The modernisation of EU public procurement policy

This paper has been prepared and produced as a supporting paper for the UK Government in their discussions with the European Commission which will take place in early 2012.

The most important issues for CIPS as the leading professional institute for the purchasing and supply profession, are identified below and the data has been gathered from our public sector members who are practitioners and leaders in public sector procurement.

1) Simplification of the rules
   That the rules should be simplified where possible and that any changes made to the current legislation should be aimed at:
   a) Making the operating rules more effective for purchasers and public sector contracts more attractive for economic operators.
   b) Opening up more contracts to SMEs who find the process difficult to understand, onerous and costly.
   c) Encouraging innovation and change in complex procurements where standard processes can be inflexible and counterproductive.
   d) Allowing procurement teams to negotiate more freely both pre and post tender. The difference between “clarification” and “negotiation” is artificial and open to wide interpretation.

2) Procedures
   a) That the procedures available to public sector purchasers should be extended and improved including:
      a) That the negotiated procedure with a call for competition should be made available to public sector purchasers in the same way that it is available to purchasers within the utility sector. The use of this procedure facilitates better value, lower cost procurement for purchasers and reduces the costs of bidding for economic operators. Our professional view is that once a decision is made to contract for a specific requirement the professional skills and procedures required to purchase effectively are the same in both sectors and there are no professional reasons for limiting the use of the negotiated procedure by the public sector.
      b) That the facility to operate a system of qualification of economic operators as currently available to purchasers within the utility sector under Article 53 of the Utilities Directive 2004/17/EC should be made available to the public sector. This procedure has been used successfully by the utility sector for many years and its use by the public sector would reduce their costs, shorten contracting timescales to the benefit of both purchasers and suppliers in the current economic climate. More significantly it would reduce the costs of
qualifying by economic operators making public sector contracts more attractive to small to medium enterprises (SME’s) in particular.

c) We feel promoting the use of an enhanced DPS procedure would be too complex, difficult to manage and would be difficult to prove openness and fairness. The DPS procedure is overly complex and not well understood. It should therefore be withdrawn or replaced by a simpler procedure. We agree that the use of electronic procurement should be encouraged to reduce timescales and costs for purchasers and economic operators but guidance should be given as to the types of purchases this method best suits as it is not a “one size fits all” option. We would also encourage a speedy implementation of the one-stop-repository electronic database for PPQs that has been suggested.

d) That the thresholds for the public sector should be increased to take account of inflation since they were first introduced and that the public sector thresholds should be brought into line with the utility sector thresholds.

e) That in certain circumstances purchasers should be able to take qualification criteria into account at the award stage. This is necessary when the bids received and the scores achieved against the award criteria are similar and when the particular skills, knowledge, experience, past performance/track record or resources of a particular bidder are demonstrably advantageous for a particular contract.

f) Allow buyers to negotiate more freely with suppliers within a restricted procedure, as with competitive dialogue, both pre and post tender. It is currently difficult to determine what is ‘clarification’ and what is ‘negotiation’ under the current system.

g) Allowing public sector buyers to set realistic timescales that are relevant to each procurement and not be bound by forced fixed timings.

h) A process which allows suppliers to prequalify for a period and then be invited to tender as and when required, adding to the list of prequalifying companies throughout that period would make public sector contracts much more appealing and financially viable for companies to bid for. This would need to be simpler than frameworks which can lock out new entrants.

i) The procedures are currently too restrictive and process driven. They do not allow contracting authorities to obtain the best possible procurement outcomes as they are cumbersome and costly to apply. A simple one stage process, based on the key principles, is more appropriate. The revised procedures should also permit the consideration of experience at award stage.

j) The thresholds for the application of the public sector directive (2004/18/EC) for goods and services are far too low and need raising to at least the same level as that specified in the Utilities Directive.

3) **Public to Public contracts.**

   a) That the rules should allow public sector bodies (including the third sector) to work together to provide services for the benefit of the participating authorities. Teckal and other case law facilitate this in certain circumstances but in the current economic climate when public authorities within all member states are seeking ways to reduce costs and increase efficiencies we consider that the rules should make it clear that this type of co-operation is outside the scope of the procurement directives.

4) **Environmental and Social Objectives**

3rd January 2012
a) That the rules relating to the use of the procurement directives to achieve environmental and social objectives should not be changed although further guidance on this issue would be welcomed. Our views are that:

b) The possible use of the procurement directives as a means of achieving socio-economic/environmental objectives is primarily a decision to be made by the member states and not purchasers. There should still be a requirement that selection and award criteria should relate to the subject matter of the contract so that purchasers can still demonstrate contract award on the basis of best value in a transparent and non-discriminatory way.

c) The facility for purchasers to include within the specification nondiscriminatory environmental and social requirements is already available. Guidance on how this facility can be used to meet other government objectives may be required but our view is that having included the requirements in the specification the requirement to retain the link to contract performance when assessing economic operators should be retained.

d) That the rules relating to procurements for social services should be amended to take account of the special service and personal issues involved in the letting of these contracts. We are aware that these are “B” services but the need to comply with the Treaty Principles results in time delays and unnecessary costs particularly for lower value contracts. For this reason we are particularly concerned that the issues relating to cross border interest in social service contracts (particularly lower value contracts) should be clarified.

2) Award Criteria
   a) The award criteria (EMAT and lowest price) should be subject to a review. All contracts are not equal and these criteria give the highest consideration to the financial element rather than taking into account all the costs/benefits that relate to the life cycle of the product/service. EMAT and lowest price are suitable only for purchases with low/medium value and a competitive supply market.

3) SME’S
   a) A liberalisation from the confines of over detailed legislation would encourage procurement practitioners to disaggregate requirements, either into separate procurements or make great use of lots. This would reduce the administrative burdens on SME’s and make the task of competing for government contracts less resource intensive and bureaucratic.
   b) PQQ process simplified so that SMEs (however defined) can operate on a much less complex set of rules meeting a set of minimum requirements.

4) Bodies governed by public law
   a) The current approach to defining public procuring bodies is reasonable, however, the concept of a “body governed by public law” must be clarified and updated in the light of ECJ case-law and the aspirations of Member States to allow their public bodies to co-operate, collaborate and develop employee led mutuals.

5) Remedies Regulations
a) Although we understand that this modernization does not address the Remedies Directive, it must be said that our feedback shows them to be universally disliked. The Regulations have been called a “chancers charter” for suppliers and have made the de-briefing process so burdensome that it can several days to de-brief just a small number of tenderers.

There is a need to further promote and stimulate economic/social innovation through public procurement and this can only be achieved by lessening the reliance on process and procedure and trusting the procurement teams to use their skill and capability to get the best result for their contracting authority. New and innovative procurement models must be designed and implemented especially for the provision of services to communities and the new proposed directives must contain the flexibility to allow models such as commissioning and others to allow procurement professionals to provide innovative solutions whilst ensuring efficiency and effectiveness.

CIPS are committed in their support of the UK Government to reform and modernize the European Procurement Directives. Now that the new proposed draft Directives have been issued by the European Commission we will continue to seek the support and feedback of our members to comment on the new proposals.