# PROCUREMENT LAWYERS' ASSOCIATION

# RESPONSE TO EC COMMISSION PROPOSALS TO MODERNISE

# THE EUROPEAN PUBLIC PROCUREMENT MARKET

## GENERAL COMMENTS

## AND

## INITIAL COMMENTS ON UTILITIES AND CONCESSIONS DIRECTIVES

**JULY 2012**

## ABOUT THIS PAPER

The Procurement Lawyers' Association ("PLA") is an organisation which exists to bring together all public 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 has already submitted a series of papers on aspects of the proposals to the Cabinet Office to assist it in the ongoing negotiation of the reforms at EU level – these are as follows:

I. Flexibilisation of procedures (Cluster 1)
II. Strategic use of public procurement (Cluster 2)
III. Better access for SMEs and start ups, including: reducing documentation requirements, SME access, aggregation of demand and other procedural requirements (Clusters 3, 5, 6 and 7)
IV. Sound procedures and governance (Clusters 8 and 9)

Papers on the following areas will be submitted shortly:

V. The proposed Utilities Directive
VI. The proposed Concessions Directive

The purpose of this paper is twofold:

1. To set out further comments on the effectiveness of the proposals to reflect feedback and concerns that have been common themes across the sub-working groups within the PLA; and

2. In view of the timing constraints to set out a number of the most important points we wish to make on point V above in relation to the proposed Utilities Directive and point VI in relation to Concessions.

## 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.

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

**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*).

**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.

## PART 1

### 1.1 Duplication across the three proposed directives

In our view consideration should be given as to whether it is necessary to replicate identical provisions across the Revised Classic Directive, the Revised Utilities Directive and the New Directive on Concessions. The day to day queries raised by public sector clients in respect of the current Directives and Regulations are proof that there is a lack of understanding of the current regime and new sets of rules will only serve to over-complicate and over-burden contracting authorities and bidders.

An alternative could be to pool the provisions that are identical in one part of one of the directives and then use cross references in the other directives. A further alternative would be to create one directive with a clear index to show which parts are discreet to the general rules, the utilities rules or concessions and which provisions function in exactly the same way across all three areas. Where there are provisions that overlap substantially but do contain differences these could be highlighted but with a common text retained where possible.

Our concern here is a largely a practical one based on PLA members' experience of advising contracting authorities and private sector tenderers on the application of the rules. One of the proposed reform's primary objectives is simplification yet contracting authorities and economic operators will be faced with a greater level of documentation to deal with. It is perhaps possible that Member States will be able to introduce a more reader friendly format on implementation but it seems more likely that the final format of the directives will be reflected in the national laws and regulations adopted. The Commission is keen to help SMEs but in our view the greater the volume of documentation – especially when it is not strictly necessary – the greater the compliance burden that will be placed on them. It is also likely that smaller contracting authorities will also struggle with an increased compliance burden for the same reasons; particularly where there is no in-house procurement expertise.

### 1.2 Stimulating demand by removing cumbersome regulation

While there can be no doubt that the public procurement rules are a necessary expression of the obligations set out in the EU Treaties we are concerned that there has been little consideration of whether detailed regulation is actually necessary. While recognising that significant changes to the overall structure of the proposals may be difficult at this stage we do think that it should be made clear that on the ground in the UK, and the position must be similar in many other Member States, the current public procurement rules are generally seen as cumbersome, unwieldy and inefficient by the business community.

The proposals do make efforts to make things easier for SMEs and sub-central contracting authorities but these are not, in our view, very effective. For example, the proposals in relation to self-certification may appear to reduce the administrative burden but also have the potential to lengthen procurement processes in practice where final verification proves difficult. Further, these attempts at simplification generally operate by making more rules or more exceptions to existing rules – the web of regulation becomes more intricate not less. The changes made may change some of the administrative burdens for SMEs however they do not address the fundamental issue that procurement regulation remains complex and bureaucratic. SMEs are not able to deliver against that framework. Where risk is increased for contracting authorities their natural instinct (arguably rightly) is comply with the letter of law even more firmly. This in reality means that SMEs are more likely to be tripped up as they are not able to understand the rules of the game in the same way that the bigger players are. In addition, we do not believe that the obligations around splitting larger contracts into Lots is going to have any significant benefit for SMEs and may in fact be detrimental to SMEs. At the moment parcels of larger contracts are likely to be sub-contracted by those economic operators who win large contracts. The manner in which such economic operators let these sub contracted elements is far more accessible to SMEs and clearly less burdensome to them in terms of tender exercises. Forcing smaller contracts to be subject to the regulations is actually potentially increasing burdens on SMEs.

The proposals also introduce additional regulated concepts, for example innovation partnerships where in practice the existing procedures may suffice. In the UK there is a wide range of contracting authorities and they all have differing levels of in-house resource to deal with procurement compliance. It needs to be recognised that some of the less well resourced bodies already struggle with the compliance burden and so what they need is genuine simplification of the rules.

At a certain point regulation loses its effectiveness because it becomes too detailed and complex to be well understood by the average contracting authority / commercial operator which can actually reduce its overall effectiveness. There can also be an significant adverse effect on efficiency that will, even if only incremental in each individual procurement process, damage the economy. In our view this point may have been reached. For example, in the UK it is increasingly common to see tenderers raising breaches of the rules, which may have little or no real impact on the fairness of the overall process, once they have seen the Alcatel letters. The new remedies rules allow disgruntled tenderers to exert significant pressure by alluding to a breach in combination with an inadequate Alcatel process as a ground for a declaration of ineffectiveness. Even where a procurement process is run with great care and significant resource it is difficult to say with certainty that there has been absolutely no breach. In the PLA's view far greater weight should be applied to the underlying policy concern of whether the process has been operated in a broadly non-discriminatory and fair manner.

During the economic crisis the European Commission allowed the accelerated restricted procedure to be used far more widely on the basis that this reduction in regulation would stimulate demand within Member State economies through faster implementation of major projects. In our view the logic behind this relaxation could be applied more widely. It is more than possible that throughout the life-time of the next directives the EU Member State economies may struggle either absolutely or relatively to the more competitive and/or developing economies. With this in mind does the EU really need a new set of directives that maintain and expand the current system of regulation or could this be an opportunity to significantly reduce the level of regulation?

A view that has been expressed among PLA members is that the rules could be radically simplified – at base the rules are an obligation to advertise an opportunity and thereafter operate a fair and non-discriminatory competition. Beyond these simple objectives any additional complexity does, on this view, require careful consideration.

One option could be to significantly increase the financial thresholds and so leave a far larger number of contracts to be let in accordance with general principles of EU law. This approach would likely have a greater impact on smaller contracting authorities and SMEs and so would be in line with the European Commission's objectives. In a similar vein we note the proposal to codify the Pressetext case and the proposed 5% de minimis value threshold for material change (Article 72(4) of the Revised Classic Directive). Clarification of the definition of material change is very welcome indeed but a significant compliance burden would be removed by increasing this percentage to provide a larger safe harbour for contracting authorities.

### 1.3 Increasing scope of regulated procurement

Taken together the proposals would increase the scope of application of the public procurement rules in two significant ways:

(1) Service concessions would be covered.

(2) The distinction between Part A and Part B is removed with the effect that a large number of service contracts would be fully regulated.

At a conceptual level we agree that both proposals have a valid motivation albeit one that can be questioned. It is indeed the case that service concessions probably should be fully covered by the rules and the current position is not ideal. As regards Part B services it probably is the case that many could have cross border impact (although not all).

Nevertheless, the effect of these proposals will be to bring more of the EU economy under the umbrella of regulated procurement. We would be interested to know whether an economic impact assessment has been undertaken at the EU level and whether the additional costs generated are likely to be outweighed by economic growth within the internal market? If not then the question should be raised as to whether the proposals will increase the competitiveness of the EU economies and help maximise employment across the union.

## PART 2

### Initial comments on point V: the proposed Utilities Directive

#### (1) Special and Exclusive Rights

The issue of special and exclusive rights, which is covered in Article 4(2), the Definitions and Recital 8. Whilst it is our view that 4(2) is an improvement, the amendments still leave areas of worrying uncertainty as to what is meant by *"adequate publicity"*. In particular it is not clear whether the list of specified procedures is exhaustive or not. We suggest that it should be made clear in Article 4, and preferably in recital 8 too, that *"adequate publicity"* is not limited to the specific forms of procedure referred to, and may be achieved by some other form of transparent procedure.

#### (2) Framework Agreements

Framework agreements. The concerns that many practitioners have with framework agreements in the Classic Directive have been transferred to the Revised Utilities Directive. Currently there is no statutory limitation to the duration of a framework agreement concluded under the Utilities Directive. The view of the Commission appears to be that this leaves a risk of market foreclosure. The Revised Utilities Directive proposes limiting the duration of a framework agreement to 4 years. This is a significant change for the utilities sector. It adds further regulation and limits flexibility. Some utilities currently structure their framework agreements around funding cycles, which are beyond 4 years. In these cases utilities will constantly have to use the *"exceptional cases"* exemption from the 4 year rule.

#### (3) Central Purchasing Bodies and Competition Law

As drafted a private utility cannot be a central purchasing body. This was the same under the Utilities Directive. It is unclear why a contracting authority is able to purchase through a CPB which is also a contracting authority, but the same is not true of a private utility. This is especially so given that co-operation between utilities is already permitted by Article 23. Any perceived risk of any infringement of competition law does not explain this anomaly, because normal competition law would continue to apply, and there will be many instances of joint procurement by utilities which will not give rise to competition law concerns. The fact that use of a CPB is without prejudice to the application of competition law could be made explicit in the Directive if needs be. In any event, this limit on procurement by private utilities should be removed.

#### (4) Joint Ventures

The Utilities Directive is intended to apply lighter touch regulation on the basis that utilities are more likely to be subject to commercial pressures and less inclined to award contracts on a discriminatory basis. Given this, similar cooperation to Article 21 (transposition of Teckal and Hamburg) should be permitted for private utilities in their dealings with other utilities (whether public or private). To achieve this, we propose amending Article 23 by adding a definition of joint venture, which would make clear that Article 23 applies whether the joint venture is *"institutionalised"* or *"horizontal"*. For example:

> *"joint venture includes any incorporated or unincorporated entity and any contractual or collaborative arrangement".*

## Initial comments on point VI: the proposed Concessions Directive

### (1) Need for a separate Directive

There is a general concern in relation to the adoption of a separate directive in relation to concessions, given that the intention of the proposed reforms is to simplify procurement processes. It is not clear how a separate regime will assist either contracting authorities or potential providers (and in particular SME's who are intended to be a specific beneficiary of the reforms). If concessions do need to be regulated then arguably this can be done under the main directive, allowing for separate thresholds to apply but at the very least allowing procedures to be aligned.

### (2) Position below the thresholds

A number of local authorities currently use concessions and these tend to fall below the value of the proposed threshold. Will they still be subject to the Treaty principles if there is a cross border interest or will there be a presumption that there is no such interest if they fall below the threshold? If it is the former then matters will be complicated for contracting authorities (particularly smaller public entities) who will be required to consider an increasing number of potentially applicable regimes.

### (3) Valuation

The relatively high financial thresholds which will need to be met before the Directive takes effect are broadly welcomed subject to clarification on a number of points.

There is some concern as to how to quantify the value of a concession contract prior to the tendering process. We would welcome more detailed guidance as to how to estimate the likely revenue to be received by the concessionaire. There is a concern that considerable time and expense would need to be spent by the contracting authorities, in investigating the market before they are able to arrive at a sensible estimate for the value of the concession contract; and the impact that such a "market-testing" exercise may have (which may influence how such concession will work in practise, as to its estimated value) to the subsequent procurement process, in terms of maintaining the necessary levels of transparency and equality of treatment and also complying with the "procedural guarantees" which the Directive refers to. Directly linked to this, we would welcome further guidance on the consequences of a contracting authority estimating the value of the concession contract incorrectly. Would there be any penalty and/or will the contracting authority be obliged to re-run the tender process as a result?

### (4) Duration of contracts

The proposals require the duration of the concession to be limited to the duration necessary for the concessionaire to recoup the investment made. Although this replicates case law, it is uncertain and unsatisfactory and this is a prime opportunity to clarify this point. Whilst the relevant case law may have been appropriate in circumstances where concessions were not adequately competed, this seems less relevant where there is competition.

There are a number of questions that this raises:

> (i) Firstly, how would this be applied if there was very little upfront investment? Does this mean that the concession period must be very short? It is intended that there is a direct linkage between the level of investment and duration of the contract? Secondly, given that concessionaires are often granted relatively long contracts (particularly in the leisure and cultural sectors), will this potential shortening of a contract's duration serve to detract some economic operators to bid for these contracts?
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> (ii) It will ultimately be very difficult to accurately gauge the likely time period for a concessionaire to recoup their investment at the outset. What will be the consequences of a contracting authority getting this likely period wrong?
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> (iii) Also, what is likely to represent a "reasonable return" on that investment?