PROCUREMENT LAWYERS' ASSOCIATION

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

GOVERNANCE SUB-GROUP

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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 five: Governance.

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*).

OB: Oversight body.

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*).

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 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. We have included the initial comments from the PLA on Article 84: Public Oversight sent to the Cabinet Office on 1st February 2012.

1.1. General Comments

Generally, the governance proposals are administratively burdensome and will require significant resourcing both for the OB and for contracting authorities. Whilst harmonisation of models across Member States is a useful goal, this should be proportionate to the benefit. For example if the concern is errors, fraud and sub-optimal management of resources (see section 3.5 of the Commission Staff Working Paper accompanying the proposal for a Directive) then this could be better addressed by considering outcomes rather than seeking to over-regulate.

Members of the sub-group include lawyers acting on procurement of major projects and complex contracts. We are concerned that the additional bureaucracy of having a central procurement national OB might hold up large procurements which are already subject to central government oversight, for example projects requiring central government support and sign-off by PFS, WIDP etc.

In setting up any OB the Commission and UK government should be alive to the need not to stifle buying processes and add layers of administration which may hold up contracts, particularly in the current financial climate when the markets need all the help they can get.

1.2. Article 84 – Public Oversight

General comments

In general, the group was concerned that, practical difficulties aside, the new governance proposal may not deliver real benefits which are proportionate to its cost. There were also many concerns about the precise scope of authority and the precise activities to be carried out by the OB and how these would fit in with existing powers and structures within the UK.

However, some aspects of the proposals are welcome. In essence, Article 84 requires member states to create a body whose functions closely mirror those of the European Commission in the field of public procurement. This proposal seems workable in many respects. Many of the functions entrusted to this entity are already performed in England and Wales by the Cabinet Office. It may be that the enforcement role proposed will lead to a form of subsidiarity (or devolution) of enforcement from the Commission to member states,

with the Commission only pursuing cases where the national OB does not. If this is the intention, it should be made clear in the text.

Article 84(1)

Article 84(1) provides that "Member States shall appoint an independent body responsible for the oversight and coordination of implementation activities". The use of the singular raises particular issues in the UK and unless this is amended to reflect the multi-jurisdictional nature of the UK this could be problematic.

Is what is envisaged a straight 'transplant' of the role of such bodies found in continental jurisdictions, exampled in some respects by the Commission's own (legal, administrative, and interventionist) role in relation to the European Union as a whole? The Commission's answer to this would at least give some indication as to whether the OB would require any innovative (and perhaps, radical) amendment to the existing court/tribunal structure; or simply require the (innovative) development of a new body with the requisite dovetailing into the existing court/tribunal structure.

The nature and status of the OB will be critical in the UK, in the absence of any current independent body which could take on the role

Article 84(2)

The reporting requirements in the form of the annual report are onerous and extensive. It would be an extensive piece of work and research, on both the competent authority responsible for implementation and on contracting authorities who would presumably have to provide information to the competent authority to allow them to compile the annual report.

Article 84(3)(a)

The proposed monitoring of the application of public procurement rules, in particular by central purchasing bodies, is a positive step. In the UK many framework agreements are being let on an extremely wide basis and, arguably, in breach of the public procurement rules. Examples include IT frameworks which allow all contracting authorities in wide area to participate and central government contracts which provide for others to piggy back off the contract but it is essentially a procurement for that body only. Greater monitoring would help contracting authorities to define where the line lies between framework agreements and contracts which ought to be separately procured each time.

Article 84(3)(b)

This provides that the OB shall provide "legal advice to contracting authorities on the interpretation of public procurement rules and principles and on the application of public procurement rules in specific cases". This is in addition to issuing opinions and guidance on questions of general interest (sub-paragraph (c)).

The members of the PLA's working group were generally not in favour of this proposal and considered that it raises a number of potential problems, as follows:

1. Who will be entitled to rely on that legal advice?

2. The proposal does not recognise the scale of advice which is required in major procurements. Even assuming that there was a budget and staff to provide unlimited high quality advice on procurement issues, how would that relate to all the transactional advice which has to be provided? Public procurement advice quite often requires an in-depth knowledge of the procurement itself and theoretical advice from an OB is not going to be helpful for a contracting authority.

3. Is it envisaged that the OB would be the sole legal advisor to all existing contracting authorities i.e. would law firms only advise the private sector? If so, this would require huge resource on the part of the OB. Currently bodies such as the NI Central Procurement Directorate or Cabinet Office will give guidance to authorities but in the majority of cases will suggest that a contracting authority takes it own legal advice. These bodies have never allowed themselves to be held out as definitive legal advisors to those who come to them for guidance on the statutory and legal principles under which they operate, and are responsible for promoting.

4. It is possible that the lawyers at the OB could be faced with a professional conflict of interest if two authorities with diverging interests separately seek legal advice on the same project. Similarly there may be a conflict if the OB has advised the contracting authority under (b) and then receives a complaint under (f) from an economic entity.

5. In light of the proposed obligation for the OB to take enforcement action in the courts, it is foreseeable that when authorities take legal advice from their usual lawyers (whether in-house or external) and the advice is that a particular course of action is the best way to comply with the rules, but that there are some (possibly theoretical or low) risks that the course of action might be seen as infringing the procurement rules, the authority concerned will systematically then seek a view from the OB This would be costly[1], inefficient and cause delay to procurements where the risk of infringement is low. For example, this might be the case if there are likely to be politically motivated complaints, as in planning or waste cases. It is important to recognise that very many decisions made during the procurement process involve an informed judgment call between two equally difficult options and that well-informed lawyers may have different views as to which of these options is more likely to infringe the procurement rules.

6. The sort of case specific advice envisaged in article 84(3)(b) goes far beyond anything that we would expect the Commission to do. It is not guidance or an indication of broad principles, but rather detailed case specific advice.

Article 84(3)(e)

If the OB is responsible for drawing the attention of national competent institutions to violations detected then it will be difficult for contracting authorities to go to the OB for legal advice for fear that they will be reported for a violation. The proposed dual role of the OB as advisor and enforcer does not sit comfortably.

[1] Though not necessarily costly to the authority seeking the advice - as the cost may be borne by the oversight body

Article 84(3)(f)

This section deals with procurement complaints from citizens and businesses. Does this need to be caveated around those individuals actually having locus standi to raise a claim themselves under the Directives/Regulations? It shouldn't just provide a platform for anyone to complain about the appointment of a preferred bidder or because for example they wish to block a contract for other reasons but wouldn't actually have the standing under the Regulations themselves.

Article 84(3), final sub-paragraph

This sub-paragraph provides that "Member States shall empower the OB to seize the jurisdiction competent according to national law for the review of contracting authorities' decisions where it has detected a violation in the course of its monitoring and legal advising activity."

This proposal has raised a number of concerns. Our comments can be grouped together as follows:

1. What is the meaning of the provision, and in particular the words "seize the jurisdiction"? We are unsure if this means that the OB will itself assume a quasi-judicial role in order to consider alleged violations, or whether the OB will take such alleged violations to court (within the framework of the existing court structure) as a sort of public prosecutor of procurement law infringements.

2. The majority of the working group members believe that the intention is the former i.e. that the OB will assume a quasi-judicial role. This will create a vast potential conflict of interest, as the OB will act as both advisor/lawyer and judge and jury.

3. If the OB were giving legal advice (as above) and that advice were to be definitive, risk-based assessments would have to go as they would not be based on law. If on the other hand the advice was not definitive, and just advisory, no public body would approach the OB for advice, given that the OB would then be able to sit in judgment on that authority. But the existence of the OB and its role in providing advice would mean that there would be no budget for any other legal advice, so public bodies would be conducting themselves without any legal advice at all.

4. Therefore the concern about conflicts of interest may be partly addressed if the OB were not also responsible for providing legal advice. Some issues may still arise where a contracting authority has followed erroneous OB-published guidance, but in practice that seems less likely. The degree of quality control on such guidance may be expected to be higher and, since it is not fact-specific, it is less likely that a breach of the procurement rules will result directly from following the guidance: it is more likely that any breach would be as a result of the incorrect interpretation by the contracting authority of the guidance.

5. We considered that if the European Commission wants a national procurement tribunal, this should be made explicit and should be separate from any OB.

6. If this were to be the case, then the OB should have the right to bring enforcement proceedings before the specialist tribunal, which would also be open to private parties.

7. If the OB is to have a judicial function, we consider that there should be a right of appeal rather than judicial review being the only option following a decision of the OB. We also consider that clarification would be required as to whether the OB would constitute a court or tribunal for the purposes of the preliminary reference procedure.

Article 84(4),

In the second paragraph re wording "[T]he Commission may in particular refer to the OB the treatment of individual cases where a contract is not yet concluded or a review procedure can still be carried out" – if this wording is retained it would seem likely that advisers will be saying that "under the new rules" it is worth sending a letter to the Commission if you have concerns during the standstill period as the Commission is under a loose obligation to consider the point and to decide whether to refer it to the OB. It follows that the Commission may receive a great deal of correspondence if this provision is retained which it is unlikely to be able to deal with. A better approach may be to leave out this wording as the Commission does in any event have the power to make such a referral.

Article 84(6) and (7),

The provisions on access to contracts are useful, in particular as under restricted procedures they will allow economic operators to ensure that a contract has not been varied as compared to the version attached to the ITT. However, it will lead to questions, such as what to do where there are variations to contracts that have been submitted to the OB at an earlier stage? If variations are to be submitted does that mean that every time a contracting authority makes an assessment as to whether a change to a contract is "material" (i.e. Pressetext test) its decision will be reviewed by the OB? If the OB identified a material variation would it be obliged to take enforcement action?

These obligations regarding public contracts are no greater than under FOI but they need to be consistent with FOI in terms of time frames etc. The OB will presumably be a public authority for the purpose of FOI/EIR so as soon as a contract has been provided to it, it will become the OB's decision as to whether information should be disclosed under an FOI/EIR request. It is not clear how the access rights proposed in Article 84(7) will interplay with FOI/EIR. At the very least the OB should be required to consult with the contracting whose contract to which access has been requested before granting access. Contracting authorities are best placed to determine whether access would prejudice commercial sensitivity, etc.

A further question will be in what time frame the Contracting Authorities are obliged to provide the documents to the OB as without that being defined it is not clear how the provision for access within 45 days under the second paragraph of Article 84(7) will operate and so what remedies, if any, it will enable. A consideration must be how this provision interacts with the available remedies, for example, if a contract is signed that exceeds the original scope as set out in the OJ Notice and ITT this fact may not come to light until the

limitation period for an ineffectiveness action has passed where the 6 month limitation period has been reduced to 30 days.

There will be confidentiality issues with the transmission of the full text of concluded contracts, even if these are limited to high value contracts. This is not stated to be without prejudice to national laws governing access to information (whereas Article 84(5) is) so would not allow contracting authorities to redact commercially sensitive parts of the contract. Private sector counterparts to such contracts are most likely to be concerned about financial models and insurance arrangements.

There is also a significant issue around whether contractors will consider the OB competent enough to decide whether particular terms are commercially sensitive. Presumably the OB would take the easy view and make everything available. The Veolia case shows that what might seem to be innocuous financial/pricing information to a "layman" in a particular sector could actually be very important market know-how which gives competitors an advantage. How would an OB without the time and resources to deal with FOI requests properly safeguard commercial sensitive data? Surely the Contracting Authority itself is best place to liaise with the contractor and make those decisions?

1.3 Article 85 – Individual reports on procedures for the award of contracts

We would query if the reporting requirement should be for every contract or framework agreement and suggest it should only be only be for contracts over a certain value?

To add this great level of bureaucracy just in *case* it is asked for by the OB or Commission seems totally disproportionate for all contracts.

If information has to be collated by contracting authorities would it be simpler to roll all post-contract reporting into one process i.e. to combine the requirements in Article 48 for Contract Award Notices to be sent to the OJEU with the requirements in this Article 85. Having two parallel mandatory reporting regimes is likely to lead to unnecessary confusion.

We suggest that the obligation to document procurement procedures in the second to last paragraph could do with development or perhaps should be deleted. It is likely that the scope of this obligation would be looked at very closely, for example, the term "internal deliberations" is ripe for a wide range of interpretations and misunderstandings, for example does it imply an obligation to minute every internal discussion about the procurement? Clearly these issues are likely to come up when Freedom of Information/Transparency requests are made and/or in litigation.

1.4 Article 86 – National reporting and lists of contracting authorities

Article 86 (1)

The reporting requirements in this Article are onerous to the point of being impossible to comply with. It would be a talk in itself to keep an up to date list of all contracting authorities. The reporting requirements also cover below threshold value contracts, which are not subject to the public procurement rules. It will be particularly onerous for contracting

authorities to compile this information and it begs the question as to whether the OB is supposed to scrutinise the information.

Article 86 (2)

Sub-section (2)(a) - Producing a list of all bodies that must apply the public procurement rules would certainly be very useful. However, there must be serious doubts that it is possible to create such a list, certainly a complete one. For example the group "bodies governed by public law" is comprised of bodies that fall within the definition set out at Article 2(6) of the Proposed Directive (and essentially replicates the current definition as applied under PCR 2006 Reg 3(1)(w). Given that there is often uncertainty as to whether a subsidiary entity is a body governed by public law it seems likely that the task set out at Sub-section 2(a) is impossible to complete in an accurate and exhaustive manner.

Production of a list under Sub-section (2)(a) may also raise the expectation that if a body is not listed then it does not need to apply the EU public procurement rules and so to allow entities reach this conclusion without considering the point fully. Sub-section (3) provides that the lists submitted by the OB will be published in the OJEU, so they will gain significant legitimacy. The position of an entity that was covered by the EU public procurement rules but that as not included on this list would, in the event of a challenge against it by an economic entity, be interesting and in particular the question of the extent to which that entity then had recourse against the OB for the loss, damages suffered and fines imposed.

Sub-section (2)(c)(i) – as with the point above in relation to Article 85 the Commission should already have some of this information from the contract award notice – the question needs to be asked as to whether this provision is suggesting that both the OJEU and each OB are to make a separate record or whether they can rely on the same data source. If there is no need for cross-checking then a question must be whether duplication of reporting requirements is necessary?

Sub-section 2(d) – Imposing a reporting requirement for contracts below the thresholds is potentially very onerous. There is no apparent de minimis level below which reporting is not required. A question must also be whether the European Commission has jurisdiction to ask for this information where the financial thresholds not met and general principles of EU law cannot apply (i.e. there is no effect on inter-state trade). From a practical view point it also needs to be asked how information on every single contract could be collated and whether, if the proposal were followed to the letter, it is really proportionate to determine whether each and every contract would be subject to the Directive if its value were sufficient.

Article 87 – Assistance to contracting authorities and businesses

Article 87(1)
Whilst this is a good idea the extent of the obligation is unclear.

Article 87(2)
This presumably provides for information to be generally available to the private sector but again the extent is unclear.

Article 87(3)

It seems that the assistance is to be provided by the Member State where the economic entity "resides" but this is not clear. It is difficult to see how the Member State where an economic entity resides will be able to provide adequate assistance in relation to the systems of all other Member States. If this is the intention then it could be very inefficient as each Member State would need to maintain expertise on every other Member State's "administrative requirements". This raises the question of whether it would not be far more efficient for the Member State where the procurement is taking place to be obliged to provide support to the foreign "in-coming" economic entity.

If the quality and scope of assistance varies as between different Member States the system could be "played" by establishing a subsidiary in the most helpful Member State. This could create very significant resource implications for the Member State that provides the best guidance – after a period that can be expected to act as disincentive to being effective. This point also raises the question of how a consortium would be assisted if its members came from several Member States – would the consortium have the ability to obtain support from several Member States?

Perhaps a solution to the issues above is for each Member State's OB to provide national expertise to one pan-EU body; this could collate information in one place, in an efficient manner and also create a forum with experts from each Member State. These national experts could combine in teams to provide the specific support needed given the identity and home state of the economic operator requiring advice and the location of the procurement. Admittedly, this does sound a little like a new department of the EC, but the possibility of highly inefficient duplication of efforts in each Member State raised by this proposal does need to be addressed.

End