeguards from corruption:
- specific safeguards against conflicts of interest, similar to common existing UK practice where declarations are signed by procurement staff to confirm they have no outside interests with bidders etc
 - similar provision against illicit behaviour by candidates and tenderers, such as attempts to improperly influence the decision-making process or collusion.
 - safeguards against undue preference in favour of participants who have advised the contracting authority or been involved in the preparation of the procedure.
 - self-cleaning measures, for suppliers who have cleaned up their bad practices
- xiv) Buyers will be encouraged to break contracts into lots to facilitate SME participation, but there is discretion not to do so where appropriate.
- xv) The new rules encourage and allow preliminary market consultation between buyers and suppliers, which should facilitate better specifications, better outcomes and shorter procurement times.
- xvi) A turnover cap has been introduced to facilitate SME participation. Buyers will not be able to set company turnover requirements at more than two times contract value.
- xvii) A new procedure has been introduced: the "Innovation Partnership" procedure. This is intended to allow scope for more innovative ideas. The supplier essentially bids to enter into a partnership with the authority, to develop a new product or service.
- xviii) The full life-cycle of costings can be taken into account when awarding contracts; this could encourage more sustainable and/or better value procurements which may save money over the long term but appear more costly on the initial purchase price
- xix) Public authorities will no longer have to submit detailed annual statistics on their procurement activities. The Commission will collect this information directly from the online system, thereby freeing up valuable time and resources for public authorities.



- xx) “E-certis”: Where contracting authorities require certificates etc from winning bidders, suppliers need to know what type of information and documents they will need to provide. “E-certis” will be a central, on-line point where suppliers can find out the type of documents which they may be asked to provide in any EU country, even before they decide to bid. This should be of particular help when suppliers wish to bid cross-border, as they may be unfamiliar with the detailed requirements of other EU Member States

- xxi) Concessions contracts (works and services) will need to be advertised in OJEU where the contract value exceeds EUR 5million, and procured in compliance with the new procedural rules regime for concessions



Annex B – Table of Policy Choices for Member States in the (provisionally agreed) new EU procurement directives

This Annex summarises the main policy choices that Member States have when transposing the directives. There are similar choices in the 3 directives, though the concessions directive has far fewer choices, because it is much shorter.

For simplicity/brevity, the left column of the table below summarises the essence of each policy choice, and the subsequent 3 columns identify which of the 3 directives that choice appears within.

Policy Choice ⁶	In Classic?	In Utilities?	In Concessions?
<ul style="list-style-type: none"> Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by certain international environmental, social and labour law provisions. The choice for Member States is what appropriate measures to take to ensure this. 	Yes	Yes	Yes
<ul style="list-style-type: none"> Member States may establish standard terms to consider how groups of economic operators meet various selection criteria, instead of these assessments being made by individual contracting authorities 	Yes	Yes	Yes
<ul style="list-style-type: none"> Member States may reserve the right to participate in public procurement procedures to sheltered workshops. 	Yes	Yes	Yes
<ul style="list-style-type: none"> For works contracts and design contests, Member States may require the use of specific electronic tools, such as of building information electronic modelling tools or similar 	Yes	Yes	N/A
<ul style="list-style-type: none"> Member States may specify the level of security required for e-comms, or establish a framework in which Contracting Authorities themselves may do so Similarly, Member States may decide, or establish a framework within which Contracting Authorities decide, when the level of risk requires the use of advanced Electronic Signatures 	Yes	Yes	N/A
<ul style="list-style-type: none"> Members States are required to ensure that Contracting Authorities take 'appropriate measures' to effectively prevent, identify and remedy conflicts of interest (and, in relation to concessions, to combat fraud, favouritism and corruption). The issue here is how the UK should ensure this. For example, should the Cabinet Office specify in the regulations the measures which it considers appropriate and, if so, what should those measures be? 	Yes	Yes	Yes

⁶ To keep things simple, this refers where relevant to contracting authorities, contracts etc, but where relevant should also be read as covering contracting entities, concessions etc.



<ul style="list-style-type: none"> For concessions, Member States may choose one or several means of communication and may make mandatory the use of electronic means of communication generally (except where electronic communication is already mandatory ie publication of notices and availability of concessions documents), 	N/A	N/A	Yes
<ul style="list-style-type: none"> Where a contract is awarded by restricted or competitive procedure with negotiation by a sub-central contracting authority, Member States may provide that the call for competition may be made by means of a Prior Information Notice instead of a contract notice. Member States may also decide to limit this facility to particular categories of sub-central authority 	Yes	N/A	N/A
<ul style="list-style-type: none"> Member States may provide that Contracting Authorities may use the negotiated procedure without prior publication in circumstances specified in the directive. 	Yes	Yes	N/A
<ul style="list-style-type: none"> Restricted procedure – Member States may provide that all or specific categories of sub-central Contracting Authorities may set the time limit for the receipt of tenders by mutual agreement between the Contracting Authority and selected candidates 	Yes	N/A	N/A
<ul style="list-style-type: none"> Member States may render the use of electronic catalogues mandatory for certain types of procurement. 	Yes	Yes	N/A
<p><u>Central Purchasing Bodies</u></p> <ul style="list-style-type: none"> Member States may provide that Contracting Authorities may acquire supplies and/or services from a central purchasing body or by using contracts/dynamic purchasing systems/framework agreements established by a central purchasing body Member States may provide that certain procurements <i>must</i> be made by having recourse to central purchasing bodies or a specific central purchasing body. 	Yes	Yes	N/A
<ul style="list-style-type: none"> Member States may choose to limit their Contracting Authorities to using a particular one, rather both, of the following two kinds of service offered by central purchasing bodies in other Member States: wholesale services (where the CPB buys in its own name and resells to Contracting Authorities) or intermediary services (where the CPD awards contracts, operates dynamic purchasing systems or concludes framework agreements to be used by contracting authorities). 	Yes	Yes	N/A
<ul style="list-style-type: none"> Member States may provide that, where more than one lot may be awarded to the same tenderer, Contracting Authorities may award contracts combining several or all lots where they have specified in the contract notice or in the invitation to confirm interest that they reserve the possibility to do so and indicate how the lots or groups of lots that may be combined. 	Yes	Yes	N/A



<ul style="list-style-type: none"> Member States may render it obligatory to award contracts in the form of separate lots under conditions to be specified in accordance with their national law and having regard for Union law. 	Yes	Yes	N/A
<ul style="list-style-type: none"> Member States may require Contracting Authorities to publish “Group notices” of call-offs under a framework agreement on a quarterly basis – within 30 days of the end of each quarter. 	Yes	Yes	N/A
<ul style="list-style-type: none"> Open procedure – Contracting Authorities may examine tenders before checking to see if any of the grounds for exclusion apply or if the tenderer meets the selection criteria. Member States may however make provision prohibiting this, or permitting it only in certain types of procurement or in specific circumstances. 	Yes	Yes	N/A
<ul style="list-style-type: none"> Contracting Authorities may ask economic operators to submit, supplement, clarify or complete information or documentation which is incomplete, erroneous or missing “unless otherwise provided for by the applicable national law implementing this Directive”. 	Yes	Yes	N/A
<p><u>Mandatory exclusion – Several Policy Choices</u></p> <ul style="list-style-type: none"> Member States may require mandatory (instead of discretionary) exclusion in the instances listed, which include (summarised for brevity): where the economic operator: <ul style="list-style-type: none"> has breached obligations to pay taxes or social security obligations where a mandatory exclusion has not been triggered by a formal judicial or administrative finding; has violated social/environmental/labour laws; is bankrupt/insolvent (though Contracting Authorities may decide, or may be required by Member States, not to exclude the operator where it can be established that the operator will be able to perform the contract); has committed grave professional misconduct; has attempted to distort competition in various kinds of way; has significantly or persistently under-performed in previous public contract(s); has misrepresented the evidence required to assess exclusion grounds; has attempted to unduly influence the decision-making process. Member States may also require the exclusion of any economic operator at any stage of the procurement procedure when it is discovered that the operator is in one of the above listed situations. Member States may provide for derogation from the provisions requiring mandatory exclusion where, exceptionally, there are overriding requirements in the public interest. Those mandatory exclusions that could be so derogated from, include convictions for: participating in a criminal organisation; corruption; terrorism; money laundering or terrorist financing; child labour and other forms of trafficking in human beings; and also where it has been established by judicial/administrative decision that the economic operator has 	Yes	Yes	Yes



<p>breached its obligations to pay taxes or social security obligations</p> <ul style="list-style-type: none"> Where the exclusion relates to failure to pay tax or social security, Member States may provide for derogation from mandatory exclusion where exclusion would be clearly disproportionate, such as where only minor amounts of taxes or social security are unpaid. Member States must specify, by law, regulation or administrative provision, the implementing conditions for mandatory exclusion. They shall, in particular, determine the maximum period of exclusion (subject to self-cleaning) up to a maximum of 3 or 5 years (depending on the exclusion ground concerned). The choice here is whether to opt for the maximum exclusion periods allowed by the directive, or limit these to shorter periods. 			
<ul style="list-style-type: none"> Member States may provide that contracting authorities may not use price only or cost only as the sole award criterion or restrict their use to certain categories of contracting authorities or certain types of contracts. 	Yes	Yes	N/A
<p><u>Sub-contracting – Various Choices</u></p> <ul style="list-style-type: none"> Member States may make it compulsory (instead of discretionary) for Contracting Authorities to ask economic operators to indicate in tender documents any share of the contract they may intend to subcontract to third parties and any proposed subcontractors. Member States may provide for direct payment of subcontractors. Member States may impose obligations directly on the main contractor, to provide information about its subcontractors, and further down the supply chain, and to apply other information obligations to categories of contract beyond those required by the Directive. Member States may require contracting authorities to verify whether there are grounds for exclusion of any subcontractors, and may require that the main contractor finds a substitute subcontractor where appropriate Member States may provide for more stringent liability rules under national law or to go further under national law on direct payments to subcontractors, for instance by providing for direct payments to subcontractors without it being necessary for them to request this. Where a Member State exercises the above options on subcontracting, it must specify the implementing conditions, which may include limitations on the scope of the requirement. 	Yes	Yes	Yes
<ul style="list-style-type: none"> Member States must ensure that Contracting Authorities are able to terminate contracts in certain circumstances “under the conditions determined by the applicable national law”. The main issues are likely to be how this should be ensured and under what conditions. 	Yes	Yes	Yes



<ul style="list-style-type: none">Member States shall put in place appropriate procedures for the award of contracts under the “light touch” regime (setting the rules is mandatory, but the choice comes in deciding what the national rules should be).	Yes	Yes	N/A
<ul style="list-style-type: none">Social and other specific services – Member States may provide that the choice of service provider shall be made on the basis of MEAT, taking into account quality and sustainability criteria for social service.	Yes	Yes	N/A
<ul style="list-style-type: none">Member States may provide that contracting authorities may reserve the right for organisations to participate in procedures for the award of public contracts exclusively for certain health, social and cultural services	Yes	Yes	N/A
<ul style="list-style-type: none">Member States may postpone the requirement for electronic communication until 30 months after the deadline for transposition of the directive in national law.	Yes	Yes	N/A
<ul style="list-style-type: none">Member States may postpone the requirement for Contracting Authorities to have recourse to e-Certis and only require types of certificates etc. which are covered by e-Certis until 30 months after the deadline for transposition of the directive in national law.	Yes	N/A	N/A
<ul style="list-style-type: none">Although not a policy choice in the directive, Cabinet Office will also be sounding out stakeholder views on practical handling of the standard forms (eg OJEU contract notices and other forms), because the new standard forms may not have yet been made by the Commission when the UK rules go live.			