the voice of the NHS in Europe

NHS European Office

briefing

February 2012 Issue 9

Reforming public procurement

EU proposals for a new public procurement Directive

Key points

- The European Commission has proposed new EU public procurement rules.
- The key proposed changes are shown in the box on page 2.
- The NHS European Office sought the views of the NHS when the European Commission was shaping the proposals in Spring 2011; this *Briefing* summarises the definite proposals from the Commission.
- We are seeking the views of NHS organisations on the implications for them (see page 6 for details of how to input).
- We will brief EU decision-makers on NHS views and seek changes to the legal text in the interests of the NHS.

The European Commission has published legal proposals to revise the existing EU public procurement rules. The current rules are felt to be challenging, specifically due to inflexibility, complexity and uncertainty in the procedures. The changes are timely for the health and social care sectors, particularly because of the current NHS reforms, the greater use of Any Qualified Provider, encouragement that the NHS procure from a wider range of suppliers, and the continuing QIPP challenge – where £1.2 billion in savings is required from efficiencies in public procurement.

This *Briefing* outlines the key changes proposed to the legal framework and seeks views from NHS organisations on the likely implications for the NHS. The proposals will be subject to negotiation at EU level and the NHS European Office will work closely with EU decision-makers throughout the legislative process to ensure that NHS views receive due consideration.

Introduction

On 20 December 2011 the European Commission issued a proposal for an EU Directive on public procurement[1]. This is the first wholesale revision of EU public procurement law since 2004, and responds to the challenges experienced with the current rules and to recent European Court of Justice (ECJ) judgements.

The European Commission issued a green paper prior to the release of these proposals and the NHS European Office consulted widely within the NHS to provide significant input on how the rules should be amended from an NHS perspective. The current proposals represent a substantial change from the initial approach and a number of the proposed changes

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Why are these proposals important for NHS organisations?

- As public bodies, NHS organisations must comply with EU public procurement rules when purchasing goods and services.
- Procurement is an integral element of the commissioning of clinical services. It contributes to driving up quality and productivity of healthcare, challenging existing service provision and securing innovative, more cost-effective measures of service delivery.
- NHS commissioners should give full consideration to the legal requirements which could emerge from the EU proposals and their impact on their commissioning strategies and procedures in the future.
- The requirement in the proposals to publish all health service contracts above a certain threshold in the *Official Journal of the European Union* is a significant change for commissioners both from a procedural and a cultural perspective. The application of this requirement to the Any Qualified Provider procurement model will have to be fully considered.
- Another challenge will be to ensure that emerging clinical commissioning groups are equipped with the appropriate knowledge and skills to comply with the public procurement rules. This will be particularly important in light of the proposed changes which could increase the risk of penalties and of contracts being rendered ineffective in case of breach of the rules.
- Beside the impact on NHS commissioners, the proposals will also greatly affect the purchasing of goods and non-clinical services by NHS organisations.
- NHS providers spend upwards of £17 billion each year on these goods and services (which are subject to a more rigorous procurement regime), using a range of procurement routes. This expenditure typically amounts to around 30 per cent of a hospital's operating costs.
- Procurement is a QIPP work stream which has been tasked to save £1.2 billion by 2014 through more efficient procurement of goods and services.

Key proposed changes

- Increased flexibility and simplification on the procedures to follow, negotiations and time limits.
- Abolition of the distinction between Part A and Part B services (but a special regime for the award of health service contracts is maintained).
- Contract notices and award notices for health service contracts above €500,000[3] will have to be published in the *Official Journal of the European Union (OJEU)*.
- Clarification on when cooperation between public bodies is not subject to public procurement rules.
- The option to use life-cycle costing in award criteria.

are in line with amendments pressed for by the NHS European Office.[2]

The overall implications for the NHS of these revised proposals will have to be fully considered and other amendments could be sought.

The main changes from an NHS perspective are presented below and summarised in the box above. Your views will help us shape the detailed NHS position on the proposals.

Increased flexibility and simplification

The proposals provide for a simplified, more flexible and user-friendly approach for certain important features of procurement procedures. Time limits for participation and submission of offers have been shortened, allowing for quicker and more streamlined procurement.

The distinction between selection of tenderers and award of the contract (often a source of error and misunderstanding) has been made more flexible. Contracting authorities can decide on the most practical sequencing by examining award criteria before selection criteria, and take into account the organisation and quality of the staff assigned to performing the contract as an award criterion.

Grounds for exclusion of candidates and tenderers have been reviewed and clarified. Contracting authorities will be entitled to exclude economic

operators who have shown significant or persistent deficiencies in performing prior contracts.

Abolition of the distinction between Part A and Part B services

The proposed Directive abolishes the distinction between priority (Part A) and non-priority (Part B) services, arguing that it is no longer justified to restrict the full application of procurement law to a limited group of services. Changes to the thresholds for the award of public contracts have therefore been proposed where the value is estimated to be:

- €130,000 for supplies and services[4]
- €500,000 for health, social, education and a few other special services
- €5 million for public works.

However, the Directive recognises that health and social services have characteristics which mean that it is not appropriate to apply to them the regular procedures for the award of public contracts. These services are provided in different ways across the 27 EU member states. Given the limited scope for cross-border working in this area, it is important to have local discretion in how these services are commissioned.

The proposals provide a specific regime for the award of public contracts for health and social services (as well as for education), with a higher threshold of €500,000 and imposing only respect of the basic principles of transparency and equal treatment.[5] However, although this threshold has been raised, it still appears to be low given the nature of health service contracts.

With the distinction between Parts A and B removed, health and social services contracts may potentially be scrutinised more fully against the requirements of the EU Remedies Directive.[6] As such, rigorous application of the new procurement rules would be vital to avoid any challenge of contract validity.

Whilst health and social services contracts (including education) are subject to the €500,000 threshold and need to uphold basic principles, all other tendering that takes place within the NHS will be subject to the full force of the final Directive. Some formerly Part B services fall into this category, including legal services and catering services. These services are commonly procured by the NHS, and therefore the ramifications of the potential changes should be considered.

The proposed Directive makes it clear that member states will be able to put in place specific procedures for the award of health and social services contracts, while respecting the principles of transparency and equal treatment. These will allow contracting authorities to take into account the need to ensure quality, continuity, accessibility, availability and comprehensiveness of the services, the specific needs of different categories of users, the involvement and empowerment of users and innovation.

Procurement within the NHS in the area of health and social services covers a wide variety of contract types (i.e. contracting for clinical services, education and training commissioning). Therefore, it will be important to ensure that when implementing the Directive, the UK Government takes account of the differences between these areas.

> 'Member states will be able to put in place specific procedures for the award of health and social services contracts, while respecting the principles of transparency and equal treatment'

Contract notices and award notices for health and social services contracts above €500,000 to be published in the *OJEU*

This is a significant change. However, it should be emphasised that publication in the *Official Journal of the European Union (OJEU)* does not imply that the full procurement regime applies to these contracts, as mentioned above.

Despite the new burden of publishing all notices above this threshold in the *OJEU*, the new regime could have the advantage of giving greater clarity to commissioners. The proposed threshold would provide them with objective guidance on the likelihood of cross-border interest for health service contracts and thus the need to follow a more regulated procurement procedure for the award of contracts above €500,000.

'Prior to launching a procurement procedure, contracting authorities may conduct market consultations to assess the market'

Cooperation between public bodies

The proposals clarify when contractual relationships between public bodies are not subject to public procurement rules. Building on ECJ judgements, the proposed Directive states that agreements concluded between public bodies to carry out jointly their public service tasks in the public interest are exempted from public procurement rules.

The Directive also clarifies that contracts awarded by a contracting authority to another public body on which it exerts control, and which carries out at least 90 per cent of its activities for the controlling authority, are also excluded from public procurement rules.

While the introduction of these provisions in the legal framework is welcome, their particularly stringent nature should be emphasised. More flexible wording would probably be required to ensure that the varied forms of collaboration between NHS bodies are safely exempted from public procurement procedures. This is particularly important at a time when the efficiency agenda and the programme of NHS reforms have led an increasing number of NHS bodies to combine their back office functions and other tasks.

Market consultation

Under the proposals, prior to launching a procurement procedure, contracting authorities may conduct market consultations to assess the structure, capability and capacity of the market and inform economic operators of their plans and requirements. For this purpose, contracting authorities may seek or accept advice from administrative support structures or from third parties or market participants, provided that such advice does not have the effect of precluding competition and does not result in a violation of the principles of non-discrimination and transparency.

Procurement toolkit and increased access to negotiation

The choice of procurement procedure will revolve around the two basic forms: the open and the restricted procedures. The Directive also provides that the negotiated procedure with publication and the competitive dialogue remain.

The intention is that the negotiated procedure and the competitive dialogue can be used much more easily than at present. Contracting authorities will be able to use these procedures in a variety of situations, where the procedures without negotiations are not likely to lead to satisfactory procurement outcomes. This will give greater leeway to contracting authorities to purchase supplies, services and works more adapted to their specific needs.

Contracting authorities will have a set of six specific procurement

'The proposals allow for an increased recourse to negotiation, thus enabling the contracting authorities to purchase goods and services which are better tailored to their needs at the best price'

techniques and tools intended for aggregated and electronic procurement:

- framework agreements
- dynamic purchasing systems
- electronic auctions
- electronic catalogues
- central purchasing bodies
- joint procurement.

Compared to the existing Directive, these tools have been improved and clarified with a view to facilitating e-procurement.

With regards to e-procurement, the proposals introduce the mandatory transmission of notices in electronic form, the mandatory electronic availability of procurement documents, and a switch to e-submission under all procurement procedures, allowing a transition period of two years.

Innovation partnerships

Member states may decide to allow contracting authorities to make use of a new procedure for the procurement of innovation. Contracting authorities can establish 'innovation partnerships' for the development and subsequent purchase of new, innovative products, works and services, provided they can be delivered to agreed performance levels and costs. The partnership

will be structured in successive phases following the sequence of steps in the research and innovation process. Innovation partnership contracts will be awarded following publication of a contract notice and in accordance with the rules for the competitive procedure with negotiation.

Modifications to existing contracts

Codifying the ECJ Pressetext judgement[7], the proposed Directive states that if there is a substantial modification to a public contract already in existence, it must be considered to be a new contract and, as such, the procurement process must begin again.

The factors determining whether a change is 'substantial' are:

- conditions which, had they been a part of the original award procedure, would have allowed other tenderers to bid for the contract, or the acceptance of an alternative tender
- a considerable extension of the scope of the contract to include services which were not originally covered
- a change in the economic balance of the contract to favour the contractor in a way that was not provided for in the terms of the initial contract.

The proposed Directive also specifies the instances when amendments to a contract would be permitted.

Division of contracts into lots

The proposed Directive encourages contracting authorities to divide contracts of a value equal to or above €500,000 into lots (either of the same kind or diverse) to make them more accessible, particularly to small and medium-sized enterprises (SMEs). If they decide not to do so, they will be obliged to provide a specific explanation of their reasons in the contract notice. This provision is of particular relevance to the health service where it is common practice to have larger, more all-encompassing contracts to encourage collaborative working on related pieces of work, knowledge sharing and attainment of greater value for money.

This proposed change may increase the likelihood of challenge where is it felt that the justifications used for not dividing contracts into lots are not sufficiently robust.

Conflicts of interest and illicit conduct

The draft Directive requires member states to put in place effective, proportionate and rapid mechanisms to prevent, identify and immediately remedy conflicts of interest arising in the conduct of public procurement. The rules cover actual, potential or perceived conflict of interest situations. This new provision has to be noted in light of the current transferring of commissioning functions from primary care trusts to clinical commissioning groups and the risks of potential conflicts of interest which have been highlighted during ongoing debates.[8]

'This proposed change may therefore increase the likelihood of challenge where is it felt that the justifications used for not dividing contracts into lots are not sufficiently robust'

A specific provision to prevent illicit behaviour by both candidates and tenderers is proposed. The provision covers attempts to improperly influence the process of decision-making, or entering into agreements with other participants in order to manipulate the outcome of the procurement process.

The use of life-cycle costing in award criteria

The proposal states that contracts can be awarded using either:

- the lowest cost (which replaces the 'price only' criterion)
- the most economically advantageous tender criterion.

Costs may be assessed, on the choice of the contracting authority, on the basis of price only or using a cost-effectiveness approach such as life-cycle costing.

The proposal therefore introduces the possibility to base award decisions on life-cycle costs of the products, services or works to be purchased. The life-cycle covers all stages of the existence of a product or works or provision of a service, from raw material acquisition or generation of resources until disposal, clearance and finalisation. The costs to be taken into account do not only

'The NHS European Office will continue to brief EU decision-makers on NHS views and seek changes to the legal text in the interest of the NHS'

include direct monetary expenses, but also external environmental costs if they can be monetised and verified. If an EU method to calculate life-cycle costs exists, contracting authorities have to make use of it.

Governance – the role of a 'single responsible authority'

The proposal requires member states to designate a single authority responsible for monitoring, implementation and control of public procurement. Consideration will have to be given to how this requirement would fit with the proposal for Monitor to take oversight responsibility for competition in the health sector as part of its economic regulator functions.

Contracting authorities will be obliged to submit information on all contracts for supplies and services above €1 million to this body, which will then scrutinise the contracts.

The proposal also obliges member states to provide support structures offering legal and economic advice, guidance, training and assistance to contracting authorities preparing and conducting procurement procedures. These structures will also provide specific information and assistance to economic operators intending to bid for public contracts.

Help us shape the proposed Directive on your behalf

In order to brief EU decision-makers and seek changes to the proposals in the interests of the NHS, we would welcome your views on the questions below.

- How do you think the proposed new regime for health services will affect the level of clarity for commissioners?
- Do you believe it to be an improvement compared with the current regime for Part B services?
- What do you think the implications of publishing health service contract notices in the *OJEU* could be?
- Do you agree that the proposed Directive allows for a significant simplification and more flexibility in the procedures?
- How do you think that the Any Qualified Provider (AQP) procurement model may be impacted by the proposals?
- Do you believe that the proposed changes will help NHS organisations achieve efficiencies through public procurement (such as those required through QIPP)?
- Do you think that sufficient flexibility for negotiation is offered in the proposals? Are there any improvements that could be made?
- Do you think that the requirement to explain why contracts have not been broken down into lots will go against trends to aggregate NHS procurement?
- Do you agree that greater flexibility should be allowed to exclude cooperation between public bodies from the scope of the Directive?
- Do you think that the new 'innovation partnership' procedure will be helpful in supporting innovation in the NHS?
- What do you think will be the impact of the request to transmit all contracts above €1 million to the single responsible authority?

How you can input

Please complete the web survey on our **website** by Wednesday 29 February 2012. Alternatively, please email your views at any time, on any aspect of the proposals to: **elisabetta.zanon@nhsconfed.org**

Next steps

These proposals will now pass through the EU legislative procedure, with agreement needed between the European Parliament and the Council of Ministers. The negotiation process for these proposals will take place throughout 2012 and potentially into 2013, allowing time for the

principles of the revised Directive to be implemented into UK law by summer 2014.

We will continue to brief EU decision-makers on NHS views and seek changes to the legal text in the interest of the NHS. Therefore, we would welcome your response to the questions highlighted in the box opposite, as well as your general thoughts on the provisions of the draft Directive.

For more information on the EU decision-making process, see www.nhsconfed.org/Publications/Documents/The-EU-decision-making-process.pdf

The current EU public procurement rules

The EU public procurement rules govern the way in which public bodies procure goods, services and works. They apply whenever a purchase by a public body exceeds the minimum financial thresholds set by the legislation. The rules are applied to ensure that public sector contracts are not simply awarded to a chosen provider, but are open to competition in line with the EU's principles of free movement of goods and services across the EU.

EU public procurement legislation currently draws a distinction between Part A and Part B services:

Part A services, or priority services, are those which are subject to the full requirements of the EU public procurement Directives. These include, for example, the advertisement of the tender in the *Official Journal of the European Union (OJEU)*.

Part B services, or residual services, do not have to be advertised in the *OJEU*, but they do need to comply with EU provisions on technical specifications. A notice must be placed in the *OJEU* once a contract has been awarded. Health and social care services are currently classified as Part B services.

Notes

1 For the full text of the proposed Directive, see: http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/COM2011_896_en.pdf

2 For the full text of the NHS European Office response to the green paper, see: www.nhsconfed.org/Documents/Final_NHS_response_to_the_Public_Procurement_Green_Paper_20110418JLS.pdf

3 It is proposed that the new suggested thresholds be reviewed on a two-yearly basis to take into account any inflationary cost changes. In addition, for non-Euro member states an exchange rate into local currency will be set at EU level and reviewed every two years. As at January 2012, €500,000 is approximately £415,000.

4 It should be emphasised that, reflecting international trade agreements, NHS organisations qualify as central government bodies for the purpose of the Directive. Therefore, a higher threshold of €200,000 (instead of €130,000) and the lighter regime for the award of supply and service contracts by sub-central contracting authorities does not apply.

5 See Articles 74, 75, 76 of the proposed Directive.

6 See *The new EU Remedies Directive*. NHS European Office briefing, January 2010. www.nhsconfed.org/Documents/Remedies_briefing_cl03092010.pdf

7 Pressetext Nachrichtenagentur GmbH v The Republik Österreich (Bund) (2008)

8 See *Managing conflicts of interest in clinical commissioning groups*. NHS Confederation and Royal College of GPs, September 2011. www.nhsconfed.org/Publications/Documents/Managing_conflicts_of_interest_060711.pdf

The NHS European Office

The NHS European Office has been established to represent NHS organisations in England to EU decision-makers. The office is funded by the strategic health authorities and is part of the NHS Confederation. EU policy and legislation have an increasing impact on the NHS as a provider and commissioner of healthcare, as a business and as a major employer in the EU.

Our work includes:

- monitoring EU developments which have an impact on the NHS
- informing NHS organisations of EU affairs
- promoting the priorities and interests of the NHS to European institutions
- advising NHS organisations of EU funding opportunities.

To find out more about us, and how you can engage in our work to represent the NHS in Europe, visit **www.nhsconfed.org/europe** or contact **european.office@nhsconfed.org**

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