PROCUREMENT LAWYERS' ASSOCIATION

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

PROCUREMENT LAWYERS ASSOCIATION SUB-GROUP FOR CLUSTER ONE – FLEXIBILISATION

22 FEBRUARY 2012

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 one**' – the proposals for reform concerning the flexibilisation of procurement procedures. Owing to the short timescale, it is intended to be a concise summary of the main issues and a precursor for continuing discussion and submissions on this and other clusters.

Minor clarificatory drafting amendments are included in the appendix to this paper.

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

Cluster four: the proposals for reform concerning sound procedures.

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

KEY POINTS TO HIGHLIGHT FOR UK GOVERNMENT NEGOTIATIONS

We wish to draw the attention of the Cabinet Office to the following key issues and observations on the proposed reforms.

1 OVERALL CONCEPT: FLEXIBILISATION

The Commission's objectives concerning reform of the public procurement rules generally and flexibilisation can be summarised as follows:

- Increase the efficiency of public spending to ensure the best possible procurement outcomes in terms of value for money. This implies in particular a simplification and flexibilisation of the existing public procurement rules to benefit all economic operators and facilitate the participation of SMEs and cross-border bidders.

- Allow procurers to make better use of public procurement in support of common societal goals.

In our opinion, the proposals contained within the Revised Classic Directive may struggle to achieve the Commission's overriding objectives for the simplification and flexibilisation of procurement procedures, summarised above.

We reached this conclusion following an assessment of the practical application of the Revised Classic Directive in the light of existing practice and the needs of our clients (primarily contracting authorities).

In particular, we are concerned that the Revised Classic Directive:

- Adds complexity to the choice and application of procurement procedures;

- Results in inconsistency between the recitals to the Revised Classic Directive ((15) to (18)) and the substance of the articles;

- Restricts access to the competitive procedure with negotiation and blurs the distinction between this procedure and competitive dialogue under the Classic Directive; and

- Results in increased cost and complexity for those contracting authorities seeking 'Part B' services by removing the 'Part A'/'Part B' distinction

2 MAJOR SUBSTANTIVE ISSUES OF THE PROPOSED REFORM

2.1 Substance of Article 24 – Choice of Procedures

We are concerned that the nature of the proposed changes to Article 24 may not accord with the Commission's overriding objective to flexibilise access to the procurement procedures. In particular:

(a) By distinguishing between works, supplies and services contracts, Article 24.1(a) may be construed as limiting the availability of the competitive dialogue procedure from its current availability for supplies and services contracts where the legal or financial make-up of the project cannot be defined in advance.

This is accentuated by the wording of the newly introduced Article 24.1(e) which appears to closely resemble that used to authorise the use of negotiated procedure under Article 30(b) of the Classic Directive. Since this provision has traditionally been interpreted restrictively, we are uncertain as to the scope and intention for the proposals in practice. We assume that such a mechanism is intended to increase flexibility, but can foresee the possibility of this having the opposite effect.

We would suggest restoring this provision to that under the Classic Directive so as to permit the use of the competitive dialogue and competitive procedure with negotiation for supplies and services contracts as well as for works contracts where their legal or financial make-up cannot be defined in advance.

(b) In addition, it may also be desirable to utilise the competitive procedure with negotiation and CD procedure in the case of works contracts where the technical specification cannot be defined.

(c) A question that frequently arises is whether a contracting authority may award a contract utilising a negotiated procedure where only one tender has been received. This scenario should be clarified by the proposals, we would suggest by the insertion of a new provision which allows a contract to be awarded where the original contract terms are not substantially altered and the tender is submitted in accordance with the requirements of the tendering procedure.

2.2 Substance of Article 27 – Competitive Procedure with Negotiation (CPN)

We are concerned that the Revised Classic Directive may increase the procurement burden on contracting authorities.

In particular:

(a) The introduction of the concept of "minimum requirements" has the potential to expose contracting authorities to added uncertainty, procurement risk and prolonged timescales. We are concerned that, without clarification or guidance, the basis on which "minimum requirements" will be formulated and assessed will be difficult to apply in practice.

We are also concerned that the underlying notion of “minimum requirements” may operate to restrict the ability of a contracting authority to take advantage of innovative proposals, particularly during the competitive dialogue procedure or competitive procedure with negotiation.

(b) There is no provision in Article 27 that allows post-BAFO negotiation with the tenderer identified as being the most economically advantageous. This contrasts with a specific provision in Article 28 which provides for such negotiation in the competitive dialogue procedure. This is a major shortcoming in the use of the competitive negotiated procedure and narrows the flexibilisation of this procedure.

We would suggest inserting a new provision as the final provision in Article 27 which permits final negotiations with the most economically advantageous tenderer.

2.3 Article 29 – Innovation Partnership

We are concerned that the innovation partnership procedure will be of such limited applicability that no contracting authority will utilise it, especially in the light of the Commission's desire to flexibilise access to the competitive procedure with negotiation. Contracting authorities are likely to be deterred by the rigid form and constraints which will struggle to make the procedure viable. In particular:

(a) The possibility that the contracting authority may terminate the innovation partnership after each stage (Article 29(2)) may be a disincentive to private partner participation in the process.

(b) The requirement that the contracting authority acquire the intellectual property rights (IPR) before launching a procedure for the remaining phases may unnecessarily impose cost on the contracting authority (where, for example, it decides to embark on the remaining phases without the IPR) (in relation to which see the Communication on Pre-commercial Procurement – see below).

We would suggest instead imposing a requirement in relation to putting in place an agreement on ownership of the IPR.

(c) We are unsure as to why the contracting authority is required to pay particular attention to the tenderers' capacity and experience in the field of R&D and of developing innovation solutions (Article 29(3)).

We would suggest the deletion of this paragraph.

(d) Concepts such as "appropriate limits" and "adequate profit" are difficult to quantify and lack legal certainty (Article 29(4)). Given that the objective is to ensure that markets are not foreclosed, the final provision with regard to not using innovation partnerships to prevent, restrict or distort competition should be sufficient.

We would therefore suggest the deletion of references to such terms.

In addition, it would be helpful to understand the extent of any relationship between the new innovative partnership procedure and the Commission's 2007 communications and policy on "Pre-commercial Procurement" and the "Lead Markets Initiative".

We wonder whether there is any demand for this procedure in any event. We have seen no evidence that suppliers are inhibited from presenting innovative proposals to contracting authorities by the lack of a formal procedure to do so.

2.4 Application of 'Unacceptable' tenders under Article 30

The proposal to define where tenders are "unacceptable" in Article 30 is helpful, but leads to a few questions, for example – exactly how many tenders need to be unacceptable or irregular for the procedure to apply? Must this be the case for all tenders received? We assume that the reference to tenderers not having the requisite qualification applies where the self declaration is found not be true. The definition of an irregular tender seems to be a recipe for litigation - exactly how non-compliant must a tender be in order to be irregular?

We would appreciate clarity on these issues.

2.5 Application of Article 51 – Electronic availability of procurement documents

Although this issue is likely to be dealt with under the Cluster 4 submissions, it is also relevant to flexibilisation.

There is concern at the use of the definition of 'procurement documents' in relation to those documents that must be made available electronically at the pre-OJEU notice stage. The use of the term means that a variety of documents which would not normally be available at that stage would need to be produced. This may result in increased procurement timescales and potentially unduly constrain the award process chosen. If the conditions of contract have to be made available at the time of the OJEU notice, how can this be done where the “legal and financial make-up” of the project is still to be determined. This requirement has the potential to operate against the overriding objective of streamlining and flexibility the procurement process.

2.6 Removal of Part A / Part B Services distinction

Contracting authorities currently enjoy much greater freedom and flexibility in procuring and contracting for Part B services. By seeking to remove the Part A / Part B distinction and make all public service contracts fully subject to the rigours of the procurement rules this flexibility will be reduced; something which seems to be at odds with the general objective of simplification. We believe that this would lead to a greater administrative (and therefore financial) burden on contracting authorities.

We would ask why this distinction has been removed and perhaps suggest whether, as a compromise the thresholds could be revised upwards in respect of these former Part B services.

Appendix - **SUGGESTIONS TO EFFECT MINOR CHANGES**

TO PROPOSED DRAFTING

1 The changes below are aimed at improving clarity in the drafting:-

1.1 **Article 25(3):** *"Where a state of urgency duly substantiated by the contracting ~~authorities~~ **authority** renders impracticable the time limit laid down in the second subparagraph of paragraph 1, ~~they~~ **it** may fix a time limit which shall be not less than 20 days from the date on which the contract notice was sent."*

1.2 **Article 27 (1) (last line of second paragraph):** *"In the technical specifications, contracting authorities shall specify which parts thereof define ~~**the**~~ the minimum requirements".*

1.3 **Article 27(1) and (2):** Restructure Article 27(1) (third paragraph) and Article 27(2) to make it chronological and tidy up the drafting in respect of Article 26(3) to (6)) i.e.:

"…The minimum time limit for receipt of requests to participate shall be 30 days from the date on which the contract notice or, where a prior information notice is used as a means of calling for competition, the invitation to confirm interest is sent. ~~The minimum time limit for the receipt of tenders shall be 30 days from the date on which the invitation is sent.~~

2. Only those economic operators invited by the contracting authority following their assessment of the requested information may submit a written tender which shall be the basis for the subsequent negotiations. Contracting authorities may limit the number of suitable candidates to be invited to participate in the procedure in accordance with Article 64.

*3. The minimum time limit for the receipt of tenders shall be 30 days from the date on which the invitation is sent. **Where a contracting authority has published a prior information notice,** Article 26 (3) to (6) shall apply.*

1.4 **Article 30(2):** change "foreseen" to "used" i.e.

*"(2) The negotiated procedure without prior publication may be ~~foreseen~~ **used** for public works contracts, public supply contracts and public service contracts…:*

1.5 **Article 30(2)(b):** "*where the aim of the procurement is the creation or ~~obtention~~ **obtaining** of a work of art;*

1.6 **Article 30(2)(d)(first paragraph):** "*Force majeure*" is not defined although Recital 18 indicates it is "*force majeure in line with the standing case-law of the Court of Justice of the European Union*". We would suggest including a definition of force majeure to ensure legal certainty.

1.7 **Article 30(2)(d)(second paragraph, second bullet):** change *"completely irrelevant to the contract" to "it has no relevance to the contract, being incapable of meeting…"*

1.8 **Article 30(2)(d)(fourth paragraph, third bullet (c)):** ***"****their price* ***~~either~~*** *exceeds the contracting authority's budget as determined prior to the launching of the procurement procedure; the prior determination of the budget must be documented in writing;"*

1.9 **Article 30(3)-(5):** change "foreseen" to "used" i.e.

"(3) The negotiated procedure without prior publication may be ~~foreseen~~ ***used*** *for public supply contracts…:*

(4) The negotiated procedure without prior publication may be ~~foreseen~~ ***used*** *for public service contracts…:*

(5) The negotiated procedure without prior publication may be ~~foreseen~~ ***used*** *for new works or services…:*