

Report on Open Meeting of the EURIM Public Procurement Working Party  
held at the House of Lords Conference Room, 1 The Abbey Gardens, London SW1 on 2 July 1998

*1. Introduction*

Viscount Chelmsford welcomed those attending and explained the purpose of the meeting. He then introduced each of the speakers.

*2. The Communication: An IT Perspective*

**BOB ASSIRATI**, Chief Executive, CCTA, said he wished to speak about communications and IT procurement from a business perspective and the first question to ask was “Why is IT different?” On the service side it was a fairly immature industry. There was a lack of confidence and trust and little track record of successful delivery. Procurement should not be looked at on its own but as one stage in an IT development project which must facilitate business optimisation.

Because of the rate of change in IT and acute skills shortages in some areas there were different priorities from those found in other types of procurement. The first of these was to secure delivery of business benefits, not just IT products and services. There had to be a flexible system during delivery and its lifetime and this might also be needed in the procurement process. Value for money was basically expressed in those terms but it could not be balanced easily in evaluation terms.

The public sector in the UK had, he said, learnt to live with the Directives, which often reflected best practice although there were difficulties with large, long term contracts.. We had been encouraged to follow business methods. The degree of change in IT was considerable and happened quickly. Changes forced additional requirements on suppliers. Strategic partnerships were being adopted increasingly because a joint problem solving approach was needed.

To get satisfaction we needed mature suppliers with mature customers. Too often neither side knew what they were letting themselves in for.

The Communication was a significant step forward and many of the views put forward by the UK had now been accepted. It had two clear themes: amendments to the rules and the encouragement of electronic procurement. He welcomed the greater ability to negotiate contracts - and the CCTA would have to look at TAP (Total Acquisition Process) to accommodate that.

He had some concerns on entry criteria for competitive negotiation. We must make sure they were not too difficult to deal with.

The legalisation of framework agreements was welcome. The Commission was set to make clear where and when they were legitimate. He felt that uncertainty on this matter was now in the past.

The treatment of service concessions was not currently within the procurement rules. The Communication suggested they should be brought in. This was of interest especially in the “better government” arena, where there was a large private sector involvement in services. A further process of consultation was proposed on this, so we would not see rapid action.

There were still three areas giving concern in the UK which had not yet been accepted by the Commission:

- *IT standards*: There were problems with the current rules, especially that we cannot mandate industry standards. It was difficult to reconcile the rules with the G8 Bonn declaration on use of the Internet.

- *Short-listing rules.* We needed more scope.
- *Contract amendments.* We needed more flexibility.

He welcomed acceptance of the importance of electronic procurement but thought that 25% by 2003 was a fairly modest target.

There were some concerns about the intention to try and co-ordinate electronic procurement across all states. It was important that we did not fall back to the lowest common denominator that could be achieved - we needed forward seeking pilots, not backwards conformity.

The procurement regime provided difficulties in some other areas.

PPPs needed rapid business judgements by senior civil servants - but they had a risk-averse approach. The National Audit Office should judge these arrangements on a broad canvas, not cherry-pick individual decisions. The Public Accounts Committee needed to take more time looking at good practice and give out some plaudits as well as brickbats. Civil servants must get used to making these decisions.

He asked whether trends mitigated against small suppliers? The IT industry was international but smaller enterprises still faced barriers to cross border trade. Big contracts were allowed to go to international players with a local presence.

To what extent were the Commission's underlying objectives relevant to the UK? The current rules prevented us from optimising at project level to achieve key business benefits. We tried hard to keep to the rules, which made us unpopular with senior managers. Very big numbers still needed rapid decisions. Including detailed audit trails could add months to the procurement process. The legislative process could not keep pace. How could we get a more rapid turnaround? There was scope for some specific relaxation of rules but with the decision makers held responsible.

#### *Questions and Discussion:*

Asked about the difficulties inherent in asking risk averse people to make rapid judgements and to be cost conscious without an income stream, BA said that Civil Servants got re-assurance from the private sector but shrank from decisions because of the threat of having to explain them to MPs. It was difficult for them to make commercial compromises and this could lead to lost opportunities.

Concern was expressed that in many large negotiations the team sitting opposite the suppliers were lawyers, consultants and junior procurement staff. Senior civil servants were not involved in the deal. BA agreed that this was wrong and that such negotiations should not be left to junior staff. There were some encouraging signs that this was now being understood.

IDPM four years ago produced guidelines in response to the Public Accounts Committee. The PAC and the Auditor General agreed to use them as yardstick. These now needed to be reviewed and updated. Might there be scope to get confirmation of them and then do similar exercise again. BA said he would be in favour of that.

### 3. *Private Partnerships and UK Objectives*

**MARTIN DARCY**, PFI advisor, HM Treasury, explained that the Treasury led on procurement policy and disseminating procurement practice and was also concerned with Value For Money initiatives.

There were, he said three types of PFI. Two were of long standing and accepted world wide examples being (1) a toll road or bridge which was financed by users and (2) where some type of public subsidy was made to enable something which is often socially desirable, such as public transport.

The third type was where the UK had blazed a trail in the provision of services. In this type, the private sector was responsible for the initial investment and kept ownership; the public sector paid only when the service was acceptable. This involved an active partnership between the public and private sectors.

(Note PPP was an umbrella term for many initiatives - PFI was the best defined form.)

The UK had a long tradition of privately funded projects. Victorian entrepreneurs built much of the industrial infrastructure. We then had nationalisation but more recently many projects had returned to private ownership.

There was a need to prove that PFI was a Value for Money solution or there was no point in doing it. PFI would not replace public procurement, which had a current turnover in the UK of ,26billion a year, excluding military systems.

**MIKE DAVIS**, Policy Administrator, HM Treasury, said that the UK government was generally pleased with the result of the Communication. It reflected many of their concerns and objectives. It looked at issues such as the need for simplification, clarification and modernisation of the rules to take account of developments such as PFI, privatisation and liberalisation in the utilities sector. The Internal Market Council had endorsed the Communication and he hoped that the Commission would now stick to the timetable set out in it for producing detailed proposals. Implementation would be a consultative process. There were a lot of negotiations still to go on, but we now had the framework.

There was still uncertainty about the extent to which negotiations were allowed. The negotiated procedure could currently only be used in certain defined circumstances. The Treasury would like to see more flexibility in its use. A new negotiations procedure had been proposed to meet this need. On the e-commerce side, the Commission was pressing ahead with pilot projects to test new methods. He hoped that these would be conducted without the constraint of the detailed rules. Derogations were needed and were being proposed by the Commission.

#### *Questions and Discussion:*

Since independent review bodies had been rejected, could the CCTA have a role rather than the PAC/NAO? MDs said it was difficult to change the overall system before all states had subscribed to the old rules. The problems of enforcing implementation needed to be looked at. BA pointed out that the CCTA no longer had a central "policing" role, but said that some way of testing could be constructive.

The Utilities had some problems affecting PFI which were not EU based. For instance, The Housing Grants and Construction Act 1996 had a provision where, if a project included construction work, the contractors had to be paid at regular intervals. This affected projects like the development of a customer call centre. The government was exempted from this but the Utilities were not.

Asked for more information on pilot projects, MDs said there would be a meeting shortly to discuss

them. There was an idea of ring-fencing areas of procurement to test new technology and new procedures and consider the effect. No details were available yet.

Asked what was meant by "Direct agreement procedure" in competitive dialogue, MDs said that tendering would be split into two areas and enable choice. He pointed out that Commission terminology was different from ours.

Reference was made to an FT article on unsatisfactory contracts. MDy said The Treasury would be going to consultation in September re long-term contracts. Asked about the dangers of contracting out core services, MDy said it was necessary to be very clear what your business was and if the activity was too close to perceived core business it must be kept in-house. These decisions must be taken by the individual contracting authorities. That was the intelligent customer argument - you had to retain knowledge of what you were processing and why. What constituted core services was a grey area, eg in the health service, X-rays are "close to the bone".

#### 4. *Private Sector Viewpoint on the Communication*

**AMANDA MCINTRYE**, Senior Policy Advisor, CBI, said that the Communication made the billions point. It was important for competitiveness and to keep public spending under control.

The Objectives of the Directives should be: to encourage world class purchasing; to be clear, simple and flexible; to be limited to what was necessary to meet Treaty goals; and to avoid codifying purchasing practice. Legislation had to strike the optimum balance between sufficient flexibility to facilitate good practice and sufficient prescription to outlaw anti-competitive behaviour. Suppliers were influenced by: client skill and commitment; national legislation and ground rules(eg UK procurement strategy; CCT); and EC Directives and GPA.

The Communication was encouraging a culture change. The priorities they identified were:

- a) Utilities: the rationale for detailed legislation for utilities was fading.
- b) PFI/PPP had brought glamour to procurement! It had changed government and official attitudes and they now realised the need for flexibility. PPP was a tricky area for the Commission; there was not even common terminology. It was important that the framework for PFI made commercial sense. There was a danger that the Commission would work first on concessions, then find the results were not suitable for other types of PFI.
- c) It must be possible to have pre-tender discussion (which can and must be non-discriminatory). There could be difficulty in defining the job, with different meanings applying across states. There was no CPV within PFI.
- d) A choice had to be made in defining the ground rules for competitive negotiation. They could either be based on an option to use it widely or say that it only/must be used in some areas. There was a real danger of the rules being too rigid. Many countries were very wary and wanted to proscribe the process.
- e) Business freedom could be a tricky issue. Competition should be a great VFM driver, but it could stifle innovation. Contract length was important. Flexibility to respond to changing customer demands was needed and the extent of this had to be clarified. In addition, we needed to sort out framework agreements quickly.
- f) Procurement policy was another tricky issue. The rules told you how to buy, not what to buy. The rules should not be made a vehicle for encouraging good environmental practice or as a way of tackling social issues. We had to be careful about what policy vehicle was used to get what policy result.. That said, where the public sector was working with the best of the private sector to achieve best value, workers' interests would also be protected. Employees have suffered in the past when the public sector has bought on lowest up-front price.

Over what time scale and across what range of costs should "most economically advantageous" be judged - on a single project or in a wider context?

- g) A realistic approach was needed to SME involvement. We did not expect them to bid for unsuitable work. Responses to a CBI survey highlighted some problems for them as suppliers. Asked what deterred them:

31% said	lack of contacts
29% said	qualifying tests
28% said	lack of market knowledge
27% said	meeting response deadlines
19% said	language problems
18% said	complex specifications and standards
14% said	unfair specifications and standards
10% said	cultural factors
8% said	insufficient export experience
7% said	contract cancellations
6% said	changes to specifications / Labour Law
4% said	licensing requirements
3% said	sub-contracting arrangements
2% said	legal costs.

A frequent problem for SMEs was to get a foot in the door. We needed to help them understand legislation and make contact with suppliers. Northern Ireland had the right approach and were doing very good work, including across the border with Eire. They were a source of good ideas. Framework agreements could be useful for SMEs as they broke the project into manageable chunks without the need for repeated tendering. Tender notices could be more user-friendly and the remedies procedures less adversarial.

- h) When it came to Enforcement of the rules, the Commission should set the ends, not the means. Implementation had to fit the national climate and policy/legal framework.
- i) She was glad to see that e-commerce was listed as a priority as there were spin-off benefits. The purchaser was empowered and, because so much routine work was streamlined, had time and resource to attend to high-value deals.

The widespread use of intermediaries in the procurement process would not, in her view be beneficial. The key message was that purchasers and suppliers had to be in the driving seat.

#### *Questions and Discussion:*

Regarding contract term, in the private sector there was a shift away from fixed contract length. Could this work in the public sector or would a 10 year, agreement, say be feasible? When re-competition was due, there were a couple of years in which there was very little ability to make changes and often people were not willing to bid against an incumbent. We should be thinking about minimum terms, but perhaps no maximum, albeit subject to regular review. Rolling contracts were not permitted under the Directives. The cost of transferring to a different supplier would need 10 to 15% better value to justify it. AM suggested this was similar to some of the market testing debates. A more sophisticated approach was needed to contracting. We should capitalise on the Commission's interest in private sector best practice.

Too much and too little competition were both adverse, as the insurance industry had clearly shown.

Asked how we were going to re-compete big projects, eg the lottery and how we could get a level playing field when one company owned all the knowledge, BA said that we had to be able to re-compete, but we might have to bar the incumbent so there was no vested interest.

MDs said that if you had, say, a 20 year contract, it would be difficult to demonstrate to the PAC that you could not have got better value at some stage along it. He also pointed out that the Commission used competition to further free movement. Long-term contracts limited this so they were not liked because of Treaty requirements.

It was suggested that it would be best to look to the details of the tender to decide/negotiate contract length, but there was agreement that it would be difficult not to have a re-tendering option at some stage, even if it was only after 15 years or so.

A topic not yet mentioned was the need for professionalism in IT&S procurement. It resolved many problems. Professionals should be able to justify their decisions. Senior people had to be involved in the detail on big deals. This was a challenge to the Civil Service culture.

AM commented that in the past, the Commission thought they could get what they wanted by legislation. They now realised that was not always so. Every point of flexibility, however, offered a potential for abuse of the system.

#### 5. *The Devil is in the Detail - the working party's next steps*

BARBARA NIELSEN, Working Party Chairman, indicated that the working party would be following through on the issues raised this morning in discussions with MEPs and Commission officials. To do this a structure was required which enabled us to tackle systematically those issues where there was an opportunity to influence the outcome. We had to recognise the dichotomy between expressing best practice and interpretation of EC rules.

We had to distinguish between areas where we can do something now (ie the topic is in the Communication with a commitment to take it forward) and issues for later consideration (ie the topic is not in the Green Paper, so it will not be part of this round of discussions). Each Commission action would include an opportunity for national discussion so we needed to find those areas where we could be pro-active. There were still significant areas where the detail was uncertain and the working party would monitor continuing discussions and actions, a number of which were scheduled to take place in the coming few weeks. In the autumn, the additional information would be consolidated and discussed and meetings arranged with MEPs and officials in Brussels.

The comment was made that the Commission statements were great in theory but there was no bedrock of practicality. They seemed to be saying "This is what we would like but we don't know how to make it work!" They must consider the reality of what would happen to businesses.

#### 6. *Summary of priorities for action by the working party:*

<i>Theme</i>	<i>Issues</i>
Tendering	1. how can competitive negotiation be used in a constructive way? 2. entry criteria 3. more scope needed in short listing rules

	<ol style="list-style-type: none"> <li>4. issues of contract length should be examined carefully</li> <li>5. in respect of VFM, over what time scale and across what range of costs should “most economically advantageous” be judged?</li> <li>6. monitoring requirements (in the UK, those of the NAO and PAC) increase the cost and length of the procurement process</li> </ol>
PPP/PFI	<ol style="list-style-type: none"> <li>1. evaluation criteria</li> <li>2. need to ensure legal framework makes commercial sense, noting particular characteristics of IT&amp;C</li> <li>3. encourage Commission to facilitate all kinds of PPPs, not just concessions.</li> <li>4. need for common vocabulary across states</li> <li>5. will implementation of PFI procedures include a consultative process?</li> </ol>
Framework Agreements	words are vague on what they are planning to do - get more details this area needs to be sorted out quickly
Derogations	discussions are due shortly - get details
IT standards	<ol style="list-style-type: none"> <li>1. how can they be described in proposals?</li> <li>2. ability to specify industry standards</li> <li>3. G8 Bonn declaration means rules need amendment</li> </ol>
Electronic Procurement	<ol style="list-style-type: none"> <li>1. definition - must separate off electronic procurement as a tendering exercise from the use of electronic commerce</li> <li>2. important to avoid lowest common denominator of technology being adopted</li> <li>3. should be included in e-commerce and Framework 5 priorities; need to encourage bridges between DGs</li> <li>4. practical appraisals are required.</li> </ol>
Pilots	<ol style="list-style-type: none"> <li>1. how can we influence them? how many relate to IT?</li> <li>2. need for electronic commerce pilots to be conducted without the constraint of the old directive rules;</li> <li>3. they are at different levels, and no one is pulling them together; press for some high level co-ordination;</li> <li>4. MEPs could ask questions about criteria for evaluating pilots;</li> <li>5. seek update on the Danish pilots.</li> </ol>
SMEs	<ol style="list-style-type: none"> <li>1. is the best way forward as subcontractors?</li> <li>2. do the trends mitigate against SMEs?</li> <li>3. will innovation be lost if SMEs face too many barriers to trade?</li> <li>4. can they survive cross-border trade?</li> <li>5. are the procedures sufficiently simple and cost-effective for smaller companies to gain business?</li> <li>6. short-listing rules need to be re-examined; flexibility is important</li> </ol>
Management	<ol style="list-style-type: none"> <li>1. professionalism;</li> <li>2. relationship of best practice to the rules;</li> <li>3. education in IS&amp;T procurement (there is no specific training for this - flag IMIS);</li> <li>4. involvement of senior staff essential in negotiations/decisions on large contracts</li> <li>5. need to tackle the “risk adverse” attitudes of UK Civil Servants</li> </ol>
WTO/GPA and G8	1. public procurement is on WTO agenda; concern that although trying to work in the same direction rules will not necessarily end up the same; provide comment for input to DG1, who will lead from EU on the trade and policy side;

	2. also use G8 contacts to flag international aspects.
Timetables	press that the schedule in the Communication is adhered to.