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to us, to you, to your customers

A Service Matters White Paper: New Directive, Same Direction?

How much difference will the new EU Procurement Directive make in our sector?

You can't have escaped the fact that the latest EU Procurement Directives were finally published in February. There are three Directives:

- Goods, Services & Works
- Utilities contracts
- Works and Services Concessions Contracts

But after all the hype about speedy implementation and fundamental change, what impact will they really have?

This article is limited to the main Public Procurement Directive, as the others are likely to have limited impact on Registered Providers of Social Housing (RPs) in our purchasing capacity. I've also restricted myself to those areas where we have regular direct experience. Dynamic Purchasing Systems, Electronic Auctions and the use of Electronic Catalogues in tendering are clearly on our radar but beyond our core activity thus far.

The first point to bear in mind is that although the Directive is effective as of its publication in February, it doesn't actually change the rules for any of us until it is transposed into national law. National governments have the standard two years in which to do this. The Cabinet Office are on record as saying they'll fast-track it and (for once) it'd be good if they did.

There is some good stuff in here that will help, at least a little.

Don't get too excited, though. This is not going to change your life: not much, anyway.

What follows are initial thoughts on a first reading of the Directive. The content should not be treated as exhaustive (though it might feel that way!) and there may be further changes when we see how the UK government manages the transposition.

WHAT DOES NOT CHANGE

The General Principles: all public contracts, irrespective of value, remain covered by the original Treaty on the Functioning of the European Union (the Lisbon Treaty of 2008, which updated the original Treaty of Rome). TFEU enshrines the requirements for

- Equal treatment
- Non-discrimination
- Mutual recognition
- Proportionality, and
- Transparency

We should maybe all be thinking a bit more about those with regard to our lower value contracts, which escape the full rigour of the rules.

The definition of Contracting Authority does not change.

Any hope that Registered Providers of Social Housing (RPs) would suddenly be free of the shackles is false.

The preamble states quite clearly that the definition remains unaltered, and the formal definition includes organisations that are '*established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character*' and '*or are subject to management supervision*' by other public bodies. We might be getting more commercial, but we're still a long way from freely operating commercial landlords.

The general threshold for goods and services is not significantly changed. There was a lot of media hype about a new threshold of €750,000. This relates only to the 'light touch regime' services – "son of Part B" for those familiar with the current rules. (See below.)

Exempt transactions are confirmed as

- Acquisition or rent of land, buildings or property
- Arbitration or conciliation services
- Legal representation in or in preparation for arbitration, conciliation or litigation
- Document certification i.e. by a notary
- Legal services required by law
- Financial services for issue, sale, purchase or transfer of securities or other financial instruments
- Loans
- Employment contracts
- Audio-visual media services
- Public transport services
- Civil defence
- Political campaign services

The distinction between Selection & Award Criteria remain in place. Proposals to free up what can be asked at PQQ and what at Invitation to Tender do not appear to have survived.

The Spend Aggregation rules and how to calculate contract value remain unchanged.

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WHAT <u>DOES</u> CHANGE

Negotiation: much was made of the need to be able to negotiate, but much of the opportunity to give us that freedom has been wasted.

The Open and Restricted procedures have not been amended and still do not permit any negotiation. Negotiation options are now covered by 3 procedural possibilities:

(1) Competitive Procedure with Negotiation or (2) Competitive Dialogue Procedure

These can only be used in defined circumstances, which have not significantly changed.

There appears to be very little difference between the two processes, save that in the CPwN the Contracting Authority can reserve the right not to negotiate – and that the CDP is aimed at the more complex areas where there are no clearly envisaged solutions to the requirement.

or: (3) Negotiation without Prior Publication – again there is limited relaxation of the circumstances in which this can be used.

However: There is now clarity that it applies to products bought on a commodity market, which the preamble indicates includes energy. The argument is that these markets are already highly competitive. Current investigations under way on behalf of OFGEM may shed further light on how effective the energy market really is, but certainly the market operation is incompatible with any EU procedural requirements.

Also: It now includes an ability to negotiate for "*new works or services consisting in the repetition of similar works or services entrusted to the economic operator… provided [that they] are in conformity with a basic project for which the original contract was awarded*"

What this means in practice is not entirely clear. What is clear is:

- It is works or services – specifically not goods
- So… presumably a phase 2 construction project, which is largely are repeat of phase 1?
- Or – a repeat of a customer segmentation exercise?
- The *possible* use of the process must be advertised with the original opportunity (so no good if phase 1 is already on site!)
- It can only be used for 3 years from the conclusion of the original contract. (Note conclusion of the contract means awarding or execution, not completion or termination)

Innovation Partnership Procedure is a new procedure. It only really applies to research and development arena and is unlikely to apply in RP world, unless some truly innovative ICT programming is envisaged. It operates on a very similar basis to CDP.

Time Limits: possibly the most helpful change is the least dramatic: a reduction in minimum times for process steps. Minimum times are more consistent across the processes, but let's take the **restricted procedure,** the most commonly used, as our example.

The minimum time for requests to participate (Expression of Interest) is now 30 days from the date upon which the contract notice was sent. Note: this is the submission date, not the publication date.

The minimum time for receipt of tenders is 30 days from the date upon which the invitation was sent, but (subject to reasonableness) this may be reduced by 5 days if tender submission is electronic i.e. down to 25 days.

In cases of urgency: time limits may be reduced to 15 days for Expression of Interest and 10 days for tender.

The pre-amble indicates that in this context urgency merely needs to be 'duly substantiated'. It does not have to be extreme or unforeseeable or beyond the control of the contracting authority. However, we would still caution limited use of fast-track times as experience demonstrates that doing this has detrimental impacts on both the quality of specification and the quality of bids received – either of which will make for an unhappy contract, a combination of which will make for a disaster.

A down-side of the time limit changes is that we now have only 30 days in which to issue the Contract Award Notice

There are still further reductions available where Prior Information Notices are used – but our view is still that this reduction doesn't warrant the extra administration involved in producing them.

Eco-labelling (& 'social' equivalents such as Fair Trade) are now specifically allowed.

Use of Lots: there are a number of changes here:

- In support of the SME agenda there's now a requirement to 'consider' breaking large contracts into Lots. Where contracts are not split, a reason for not doing so must be given in the contract notice. There is no limitation on what such a reason might be. Risk and cost-leverage are implicitly acceptable on the basis of the preamble.

- It is now explicit that we can limit the number of Lots for which suppliers may bid. (This is not a change, merely a clarification.)

- It is also explicit that even where we allow bids for all Lots, we may restrict a maximum number which will be awarded to any one supplier – provided we set out up front what the maximum number is, and the process for determining which Lots are awarded if the maximum number is exceeded on first analysis of the results.

The Part A / Part B Services distinction is abolished.

But there is a successor to Part B.

Annex XIV sets out a "light touch regime" for a limited number of services.

The services concerned are:

- Health, social and related services
- Administrative social, education, health and cultural services
- Compulsory social security services
- Benefit services
- Trade union, political parties and youth organisations
- Religious services
- Hotel and restaurant services
- Governmental administration services
- Legal services not already exempted
- Prison services
- Investigation & security services
- Postal services; and, for some reason, …
- blacksmith services and tyre-remoulding

Where services fall within the 'light touch' regime the threshold for full compliance is 750,000 Euros.

The detail of this procedure is left to national governments to clarify.

Abnormally Low Tenders: there is now a specific duty to investigate a tender which appears to be abnormally low – raising a right of challenge if not investigated. The tender **can only** be rejected if the tender does not satisfactorily account for the low price and **must be** rejected if the low price is due to the breaching of labour/employment laws.

The definition of a Works Contract has changed to codify the ruling in the Jean Aurox case (aka the Rouannne case) i.e. where in a combined land and development contract the Contracting Authority exercises "decisive influence" over the design of the work, it is a Works contract, regardless of any attachment to a land-transfer arrangement. RPs as a general rule DO exert decisive influence over what is to be built and to what standards. Straight-forward land purchases remain exempt.

Electronic Communication submission of documents is not yet mandatory. The pre-amble indicates an intention that it should be within thirty months.

As it stands however, the Directive **does** require that potential supplier are given '*by electronic means full and direct access free of charge to the procurement documents from the date of publication of*' the contract notice.

The simple interpretation of this is: if you are not already using some form of e-tendering platform, now is the time to give it serious consideration. At the very least access to bid documents via your own website will need to be put in place.

Notifications to Candidates and Tenderers: There is an apparent retrograde step here in that the Directive seems to require reasons for exclusion, non-progression, lack of success etc only to be given on request. This is actually in conflict with the intentions outlined in the preamble i.e. that excluded or unsuccessful bidders should not have to request this information. We would continue to support the provision of information on the current basis i.e. provide sufficient information as a matter of course at the point at which a potential bidders ceases to be part of the process.

Procurement Project Reports: there is now a specific requirement for a project by project report clearly setting out the process and the rationale for all decisions made in it. As a matter of good practice, these should already be being produced but the content detail may need to be reviewed to ensure all the relevant detail is captured. Such reports are also required if a project aborts, after the issue of Contract Notice.

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WHAT DOESN'T CHANGE BUT IS CLARIFIED

A Central Purchasing Body is clearly defined as "*a contracting authority providing centralised purchasing activities*" i.e. the CPB must itself be a contracting authority, subject to the rules in respect of its own purchasing.

A Procurement Service Provider definition is also helpfully added to differentiate between those offering procurement support or services, and those actually acting as a CPB. These providers do not have to be contracting authorities themselves.

The distinction is an important one because the appointment of or access to a CPB is not subject in itself to the directive, but the appointment of a Service Provider is.

Other definitions: there are a number of other helpful definitions that worth consideration when in doubt – e.g. design contests, innovation, written and in writing…

Use of subsidiaries etc: The *Teckal* ruling has been codified. The Directive explicitly states that a Contracting Authority can award a contract to a subsidiary without advertisement where:

- The Contracting Authority exercises control over the entity similar to that exercised over its own departments - such control must include "decisive influence over both strategic objectives and significant decisions of the subsidiary; **AND**
- More than 80% of the subsidiary's activity is carried out for the parent company; **AND**
- There is no direct private capital participation in the controlled body, "except for non-controlling and non-blocking forms of private capital participation" (it is hard to see what such forms might be).

This is the current position as established by the *Teckal* case and will be familiar to most buyers.

The Directive goes further however and confirms that:

- It also applies where the control is exercised jointly by a number of contracting authorities, subject to the above rules and subject to the control being exercised by representatives of each individual controlling body (though one person may represent more than one body) – basically, a consortium of purchasers having the requisite control over an jointly controlled enterprise. Note that it is 'control' of the enterprise that is the defining factor, not ownership.
- What we might call *'Reverse Teckal'* also applies i.e. that (subject to the same definitions) the subsidiary can directly appoint, without competition, the parent body;

Also that:

- What we might think of as 'lateral' or 'intra-group Teckal' also applies i.e. one subsidiary can directly appoint another subsidiary, provided that the same controlling entity rules apply to both controlled parties.

Co-operation between Contracting Authorities: the *Hamburg Waste* ruling has been codified i.e. that an agreement to collaborate concluded between two or more Contracting Authorities will be outside the scope of the Directive where it:

- Establishes co-operation between them to provide public services with common objectives;
- Is established purely on considerations related to the public interest; and
- The Contracting Authorities have less than 20% of the relevant market.

NOTE: the public interest element is paramount in this and it is unlikely therefore to apply to RP activities. What we generally consider to be "shared service organisations" are more likely to be either commercially transacted provisions (which are subject to the regulations) or jointly controlled entities (which could operate under the *Teckal* provisions).

Changes to an existing contract: the *Pressetext* Judgement has been codified. This goes to clarifying the extent to which contracts and frameworks can be modified without a new call for competition.

- The modifications were provided for at the outset in clear and precise wording this includes price review or price indexation clauses; **OR**

- Additional works are necessary and a new contractor cannot be appointed:
    - for economic & technical reasons resulting in significant inconvenience or duplication of cost; **and**
    - the addition is no more than 50% of the value of the original contract; **and**
    - the additional work could not reasonably have been foreseen

    in this context additions may be cumulative, provided they are not deliberately manipulated as a means of avoiding competition **OR**

- A change of contractor was provided for in the original procurement (it's not clear how this could apply) or results from the restructuring of the supplier's company; **OR**

- The change is below 10% of the contract value for goods or services or 15% for works

    *in this context neither of the previous grounds has to be established or proven, **but** additions cannot be used cumulative **and** any individual increase must not exceed the normal thresholds; **OR***

- The change is not 'substantial' under the *Pressetext* tests i.e.
    - doesn't create a situation which could have changed the outcome of the tender
    - doesn't change the economic balance in favour of the supplier in a manner not provided for in the original contract
    - doesn't extend the scope substantially
    - doesn't replace the contractor except as allowed for above.

Bidding Consortia cannot be required to form a specific legal entity (e.g. a legally binding joint enterprise) purely in order to bid; but they can be required to do so as a condition of contract.

Framework Agreements:

- Can generally only be for four years duration – but contracts can run beyond there expiry in a logical fashion for the completion of the call off contract.
- Contracting Authorities able to access the framework must be **clearly identifiable** at the outset – this can be by reference to a register, but should specifically define a geographical parameter
- They cannot be opened up to new suppliers

Preliminary Market Investigation is now explicitly allowed provided that it doesn't distort Competition – basically you can talk to anyone you want to before you start the formal tender exercise. This allows market-warming; it also encourages access to the kind of knowledge that can future-proof specifications. There are obvious caveats though:

- Be careful that you share all information provided by you during pre-tender discussions with all potential bidders (i.e. build it in to the brief);
- Be careful that you don't share (even by way of specification) confidential product development information given by suppliers without specific authority to do so;
- Be sure that the specification is designed around a specific supplier's current offer or future plans, without allowing options, equivalents or variants.

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WHAT IS STILL A BIT MUDDY…

Selection Criteria: article 58 takes about Selection Criteria **as requirements for participation**. It goes on to limit what can be considered and limits the information that can be asked for.

Articles 59 to 63 then go on to talk about certificates, self-certifications, burdens of proof etc.

References and past performance are now specifically noted as valid criteria.

This includes a general presumption that minimum annual turnover requirements should not be more than twice the contract value (whereas it has previously been common to work on 3 or 4 times the value). There is an exemption to this if specific exceptional risks can be identified.

Note that all of these are in respect of **participation**. If we're thinking about pre-qualification, they are really about the items that can be used to simply exclude bidders – or as we might see it: Pass / Fail questions.

Only when we get to Article 65 do we start to talk about limiting the number of eligible bidders who are then actually invited to bid. It specifically makes reference to Article 58 as the **minimum levels of ability**.

Minimum numbers to be invited don't change: 3 for CDP and 5 for restricted tenders (subject to sufficient minimum standard bidders in the pool), but the Directive remains silent on how those 5 (or 3) are selected. – but in line with the overriding rules on transparency and case law, clearly it should be on published criteria and transparent weightings.

To be fair: we would prefer the Directive to remain silent on this issue or the whole process of selection for invitation will cease to function.

Reduction of numbers of bidders in the negotiated or dialogue procedures on the other hand must be based on the Award criteria.

Award Criteria: MEAT is being redefined as Cost/Quality ratio.

Under the Directive the Quality percentage could be zero (i.e. price only – but member states can choose to outlaw this).

The cost element may now include whole life costing, including costs of disposal – but the methodology has to be rational, independent and disclosed up front.

Technical characteristics can now refer to social or environmental impacts in the method of production and/or ultimate disposal, as part of the imputed whole life costs.

It is now explicit that social and environmental requirements can be written into contract terms, provided that they go to the subject of the contract and not the general business management of the supplier; provided also that the general principle of non-discrimination is not breached.

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WHAT WE'RE WAITING FOR THE UK GOVERNMENT TO TELL US

Things still at the discretion of the UK Government include:

- Whether we can reserve contracts for sheltered workshops – given current central government approaches to such workshops we can but hope that at least this level of protected opportunity will remain open to them;
- Whether contracts of a given type or value are **required** to be split into smaller Lots;
- Which of the non-mandatory grounds for exclusion (if any) it may wish to make mandatory
- Whether price only bids will be permissible
- The process detail for the 'light touch' projects

SO WHERE DOES THAT LEAVE US?

The fundamentals remain fundamentally unaltered. The public procurement rules are still absolutely about ensuring competition and absolutely not about efficient procurement or value for money.

The opportunity to allow Competition with Negotiation as a purely elective option was clearly a freedom too far for the EU.

There is no reference to remedies, so current rules on those remain in force. This might be seen as a further lost opportunity to redress a balance that some may feel is too far weighted towards the suppliers.

The removal of "Part B" will impact on those buyers who made full use of it – we tended to treat many Part B services as if they were Part A in any event. The higher threshold on those that remain will be a help to Local Authorities and government departments but likely to have limited impact on RPs.

An opportunity to significantly raise the goods and services thresholds to levels supportive of longer more partnership- and innovation-friendly contracts on low-annual-spend areas has not been taken.

The potential to make tendering activity less onerous for buyers and bidders alike by granting more freedom to choose what is asked of bidders at what stage thereby controlling both the amount of information submitted and evaluation time needed in early stages, has been ignored.

That said; there have been slight swings towards the idea that full competition *won't necessarily* deliver the best VfM and *will necessarily* entail an amount of bureaucracy (& defensiveness) that we could do without.

It isn't going to have a massive impact on how we do things, but let's finish with a review of the good stuff:-

Clarity over items derived from case law is to be welcomed.

The apparent widening of the ability to use whole life costs and social / environmental criteria in a broader context will help support our wider agenda in terms of social value, provided suppliers rise to the challenge of meeting the requirements head on, rather than seeking to avoid them. There's a potential risk that if bidders choose to see the agenda as discriminatory they may seek through court action to narrow it back down. We look to the Courts therefore to support the policy intent behind the provisions.

The changes to minimum project timescales is most welcome. It will enable us to spend more time on getting the specification right, engaging with the market up front etc, rather than having to sacrifice time to minimum open to response periods.

The change of direction is barely noticeable in the grand scheme of things, but at least it is a change in the right direction.

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The full published text is available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024&from=EN

The preamble alone is worth a read as it sets out in detail what the EU Parliament & Council were trying to achieve by each of the provisions.

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