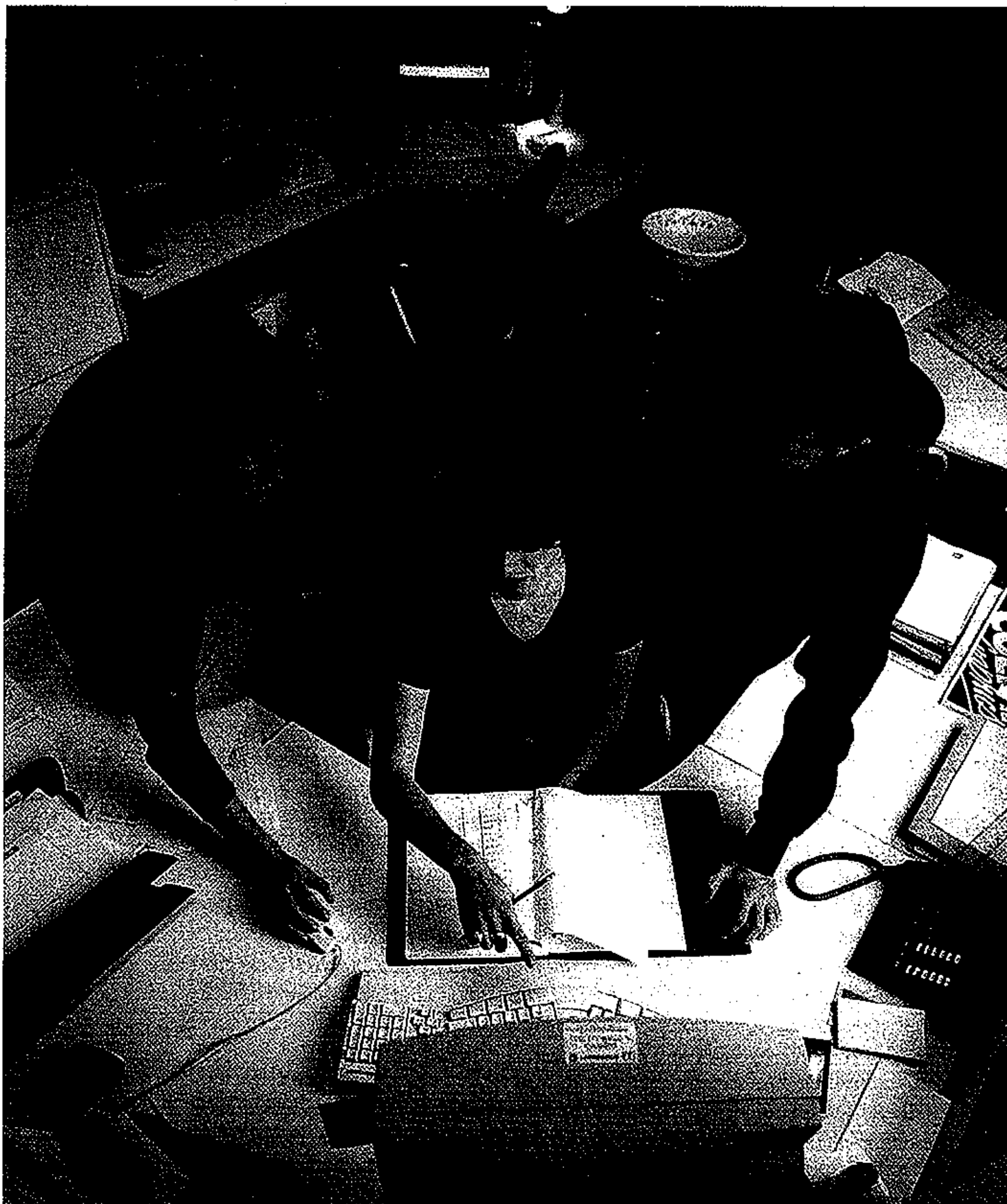
Feature

A piece of cake?

Under European rules, businesses that contract with the public sector have to get to grips with what are often complicated procedures. Soon, though, that may change. **Susan Singleton** looks at forthcoming changes to EU public procurement.



In February, the European Union's Council of Ministers and the European Parliament adopted a legislative package simplifying and modernising the Directives that outline EU law on public procurement.

A study published by the European Commission, also in February, showed that public procurement accounts for over 16 per cent of the Union's GDP and that the existing public procurement Directives have increased cross-border competition and reduced by around 30 per cent the prices paid by public authorities for goods and services. The study also provided evidence that the implementation of the measures in the new legislative package will deliver further gains.

Many company secretaries, then, have to grapple with the EU public procurement rules. The rules require that high value public sector contracts be advertised throughout the EU in accordance with a set of fixed and often complicated procedures, the aim of which is to ensure that tenders are awarded fairly and without national bias. The rules are cumbersome, and those working in the public sector will often have very detailed internal instructions or even handbooks on how to operate tenders according to the rules.

The rules may cover only public contracts, but this does not mean they stand in isolation. Even if the rules are followed the parties to the agreements must still comply with the EU and UK competition rules as well: the two sets of rules run side by side. Sometimes, too, the EU takes countries to the European Court for failing to abide by the public

procurement rules. There have, for example, been concerns that the UK Government's position of allowing five-year framework agreements without any retendering until the five years are up may breach the regime. In practice, of course, having to go through retendering in order to add a company to a list of preferred suppliers more often than every five years or so is very cumbersome and expensive.

Anyone who finds the rules have been breached to his or her detriment can sue for damages or even obtain a court order to restrain a contract award from going ahead. Clients are, though, often reluctant to litigate because they fear they would then unofficially be blacklisted by a would-be customer when next they placed a tender, even if they had supplied that customer in the past. Yet despite this reluctance, the right to sue does exist and is sometimes exercised.

'There has been a small but noticeable increase in the trickle of disputes that reach the litigation stage' says Jennifer Skilbeck, a barrister from Monckton Chambers who practises in the area of public procurement law. 'Contractors are less squeamish about suing, perhaps because the requirement to put work out to tender has reduced the importance of maintaining long-term relationships between the parties. The new obligations placed on public authorities by the Directive will almost certainly add to the increasing tendency to litigate.'

The changes

Simplification, clarification, modernisation

The current public procurement rules are set out in five EU Directives, which cover contracts for works, services, supplies and utilities. There is also a 'remedies' Directive.

The new legislative package has two main objectives. The first is to simplify and clarify the existing Directives. The second is to adapt them to modern administrative needs, for example by facilitating electronic procurement and, for complex contracts, by introducing more scope for dialogue between contracting authorities and tenderers in order to determine contract conditions. The amended Directives will be brought into force 21 months from publication in the *EU Official Journal*, which is likely to mean implementation in or around December 2005 (at the time of writing, the final version of the Directives had not yet been published).

The three current Directives that cover supplies, services and works are to be consolidated and recast in a single text, which should make it possible to reduce the number of articles by nearly a half. This will be extremely helpful: the current legislation is very lengthy, and for lawyers advising companies in this field the first stumbling block always comes in establishing which Directive (if any) applies. Lots of contracts mix goods and services, and the rules are not identical in each one.

The new provisions are presented in a more user-friendly manner, says the Commission, set out in such a way as to reflect the normal order of an award procedure. The new structure and the new provisions are designed to guide users through all the stages of the award procedure. Until the final results are implemented into English law, however, how accurate this claim actually is will be difficult to assess.

The thresholds which determine the application of the new instruments are also to be simplified, and will be expressed in euros instead of special drawing rights. At present, there is a conversion rate to national currencies set periodically which has to be consulted when the limits are considered. The current thresholds came into force on 1 January 2004, and are likely to apply for the next two years, until the new regime comes into force.

With the objective of enhancing transparency in the award process and of combating corruption and organised crime, the legislative package also includes a number of measures designed to make for greater clarity in the criteria that determine the award of the contract and the selection of tenderers, says the Commission.

For complex contracts, new procurement arrangements would allow for a 'dialogue' between awarding authorities and tenderers to determine the contract conditions. The new procedure would offer guarantees that the principles of transparency and equal treatment would not be adversely affected by this dialogue. Until now, post-tender negotiation has been strictly forbidden, on the grounds that nothing must take place that gives one tenderer an advantage over another.

In order to enable administrations to benefit from economies of scale flowing from a long-term procurement policy and to guarantee security of supply and the necessary flexibility for recurring purchases, the new proposals are more flexible in the approach to standard-form contracts.

Public sector buyers would enjoy more flexibility in defining the purpose of the contract: under the new provisions public sector purchasers could specify their requirements in terms of performance and not only in terms of standards.

Negotiated procedure and competitive dialogue

The existing Directives provide for three different procedures for awarding contracts:

- restricted procedure, whereby only invited suppliers may submit tenders;
- open procedure, whereby all suppliers interested in the contract can subsequently be invited to submit tenders; and
- negotiated procedure, whereby purchasing bodies may negotiate the terms of a contract with one or more suppliers of their choice (this can only be used in special circumstances, but in certain cases may be used without first publishing a contract notice).

To these three, the new Directive includes a new procedure – competitive dialogue. Says Jennifer Skilbeck: 'In the negotiations, the UK Government fought hard to retain the flexibility of procedure that complex projects such as the PFI and

Feature

PPP require, which if not unique to the UK are particularly associated with it.

'The result has been the retention of the negotiated procedure, alongside the new 'competitive dialogue'. If the conditions for the use of the "competitive dialogue" are satisfied, then the condition which permits the use of the negotiated procedure when "prior overall pricing" of a tender is impossible will almost certainly also be satisfied. It is entirely possible therefore that the new procedure that has been the subject of hot debate for a number of years will rarely or never be used.'

Under the current rules, contracts can be awarded using various procedures depending upon the circumstances. Tenders are expensive, and allowing anyone to tender adds to the cost. Sometimes that is appropriate, but not always. Open tendering is the procedure used in such situations.

There are also accelerated and negotiated procedures. The negotiated procedure is popular, as it allows fewer companies to be approached. Often a buyer will know that there is really only one suitable company available to supply, and that it will be a huge waste of time and resources to let 100 or more companies from 25 EU Member States (as it will be from 1 May) tender.

Not surprisingly, a proposal to abolish the negotiated procedure was not much welcomed in the UK. Retaining the negotiated procedure alongside the new competitive dialogue allowed for in the new legislation will mean companies should be able to continue to use the negotiated procedure when the requirements in the new legislation are met.

Likely impact

The changes will not come into force until around the end of 2005, so there is no need to panic, but changing current procedures will take time to put into effect so now is a good time to be considering what impact the changes will have.

'The new Directive will require useful further precision in the statement of the award criteria, requiring that the relevant weightings be given and that tenderers be provided with a clearer focus in the preparation of their tenders', says Jennifer Skilbeck. This suggests that those businesses that do tender for public contracts will find it easier to see what requirements the buyer has – something that is often far from clear under current award procedures.

On the other hand, Jennifer continues: 'One of the major problems with the legislation generally is that it is intended to open up contracting between Member States, not improve the efficiency of the tendering process. As a result, changes to the specifications in the light of changing requirements in a lengthy procedure, or in the light of what tenderers can most usefully offer, are almost impossible to take into account. The new Directives do nothing to address this difficulty. In fact, there is barely a nod in the direction of increasing the efficiency of the tendering process.'

This will not be good news for those who are already grappling with the existing legislation. However, the Directives are now agreed so there will not be much scope in the national implementing legislation to alter their provisions.

Further information

The full texts of the legislative package as definitively adopted will be made available at *http://europa.eu.int/comm/internal_market/en/publproc/general/2k-461.htm.*

General information on the EU public procurement Directives currently in force is on the DTI website at *www.dti.gov.uk/about/procurement/procue8-8.htm.*

The Government in the UK is also looking at this area. In February 2004 Alan Wood, Chief Executive of Siemens in the UK and Chair of the EEF Economic Policy Committee, launched a consultation process to identify the barriers faced by British businesses in accessing the estimated €1,500 billion per year European market in public procurement. The consultation will run until early April, and Mr Wood will present his findings and recommendations for action later this year. A questionnaire and further information can be found at *www.woodreview.org.*

Jennifer Skilbeck practises at Monckton Chambers. See online at *www.monckton.com.*

Susan Singleton, Principal, Singletons Solicitors. Susan Singleton is author of *Tolley's Data Protection Handbook* (2nd edition 2002). She can be contacted by calling Singletons Solicitors on 020 8866 1934, by e-mail at *susan@singlelaw.com*, or online at *www.singlelaw.com.*