

Procurement Policy Note – Legislative Proposals for the Revised Procurement Directives and new Directive on Concessions

Information Note 11/11 21 December 2011

Issue

1. On 20 December 2011, the European Commission published legislative proposals for the revised public procurement directives¹ and a new concessions directive. This PPN cascades the announcement to UK stakeholders and invites comments on the proposals to inform Cabinet Office's negotiating position.
2. The Commission's announcement and the text of the proposals are available at this link:

[Commission proposals, press release and FAQs](#)

Timing

3. Cabinet Office welcomes input at all times, but comments received by 20 January 2012 would be helpful in advance of the start of the actual negotiations.

Dissemination

4. Please circulate this Procurement Policy Note (PPN) within your organisation, agencies, non-departmental public bodies (NDPBs), and any other bodies for which you are responsible, drawing it to the particular attention of those with a purchasing role.

Contact

5. Please direct your response and any general enquiries to the Service Desk: 0845 000 4999 servicedesk@cabinet-office.gsi.gov.uk .

¹ Directive 2004/18/EC (the public procurement directive); and Directive 2004/17/EC (the utilities procurement directive)

Background

6. The process of reform of the EU public procurement regime is well underway. A number of consultations have been undertaken by the Commission including:
- i) A green paper consultation on the **modernisation of the public procurement directives** (January 2011), which commenced the process of revising the EU public procurement directives.
 - ii) A green paper consultation on **expanding the use of e-procurement in the EU**.
 - iii) A consultation on **concessions** contracts (May 2010), which sought inputs into a more detailed approach to the rules on public works and services concessions.
 - iv) A consultation on the **access of third countries to the EU's public procurement market** (June 2011), which sought views on a new policy enabling the EU to close its markets to countries whose markets are not reciprocally opened.
7. The Commission's announcement on 20 December covers the revised public procurement and utilities directives (which include e-procurement proposals) as well as a new proposal for the directive on concessions. Further legislative proposals are expected in 2012 on access by 3rd country markets. Therefore this PPN covers the present legislative proposals only – further updates will be issued in 2012 on the other legislative strand when it is published.
8. Influencing the rule-change is a priority for the UK Government, as reforms to the EU rules could facilitate growth: through a simplified, more flexible procurement regime, and cutting regulatory burdens and transaction costs for business. **PPN 05/11** ([PPN 0511 Modernising the public procurement directives](#)) summarised the UK's influencing plans. Throughout 2011, Cabinet Office has pressed for significant simplification of the rules, through the **UK's response to the EU-wide consultation** ([UK response to the EU wide consultation](#)) and via a programme of subsequent lobbying and influencing activity.

Legislative Proposal – Revised Procurement Directive

9. The Cabinet Office is scrutinising the proposed rules and refining the UK negotiating position, and welcomes comments on any aspect. The proposals are encouraging and appear to respond to many of the UK-proposed changes, including:
- Greater flexibility to negotiate;
 - Simpler rules on dynamic purchasing systems;
 - The ability for procurers to evaluate suppliers' past performance
 - Enablement of electronic marketplaces

- More flexible and less burdensome rules on supplier selection
- The inclusion of a clause to enable a review of the thresholds
- Faster procurement, through shortened time limits

10. The Cabinet Office would particularly welcome comments on proposals that are new/untested including (relevant articles numbered in brackets):

- The proposed abolition of Part B services and the introduction of a higher threshold for social and health services coupled with the obligation to introduce specific procedures for these services (74)
- The introduction of a new innovation partnership procedure – is this helpful/workable? (29)
- Sustainable procurement – would further clarifications be desirable? (67)
- The need to explain why contracts above 500k euros have not been divided into lots (44)
- Allowing direct payment to subcontractors (71)

11. We are also concerned that the proposals:

- do not contain a temporary exemption for employee-led organisations/mutuals. We will continue to press for such a provision, and
- contain burdensome governance requirements (articles 84 – 88).

Legislative Proposal – New Directive on Concessions

12. The European Commission has reviewed the approach to concessions in the public procurement rules. At the moment, only works concessions are covered by specific rules in the public sector Directive (2004/18/EC). Services concessions are only covered by Treaty obligations. The Commission has therefore proposed a new directive to fill the gap caused by the lack of specific rules for service concessions, because it considers that such concessions are not being awarded transparently in some EU Member States, although it has not raised any problems about UK practice.

13. The proposed threshold for both works and services concessions is 5 million euros.

14. The Cabinet Office is of the mind that these changes could have been introduced as an amendment to the main Directive but that view has not prevailed. Where the procurement and concessions directives cover the same matters, we will wish to avoid unnecessary and continuing divergence. Although the rules in the new proposal do not generally seem to be too onerous we welcome your views on this text as well.

Negotiation Timetable

15. Negotiations will take place in Council Working Group meetings in Brussels throughout 2012.

Next Steps

16. Cabinet Office will update stakeholders as we progress through the negotiations and concluding with the adoption of the revised directives, which is expected in 2013. Transposition of the revised directives will then follow.