

## Update on the changes to the EU Procurement Directives

NAVCA briefing, July 2014

Changes to the EU Procurement regime have been rolling on for some time now. We first started inputting into this back in 2011, when the European Commission issued draft proposals to modernise the Directives, and we called on the voluntary sector to [lead the thinking](#)<sup>i</sup> in how new proposals are implemented.

The [final Directives](#)<sup>ii</sup> agreed by the EU have changed little since the first drafts, and overall we welcome the increased focus on social value and enabling SME involvement. However, we do not expect that these changes will have a significant impact on improving public sector procurement practice on their own. This will require a change in culture and will be influenced by the messages and guidance coming out of central government and the LGA.

### Where we are now

The new Directives came into force in April 2014, but EU member states now have up to two years to implement them into national legislation. The UK Government<sup>iii</sup> has made it clear that it intends to implement them in the shortest time-frame possible and we are expecting the formal consultation on this later this month (which, be warned, is expected to be open for one month only).

Much of the legislation is set at the EU level. Where this is the case there will be no consultation, it has to be implemented. But there are instances where the directives permit a policy choice for national governments on whether, or how, to implement a particular provision (for example, choosing whether to make it obligatory for large contracts to be awarded in the form of separate lots). In our dealings with Cabinet Office, it has become clear that the Government policy of avoiding 'gold-plating' means that they are not keen to adopt rules above and beyond the mandatory ones set out in the directives. Where this is to the detriment of voluntary sector organisations, NAVCA has spoken out against this through our involvement in the VCS transition group and will continue to do so in the formal consultation.

The Cabinet Office is already carrying out a significant programme of training on the new rules, which could also indicate that the government intends to "copy-out" the European Directives and not enhance them or "gold plate" them in any way.

## Summary of the changes

Below is a summary of the changes that I think will have the biggest impact on the voluntary and community sector, and some of the areas that will be open for consultation.

### Light-Touch regime

Possibly the most significant change for our sector is the removal of the Part A and Part B services regime and the introduction of a new light-touch regime for social, health and community type services (if you're confused by the current rules and the different regimes, [Pathways through the Maze<sup>iv</sup>](#) provides a clear overview and will be current until the new rules are implemented into UK law).

The services covered by this regime which I would judge as of particular relevance to the voluntary sector are:

- Health, social and related services
- Administrative social, educational, healthcare and cultural services
- Benefit services
- Other community, social and personal services
- Religious services
- Legal services (some)
- Provision of services to the community
- Prison related services, public security and rescue services

A full list can be found at Annex XIV of the [new Directives<sup>v</sup>](#)

The Part B service regime was set up for services that were deemed to be of less interest to bidders from other member states. Only limited rules applied to these services. In reality, however, the culpability individual procurement officers faced led to risk-adverse procurement practice and the adoption of the full rules.

So what is different about the new light-touch regime, given that the regime it is replacing was intended to be light-touch? A difference is that it does not just have cross-border interest, or a lack of it as a focus. Clarity is given that the services within this regime (services to the person, services to the community) may need to be procured differently to standard services because of their unique characteristics. There is recognition that these services are about people, not paperclips. The new Directives also clearly remind us that member states are free to secure these types of services in ways other than contracts, for example through grant funding. For

services specifically within the light touch regime a new higher threshold has been introduced at EUR 750,000. This means that contracts within this category below the value of EUR 750,000 are effectively removed from the EU procurement regime.

## **Options open to the UK Government**

They do not have a choice on the introduction of the light-touch regime or the raised threshold. However, the Government must set some national rules for above threshold, light touch services. So long as these follow the treaty principles of transparency, fairness and non-discrimination and are advertised at European level, they are free to choose how prescriptive they are. It is expected that the UK Government will not want to introduce prescriptive rules.

A lack of prescriptive rules could support the culture change required in procurement but only if the message coming from central government, the LGA and leaders within contracting authorities make it clear what is expected. We fear that without guidance, procurement officers may default to following the full rules again.

For services falling within this light touch regime, the government has the option to prevent contracting authorities from using price only as the sole award criterion. We believe price only should not be used for such 'services to the person', but fear that government will see this as 'gold-plating'. We do not think so.

For those contracts covered by the light-touch regime and below the EUR 750,000 threshold, the EU rules and the above threshold national rules will not apply. It is therefore important that we all start thinking about what good procurement might look like in this situation, and it is important that contracting authorities look to adapt their own internal contracting rules to be able to apply flexible procurement to this category of services.

## **Reserved contracts for certain services**

One of the UK Government's priorities in the negotiations at EU level was to secure flexibility to enable newly formed mutuals to gain experience of delivering services before being exposed to EU wide competition. Certain contracts, mainly in the social and health sectors, are now able to be "reserved", so that competition is restricted only to organisations that fulfil all the following criteria:

- Its objective is the pursuit of a public service mission linked to the delivery of the services
- Profits are reinvested with a view to achieving the organisation's objective. Where profits are distributed or redistributed, this should be based on participatory considerations

- The structures of management or ownership of the organisation performing the contract are based on employee ownership or participatory principles, or require the active participation of employees, users or stakeholders; and
- The organisation has not been awarded a contract for the services concerned by the contracting authority concerned pursuant to this Article within the past three years.

While the UK government negotiated to have this included with the intention of restricting competition to public-sector spin-outs bringing services out of the public sector, we expect it could equally apply to social enterprise and voluntary sector organisations and apply to a move from grant funding to contracts. Contracts can only be reserved in this way for a maximum of three years before being opened to full competition.

### **Reserved contracts for Sheltered Employment**

Under the old rules, contracting authorities were allowed to limit competition to ‘sheltered workshops’ where 50% or more of employees were disabled. This has now been extended to include disadvantaged workers and the percentage of the workforce required to be disadvantaged is reduced to 30%. If utilised, this could support organisations that employ ex-offenders and other disadvantaged groups. Sheltered employment contracts are rarely used in this country when compared to other member states, like France, but could encourage innovative service provision and increased social value.

### **Wider objectives**

While the principle purpose of the EU Directive is to open up procurement markets to competition across the EU, the new directive makes it clear that its purpose is also to promote wider objectives, particularly the participation of SMEs (small to medium sized enterprises) in public procurement and to make better use of public procurement in support of common societal goals (social value).

### **Social Value**

I believe the main benefit of the new regulations in relation to encouraging social value in procurement is the clear message that procurement can be used for this purpose. The particular rules introduced in this area, such as the discretionary option to exclude bidders for violation of EU or national laws in relation to compliance with social and labour law or environmental law, are quite limited in nature. UK legislation, in the form of the Public Services (Social Value) Act exceeds the requirements in the new EU regulations and continues to be another area where culture change will have the biggest impact.

The new directives do clarify that involving potential bidders and stakeholders in planning and pre-procurement is permitted, so long as this does not result in unfair advantage.

## **SMEs**

We welcome a number of initiatives introduced in the new directives that aim to support SME (and therefore the vast majority of the voluntary sectors) involvement. These include:

- Limiting proof of financial capacity of bidders to twice the estimated contract value, other than where objectively justified.
- Use of simplified selection processes at the selection (PQQ) stage. This will involve greater use of self-declarations, with only the winning bidder needing to submit documentation for verification.
- Encouraging contractors to divide larger contracts into lots and, if they do not, requiring them to explain in procurement documents the reasons for not sub-dividing (the directives allow national government to rule that large contracts must be sub-divided, but as covered earlier we are not expecting the UK government to apply any “gold plating”).
- The UK government has the option to make it compulsory for contracting authorities to ask bidders to indicate any share of the contract they intend to subcontract and to whom.

Other rules, which are being sold as beneficial to SMEs, may in fact have the opposite effect. These include shortening procurement times. There is an option for local authorities to set the time-scales for the receipt of tenders in agreement with the bidders. Where agreement cannot be reached, a minimum of ten days is set from issuing the tender to deadline. As many smaller organisations already struggle with current time-frames, we feel this could be particularly detrimental to these organisations.

## **UK specific initiatives to support SMEs**

Following a review by Lord Young into SME procurement, the UK government intends to use this opportunity to legislate for wider procurement change not directly associated with the EU Directives. This includes the abolition of PQQs for lower value contracts. While this may seem a welcome proposition, simply abolishing PQQs may not reduce the burden associated with them. This requires behavioural change not legalisation. Otherwise the questions normally associated with a PQQ could simply be moved into the more onerous Invitation to Tender.

The option to self-certificate could help to resolve this, but again this requires behaviour change; if the minimum standards set are disproportionate or irrelevant it will not support the VCS.

The Government also plans to mandate that all local government contracts above £25k are advertised on the National Contracts Finder website. NAVCA believes this could actually be detrimental to smaller organisations that are focused on delivering services within their own locality (due to having to wade through the vast number of notices on a national site to find the opportunities relevant to them). This proposal would actually be of more benefit to national organisations searching for contract opportunities across the regions.

We do share the LGA's concerns that, if adopted, the above requirements together will increase the burden on local authorities in terms of the number of full tenders that they need to assess. While we do not want to see VCS organisations unfairly excluded at selection stage (PQQ), we are also mindful of the financial constraints that local authorities are under and want to see limited resources spent on service delivery, not increased procurement costs.

This is a selection of the changes that are likely to be of most relevance to the voluntary sector. For an overview of the other changes that will be introduced, see [Crown Commercial](#)<sup>vi</sup> guidance.

## **Consultation**

NAVCA will be responding to the formal consultation, which we are expecting to be published later this month, possibly as a joint-submission with other national infrastructure bodies. If you would like to contribute to or sign up to this submission please contact [rachel.rhodes@navca.org.uk](mailto:rachel.rhodes@navca.org.uk)

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<sup>i</sup> <http://www.navca.org.uk/blog/view/call-for-ideas>

<sup>ii</sup> [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:JOL\\_2014\\_094\\_R\\_0065\\_01](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:JOL_2014_094_R_0065_01)

<sup>iii</sup> These UK national contract rules will not extend to Scotland where separate, but similar national rules will be made

<sup>iv</sup> <http://www.navca.org.uk/publications/maze>

<sup>v</sup> [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:JOL\\_2014\\_094\\_R\\_0065\\_01](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:JOL_2014_094_R_0065_01)

<sup>vi</sup> <http://www.navca.org.uk/downloads/generate/3786>