



BRIEFING

Government and utility buying – a new approach

Summary

Today, the European Commission published proposals to reform the procurement regime with new directives for public contracts, utilities and concession contracts.

The proposals are the culmination of reports and consultations recently conducted by the Commission with a view to increasing the efficiency of public spending and maximising value for money.

In this briefing we highlight seven features of these proposals. The first six apply to the public sector and utilities, unless otherwise stated. The last addresses the concessions proposal.

For further information please contact

Jane Jenkins
Partner
T +44 20 7832 7280
E jane.jenkins@freshfields.com

Expanded availability of the negotiated procedure and competitive dialogue alongside a new ‘innovation partnerships’ procedure

The public contracts and the utilities proposals provide for greater flexibility in the choice of procurement procedures, but the changes do not go as far as the UK government had hoped, particularly given that limits remain on the availability of the negotiated and competitive dialogue procedures.

The proposals provide the opportunity for member states to promote research and development (R&D) through innovation partnerships. These would be structured in successive stages, for the development of an innovative product, service or works and its subsequent purchase by a contracting authority, with the latter able to end the partnership after each stage.

Mixed reactions are expected. Those seeking greater flexibility in choice of procedures will welcome the greater opportunity to use the negotiated procedure but others will question the risk of reduced transparency.

Innovation partnerships may be better received because they go some way to meeting the concerns expressed about the Defence Directive. The UK defence industry was particularly concerned by the lack of any provision in the Defence Directive for ‘spiral development contracts’, which cover not only the R&D stage but also the production stage without there being a fresh competition. There remains a risk for the private sector, however, given the proposed right to end the partnership after each stage.

Splitting into lots of contracts over €500,000

The public contracts and the utilities proposals promote the splitting of contracts into lots. The Commission’s objective is to maximise opportunities for small- and medium-sized enterprises.

There is a presumption in favour of splitting public sector contracts over €500,000 into lots and a requirement for contracting authorities to give reasons for a decision not

to do so. It is unclear from the proposals what reasons will be acceptable and whether they will be susceptible to challenge. Certainly a requirement to split contracts into lots would be problematic for high-value, complex procurements, notably privately financed outsourcing, where one of the questions to be addressed is how a potential myriad of separate packages would be financed.

Given the constraints of the financial markets, prime contractors, funders and contracting authorities seeking to outsource responsibilities are likely to continue to favour a single point supplier.

Carve out of social services, health and education to a ‘softer’ procurement regime

The Commission proposes a light procurement regime for social services, health and education above certain thresholds (€500,000 for the public sector). Member states would have a significant margin of discretion in the procedures they adopt. The main stipulation is that they observe the EU Treaty principles of transparency and equal treatment in the contract award.

The Commission has concluded that these services have specific characteristics, making them inappropriate for the application of the regular procedures for the award of public services contracts, given they have only a limited cross-border dimension. ‘Public administration, education, health and social services make up more than 60% of public sector expenditure. These sectors have import penetration close to zero (0.1%)¹. There remains, however, ambiguity regarding the minimum requirements for compliance with the overriding principles of transparency and equal treatment, given there is limited guidance and case law in this area.

1
[EU Public Procurement legislation: Delivering Results Summary of Evaluation](#), published by the EU Commission Report, page 15.)

Establishment of administrative bodies to oversee the procurement process

The proposals oblige member states to designate an independent body to oversee various tasks, such as the application of the procurement rules by contracting authorities. The proposals extend to obliging member states to provide technical and legal guidance to contracting authorities and bidders engaged in the process. This support may be provided through one or more bodies, with the requirement that in the latter case proper co-ordination should be put in place. There are additional proposals for the exchange of information between these national bodies via the Internal Market Information System.

These proposals could potentially impose a heavy financial and administrative burden on member states, and they seem to be at odds with the pressures on public bodies to downscale in this context.

Amendments to existing contracts

Under existing European Court of Justice case law², material amendments to existing contracts may generate a requirement for a new procurement on the basis that the amended contract is substantially different from that initially advertised, tendered and awarded. The Commission has proposed that only modifications that render a contract ‘substantially different from the one initially concluded’ would require a new award procedure. The proposals contain non-exhaustive examples of what a substantial modification may amount to. These follow the *Presstext* ruling; for example, the change of the economic balance of the contract in favour of the contractor.

In addition, the proposals introduce benchmarks at which the modification will not be considered substantial (provided the modification does not alter the overall nature of the contract), for example, where the cumulative value of the amendments is less than 5 per cent of the original contract price.

Arguably, however, such benchmarks are set too low and are too rigid. It is not unusual

for larger value adjustments to be made over the life of long-term contracts that govern the provision of services over a significant period.

Mandatory/discretionary exclusions – the rehabilitation of economic operators

Bidders that would be subject to mandatory or discretionary exclusion from procurement competitions on grounds of, for example, bribery convictions, will have the opportunity to prove reliability to be re-admitted into tendering processes. The Commission proposes three basic requirements for a bidder to try to regain its capacity to take part in the procurement process: the payment of compensation for damage caused by the offence, active collaboration with the investigating authorities and the taking of appropriate measures to prevent further offences.

The proposals seek to ensure that if a bidder has implemented these measures, then contracting authorities will be obliged to take these into account. Where contracting authorities consider insufficient measures have been implemented, reasons must be provided for this assessment.

If adopted, this aspect of the proposals would establish an EU-wide level playing field to the recognition of so-called self-cleaning measures already permitted in some member states, for example, Germany and Austria.

The concessions proposal

The Commission wants to introduce a separate instrument to deal with concessions – to include services concessions until now outside the directives – as opposed to amending the existing provisions in the main directives. One area that differentiates the concessions proposal from the proposals referred to above is in the provisions relating to how to run the competitions for concessions.

Acknowledging that most concessions are long-term, complex arrangements, necessitating flexibility in organising the award process to allow for contract negotiation with the bidders, the draft concessions proposal does not provide for

²
Presstext (Case C-454/06, 2008 ECR I-4401)

the equivalent of the various procedures in the main directives. Instead, it contains provisions incorporating what are described as 'procedural guarantees'. The proposal sets out eight such guarantees, an example of which is that where the contracting authority uses an award procedure that entails negotiation, five sub-rules must be complied with. These include that the contracting authority shall not reveal to other participants solutions proposed or confidential information submitted by a candidate participating in the negotiations, without that candidate's agreement.

In essence, these procedural guarantees set out requirements designed to ensure a transparent and fair award process. The substance of these guarantees is, of course, familiar from the application of the general EU Treaty principles to contracts that have thus far been 'exempt' from the strict application of the procurement regime.

It will be interesting to see how the concessions proposal is greeted and, in particular, if it will adequately import the clarity sought by those that took part in the 2010 consultation on concessions³ or merely add another layer of regulation.

Conclusion

We opened this briefing with reference to the goals driving these proposals for reform from the Commission. Will the proposals made available today achieve these? Certainly, the greater availability of the negotiated procedure should result in enhanced flexibility and the lighter regulation for social services, health and education should provide a basis for cost savings.

However, it is also clear that other measures may undermine the efficient allocation of public funds and the impetus in the UK to

regenerate the private finance initiatives to harness private sector skills and financing. The presumption in favour of splitting public sector contracts into lots presents particular challenges in this context. The Commission's proposals for reform do, however, provide a valuable platform for a constructive debate.

³
[Consultation on an EU initiative on Concessions
05/08/2010–30/09/2010](#)

www.freshfields.com

Freshfields Bruckhaus Deringer LLP is a limited liability partnership registered in England and Wales with registered number OC334789. It is regulated by the Solicitors Regulation Authority. For regulatory information please refer to www.freshfields.com/support/legalnotice. Any reference to a partner means a member, or a consultant or employee with equivalent standing and qualifications, of Freshfields Bruckhaus Deringer LLP or any of its affiliated firms or entities. This material is for general information only and is not intended to provide legal advice.

©Freshfields Bruckhaus Deringer LLP 2011 – 31928