Tracker Intelligence Guide

Business in Britain

What the new EU Directives will mean for your business –

A guide for businesses which want to work (or are working) with the public sector
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Editor’s foreword

In advance of the publication of the new Public Procurement Directive, as well as new Utilities Procurement and Concession Directives, it is important that the businesses that supply to the public sector understand the implications of the myriad proposed changes affecting public sector procurement.

The new Public Procurement Directive sees significant change in areas such as services to the person, the removal of Part B services, significant changes to timescales and thresholds, the introduction of two new procurement procedures and changes to the selection and award criteria, to name but a few. A provisional agreement has been reached on the revised EU Procurement Directives between the EU Council, Commission and Parliament.

The new Directives will significantly impact on the processes, procedures and methodologies of buyers and suppliers and this guidance aims to explain some of the potential key elements that private sector organisations which provide goods and services to the public sector need to be aware of.

We hope you find this guide useful.

Nicola Smith, Editor
The new EU Procurement Directives

Senior Procurement Advice & Support Service (PASS) Consultant Eddie Regan explains: “2014 will be a challenging year for buyers and suppliers in the public sector and utilities markets, with the introduction of new Procurement Directives and a dedicated Concessions Directive.

“Organisations on both sides will need to give consideration to how they request and supply information, not least because of the new requirements on social and environmental issues, labour laws and conflicts of interest.

“The suggestion that the new Directives will be implemented, as regulations, in England, Wales and Northern Ireland by late summer or early autumn next year means that everyone will need to understand, very quickly, the full implications for their organisation or they may find themselves non-compliant very quickly.”

Eddie Regan is the Principal Procurement Adviser with PASS (the Procurement Advice and Support Service) and, along with other PASS consultants, has been lecturing on the new EU Public Procurement Directives across the UK. For further information, please visit www.passprocurement.com/events/
Background

The European Commission is preparing to bring in significant changes to EU procurement rules.

EU Directives lay down certain end results that must be achieved in every Member State. Businesses which work with the public sector as providers of goods, services or works will be impacted by the new EU procurement Directives, which make a number of changes to the way public sector procurement operates. The Directives seek to do this through the clarification and simplification of certain rules and procedures as well as the introduction of new systems.

Three new Directives will soon be brought into being, one for public sector procurement, one for utilities sector procurement supplies and a third for the procurement of concession contracts.

Senior Procurement Advice and Support Service (PASS) Consultant Eddie Regan comments: “Public procurement continually changes whether through EU Directives, UK or Scottish regulations, sectoral guidance, or government policy. Whether someone is a novice in procurement or has 30 years’ experience they can never say ‘I know everything’, such is the speed of change across the market. Continual learning is essential for everyone involved in public procurement, whether based on regulations, specific procedures, or complex legal judgments.”

Since 1971 various new EU Directives have been brought in. The most recent substantial change was when the EU Procurement Directive 2004/18/EC was enacted.

While the new EU Directives will set the agenda for public procurement, their interpretation into UK and Scottish law will be decided at national level.

The EU Commission website explains: “EU Directives lay down certain end results that must be achieved in every Member State. National authorities have to adapt their laws to meet these goals,
but are free to decide how to do so. Directives may concern one or more Member States, or all of them.

“Each Directive specifies the date by which the national laws must be adapted – giving national authorities the room for manoeuvre within the deadlines necessary to take account of differing national situations.

“Directives are used to bring different national laws into line with each other, and are particularly common in matters affecting the operation of the single market (e.g. product safety standards).”

Undoubtedly procurement processes and strategies will change significantly as a result of the new Directive.

The two ‘classic’ and ‘utilities’ Directives on public procurement are part of a package of four draft laws tabled by the European Commission in December 2011 in the field of procurement. A provisional agreement on ‘concessions’, the third Directive in the package, was also reached. A fourth proposal, for a regulation on ‘third market access’, is being dealt with by the EU Commission’s International Trade Committee.

The European Parliament’s rapporteur, Marc Tarabella, said: "The criterion of the most economically advantageous tender makes quality the central issue once again and puts an end to the dictatorship of the lowest price."

The trilogue negotiations on the revised EU Procurement Directives concluded in Brussels, with a provisional agreement between the EU Council, Commission and Parliament. This followed 18 months of intensive scrutiny and debate on the European Commission’s draft proposals, and marks a major milestone in the campaign to modernise the procurement rules, which began with consultations in 2010.

A package of three Procurement Directives has been provisionally agreed. This comprises revised Directives affecting the public sector and the utilities sector and a new Directive containing procedural rules for the award of concessions contracts.
The new rules are not yet live, but contracting authorities and entities will be starting to prepare the ground to ensure a smooth transition.

The new EU Procurement Directives will be directly applicable to central government, its agencies, non departmental public bodies (NDPBs), wider public sector, local authorities and NHS bodies.

For suppliers, the process of bidding for public contracts should be quicker, less costly, and less bureaucratic and the new Directives should also enable suppliers to compete more effectively.
Key changes


Public sector suppliers need to be aware of key points including:

- **A much simpler process for assessing bidder’s credentials – increased use of supplier self-declarations means more responsibility for suppliers but less paperwork as only the winning bidder should have to submit various certificates/documents to prove their status.**

  **Benefits:** Saves time for both buyers and suppliers.

  **Possible pitfalls:** Suppliers may fail to fill in forms correctly; public sector could be accused of lack of transparency.

- **More freedom to negotiate – negotiated procedure to be less constrained**

  **Benefits:** Negotiated procedure available for any requirements that go beyond ‘off the shelf’ purchasing which will give bidders a better opportunity to negotiate for contracts.

  **Possible pitfalls:** Risk of renegotiating the requirement and incurring a breach of Material Contract Variation.

- **Penalty for previous poor performance – where a supplier has been guilty of poor performance under a previous contract, buyers are now explicitly permitted to exclude them from new contracts.**

  **Benefits:** Good suppliers will be given a better chance of winning contracts, public sector better protected.

  **Possible pitfalls:** Potential for more legal challenges
Reduced red tape on suppliers’ response time – shorter deadlines: The statutory minimum time limits by which suppliers have to respond to advertised procurements and submit tender documents have been reduced.

**Benefits:** Quicker turnaround for public sector, saving money and time.

**Possible pitfalls:** Companies may struggle to meet deadlines.

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**Important changes**

Increased use of Mutuals/Social Enterprises – buyers will now be able to reserve the award of certain services to mutuals/social enterprises for a limited time without having to advertise them on official channels; only service contracts exceeding EUR 750,000 will have to be advertised.

**Benefits:** Will give mutuals a chance to win business.

**Possible pitfalls:** Risk of anti-competitive practices.

Introduction of a turnover cap – buyers will not be able to set company minimum turnover requirements at more than twice the contract value.

**Benefits:** This will help to encourage greater SME participation.

**Possible pitfalls:** Special attention will need to be paid to ‘sensitive’ or ‘critical’ contracts.
Changes to Supplier-Buyer relationships and collaboration

Introduction of ‘Innovation Partnership’ – this new award procedure will enable suppliers to bid to enter into a partnership with an authority to develop a new product or service where a solution cannot be found in the current market.

**Benefits:** Greater buyer-supplier collaboration. This procedure will allow for the development of innovative solutions in a long-term partnership between a public body and suppliers.

**Possible pitfalls:** Authorities misusing the process to procure currently available products/services.

Preliminary market consultation encouraged – new rules will enable preliminary market consultation between buyers and suppliers.

**Benefits:** Should help to facilitate better specifications, reduce procurement times and improve buyer-supplier relationships.

**Possible pitfalls:** Risk to the independence of the final specification.

Legal clarity for buyers – buyers will be able to take relevant bidder skills into account at the award stage where appropriate (for example: consultants, lawyers, architects).

**Benefits:** Confidence in the experience of individuals.

**Possible pitfalls:** Danger that irrelevant qualifications are requested.
Changes/updates to current rules and procedures

Distinction between Part A and Part B Services (including health and social services) removed – a new light-touch regime introduced. OJEU advertising will apply but with a much higher threshold of EUR 750,000. Where a contract is above this threshold, Member States will need to publish a contract notice.

Benefits: Separation of services for the person from current procurement regime.

Possible pitfalls: Incorrect interpretation of requirements by authorities.

There will be no changes to thresholds

- Review of thresholds – Directive includes a binding commitment to review the thresholds, taking into account the current economic market, within the 30 months of the Directive’s transposition.

Current thresholds levels are:

- EUR 5,000,000 *(GBP 4,186,650) for public works (unchanged)
- EUR 130,000 *(GBP 108,853) for central government suppliers and services (unchanged)
- EUR 200,000 *(GBP 167,466) for sub-central government (SCG) supplies and services. This includes local government, fire, police, education.

*Conversion rate correct as of 27 November 2013 via www.owanda.com
Digital procurement

Public authorities freed from detailed procurement submissions information on a public authority’s procurement activity statistics will be collected directly by the Commission from the online system.

Benefits: Save time for public authorities

Possible pitfalls: Effect on transparency

Launch of ‘E-Certis’ – ‘E-Certis’ will be a central, online point where suppliers can find out the type of documents that may be required to bid for work in any EU country prior to bidding.

Benefits: Big benefit for suppliers looking to work abroad in EU Member States.

eProcurement to become mandatory – electronic communication/eProcurement will become mandatory 30 months after the Directive’s adoption.

Benefits: Transition to eProcurement across Member States mandated in line with UK ambitions.

Electronic marketplaces validated – the use of electronic marketplaces for public procurement to be expressly permitted, removing any doubt over their use.

Benefits: Clarity over use of eProcurement
Social and environmental rules

Clarification of social and environmental rules – improvement of rules on social and environmental aspects of procurement, making it clear that:

- social aspects can now be taken into account where relevant
- buyers can request certifications/labels/equivalent evidence of social or environmental aspects

Refer to factors directly related to the production process

Benefits: Addresses key UK initiatives on social, employment and environmental inclusion.
Benefits of working with the public sector

Working with the public sector can be hugely beneficial for suppliers. Benefits include:

- The public sector spends over £230 billion a year and is always looking for new suppliers.
- Public sector spending is effectively recession-proof, providing the private sector with a state of certainty within contract employment.
- A public sector organisation will not go bust owing suppliers money, so payment is protected and guaranteed.
- Public sector organisations have to pay accounts within 30 days (or any other agreed credit period) of receiving a valid bill or invoice.
- There is almost certainly a market for any type of business in within the public sector, whether by contracting directly or by becoming a subcontractor.
- All public sector procurement contracts within the European Community are covered by an EC treaty, no matter what their value. The treaty enforces principles to prevent discrimination against firms from any Member State, removing restrictions on the free movement of goods and services.
- The public sector employs more than 25% of the UK workforce and includes:
  - central civil government departments and agencies
  - the NHS and its local trusts
  - the Ministry of Defence
  - Northern Ireland Assembly, National Assembly for Wales and the Scottish Government
  - local authorities
  - universities and colleges
About Tracker

Tracker is the market leader in business intelligence and procurement information solutions. Drawing on our dedicated in-house research team and experienced consultants, we believe in working in partnership with our clients to provide commercially relevant and analytical reportage to drive solid business growth.

This guide has been developed to help suppliers negotiate legal complexities and provide clear, business-related guidance and direction on the upcoming EU Procurement Directives and how the new legislation will impact on the private sector marketplace in the UK and in the EU.

Tracker is the only business intelligence tool that can provide you with public sector contracts and private sector leads, coupled with the market and competitor insights needed to keep one step ahead of the market.

About the author

Nicola Smith is Communications and Social Media Manager for Tracker Intelligence. She is an experienced journalist with extensive specialist knowledge of public sector procurement and UK business news.

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