



## Changes ahead: public procurement 2014

by Julie Teal, Partner, Fenwick Elliott

At the end of 2011, after extensive public consultation, the European Commission published its proposals for simplifying and modernising the public procurement regime. It is not expected that the proposals will become law in the UK before June or July 2014. However, the Commission is now in the process of making the final revisions to the relevant Directives.

### Why?

UK current law is based on the public sector and utilities Directives of 2004, supplemented in 2007 by another Directive setting out the remedies available to aggrieved suppliers when there are problems with the process. Despite the innovations and improvements brought about by these Directives, the regime has been criticised for taking too long to implement them, and for being resource heavy and inflexible. A number of changes have been introduced to address these issues.

### How?

The new Directives for public contracts and utilities will be accompanied by a third Directive which will apply to concession contracts. The new Directives will apply alongside the existing Remedies Directive and other sector-specific legislation. Implementation in the UK is likely to be through statutory instruments. The new rules will not apply retrospectively, so will apply to procurements beginning after the date of implementation.

### What?

We consider some of the most significant anticipated changes here.

- No differentiation between Part A and Part B services

Part A services are currently fully regulated by the procurement rules; Part B services (education, health, cultural and some transport services, for example) are regulated to a more limited extent. However, all contracts above the financial thresholds will generally now need to be procured formally, and so will be subject to OJEU contract notices. The proposed new thresholds are 5 million euros for public works contracts, 130,000 euros for goods or services contracts awarded by central government bodies and 200,000 euros for goods or services contracts awarded by other government bodies. Different thresholds apply to "social services" and utilities contracts.

- More flexible procedural rules with increased opportunity to negotiate

A lighter-touch regime for certain low-value health and social services contracts (due to their diversity across member states) will be implemented. Contracting authorities will be able to dictate their own procedures, provided that they advertise

their contracts properly and adhere to the established principles of equal treatment and transparency.

Open and restricted procedures remain; however, member states will also be able to use two new procedures: (i) the competitive procedure with negotiation (similar to the previous negotiated procedure) and (ii) the innovative partnership procedure (where the market does not already offer viable procurement solutions). Option (i) is distinct from the competitive dialogue procedure. Competitive dialogue will no longer be limited to complex procurements, again allowing a contracting authority greater choice.

- Simplified tendering through e-procurement

The ability to submit contract notices online and to download tender documentation following publication of a notice will increase accessibility and streamline the tender process.

- Benefits for SMEs

The new rules are intended to promote the participation of small businesses through various initiatives. When procuring large contracts, a contracting authority must now justify why the large contract could not be broken down into smaller lots. Other than in exceptional circumstances, contracting authorities will now no longer be able to specify a turnover of more than three times the contract value in a pre-qualification questionnaire. The new rules will also allow bidders to self-certify that they meet the selection criteria at pre-qualification stage and so reduce the administrative burden (accounts and/or other financial information will therefore only be checked if the particular bid progresses).

- In-house suppliers exemption

The Teckal test for in-house provision has been codified and so clarifies the exemption criteria for direct awards of contracts. For the exemption to apply: (i) there must be no private ownership; (ii) a prescribed percentage of the contractor's turnover must be generated by work for the contracting authority; and (iii) the contractor must be controlled as if it were a department of the authority.

- Clarification of the effect of change in a project

Whilst changes to the terms of a contract have always been allowed provided they were not material, it has been difficult to determine in some cases where a significant change should properly trigger a new procurement. The new rules follow the Prettetext case law, so that changes increasing the value of a contract by less than 5% of the initial contract price are not considered material (provided that the change in question does not alter the nature of the contract). Structural changes to a party to a contract, such as internal restructuring or merger, will now no longer in themselves trigger a fresh procurement.

- Additional rules on framework agreements

Clarification has been needed for some time as to when authorities not originally party to a framework agreement can subsequently use it. The new regime provides this clarification and establishes other rules to simplify and support framework procurements.

### Good news?

In many ways, the changes are good news, particularly for SMEs and in-house suppliers. The emphasis on efficiency and the clarification (through extra rules) of perceived gaps or grey areas in the current law which previously the ECJ has been left to address, can only be seen as a positive development.

However, the public procurement regime will now apply to more contracts. Contracting authorities will therefore need to update their internal procedures, published policies and other know-how to respond properly to the new rules and provide additional training for staff involved in commissioning and project delivery.

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