Commissioning Under the New Procurement Directives: Opportunity or threat for social enterprises?

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The new Procurement Directives

• 3 new EU Directives:
  – Public Sector Directive
  – Utilities Directive
  – Concessions Directive

• UK has 2 years to make and bring into force national legislation (Regulations) implementing the new Directives – important aspects of how the new Directives will apply in the UK are not yet known

• UK Government intends to “fast track” implementation so that UK legislation in force by end 2014

• New national legislation will not have retrospective effect
Public sector procurement rules: Scope of application

• Applies to procurement by “contracting authorities”:
  – State bodies at all levels (national, local, etc.); and
  – ‘bodies governed by public law’, e.g. universities, charities, etc., that depend on the State for the majority of their funds

• The concept of ‘below threshold’ contracts will remain

• But it is important to understand that the Directives cannot override the principles and rules developed by the European Court of Justice (ECJ) based on the free movement provisions of the EU Treaties
What the new Directives seek to do; and what they actually do

- Provide “clarifications” and codify some of the principles developed by the ECJ in its case-law, including in relation to concession contracts
- Abolish the distinction between Part A and Part B contracts – seen as outdated
- Increase flexibility for contracting authorities (“CAs”)
- Facilitate “externalisations” of public services to employee owned companies
- Make more public sector contracts accessible to SMEs

BUT new Directives will also make the procurement rules more extensive and more complex than ever
Key reforms relevant to social enterprises (1)

- Abolition of Part A/Part B services distinction, but introduction of a new ‘light touch’ regime for social, clinical and cultural services
- Permit “first award” reservation of contracts to employee owned companies when health, social and educational services are first “externalised”
- Codification of rules setting out when co-operation between CAs will not engage the procurement rules (but still no clarity on the extent to which intra-NHS contracts can be regarded as ‘in house’ contracts)
- Preliminary market consultations expressly permitted
Key reforms relevant to social enterprises (2)

• “Competitive procedure with negotiation” permissible in much wider range of situations (including where ‘off the shelf’ solutions not available)

• Simplifications:
  – Prior Information Notices inviting expressions of interest
  – Bidders’ “self-declarations” by bidders; only winner must provide evidence

• Concessions Directive will not apply to concessions with an estimated value of less than €5million – *will this succeed in providing a ‘safe harbour’ for concessions falling below that value threshold?*

• Contracts can be reserved for “sheltered workshops”
Key reforms relevant to social enterprises (3)

- Helping SMEs access public contracts:
  - Cap on minimum capital requirements
  - Encouraging CAs to divide contracts into lots

- Award criteria:
  - Life-cycle costing can be taken into account (including the costs of environmental and other externalities)
  - Can include requirements regarding the way that the product/service has been produced
  - Can take account of the experience of employees used to provide the service
Replacement of Part A/Part B services distinction with ‘light touch’ regime (1)

The current rules:

- ‘Above threshold’ Part A services fully subject to the procurement rules – must be procured in accordance with one of the procedures laid down in the current Public Sector Directive
- Other services (i.e. Part B services) are essentially outside the current Public Sector Directive, save that non-discriminatory technical specifications must be used
- But ECJ has stated that the EU Treaties require Part B contracts to be opened up to competition where suppliers in other Member States may be interested in bidding
Replacement of Part A/Part B services distinction with ‘light touch’ regime (2)

The new rules:

- All ‘above threshold’ service contracts are fully subject to the procurement rules (so “Part B services” are no more)
- But some services that are currently Part B services will fall within a new ‘light touch’ regime:
  - Social, clinical, cultural and education services
  - Higher threshold of €750,000
  - Contract will need to be advertised in OJEU
  - Member States free to decide the procedure for awarding the contract, subject to transparency and equal treatment
- *If* ECJ respects the €750,000 threshold, then services below the threshold can be awarded without a competition
“First award” reservation of contracts when services are “externalised” (1)

• Permit “first award” reservation of contracts to employee owned companies when health, social and cultural services are first “externalised”

• Contract can be reserved for bidders that:
  – are employee-owned mutuals or run on participatory principles,
  – have a public service mission linked to the service in question, and
  – either reinvest their profits or distribute to participants

• Maximum non-renewable duration of 3 years
“First award” reservation of contracts when services are “externalised” (2)

• Remains to be seen how useful this exemption will be in practice
  – Not required for ‘light touch’ contracts < €750k
  – 3 years is not a generous period of time for the new mutual to establish itself
  – Does not preclude the need for a procurement procedure
  – Will often be no other providers interested in bidding anyway

• The new Directive does not consider how State aid rules to be complied with if there is, in reality, only ever going to be one bidder
Helping SMEs and social enterprises access public sector contracts

• Cap on minimum capital requirements
  – High minimum turnover requirements often eliminate SMEs at the PQQ stage
  – CAs will be prohibited from specifying a turnover requirement that is more than twice the value of the contract (though CAs can override this limit where they have good reasons for doing so)

• Encouraging CAs to divide contracts into lots
  – Must provide explanations if contract not divided
  – Division may not always be to the advantage of social enterprises
Award criteria: Employees’ qualifications and experience

- Award criteria can take account of the qualifications and experience of employees used to provide the service, where this could have a significant impact on the level of performance
  - This could be of assistance to employee-led spin-outs bidding for contracts to carry out “externalised” public services
  - But arguably this “reform” is simply a codification of the current legal position in order to remove certain misconceptions that had arisen
Social and environmental specifications and award criteria

- CA can include requirements regarding the way that the product/service has been produced (e.g. using apprentices), even if it does not impact on the quality of the product
- CA can also specify that the product/service must qualify for an environmental or social “label” awarded by an independent body based on transparent non-discriminatory criteria
- But CA cannot specify requirements/labels that are unrelated to the production of the goods/service being procured (e.g. a requirement that contractors pay all the ‘living wage’ to all their UK staff)
- Arguably this is a codification rather than a reform
Award criteria: Life-cycle costing (1)

• Assessment of the financial benefit of each bid: the distinction between (i) ‘price’ (which can then be weighed together with quality criteria including social/environmental criteria), and (ii) ‘life-cycle cost’

• CAs encouraged to use life-cycle costing to assess the value for money provided by each bid
  – E.g. a cloud-based software solution could be higher price than a non-cloud solution, but could offer lower costs over time

• May be possible to take account of savings that a social enterprise’s bid will deliver to the CA over time – but the savings will need to be quantifiable, and the award criteria will need to be designed with care
Award criteria: Life-cycle costing (2)

- Life-cycle costing can include environmental and other externalities (e.g. carbon footprint)
- But this can be done only if the monetary value of those externalities can be determined
  - If no common EU method exists for the calculation of life-cycle costs, then such methods can be established at a national or local level, but must be general (i.e. not designed for a specific procurement only) and objective, and it must be possible for bidders to provide the necessary data with reasonable effort
- Seems doubtful that many CAs will wish to extend life-cycle costing to environmental externalities
The Concessions Directive

• What is a “service concession”? – The enterprise carrying out the service receives a substantial part of its remuneration from operating the service, and therefore bears commercial risk

• Directive does not apply to concessions with estimated value of less than €5million

• Concessions should be for no longer than 5 years unless longer duration can be justified by the upfront investment costs

• Award criteria must be objective and advertised in advance in descending order of preference

• But will the ECJ insist on supplementing these requirements?
So what difference will the new Directives make for social enterprises?

- Greater flexibility for CAs in deciding how to go about procuring
- But even where the ‘competitive procedure with negotiation’ is used, it may already be too late for CAs to take account of the full value which a social enterprise’s bid can provide (both to the CA itself and more widely)
- CAs and social enterprises need to take full advantage of ‘preliminary market consultations’ to ensure that criteria are designed in a way that takes full advantage of the new Directives’ possibilities
Thank you for listening

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