

PROCUREMENT LAWYERS' ASSOCIATION

**RESPONSE TO EC COMMISSION PROPOSALS TO MODERNISE THE
EUROPEAN PUBLIC PROCUREMENT MARKET**

**PLA working group on public procurement reforms: Cluster three: the proposals for
reform concerning reducing documentation requirements and better access to the
market for SMEs and start-ups.**

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ABOUT THIS PAPER

The Procurement Lawyers' Association (PLA) is an organisation which exists to bring together all procurement lawyers, whether in private practice or in-house, public or private sector and including solicitors, barristers and academics based in the UK and elsewhere.

The PLA has established a working group to consider the proposals for the reform of the EU public procurement regime. This working group will be submitting a series of papers on all aspects of the proposals to the Cabinet Office to assist it in the ongoing negotiation of the reforms at EU level. In light of the tight timescales that are applicable, the PLA will be submitting separate reports on the following subjects:

- Cluster one.
- Cluster two.
- Cluster three.
- Clusters four and five.
- Utilities.
- Concessions.

This paper focuses on Cluster 3: SME access

DEFINITIONS USED

In this paper the following definitions have been used:

Classic Directive: Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

Cluster one: the proposals for reform concerning the flexibilisation of procurement procedures.

Cluster two: the proposals for reform concerning the strategic use of public procurement to meet new challenges.

Cluster three: the proposals for reform concerning reducing documentation requirements and better access to the market for SMEs and start-ups.

Cluster four: the proposals for reform concerning sound procedures.

Cluster five: the proposals for reform concerning national oversight bodies and governance.

IC on concessions: European Commission interpretative communication on concessions under Community law (2000/C 121/02).

IC on excluded contracts: European Commission interpretative communication on the community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (2006/C 179/02).

New Directive on Concessions: the proposal for a Directive of the European Parliament and of the Council on the award of concession contracts (2011/0437/COD).

Public Contracts Regulations: the Public Contracts Regulations 2006 (SI 2006/5).

Revised Classic Directive: the proposal for a Directive of the European Parliament and of the Council on public procurement (2011/0438/COD).

Revised Utilities Directive: the proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors (2011/0439/COD).

SME : Small and Medium Enterprises

Utilities Regulations: the Utilities Contracts Regulations 2006 (SI 2006/6).

Utilities Directive: Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

1. KEY POINTS TO HIGHLIGHT FOR UK GOVERNMENT NEGOTIATIONS

We wish to draw the Cabinet Office's attention to the following key issues with the current status of the proposed reforms, which we feel the UK government should take account of in the ongoing negotiation process:

1. The effect of flexibilisation of procedures on SME's.
 - 1.1. There is some concern about the capacity of SME's to respond to some of the measures designed to achieve greater flexibility. For example the ability of sub-central contracting authorities to seek very short tender return times pursuant to Article 26 (4) would potentially put SMEs at a disadvantage. Resource of SME's to deliver tender proposals in short order is limited. The fall back of ten days from the date of the invitation to tender is likely to put considerable pressure on all tenderers and candidates to accept very short return times.
 - 1.2. Can further clarity be given to the procedure for the use of a prior information notice (PIN) as a call for competition by sub central contracting authorities pursuing to Article 46 (2).
 - 1.2.1. On the presumption that the PIN contains the information required by Article 46 (2 a-d) what is expected from economic operators at that stage in relation to their expression of interest, especially in light of the fact that much of the information required by Annex VI Part B (II) may not be known at the time of the issue of the PIN.
 - 1.2.2. Is it expected that PINs issued as calls for competition may contain numerous Annexes in relation to potential contracts (in the form required by annex VI Part B II)? Would there be anything to stop sub central contracting authorities to regularly issue speculative PINs? Would it be feasible for one annexe to cover a series of contracts, or is it one annexe per contract award?
 - 1.3. Although we would not suggest that it is something that is needed in the underlying directive, we would suggest that the Cabinet Office consider in due course guidance on the drafting of Specifications. SME's sometimes struggle to meet very solution orientation specifications. Outcome based specifications could often provide greater value for money solutions and also provide a greater ability for innovation.
2. The specific changes designed to improve the ability of SMEs to tender (or otherwise improve their position).
 - 2.1. Article 57 self declarations and other means of proof – paragraph 1 provides that contracting authorities shall accept self-declarations. Paragraph 2 confirms that a contracting authority may ask a candidate or tenderer at any moment during the procedure to submit all or parts of the required documentation:
 - 2.1.1. Would this permit Contracting Authorities to seek documentary proof in their request for information or other standard communication or does it require some further reason (either being contract specific or an event which occurs during the procedure) which triggers the right for the self declarations to be corroborated by supporting documents?
 - 2.1.2. what is to happen if such information proves to be incorrect in particular what is to happen if information is not verified until award of contract and then proves to be incorrect. In particular will contracting authorities who have relied on certificates, expose themselves to potential claims from wrongly excluded

- candidates, for example those who would have been shortlisted to tender but for the inclusion of such candidate in stead of them?
- 2.2. Article 57 sub-paragraph 3 infers that the contracting authorities will have to keep a central repository themselves of candidates and tenders information provided to them during tender processes. Will:
 - 2.2.1. Contracting Authorities be able to charge a fee to manage such a system; and
 - 2.2.2. Contracting Authorities have to proactively seek to confirm that information is still valid at regular intervals as per the second paragraph of 3 and will it be the Contracting Authority's opinion as to validity?
 - 2.3. Article 59 sub paragraph 3 – Will national authorities be able to charge for the provision of the passport, if so will there be any control over the level of costs?
 - 2.4. Article 59 sub paragraph 4 – seems to potentially conflict with the absolute right contained in Article 57 (2). Accordingly, should article 57 (2) make reference to this higher level of “justification” for matters covered by the European passport?
 - 2.5. Article 44 Division in Lots where a prior information Notice has been used as a call for competition must a contracting authority indicate at that stage that it expects to divide any contract into Lots or may it do that just at the stage that seek candidates and tenderers to confirm their continuing interest?
 - 2.6. Recital 21 and Article 31 – Framework Agreements
Often it can be seen that large framework agreements effectively exclude SME's from participation in public procurement. Framework agreements are frequently set-up without the participation or any other input from many of the contracting authorities who are subsequently able to use these agreements.

Article 31 (2) states:

Contracting authorities shall not use framework agreements improperly or in such a way as to prevent, restrict or distort competition

It can be argued that in many cases they do have a distorting effect on competition.

Article 5 (4) states:

With regard to framework agreements and dynamic purchasing systems, the value to be taken into consideration shall be the maximum estimated value net of VAT of all the contracts envisaged for the total term of the framework agreement or the dynamic purchasing system.

We would suggest that there should be much greater clarity upon how such estimates should be assessed. In particular, we would suggest that where large frameworks are being procured, there is confirmation of actual commitment from those bodies that would be able to utilise the framework. This would give more clarity over the true financial size of a framework and also greater clarity for SMEs (in particular) about those frameworks that have the ability to deliver work to them.