

Reform of EU public procurement rules – what could it mean for PPP?

At the end of January 2011 the European Commission launched a consultation on possible future changes to the European public procurement rules in the form of a Green Paper ("Towards a more efficient European Procurement Market" COM(2011) 15/4). (http://ec.europa.eu/internal_market/consultations/2011/public_procurement_en.htm)

It is a wide-ranging document with 114 questions for consultation, reflecting the growing interest in using public procurement as a tool for implementing other policies such as promotion of innovation, support for SMEs and underpinning European social and environmental policies.

The consultation does not deal with concessions, which have been the subject of earlier separate consultation exercises and impact assessment and, as I wrote in last month's Talking Point, a long awaited legislative initiative on concessions is expected before the summer.

PPP are, of course, a form of complex and often high value public procurement, so any changes to the public procurement Directives will also apply to them.

The questions with the most potential to impact directly on PPP include:

- Do you think that the distinction between A and B services should be reviewed? (Q4)
- 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? (Q17)
- Would you be in favour of allowing more negotiation in public procurement procedures and/or generalising the use of the negotiated procedure with prior publication? (Q19)
- 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? (Q39)
- 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? (Q40)
- 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? (Q41)
- 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? (Q42)
- Do you think that contracting authorities should have more possibilities to exert influence on sub-contracting by the successful tenderer? If yes, which instruments would you propose? (Q44)
- 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? (Q73)

And the consultation also contains an open ended opportunity (Q113) to comment on any other issues which might be addressed in a future reform of the EU public procurement

Directives but which are not covered by the consultation questions. So it may be used to return to issues such as:

- The need for greater transparency regarding the use of the negotiated procedure without prior publication to minimise its inappropriate use
- Reducing the diversity within national legal systems in the application of the Remedies Directive.

What is likely to happen next?

The consultation is open until 18 April 2011 and then it can be expected that the Commission will produce a summary of the responses to the consultation.

Since many of the issues are likely to attract widely differing views from respondents, summarising the results of the consultation is likely to be both far from easy and protracted. Following the consultation on PPP and concessions from April to July 2004, which included 22 questions, the summary of the results did not appear until May 2005. It would therefore be surprising, given the wide scope of this consultation, if such a summary appeared before 2012.

On the basis of the contributions received the Commission will then, where appropriate, submit concrete follow-up initiatives, which may be legislative or non-legislative.

The legislative process is also likely to be keenly contested both in the Council and the European Parliament and thus will probably be lengthy. The current public procurement Directives (Directives 2004/17 and 2004/18) were adopted on 31 March 2004, but originated in a Commission proposal in May 2000.

Nothing is, therefore, likely to happen soon, but the debate about the future of the public procurement Directives goes to the heart of what the Internal Market is and should be about and how the fundamental conflicts between different EU policies will be resolved.

So no-one with an interest in these matters can afford to stay on the sidelines – including, of course, this web site, where all are invited to submit comment for debate.

Michael Burnett – March 2011