



**Response of EURIM, the Information Society Alliance
to the consultation on
The modernisation of EU public procurement policy
Towards a more efficient European Procurement Market**

EURIM (www.eurim.org.uk) is a policy research group concerned with the formation and scrutiny of legislation, regulation and government initiatives related to UK/EU competitiveness in the global information society and to the effective use of technology to serve society as a whole. It uses funding from its corporate and associate members to organise working groups of politicians, advisors, officials, industry (users as well as suppliers), professional bodies, trade associations and interest groups.

The main points are:

1. The financial and economic pressures on Member States mean that public funds must be used as efficiently as possible to achieve the stated policy objectives for a procurement. Where the objectives include innovation, low carbon economy or small firms support that should be stated in the procurement.
2. The over-riding objective of the EU Procurement Policy should be not to inhibit good practice in securing value for money. Good practice should be in an Annex rather than in the normative body of the Directive. Guidance should be uniformly interpreted. Some Member States view a Directive as enabling them to do something whereas others view it as a hindrance so tend on the side of extreme caution. In the UK it tends to be the latter.
3. The tension between encouraging small firms (under 250 staff and/or 50 million euros turnover) and promoting EU wide markets for those large enough to benefit needs to be recognised and addressed separately. Tensions with the use of local procurement to help meet skills, training and employment objectives also need to be addressed separately
4. The cost of current competitive tendering processes can often be excessive relative to the value of the business being transacted. (Q6, 15, 27, 28) The effect is to increase the cost of goods and services used by the public sector by more than the savings achieved through following an open and fair competitive process. Ideally the expected procurement costs for commodity products should not be more than 5% of the likely contract value (implying the use of electronic procurement). Even the costs for complex works projects or ICT systems should not total more than 30%. Our members are divided on how this might be achieved but agree that the Directives need to encourage possible solutions.
5. The possible answers include increasing the lower limits in the Directives (using the same limits for ICT systems and other complex services as for works) and relating the cost of the tendering process to the expected value of the procurement. Enabling trusted purchasers to obtain value for money in the particular circumstances of each procurement will also result in better outcomes for EU economies.
6. While the Directives should be neutral with regard to the technologies used, it is reasonable for them to actively encourage reductions in procurement and tendering costs that can only be met by, for example, electronic procurement. This has the advantage of reducing the incentive to use the Restricted process simply to cut the number of responses to be handled.

7. There is scope in the Directive for the Restricted process to be used as long as the procurer can justify its use. The condition could be changed so that the Restricted process can be used when it makes no economic sense to do an open procurement. This embodies the concept of the percentage threshold but in a manner that can be expressed objectively in law rather than in a subjective manner such as the cost of industry to respond that could be distorted by industry. There is also a case for competitive dialogue being the default above a given value.
8. The complexity of current rules increases cost particularly legal costs (Q14), especially when this is compounded by lack of knowledge of the flexibility that already exists within the existing Directives. It may well be more important to produce better guidance for public sector procurement staff (Q16-18) than to give new business for consultants and lawyers by increasing the number of "special cases" and the like in the Directives. We advocate simplification wherever possible. We also recommend a sharp reduction in the secrecy with regard to forthcoming procurements and that the terms agreed should be fully published after the award. While there may be a need for "secrecy" when Defence and National Security are involved we do not see a case for "commercial in confidence" clauses where public money is involved.

Proposals to reduce value of proprietary rights and address the issues of incumbent or dominant suppliers should be addressed separately and explicitly in IPR and/or competition policy. They are not a proper concern of the procurement Directives.

1. WHAT ARE PUBLIC PROCUREMENT RULES ABOUT?

1.1. Purchasing activities

1. Do you think that the scope of the Public Procurement Directives should be limited to purchasing activities? Should any such limitation simply codify the criterion of the immediate economic benefit developed by the Court or should it provide additional/alternative conditions and concepts?

Yes.

1.2. Public contracts

2. Do you consider the current structure of the material scope, with its division into works, supplies and services contracts, appropriate? If not, which alternative structure would you propose?

No. The distinction between Works and Services is outdated. Many ICT supply and service contracts, for example, are more complex than most works contracts.

3. Do you think that the definition of "works contract" should be reviewed and simplified? If so, would you propose to omit the reference to a specific list annexed to the Directive? What would be the elements of your proposed definition?

Yes. It should be merged with that for services and simply make the distinction between complex procurements for a mix of products and services and simple procurements for commodity supplies.

4. Do you think that the distinction between A and B services should be reviewed?

Yes, they should be merged.

5. Do you believe that the Public Procurement Directives should apply to all services, possibly on the basis of a more flexible standard regime? If not please indicate which service(s) should continue to follow the regime currently in place for B-services, and the reasons why.

Yes, it needs review to make for a more flexible, standard regime.

6. Would you advocate that the thresholds for the application of the EU Directives should be raised, despite the fact that this would entail at international level the consequences described above?

Yes. Notwithstanding the difficulties it should be raised to at least a million euros for commodity supplies and 5 million for both Works and Services. This is primarily because the cost of tendering under the present regime (counting the costs to both the tenderers and the public body concerned) is often as much as 30% or even 50% of the value of the services to be provided. This additional hidden

cost often exceeds the value from competitive bidding. As well as deterring innovative proposals. It is also the main barrier to bids from small firms who cannot afford the cost/risk of submitting bids that might not succeed.

It is essential to relate the cost of procurement to the expected value of the business, using total lifecycle costs. Given the problems of achieving this it might be that the use of stepped limits or bands for different types of procurement will provide an answer. There may also be merit in having higher limits with national rules in specific areas.

7. Do you consider the current provisions on excluded contracts to be appropriate? Do you think that the relevant section should be restructured or that individual exclusions are in need of clarification?

8. Do you think that certain exclusions should be abolished, reconsidered or updated? If yes, which ones? What would you propose?

We need greater clarity and fewer exclusions. Exclusions should be restricted to national security and safety critical contracts.

1.3. Public purchasers

9. Do you consider that the current approach in defining public procurers is appropriate? In particular, do you think that the concept of "body governed by public law" should be clarified and updated in the light of the ECJ case-law? If so, what kind of updating would you consider appropriate?

We agree the need for much clearer guidance but suspect this may not be practical given the evolution of different types of partnerships responsible for organising the delivery of services in a world where the distinctions between public, private and not-for-profit sectors are increasingly blurred.

10. Do you think that there is still a need for EU rules on public procurement in respect of these sectors? Please explain the reasons for your answer.

10.1. If yes: Should certain sectors that are currently covered be excluded or, conversely, should other sectors also be subject to the provisions? Please explain which sectors should be covered and give the reasons for your answer.

11. Currently, the scope of the Directive is defined on the basis of the activities that the entities concerned carry out, their legal statute (public or private) and, where they are private, the existence or absence of special or exclusive rights. Do you consider these criteria to be relevant or should other criteria be used? Please give reasons for your answer.

12. Can the profit-seeking or commercial ethos of private companies be presumed to be sufficient to guarantee objective and fair procurement by those entities (even where they operate on the basis of special or exclusive rights)?

13. Does the current provision in Article 30 of the Directive constitute an effective way of adapting the scope of the Directive to changing patterns of regulation and competition in the relevant (national and sectoral) markets?

The complexity of applying the Directives to shared telecommunications and infrastructure projects, which increasingly involve innovative public/private partnerships, argues that a radical simplification is needed in which the definitions do not get in the way of good practice and value for money. Shifting boundaries are complicated and distinctions will be very difficult.

2. IMPROVE THE TOOLBOX FOR CONTRACTING AUTHORITIES

14. Do you think that the current level of detail of the EU public procurement rules is appropriate? If not, are they too detailed or not detailed enough?

They need to be greatly simplified. With more consistency of interpretation across Member States, in the way in which the Directives are transcribed into national legislation, let alone how procurements are organised in practice.

The Cabinet Office Minister responsible for reforming UK central government planning and procurement, Rt Hon Francis Maude MP, said in his evidence to the House of Commons Public Administration Select Committee Enquiry on Good Governance: the Effective Use of IT, Wednesday 30 March 2011:

“There are 6,000 pages of guidance that went out from the Office of Government Commerce on big IT procurements.”

<http://www.publications.parliament.uk/pa/cm201011/cmselect/cmpubadm/uc715-v/uc71501.htm>

We need common simple pan-EU guidance, to reduce the effort spent in producing such national and local interpretation and guidance.

2.1. Modernise procedures

15. Do you think that the procedures as set out in the current Directives allow contracting authorities to obtain the best possible procurement outcomes? If not: How should the procedures be improved in order to alleviate administrative burdens/reduce transaction costs and duration of the procedures, while at the same time guaranteeing that contracting authorities obtain best value for money?

16. Can you think of other types of procedures which are not available under the current Directives and which could, in your view, increase the cost-effectiveness of public procurement procedures?

17. Do you think that the procedures and tools provided by the Directive to address specific needs and to facilitate private participation in public investment through public-private partnerships (e.g. dynamic purchasing system, competitive dialogue, electronic auctions, design contests) should be maintained in their current form, modified (if so, how) or abolished?

18. On the basis of your experience with the use of the accelerated procedure in 2009 and 2010, would you advocate a generalisation of this possibility of shortening the deadlines under certain circumstances? Would this be possible in your view without jeopardizing the quality of offers?

The procedures need to be proportionate to the contract type and value.

The present variations may well be adequate but are not sufficiently well known.

There needs to be a much greater use of Alternative Disputes Resolution procedures, including enabling simpler contracts and greater flexibility in the event of unforeseen change.

The current economic climate makes it particularly important to shorten procurement and implementation timescales (in line with good private sector practice), especially for new computer systems designed to help save money. This will require much greater use of the accelerated procedures.

Guidance on good practice should be included in annexes to help people respond appropriately to cost pressures.

There is scope in the Directive for the Restricted process to be used as long as the procurer can justify its use. The condition could be changed so that the Restricted process can be used when it makes no economic sense to do an open procurement. This embodies the concept of the percentage threshold (mentioned above) but in a manner that can be expressed objectively in law rather than in a subjective manner such as the cost of industry to respond that could be distorted by industry.

19. Would you be in favour of allowing more negotiation in public procurement procedures and/or generalizing the use of the negotiated procedure with prior publication?

20. In the latter case, do you think that this possibility should be allowed for all types of contracts/all types of contracting authorities, or only under certain conditions?

21. Do you share the view that a generalised use of the negotiated procedure might entail certain risks of abuse/ discrimination? In addition to the safeguards already provided for in the Directives for the negotiated procedure, would additional safeguards for transparency and non-discrimination be necessary in order to compensate for the higher level of discretion? If so, what could such additional safeguards be?

Yes, greater use of the negotiated procedure in the more complex types of procurements, such as those involving computer software and services, should be permitted. But we also need to avoid the risk of overdoing the safeguards – beyond ensuring that nothing is “commercial in confidence” when public money is involved.

The rules should be in line with the GPA and not more complex given the need to enhance European competitiveness in the rest of the world.

22. Do you think that it would be appropriate to provide simplified procedures for the purchase of commercial goods and services? If so, which forms of simplification would you propose?

Yes. This is an obvious area for the greater use of electronic procurement. However, the Directive should neither mandate nor prohibit processes and technologies used to conduct procurements. It should not attempt to define rules for use of various information communications and storage technologies (e.g. Paper, Postal, Electronic,...) but instead refer to other Directives on acceptability, validation and security of information and signatures.

23. Would you be in favour of a more flexible approach to the organisation and sequence of the examination of selection and award criteria as part of the procurement procedure? If so, do you think that it should be possible to examine the award criteria before the selection criteria?

24. Do you consider that it could be justified in exceptional cases to allow contracting authorities to take into account criteria pertaining to the tenderer himself in the award phase? If so, in which cases, and which additional safeguards would in your view be needed to guarantee the fairness and objectivity of the award decision in such a system?

It should be much easier to do the two in parallel. The safeguard is to ensure that the two are evaluated objectively and separately, even if at the same time.

25. Do you think the Directive should explicitly allow previous experience with one or several bidders to be taken into account? If yes, what safeguards would be needed to prevent discriminatory practices?

Yes. However, past performance (good, bad or absent) is not a guarantee of future performance. The main safeguard should be to avoid discrimination against new market entrants without a track record when the requirement is for innovative solutions or is not mission critical. If suppliers have been found to be in breach of performance requirements, then they should be advised at the time that remedial or punitive action is taken of any negative impact on the acceptability of their candidature in future procurements. Such warnings should be recorded if they are intended to be used as part of any subsequent bid evaluation.

26. Do you consider that specific rules are needed for procurement by utilities operators? Do the different rules applying to utilities operators and public undertakings adequately recognise the specific character of utilities procurement?

The changing nature of the infrastructure and utilities markets will make it increasingly difficult to produce specific rules which do not themselves serve to distort markets and constrain innovation.

2.2. Specific instruments for small contracting authorities

27. Do you think that the full public procurement regime is appropriate or by contrast unsuitable for the needs of smaller contracting authorities? Please explain your answer.

28. If so, would you be in favour of a simplified procurement regime for relatively small contract awards by local and regional authorities? What should be the characteristics of such a simplified regime in your view?

Yes but these should be based on the size of the contract not the authority. The earlier response on thresholds also refers.

29. Do you think that the case-law of the Court of Justice as explained in the Commission Interpretative Communication provides sufficient legal certainty for the award of contracts below the thresholds of the Directives? Or would you consider that additional guidance, for instance on the indications of a possible cross-border interest, or any other EU initiative, might be needed? On which points would you deem this relevant or necessary?

2.3. Public-public cooperation

30. In the light of the above, do you consider it useful to establish legislative rules at EU level regarding the scope and criteria for public-public cooperation?
31. Would you agree that a concept with certain common criteria for exempted forms of public-public cooperation should be developed? What would in your view be the important elements of such a concept?
32. Or would you prefer specific rules for different forms of cooperation, following the case-law of the ECJ (e.g. in-house and horizontal cooperation)? If so, please explain why and which rules they should be.
33. Should EU rules also cover transfers of competences? Please explain the reasons why.

The evolving nature of the types of co-operation and organisations involved make this an area that is fraught with difficulty. In view of the over-riding need to deliver better value for money further regulatory overheads should be avoided wherever possible. If it is necessary to have an enhanced definition of a “commercial entity” (e.g. to include an in-house department of a public body that “sells” services to other public bodies) then the Procurement Directive is not the appropriate legislative means (see comments on constraining the scope of this Directive solely to procurement.).

2.4. Appropriate tools for aggregation of demand / Joint procurement

34. In general, are you in favour of a stronger aggregation of demand/more joint procurement? What are the benefits and/or drawbacks in your view?
35. Are there in your view obstacles to an efficient aggregation of demand/joint procurement? Do you think that the instruments that these Directives provide for aggregating demand (central purchasing bodies, framework contracts) work well and are sufficient? If not, how should these instruments be modified? What other instruments or provision would be necessary in your view?
36. Do you think that a stronger aggregation of demand/ joint procurement might involve certain risks in terms of restricting competition and hampering access to public contracts by SMEs? If so, how could possible risks be mitigated?
37. Do you think that joint public procurement would suit some specific product areas more than others? If yes, please specify some of these areas and the reasons.
38. Do you see specific problems for cross border joint procurement (e.g. in terms of applicable legislation and review procedures)? Specifically, do you think that your national law would allow a contracting authority to be subjected to a review procedure in another Member State?

There is evidence from the UK of significant waste from duplication of effort but also evidence that public sector bodies which have a choice of procurement services tend to get better value for money, including wider choice, than those which are mandated to use particular procurement services.

Where aggregation can be used to reduce costs it should be used, but only where it is cost effective.

The efficiency and probity of the Public bodies acting as commercial entities to provide procurement services needs to be audited.

2.5. Address concerns relating to contract execution

Questions:

39. Should the public procurement Directives regulate the issue of substantial modifications of a contract while it is still in force? If so, what elements of clarification would you propose?
40. Where a new competitive procedure has to be organised following an amendment of one or more essential conditions would the application of a more flexible procedure be justified? What procedure might this be?

ICT service procurements in particular require considerable flexibility in the execution phase, because the available technology can be subject to rapid change and changes in business processes often follow (rather than lead) such technology changes. There can thus be a need to allow the business solution and the technology deployment to be changed substantially while the contract is in force, particularly where the contract (including the post-implementation support phase) stretches over several years. Allied to this is the need to work to life-cycle costs, anticipating significant, and not always predictable change. There is therefore a need to follow private sector best practice in change

management and dispute avoidance in order to obtain equivalent value for money – e.g. using Alternative Disputes Resolution http://www.eurim.org.uk/activities/psd/ADR_expanded.pdf clauses in procurements.

Questions:

41. Do you think that EU rules on changes in the context of the contract execution would have an added value? If so, what would be the added value of EU-level rules? In particular, should the EU rules make provision for the explicit obligation or right of contracting authorities to change the supplier/ terminate the contract in certain circumstances? If so, in which circumstances? Should the EU also lay down specific procedures on how the new supplier must/ may be chosen?

42. Do you agree that the EU public procurement Directives should require Member States to provide in their national law for a right to cancel contracts that have been awarded in breach of public procurement law?

Please see response to Q39 above. It would be difficult to draw up comprehensive rules to cover such circumstances and it is much better to trust contracting authorities to make the right decisions in their particular circumstances. Unless there is clear evidence that new rules would lead to better value for money at a time of severe economic pressure on public funds these should be avoided.

Question:

43. Do you think that certain aspects of the contract execution – and which aspects - should be regulated at EU level? Please explain.

Unless there is clear evidence that changes at EU level would lead to better value for money at a time of severe economic pressure on public funds these should be avoided.

44. Do you think that contracting authorities should have more possibilities to exert influence on subcontracting by the successful tenderer? If yes, which instruments would you propose?

3. A MORE ACCESSIBLE EUROPEAN PROCUREMENT MARKET

45. Do you think that the current Directives allow economic operators to avail themselves fully of procurement opportunities within the Internal Market? If not: Which provisions do you consider are not properly adapted to the needs of economic operators and why?

There is clear anecdotal evidence that local procurement authorities favour local suppliers. Sometimes they are under obligations to do so as part of economic regeneration objectives. The Procurement Directive will not address this. The tensions between regional policy and the Directives need to be recognised and addressed at the political level.

3.1. Better access for SMEs and Start-ups

46. Do you think that the EU public procurement rules and policy are already sufficiently SME-friendly? Or, alternatively, do you think that certain rules of the Directive should be reviewed or additional measures be introduced to foster SME participation in public procurement? Please explain your choice.

47. Would you be of the opinion that some of the measures set out in the Code of Best Practices should be made compulsory for contracting authorities, such as subdivision into lots (subject to certain caveats)?

48. Do you think that the rules relating to the choice of the bidder entail disproportionate administrative burdens for SMEs? If so, how could these rules be alleviated without jeopardizing guarantees for transparency, non-discrimination and high-quality implementation of contracts?

49. Would you be in favour of a solution which would require submission and verification of evidence only by short-listed candidates/ the winning bidder?

50. Do you think that self-declarations are an appropriate way to alleviate administrative burdens with regard to evidence for selection criteria, or are they not reliable enough to replace certificates? On which issues could self-declarations be useful (particularly facts in the sphere of the undertaking itself) and on which not?

51. Do you agree that excessively strict turnover requirements for proving financial capacity are problematic for SMEs? Should EU legislation set a maximum ratio to ensure the proportionality of selection criteria (for instance: maximum turnover required may not exceed a certain multiple of the

contract value)? Would you propose other instruments to ensure that selection criteria are proportionate to the value and the subject-matter of the contract?

52. What are the advantages and disadvantages of an option for Member States to allow or to require their contracting authorities to oblige the successful tenderer to subcontract a certain share of the main contract to third parties?

The process should not be distorted by favouring SMEs. The way to make it easier for SMEs should be to provide much better information and guidance on how to find out what is available to bid for and how to bid for it. There is also a need to make it much cheaper and easier to bid. Our proposals regarding thresholds are, inter alia, intended to help SMEs gain access to the market.

3.2. Ensuring fair and effective competition

Questions:

53. Do you agree that public procurement can have an important impact on market structures and that procurers should, where possible, seek to adjust their procurement strategies in order to combat anti-competitive market structures?

54. Do you think that European public procurement rules and policy should provide for (optional) instruments to encourage such pro-competitive procurement strategies? If so, which instruments would you suggest?

55. In this context, do you think more specific instruments or initiatives are needed to encourage the participation of bidders from other Member States? If so, please describe them.

56. Do you think the mutual recognition of certificates needs to be improved? Would you be in favour of creating a Europe-wide pre-qualification system?

57. How would you propose to tackle the issue of language barriers? Do you take the view that contracting authorities should be obliged to draw up tender specifications for high-value contracts in a second language or to accept tenders in foreign languages?

58. What instruments could public procurement rules put in place to prevent the development of dominant suppliers? How could contracting authorities be better protected against the power of dominant suppliers?

Do not introduce more regulation. These points should be addressed under competition law not the procurement Directives.

The way that procurements, wholly compliant with the Directive, are generally conducted makes local language or presence a prerequisite. This and the cost of bidding are the main obstacles to a truly open market.

Question:

59. Do you think that stronger safeguards against anti-competitive behaviours in tender procedures should be introduced into EU public procurement rules? If so, which new instruments/provisions would you suggest?

This should be addressed under competition law.

3.3. Procurement in the case of non-existent competition/exclusive rights

Questions:

60. In your view, can the attribution of exclusive rights jeopardise fair competition in procurement markets?

61. If so, what instruments would you suggest in order to mitigate such risks / ensure fair competition? Do you think that the EU procurement rules should allow the award of contracts without procurement procedure on the basis of exclusive rights only on the condition that the exclusive right in question has itself been awarded in a transparent, competitive procedure?

Open inter-operability standards should be mandated with regard to ICT services where these are appropriate. The specification of exclusive proprietary rights is anti-competitive and should be banned although requirements to cover the cost of inter-operation with existing equipment and or training for staff to any new routines are not unreasonable.

4. STRATEGIC USE OF PUBLIC PROCUREMENT IN RESPONSE TO NEW CHALLENGES

4.1. "How to buy" in order to achieve the Europe 2020 objectives

Questions:

62. Do you consider that the rules on technical specifications make sufficient allowance for the introduction of considerations related to other policy objectives?

63. Do you share the view that the possibility of defining technical specifications in terms of performance or functional requirements might enable contracting authorities to achieve their policy needs better than defining them in terms of strict detailed technical requirements? If so, would you advocate making performance or functional requirements mandatory under certain conditions?

64. By way of example, do you think that contracting authorities make sufficient use of the possibilities offered under Article 23 of Directive 2004/18/EC concerning accessibility¹ criteria for persons with disabilities or design for all users? If not, what needs to be done?

65. Do you think that some of the procedures provided under the current Directives² (such as the competitive dialogue, design contests) are particularly suitable for taking into account environmental, social, accessibility and innovation policies?

66. What changes would you suggest to the procedures provided under the current Directives to give the fullest possible consideration to the above policy objectives, whilst safeguarding the respect of the principles of non-discrimination and transparency ensuring a level playing field for European undertakings? Could the use of innovative information and communication technologies specifically help procurers in pursuing Europe 2020 objectives?

67. Do you see cases where a restriction to local or regional suppliers could be justified by legitimate and objective reasons that are not based on purely economic considerations?

68. Do you think that allowing the use of the negotiated procedure with prior publication as a standard procedure could help in taking better account of policy-related considerations, such as environmental, social, innovation, etc.? Or would the risk of discrimination and restricting competition be too high?

The 2020 objectives should be addressed by directly targeted initiatives which include guidance on how to procure within the Directives in order to help achieve value for money in delivering the targeted results – e.g. social inclusion, regional employment or innovation. They should not be directly addressed in the procurement Directives.

Question:

69. What would you suggest as useful examples of technical competence or other selection criteria aimed at fostering the achievement of objectives such as protection of environment, promotion of social inclusion, improving accessibility for disabled people and enhancing innovation?

We do not regard this question as helpful in the context of the procurement Directives. The 2020 objectives should be addressed by directly targeted initiatives which include guidance on how to procure within the Directives in order to help achieve value for money in delivering the objectives and results – e.g. social inclusion, regional employment or innovation

Questions:

70. The criterion of the most economically advantageous tender seems to be best suited for pursuing other policy objectives. Do you think that, in order to take best account of such policy objectives, it would be useful to change the existing rules (for certain types of contracts/ some specific sectors/ in certain circumstances):

70.1.1. to eliminate the criterion of the lowest price only;

70.1.2. to limit the use of the price criterion or the weight which contracting authorities can give to the price;

70.1.3. to introduce a third possibility of award criteria in addition to the lowest price and the economically most advantageous offer? If so, which alternative criterion would you propose that would make it possible to both pursue other policy objectives more effectively and guarantee a level playing field and fair competition between European undertakings?

¹ Accessibility in this context means accessibility by persons with functional limitations (disabilities).

² For the description of the procedures, please refer to section 2.1 above.

71. Do you think that in any event the score attributed to environmental, social or innovative criteria, for example, should be limited to a set maximum, so that the criterion does not become more important than the performance or cost criteria?
72. Do you think that the possibility of including environmental or social criteria in the award phase is understood and used? Should it in your view be better spelt out in the Directive?
73. In your view, should it be mandatory to take life-cycle costs into account when determining the economically most advantageous offer, especially in the case of big projects? In this case, would you consider it necessary/appropriate for the Commission services to develop a methodology for life-cycle costing?

The 2020 objectives should be addressed by directly targeted initiatives which include guidance on how to procure within the Directives in order to help achieve value for money in delivering the objectives and results – e.g. social inclusion, regional employment or innovation.

In response to question 73, we agree that it should be mandatory to take life-cycle costs into consideration but we see no virtue in creating yet another methodology, as opposed to providing guidance on those already in common use in the private sector.

Questions:

74. Contract performance clauses are the most appropriate stage of the procedure at which to include social considerations relating to the employment and labour conditions of the workers involved in the execution of the contract. Do you agree? If not, please suggest what might be the best alternative solution.
75. What kind of contract performance clauses would be particularly appropriate in your view in terms of taking social, environmental and energy efficiency considerations into account?
76. Should certain general contract performance clauses, in particular those relating to employment and labour conditions of the workers involved in the execution of the contract, be already specified at EU level?

Such objectives should be addressed by directly targeted initiatives, not the procurement Directives.

Questions:

77. Do you think that the current EU public procurement framework should provide for specific solutions to deal with the issue of verification of the requirements throughout the supply chain? If so, which solutions would you propose to tackle this issue?
78. How could contracting authorities best be helped to verify the requirements? Would the development of "standardised" conformity assessment schemes and documentation, as well as labels facilitate their work? When adopting such an approach, what can be done to minimise administrative burdens?

The range and variety of application specific solutions is such that this appears wholly impractical.

79. Some stakeholders suggest softening or even dropping the condition that requirements imposed by the contracting authority must be linked to the subject matter of the contract (this could make it possible to require, for instance, that tenderers have a gender-equal employment policy in place or employ a certain quota of specific categories of people, such as jobseekers, persons with disabilities, etc.). Do you agree with this suggestion? In your view, what could be the advantages or disadvantages of loosening or dropping the link with the subject matter?
80. If the link with the subject matter is to be loosened, which corrective mechanisms, if any, should be put in place in order to mitigate the risks of creating discrimination and of considerably restricting competition?
81. Do you believe that SMEs might have problems complying with the various requirements? If so, how should this issue be dealt with in your view?
82. If you believe that the link with the subject matter should be loosened or eliminated, at which of the successive stages of the procurement process should this occur?
- 82.1. Do you consider that, in defining the technical specifications, there is a case for relaxing the requirement that specifications relating to the process and production methods must be linked to the characteristics of the product, in order to encompass elements that are not reflected in the product's characteristics (such as for example - when buying coffee - requesting the supplier to pay the producers a premium to be invested in activities aimed at fostering the socio-economic development of local communities)?

82.2. Do you think that EU public procurement legislation should allow contracting authorities to apply selection criteria based on characteristics of undertakings that are not linked to the subject of the contract (e.g. requiring tenderers to have a gender-equal employment policy in place, or a general policy of employing certain quotas of specific categories of people, such as jobseekers, persons with disabilities, etc.)?

82.3. Do you consider that the link with the subject matter of the contract should be loosened or eliminated at the award stage in order to take other policy considerations into account (e.g. extra points for tenderers who employ jobseekers or persons with disabilities)?

82.3.1. Award criteria other than the lowest price/ the economically most advantageous tender/ criteria not linked to the subject-matter of the contract might separate the application of the EU public procurement rules from that of the State aid rules, in the sense that contracts awarded on the basis of other than economic criteria could entail the award of State aids, potentially problematic under EU State aid rules. Do you share this concern? If so, how should this issue be addressed?

82.4. Do you think that the EU public procurement legislation should allow contracting authorities to impose contract execution clauses that are not strictly linked to the provision of the goods and services in question (e.g. requiring the contractor to put in place child care services for the his employees or requiring them to allocate a certain amount of the remuneration to social projects)?

Such objectives should be addressed by guidance on how to procure within the Directives in order to help achieve value for money when employment targets are included in the requirement. They should not be included in the Procurement Directive.

4.2. "What to buy" in support of Europe 2020 policy objectives

Questions:

83. Do you think that EU level obligations on "what to buy" are a good way to achieve other policy objectives? What would be the main advantages and disadvantages of such an approach? For which specific product or service areas or for which specific policies do you think obligations on "what to buy" would be useful? Please explain your choice. Please give examples of Member State procurement practices that could be replicated at EU level.

84. Do you think that further obligations on "what to buy" at EU level should be enshrined in policy specific legislation (environmental, energy-related, social, accessibility, etc) or be imposed under general EU public procurement legislation instead?

85. Do you think that obligations on "what to buy" should be imposed at national level? Do you consider that such national obligations could lead to a potential fragmentation of the internal market? If so, what would be the most appropriate way to mitigate this risk?

86. Do you think that obligations on what to buy should lay down rather obligations for contracting authorities as regards the level of uptake (e.g. of GPP), the characteristics of the goods/services/works they should purchase or specific criteria to be taken into account as one of a number of elements of the tender?

86.1. What room for manoeuvre should be left to contracting authorities when making purchasing decisions?

86.2. Should mandatory requirements set the minimum level only so the individual contracting authorities could set more ambitious requirements?

87. In your view, what would be the best instrument for dealing with technology development in terms of the most advanced technology (for example, tasking an entity to monitor which technology has developed to the most advanced stage, or requiring contracting authorities to take the most advanced technology into account as one of the award criteria, or any other means)?

88. The introduction of mandatory criteria or mandatory targets on what to buy should not lead to the elimination of competition in procurement markets. How could the aim of not eliminating competition be taken into account when setting those criteria or targets?

89. Do you consider that imposing obligations on "what to buy" would increase the administrative burden, particularly for small businesses? If so, how could this risk be mitigated? What kind of implementation measures and/or guidance should accompany such obligations?

90. If you are not in favour of obligations on "what to buy", would you consider any other instruments (e.g. recommendations or other incentives) to be appropriate?

"What to buy" objectives should be addressed by directly targeted initiatives which include guidance on how to use the procurement Directives to help achieve value for money in delivering the desired results. They should not be addressed within the Directives themselves.

4.3. Innovation

Questions:

91. Do you think there is a need for further promote and stimulate innovation through public procurement? Which incentives/measures would support and speed up the take-up of innovation by public sector bodies?
92. Do you think that the competitive dialogue allows sufficient protection of intellectual property rights and innovative solutions, such as to ensure that the tenderers are not deprived of the benefits from their innovative ideas?
93. Do you think that other procedures would better meet the requirement of strengthening innovation by protecting original solutions? If so, which kind of procedures would be the most appropriate?
94. In your view, is the approach of pre-commercial procurement, which involves contracting authorities procuring R&D services for the development of products that are not yet available on the market, suited to stimulating innovation? Is there a need for further best practice sharing and/or benchmarking of R&D procurement practices used across Member States to facilitate the wider usage of pre-commercial procurement? Might there be any other ways not covered explicitly in the current legal framework in which contracting authorities could request the development of products or services not yet available on the market? Do you see any specific ways that contracting authorities could encourage SMEs and start-ups to participate to pre-commercial procurement?
95. Are other measures needed to foster the innovation capacity of SMEs? If so, what kind of specific measures would you suggest?
96. What kind of performance measures would you suggest to monitor progress and impact of innovative public procurement? What data would be required for this performance measures and how it can be collected without creating an additional burden on contracting authorities and /or economic operators?

The Procurement Directives are the wrong place to be encouraging innovation. But the Directives can and should be used to acquire innovation services within the context of framework contracts and much better guidance is needed on how to do this. Framework contracts, scope and duration, need to be reviewed to address many issues that are present where a Strategic Objective needs to be achieved, but the individual Tactical Stages cannot be described (cf Competitive Dialogue). By revising the concept of Framework Contract it should be possible for the public sector to engage suppliers to perform complementary tasks in a more agile and responsive manner – for example tasks within a whole programme lifecycle of “Innovation” through to “exploitation” and benefits realisation.

4.4. Social services

Questions:

97. Do you consider that the specific features of social services should be taken more fully into account in EU public procurement legislation? If so, how should this be done?
- 97.1. Do you believe that certain aspects concerning the procurement of social services should be regulated to a greater extent at EU level with the aim of further enhancing the quality of these services? In particular:
- 97.1.1. Should the Directives prohibit the criterion of lowest price for the award of contracts / limit the use of the price criterion / limit the weight which contracting authorities can give to the price / introduce a third possibility of award criteria in addition to the lowest price and the economically most advantageous offer?
- 97.1.2. Should the Directives allow the possibility of reserving contracts involving social services to non-profit organisations / should there be other privileges for such organisations in the context of the award of social services contracts?
- 97.1.3. Loosening the award criteria or reserving contracts to certain types of organisations could prejudice the ability of procurement procedures to ensure acquisition of such services "at least cost to the community" and thus carry the risk of the resulting contracts involving State aid. Do you share these concerns?
- 97.2 Do you believe that other aspects of the procurement of social services should be less regulated (for instance through higher thresholds or de minimise type rules for such services)? What would be the justification for such special treatment of social services?

We do not see a case for treating social services differently from other services because the differences are becoming increasingly blurred. What is needed is much better guidance to enable not-for-profit organisations to routinely bid for that which they can do more cheaply and efficiently than the

private sector, especially where the procurement is intended to meet social inclusion and economic regeneration objectives and not just provide a service. Our answers to Questions 30 –33 regarding the increasing difficulty of defining a “commercial entity” also refers.

5. ENSURING SOUND PROCEDURES

5.1. Preventing conflicts of interest

98. Would you be in favour of introducing an EU definition of conflict of interest in public procurement? What activities/situations harbouring a potential risk should be covered (personal relationships, business interests such as shareholdings, incompatibilities with external activities/ etc.)?
99. Do you think that there is a need for safeguards to prevent, identify and resolve conflict-of-interest situations effectively at EU level? If so, which kind of safeguards would you consider useful?

We do not see a case for pan-EU, as opposed to national legislation but we do see a need to review the arrangements for cross-border and pan-EU auditing – whether under the Procurement or Services Directive.

5.2. Fighting favouritism and corruption

100. Do you share the view that procurement markets are exposed to a risk of corruption and favouritism? Do you think EU action in this field is needed or should this be left to Member States alone?
101. In your view, what are the critical risks for integrity at each of the different stages of the public procurement process (definition of the subject-matter, preparation of the tender, selection stage, award stage, performance of the contract)?
102. Which of the identified risks should, in your opinion, be addressed by introducing more specific/additional rules in the EU public procurement Directives, and how (which rules/safeguards)?
103. What additional instruments could be provided by the Directives to tackle organised crime in public procurement? Would you be in favour, for instance, of establishing an ex-ante control on subcontracting?

We do not see a case for pan-EU, as opposed to national legislation but we do see a need to review the arrangements for cross-border and pan-EU auditing – whether under the Procurement or Services Directive.

5.3. Exclusion of "unsound" bidders

Questions:

104. Do you think that Article 45 of Directive 2004/18/EC concerning the exclusion of bidders is a useful instrument to sanction unsound business behaviours? What improvements to this mechanism and/or alternative mechanisms would you propose?
105. How could the cooperation among contracting authorities in obtaining the information on the personal situation of candidates and tenderers be strengthened?
106. Do you think that the issue of "self-cleaning measures" should be expressly addressed in Article 45 or it should be regulated only at national level?
107. Is a reasoned decision to reject a tender or an application an appropriate sanction to improve observance of the principle of equality of treatment?
108. Do you think that in light of the Lisbon Treaty, minimum standards for criminal sanctions should be developed at EU level, in particular circumstances, such as corruption or undeclared conflicts of interest?

At a time of economic pressure we see no case for pan-EU action unless there is clear evidence that it will lead to better value for public money. Any such action should then be piloted with regard to procurement which involves EU funding so that it can be done as part of the funding conditions in advance of any Directive.

5.4. Avoiding unfair advantages

109. Should there be specific rules at EU level to address the issue of advantages of certain tenderers because of their prior association with the design of the project subject of the call for tenders? Which safeguards would you propose?

110. Do you think that the problem of possible advantages of incumbent bidders needs to be addressed at EU level and, if so, how?

This issue does indeed need to be addressed but any solutions should be piloted with one of the EU's own "Framework" procurements before being considered for wider use.

6. ACCESS OF THIRD COUNTRY SUPPLIERS TO THE EU MARKET

111. What are your experiences with and/or your views on the mechanisms set out in Articles 58 and 59 of Directive 2004/17/EC?

111.1. Should these provisions be further improved? If so, how? Could it be appropriate to expand the scope of these provisions beyond the area of utilities procurement?

112. What other mechanisms would you propose to achieve improved symmetry in access to procurement markets?

Questions:

113. Are there any other issues which you think should be addressed in a future reform of the EU public procurement Directives? Which issues are these, what are - in your view - the problems to be addressed and what could possible solutions to these problems look like?

114. Please indicate a ranking of the importance of the various issues raised in this Green Paper and other issues that you consider important. If you had to choose three priority issues to be tackled first, which would you choose? Please explain your choice.

The current economic situation and the pressures faced by all EU governments to **cut overheads not services** mean that obtaining **better value for money** in the delivery of public services must be a core objective of EU public procurement policy for the foreseeable future.

The use of public procurement to **expedite economic recovery** is the other core priority, but this will require initiatives that make **efficient use of public funds**.

The third priority is to **control the cost of procurement** and of bidding so as to make it easier for small firms and others to offer **greater choice and innovative solutions**.

We do not believe that changes to the procurement Directives will expedite the removal of the barriers to cross-border purchasing which are primarily cultural and linguistic and require targeted action accordingly.

We believe that other objectives (e.g. environmental) should be the subject of specific initiatives with procurement subject to the Directives in order to ensure value for money.