United Kingdom response to the European Commission Green paper on the modernisation of EU public procurement policy (COM (2011) 15 final)

Key Messages

The UK welcomes the Green Paper on modernising public procurement, and the commitment that proposals to simplify the public procurement directives will be published at the end of 2011 or early 2012. The UK strongly agrees with the Commission's comment on the need for streamlined and flexible procurement procedures, so that purchasers can obtain high quality goods and services, while delivering value for money for the public purse. Radical simplification is needed for the benefit of small and medium-sized enterprises (SMEs), other suppliers and public purchasers alike.

The main priorities in the revision of EU public procurement policy should be:

- To make clear that contracts could be awarded directly for a period of, for instance, three years, to employee led organisations/mutuals, to enable employees to gain experience of running public services prior to full and open competition
- Reducing lengthy and burdensome procurement processes that add cost to business and barriers to market competition,
- Providing more flexibility for purchasers to follow best commercial practice, so that the best possible procurement outcomes can be achieved, and
- Supporting measures to enhance SME access to public procurement, where such measures are non-discriminatory and are consistent with a value for money approach.

Introduction

The Green Paper recalls that public procurement plays a key role in the Europe 2020 Growth strategy. In seeking to use the regulatory framework to address societal challenges and wider policy objectives, there is a risk that decisions could undermine value for money and impose uncompetitive requirements on contracting authorities and businesses. Wider policy objectives should not be advanced at the expense of value for money and the acquisition of quality goods and services, which meet the requirements of purchasing authorities. Procurement can better support Europe's strategic objectives by facilitating the efficient use of public money, stimulating private sector growth and enabling a flexible approach and choice for contracting authorities on how they manage their procurement policies to promote wider objectives.

Although public procurement accounts for approximately 17 % of the EU's GDP and total public expenditure on works, goods and services exceeds 2 trillion Euro per year, only 1.5 % of all public contracts were awarded to firms from other Member States, according to data collected by the European Commission. Even taking into consideration the specific nature of public procurement, this leaves room for development. An efficiently functioning public procurement market improves value for money, the competitiveness of firms and contributes to the growth of EU economies.

The UK government has introduced a range of policies to improve public procurement, with the aim of streamlining procedures, improving access for SMEs and encouraging innovation. In particular, we would draw the Commission's attention to:

- The Lean Review which aims to reduce wasteful practices and lengthy and burdensome procurement processes that add cost to business and barriers to market competition. The UK aims to reduce turnaround time by up to 70% on competitive dialogue procurements and reduce costs for suppliers and contracting authorities
- Increased transparency of public procurement opportunities and data, including information about the future pipeline of major projects. Contracts have been made transparent and accessible to small businesses and social enterprises by publishing government tenders and contracts in full, online and free of charge through a procurement web-portal "Contracts Finder". In Scotland, contract opportunities are advertised on the Public Contracts Scotland portal.
- At the local government level, the proposed Code of Recommended Practice on Data Transparency sets an expectation for local authorities to publish invitations to tender and final contracts on projects over £500.
- For all central government procurement in common commodities the UK will ensure that systems allow business to tell government their pre-qualification data once;
- For all procurements under the EU threshold, we will seek to eliminate PQQs entirely with procurers free to choose the best route to market for the individual circumstances; and for larger procurements to move towards greater use of the 'open procedure'.
- An aspiration that 25% of government contracts should be awarded to SMEs. From March 2011 all central government departments are required to publish a set of specific targeted actions to increase their business with SMEs. We will make this publically available and measure how well they do.

- New UK rights to enable public sector workers and community groups to form mutuals to deliver public services in line with EU procurement rules. Revisions to the Directives should allow for a period of, for instance, three years, before such organisations are subject to competition.
- Promoting better market engagement at the pre-procurement stage to address cultural barriers and allow procurers to design better informed tender requirements. We have asked government procurers to specify clearly what they want, by outcomes, and where appropriate to the market, buyers will also be encouraged to break up requirements into lots.
- Actively encouraging pre-commercial procurement to drive innovation and address future challenges. The UK is already implementing the pre-commercial procurement initiative through the Small Business Research Initiative (SBRI). This enables innovation in products and services through the public procurement of research and development, which provides a route to market for new ideas and new business opportunities for technology companies. More recently the UK has invited companies to pitch innovative products and services to Government through their new Innovation Launch Pad and SME Product Surgeries.
- The Greening Government Commitments, which include the commitment to embed Government Buying Standards (for sustainable procurement) in contracts, within the context of the overarching priorities of value for money and streamlining procurement processes.

We agree with the Commission that taking into account other policy considerations can be relevant at different stages of the procurement process, but that the link with the subject matter of the contract ensures that the purchase itself remains central to the process in which taxpayers' money is used. This is an important guarantee to ensure that contracting authorities ensure that value for money is obtained.

There are, however, aspects where greater clarity might be needed on how to take account of other policies. This includes clarification and further guidance on how and where life-cycle costing can be used in the procurement process, and on what can be regarded as `relevant to the subject matter of the contract'. This would reduce burdens and risk by providing greater legal certainty for procurers, and support the effective functioning of the public procurement market.

A broad range of UK stakeholders, including central and local government, legal and professional bodies, industry and trade union bodies, have been engaged in our consultation. They agree that simplification should be the main goal of this review. The Green Paper, in posing over one hundred questions, covers many topical issues in a very open way. **There is a significant danger that in attempting to address so many issues that complexity will be added to the rules, which would be the opposite of the overall aim of simplification.** The priority in the current economic environment should be to simplify and provide for more efficient procedures and the UK response principally addresses these aspects of the Green Paper. We would urge the Commission to look at the purpose and need for all of the provisions of the Directives before coming forward with proposals which provide for significant simplification of the current regime.

The previous review

The existing Directives (2004/18/EC for the public sector and 2004/17/EC covering the utilities) provide for transparency of procurement opportunities, which is the cornerstone of open and competitive public procurement, but the whole legal framework for public procurement, including the remedies Directives and the Defence and Security Directive, is very complex. The aim of the last review, which led to the 2004 Directives, was also to modernise and simplify the rules. That review led to new approaches, such as framework agreements in the public sector, but the new provisions were introduced in a way that added complexity and uncertainty, which has meant that certain provisions, such as dynamic purchasing systems and competitive dialogue, have not been used as much as intended.

The nature of the procurement rules (questions 1-13)

Thresholds

The questions in the first section concern the scope of the procurement rules. The most common request received from stakeholders is that the thresholds be raised (question 6). The thresholds have been in place for years and are far too low for goods and services. In the UK and other Member States the interest in cross-border activity is negligible at a low financial level and the complexity of the procurement rules creates disproportionate procurement costs relative to contract value. There has been no attempt to revise the thresholds in line with inflation, still less any real review of whether the real value of the thresholds is too low. As a result, the thresholds for the public sector directive (2004/18/EC)

should be raised substantially and a mechanism for indexation introduced. We recognise that this will need to be negotiated in due course at the WTO Government Procurement Agreement (GPA) level, but in any case it will take some time for any legislative changes following the review process to be implemented in the EU.

Part B services

It is difficult to see how applying the detailed rules of the Directives to Part B services and therefore extending the rules could be regarded as a simplification measure (question 5). As far as we are aware the distinction between Part A and Part B services does not cause major problems in practice or lead to systematic or regular breaches of Treaty principles in the procurement of Part B services. So we would not want to see the extension of detailed rules to Part B services, including social services.

We would agree that the scope of the procurement rules should be limited to procurement activities (question 1) and we also do not see the need to review the definition of a "works contract" (question 3).

Exclusions (questions 7 & 8)

We do not see any substantial reason to change the current exclusions, or any particular benefit of bringing the contracts covered by these exclusions into the ambit of the public procurement rules. For example, employment contracts are of a fundamentally different nature to public contracts for goods and services and should remain outside the public procurement rules. It is particularly important that the exclusion covering secret contracts and special security measures should remain.

Should the concept of "body governed by public law" be clarified and updated (question 9)

We consider that the definition of "management supervision" (Art 1(9) of 2004/18/EC) should be circumscribed in its application. As currently applied, it means that organisations, which are not largely funded by the state, and which have general management autonomy, can be covered where the government or another public body retains some light-touch oversight, or long stop step-in rights in case of operational failure, for instance. Such organisations should be explicitly removed from the rules, as their procurement decisions are not controlled in any way.

Utilities (questions 10 & 26)

UK utilities operate in a commercial environment and it is doubtful whether rules in the sectors covered by 2004/17/EC are of any specific benefit and conversely they do add costs

to the procurement process. Certainly for private companies, the commercial ethos could be regarded as a guarantee of objective and fair procurement and there would seem to be no justification for such companies to continue to be covered by the rules. The UK has had experience of three successful applications under the Article 30 exemption and the process has worked well. If, following the removal of the existing Utilities Directive, the remaining "public" utilities were made subject to the public sector rules, they would need to have access to a very flexible regime, similar to the one that pertains at the moment for utilities. An exclusion mechanism would also need to be maintained.

Improving the toolbox for contracting authorities (questions 14 – 44)

Modernising the procurement procedures

The first question in this section (question 14) concerns the level of detail of the public procurement rules. There is widespread agreement in the UK that the rules are over-detailed and can hamper the achievement of the best procurement outcome. Although the transparency provisions have been important in opening markets, the complexity of the current rules has not led to any improvement in the level of direct cross-border activity.

Indeed the complexity of the rules can have the perverse effect of stifling open markets and cross-border procurement. The UK government has heard from procurers that the complexities and resultant costs of the procurement process itself mean that some requirements are collated into a single procurement, which might otherwise be undertaken as separately-advertised procurements. Therefore potential suppliers, SMEs in particular, may be disadvantaged, and opportunities to achieve maximum value for money and innovation are lost. The rules also deny the opportunity to obtain best value and best fit with the requirement by removing the possibility of any negotiation with bidders for the large majority of procurements, contrary to general commercial practice.

Achieving best value should be the objective and there should not be an assumption that public bodies will behave dubiously and avoid fair and open competition, unless constrained by detailed rules. Indeed, concern to follow the rules scrupulously, has led purchasers to adopt a risk averse approach, particularly in the light of the new remedies rules, because there is a concern that any minor mistake could stop the whole process.

The complexity of the rules can also act as a perceived barrier to economic operators. This affects suppliers' view of the benefit of bidding for opportunities from within their own Member State, which is magnified when they consider cross-border opportunities.

The problems arising through the volume and complexity of the directives could be solved through radical simplification of the Directives. The Commission acknowledges the problem of complexity in suggesting that smaller contracting authorities could benefit from a simplified approach (section 2.2). The Treaty embodies the principle of proportionality, but this has not been adequately reflected in the procurement procedures so far.

The Commission outlines that there are potential restrictions to change, because of the limitation imposed by obligations under the WTO Government Procurement Agreement (GPA) and through the operation of national rules. The GPA is a simpler set of rules than the EU Directives and already contains more flexibility than the EU rules. In undertaking the simplification process, which will not be agreed and implanted in a short timescale, it should be possible to persuade our international partners of the merits of further simplification. The fact that a new approach will take some time to implement, should also not prevent member states from considering how their own processes could be simplified or the Commission from encouraging this.

Do the current procedures allow for the best outcomes and how could they be improved? (questions 15 – 17)

When considered collectively, the various "purchasing systems" that are currently available (by which we mean framework agreements, dynamic purchasing systems, approved suppliers lists (and in the utilities sector, qualification systems)) all exist to achieve a similar set of benefits for those that use them: they are meant to enable opportunities to reduce the detailed bureaucracy of applying the full set of the procedural rules in certain situations, thereby facilitating faster, more efficient and/or less costly procurement processes.

Whilst this range of tools enables some helpful choice and flexibility, UK experience is that overall there are also many inherent problems with the design, scope or limitations imposed by the existing rules, as we explore in more detail below, and we urge the Commission to alleviate these problems to enable procurers to achieve better outcomes more easily. A secondary problem is that these tools are intended for the same or similar benefits, and we think there is a compelling case for merging and simplifying the range into a smaller, more permissive and more flexible set of provisions that retain all of the current flexibilities, yet remove all the flawed or problematic provisions.

We see various ways that the Commission could approach this, but we suggest the following two alternatives:

i) Our preference is for a single, highly flexible tool to replace the aforementioned range of tools, which permits contracting authorities to set up a purchasing system (which could bear similar hallmarks to a framework agreement, DPS, qualification system or approved list) via the publication of a contract notice in the OJEU. Its features should include maximum flexibility for Contracting Authorities to:

- make specific contracts from the system without any further OJEU notification, by either competing the requirement amongst relevant suppliers on the system or by applying the contract award terms that had been agreed when the system was set-up (if such terms had been set-up – if they had not, the system would be more like a qualification system or DPS, whereas if they had been it would be more like a framework agreement)).
- use mini-competitions for contracts where some of the award terms have been previously agreed, or more intensive competitions using any of the existing procurement procedures (including negotiated procedure and competitive dialogue) if award terms have not been previously established and if the requirement fell above the relevant EU threshold).
- make the system open to new competition or closed to initially successful applicants, and if they want an open system, authorities should be permitted to re-open the EU-wide competition via an OJEU notice at a frequency of their discretion.
- run the system for up to 7 years in the case of closed systems (as is the case for framework agreements in the Defence and Security Directive), though open systems may not need any time limits providing there is an obligation for incumbent suppliers to be reassessed periodically (eg every 7 years).
- determine whether and to what extent they use electronic or non-electronic means to establish and make contracts under these systems.

ii) An alternative proposal is to make qualification systems available in the public sector, and delete Dynamic Purchasing Systems from the procurement rules altogether, because we believe that all the benefits envisioned for DPS can be achieved through a qualification system, and because we believe the current DPS rules to be fundamentally flawed (as is explored further below). This suggestion would have the benefits of enabling some additional and necessary flexibility for purchasers, but is less attractive than our previous proposal because it would involve less significant

streamlining and simplification, meaning the regime would continue to be unnecessarily cluttered in this respect for no good reason.

Our summary of the analysis of the problems with the existing rules on various types of purchasing system, which we submit as evidence to support the above proposal, follows immediately below.

Framework agreements are extremely useful but have one drawback: they are closed systems, which can limit competition over the life of the framework, locking out new and potentially innovative suppliers. We would suggest that any new tool enables (but does not require) frameworks to be "open" to new competition/entrants over the life of the framework. Any concerns the Commission might have over competition or transparency could be easily overcome by a periodic OJEU notice (for example 6-monthly or annually) which re-advertises the framework across the EU.

Dynamic Purchasing Systems (DPS) are virtually unused in the UK and elsewhere because of flawed and unnecessarily onerous procedural rules, as has been confirmed by a recent Cabinet Office study and through our domestic consultation. Examples of these flaws include:

- the onerous obligation to advertise every specific contract under the DPS in the OJEU, regardless of its value (this catches any below-threshold contracts including those of very low value eg 1000 euros). It seems inappropriate and unhelpful for such low value contracts to be required by law to be advertised in OJEU, even with a simplified notice);

- the time delays built into the award process for making specific contracts under a DPS. In the current rules, this is at least 15 days' delay from when the simplified OJEU notice is sent, so as to allow for responses from new applicants, and a further period of time in which the authority has to evaluate those applications (which could conceivably be more or less than 15 further days' delay, despite the directive's steer on a maximum of 15). This could mean 30 days' delay or more before the tender documents can even be sent out, even for specific contracts of a few thousand euros, rendering the award of specific contracts under a DPS extremely slow and inefficient. Call-off contracts from framework agreements and qualification systems can be procured much faster;

- uncertainty amongst practitioners about the need for and practical meaning of the obligation to use a “completely electronic system” – ie they wonder why this is mandatory and how sophisticated their electronics need to be (would email address and fax machine suffice, or does it need bespoke software, or a new hardware platform as well?) Some technology suppliers have interpreted that the rules necessitate a bespoke platform and have accordingly been making unsolicited approaches to contracting authorities to urge them to buy their technology – we think this was not intended by the EU.

One option to solve these and other problems with DPS would be to modify the article to remove the flawed provisions. However, as per our above proposal, we think a better solution may be to enable a single tool that makes available the essential flexibilities of DPS, frameworks and qualification systems without any of the flawed provisions. Further evidence includes that:

- **Qualification Systems** work well in the UK utilities sector, and can lead to substantial savings. Public authorities are enthusiastic about using them but are prevented from doing so by the current rules. We would therefore urge the Commission to enable this flexibility in both sectors.

- **Approved supplier lists** are permitted in Directive 2004/18, but the inherent problem is that authorities that have such a list are not able to use that list in isolation, rather they must still advertise any relevant opportunities in the OJEU. Such lists are therefore limited in their usefulness, and contracting authorities may often decide that the benefits are too insignificant to justify the administrative cost and effort of establishing and continually maintaining one. This again points to qualification systems being much more useful than approved supplier lists, and so either of our new proposals would be a better model overall.

In summary, we consider that the Directives should provide for a single tool, which enables prospective procurements to be advertised up front, so that they don’t have to be re-competed, and includes the flexibilities provided by frameworks, DPSs and qualification systems in the Utilities, but not their defects.

Timescales (question 18)

The relaxation of the rules on accelerated restricted procedure in the context of the financial crisis proved to be beneficial for UK contracting authorities. We also welcome the Commission’s decision to continue this in 2011 and suggest the relaxation be made

permanent. We favour shorter timescales generally through simplification of processes. The use of e-procurement should enable even shorter timescales to apply, without an adverse effect on competition. In the UK Cabinet Office reply to the Commission's e-procurement Green Paper, it was suggested that timescales could be reduced by an additional 5 – 10 days where tenders are required to be returned electronically.

Use of the competitive negotiated procedure (questions 19 -21)

We would be in favour of generalising the use of the negotiated procedure with publication. This could be done in such a way as to allow member states to adopt this approach, rather than requiring them to. This would also helpfully align the three public procurement Directives, (Public Sector, Utilities and the Defence and Security Directives).

We would also make a more general point on communication with suppliers. Restricting the scope for contracting authorities to discuss aspects of tender processes once they have begun is problematic, especially in open and restricted procedures. The principle of equal treatment is there to prevent discrimination. A culture has evolved where contracting authorities are often afraid to discuss the procurement with the suppliers during the procurement process. Suppliers have complained that this lack of communications results in contracting authorities purchasing a more expensive or less effective solution. We would suggest that the Directive makes clear that ongoing communication with suppliers is permitted or even encouraged, (and that guidance from the Commission should provide examples of how discussions during the procurement process can be accommodated within the scope of the equal treatment principle.) This would deliver better outcomes for both the supplier and the contracting authority.

Selection and award criteria (questions 23 – 25)

The Green Paper asks whether a more flexible approach to the sequence of selection and award criteria would be preferable and also whether contracting authorities should be allowed to use award criteria relating to the tenderer and be able to take previous experience into account.

On the first point, it should be made permissible for Member States and their contracting authorities to determine the sequence that best suits them, rather than mandated in one sequence or another. This would enable best solutions not to be rejected too early because of overly restrictive selection criteria.

UK stakeholders have repeatedly expressed concerns with current inflexibilities regarding award criteria relating to the tenderer. Those concerns commonly arise in contracts that

involve services where an individual or a team of individuals with a specific skills set is being purchased. Such contracts include management consultancy, temporary staff, professional services and so on. Taking the example of a framework agreement for consultancy, during the set-up of the framework itself, the authority will need to examine the tenderer's experience as part of the selection criteria – this might mean examining the range of skills sets of the various consultants that are employed by the tenderer. However, when it comes to making call-off contracts, it is imperative that the authority is able to consider the skills of the specific individual(s) that the consultancy proposes to deliver the work, in order to ensure that they get the best person(s) for the job. If authorities cannot examine skills and experience in this way, then they cannot validate whether the consultancy has put forward the people with relevant skills, and they cannot make an objective comparison between the different tenderers' offerings. This is an entirely necessary aspect of procuring the services of individual skilled people.

Regarding whether previous experience can be taken into account, UK stakeholders are strongly of the view that this should be possible, to facilitate good commercial decision-making and ensuring best value outcomes. One safeguard would simply be to re-iterate in a permissive provision that contracting authorities must ensure that they examine experience in a non-discriminatory way ensuring equal treatment of all tenderers.

A simplified regime and/or procedures(questions 22, 27 & 28)

The Green Paper covers whether a simplified approach could be beneficial:

- for smaller contracting authorities (question 27)
- for relatively small contract awards by local and regional authorities, question 28) and
- for the purchase of commercial goods and services (question 22)

We are generally in favour of simplified procedures, but this needs to be achieved for all contracting bodies, regardless of size. In relation to commercial goods and services, we would highlight the rapidly growing use of electronic market places. Such "eMarketplaces" enable buyers or end-users of routine commercial goods and services to web-browse an on-line catalogue and order their supplies when they locate the items that meet their specifications and price requirements. The EU procurement rules should include permissive provisions to enable and encourage the use of eMarketplaces by contracting authorities.

Below EU threshold procurement (question 29)

The case law is clear on the need to take account of potential cross border interest considering the method of awarding below threshold procurement. It is understandable that the Commission would have concerns about direct awards for contracts near to the thresholds of the Directives. A recent OECD survey (Sigma paper no. 45: The regulation in Member States of contracts below the EU thresholds) has shown, however, that most Member States have their own law, which provide procurement procedures for below threshold procurement and make clear what Treaty obligations apply. The use of web sites/portals has meant that much below threshold procurement is subject to transparent competition. In these circumstances, there seems little need to further clarify the obligations below threshold and there is definitely not any need to consider more law in this area. It would, however, be helpful if a link could be made from OJEU to below threshold opportunities advertised on portals in member states.

Mutuals and public-public co-operation (questions 30 – 33)

Mutuals

We made clear at the beginning of this response that it should be a priority in the revision of EU public procurement policy for employee led organisations/mutuals to be able to gain experience of running public services before being subject to full and open competition. To enable the employee led organisations to gain experience of delivering public services, the Directives should make clear that contracts for the provision of these services could be awarded directly to such employee led organisations/mutuals for a period of, for instance, three years, with a view to opening up public service markets. Subsequent contracts would be subject to full and open competition following the Directives.

In-house provision

The current public procurement rules are intended to govern the behaviour of public bodies in the award of contracts to “economic operators”. In other words, the basis of the rules is to govern relationship of the public authorities with the commercial market with the aim of preventing market distortion and abuse. The rules are not intended to control the manner in which authorities cooperate horizontally, or the way in which they conduct their own in-house affairs, and there is no reason why public procurement rules should cover those agreements.

These principles, that in-house provision and public-public co-operation are not covered by the rules must continue. We agree with the Commission that the case-law picture is perceived as complex and we would not object in principle to clarification which distinguishes the principles of public interest / public–public cooperation versus pure commercial procurement, but it should not be used as cover to in any way extend the application of the public procurement rules to matters which have been clarified as exempt by the ECJ.

There also seems no reason whatsoever why the EU PP rules should cover the transfer of competencies from one authority to another. Such transfers are part of the ability of a Member State to organise its own public authorities and / or public services in the manner that best suits its needs at a given time, which may of course change over time. We are strongly of the view that such transfers have absolutely nothing to do with ensuring open and fair competition in the market as between economic operators, (which is the aim of the public procurement rules) and would be an unwarranted intrusion on Member States' competence to organise their own public authorities. The rules were not promulgated with that intent and we would strongly oppose the extension of the public procurement rules to such transfer of competencies.

Creating a more accessible European procurement market (questions 46 – 61)

Better access for SMEs

The UK agrees with the statement in the Green paper that special attention needs to be paid to the issue of access to public procurement markets by small and medium-sized enterprises (SMEs), which have a huge potential for job creation, growth and innovation. A strong involvement by SMEs allows contracting authorities to considerably broaden the potential supplier base, with the consequent beneficial effects of more competition. This will only happen, however, if a streamlined public procurement system is agreed and put into operation.

More could also be done to simplify and update the EU rules governing public procurement with the specific aim of easing SME access to contracts across the EU. The vast majority of procurement contracts continue to be awarded to domestic firms and many SMEs find that poor information, bureaucratic barriers and a false assumption that bigger is always better prevent them from winning procurement contracts. The UK is already taking the steps set out earlier to address this. However even taking into consideration the specific nature of public procurement, more could be done to make improvements at the EU level so as to ensure the efficient functioning of the public procurement market, secure greater value for

money, encourage competitiveness amongst firms and contribute to the growth of the EU economies.

Increased transparency of public procurement opportunities and data, including information about the future pipeline of major projects is key to this. Whilst simplification is important, simplification should not be at the expense of transparency. The UK has made contracts transparent and accessible to small businesses and social enterprises by publishing government tenders and contracts in full, online and free of charge through a procurement web-portal "Contracts Finder".

The Commission's "European Code of Best Practices facilitating access by SMEs to public procurement" (2008) has already provided helpful pointers to practices which optimise the participation and potential success of SMEs in bidding for public contracts, such as subdivision into lots. It is very important that Member States should do as much as possible to implement the practices highlighted by the Commission. We would strongly encourage subdivision into lots where appropriate, but because it would not always represent the best route to market, we would not recommend that this, or other specific practices, be made compulsory (question 47). We would also agree with the Commission's statement that major obstacles to SME participation are to found in the selection phase. Consequently we would:

- support a solution which would require submission and verification of evidence only by short-listed candidates/the winning bidder (question 49),
- agree that self-declarations are an appropriate way to alleviate administrative burdens (question 50),
- agree that excessively strict turnover requirements for proving financial capacity are problematic for SMEs, but would be concerned that if a maximum ratio for turnover to contract value were to be set, that buyers would default to the maximum even if it was not actually proportionate (question 51). As a result, we would not want to see this included in legislation. UK businesses have complained that disproportionate turnover requirements in relation to contract value have meant that they are unable to proceed past the PQQ stage. This practice creates a barrier to potential new suppliers and can block innovation
- We would also note that requirements which de facto stop cross-border procurement should be tackled. For example, issue of documents only to companies that are registered in the Member State undertaking the procurement and the requirement for an "electronic signature", which

appeared to restrict tendering to companies registered in the Member State undertaking the procurement.

The Green Paper asks what are the advantages and disadvantages of allowing or requiring contracting authorities to oblige the successful tenderer to subcontract a certain share of the main contract to third parties (question 52). In our view, work should focus on encouraging and stimulating SME participation in existing supply chains and where legitimate sub-contracting opportunities exist. We should not focus on creating a market artificially, as this could increase cost and reduce the level of value for money achieved by the buyer.

The Commission mentions the idea of fixing procurement quotas, where a percentage of contracts are reserved exclusively for SMEs. We would agree with the Commission's comment that this would be in contradiction with the principle of equal treatment of tenderers. We would also be opposed to quotas because they undermine value for money and are not in line with open markets. We do agree, however, that contracting authorities should be encouraged to do their utmost to improve access by SMEs to do their public contracts and an aspiration to meet a percentage of contracts going to SMEs, (such as the UK central government approach of aspiring that 25% of business should be awarded to SMEs) provides a valuable focus for this work.

Supporting common societal and policy goals (questions 62 – 97)

The underlying policy objective of public procurement is to get value for money and the achievement of complementary policy objectives should not compromise this. The UK agrees with comments in the Green paper that taking into account policy related considerations in public procurement should be done in such a way as to avoid creating disproportionate additional administrative burdens for contracting authorities or distorting competition in procurement markets. In particular, the Directives should clarify the ways in which environmental impacts can be taken into account, while helping to achieve value for money and remaining relevant to the subject matter of the contract. As covered below, there are clearly some stages of the procurement process where it is more appropriate to take account of other policy considerations than others. The key consideration in all of this is the relevance to the subject matter of the contract.

How to buy

Describing the subject matter of the contract and the technical specifications

The rules on technical specifications already make allowance for the introduction of considerations related to other policy objectives, because the rules allow contracting authorities to take them into account where relevant (question 62). However, it should be clarified in the Directives what is permissible in order to avoid the uncertainty that procurers and suppliers currently face. We would strongly advocate the use of outcome and output-based specifications instead of drawing up detailed input-based specifications, but we would not advocate making this mandatory (question 63).

Certain procedures are more suitable for taking into account complementary policy objectives, because of their flexibility. Competitive dialogue is suitable for innovation and has been used in our Forward Commitment Procurement projects, because it does allow for dialogue with suppliers about the best approach. If the competitive negotiated procedure were to be generally available, this would also be a suitable approach for the same reasons (questions 66 & 68).

We do not see how a restriction to local or regional suppliers could be justified by legitimate and objective reasons that are not based on purely economic considerations, because this would restrict value for money (question 67).

Using the most appropriate award criteria

The UK policy approach is to obtain value for money. Regarding the questions in this section, we would:

- not suggest the elimination of the lowest price only criterion or suggest provisions which set out that price should be taken into account, because this would be overly prescriptive and would increase the complexity of the rules, with which suppliers must comply (question 70),
- not suggest that the score attributable to environmental, social or innovative criteria should be limited to a set maximum, because it might be particularly relevant to what is being procured and so it would be an important element of vfm, for example in the case of social care (question 71),
- not suggest that the Commission services develop a methodology for life-cycle costing, or introduce life cycle costing as a mandatory approach. This is best addressed at the national level. We do, however, agree that life cycle costing is

an important part of value for money (question 73), and it should be clarified how and in what cases this can be taken into account, to help reduce the risk of legal challenge.

We do not think that that the possibility of including environmental or social criteria in the award phase is well understood. We would agree that more clarity is needed, to make sure that relevant policy related matters are included in award criteria, but irrelevant ones are not (question 72).

Imposing proper contract performance clauses

We would agree that contract performance clauses are the most appropriate stage of the procedure at which to include social considerations relating to the employment and labour conditions of the workers (questions 74 – 76). The main issue, however, is to make sure that these are relevant to the individual contract in question. Clarification and guidance on this would be welcome.

Link with the subject matter/ with the execution of the contract

We don't think that the link should be softened or dropped (question 79) but we would welcome greater clarity and guidance on what is permissible. Removing or softening the link would open the floodgates of using procurement to do everything and would compromise value for money. It would also be very burdensome for contracting authorities, be hard to evaluate and the outcome could be poor quality goods and services. It would also be difficult for potential bidders, in particular SMEs, to meet several policy requirement which are unrelated to the contract in question. Different policy agendas have different levels of importance in different countries. Procurement is about buying goods / services that are needed and if you lose the link to the subject matter of the contract, then there is a risk that procurement becomes more about pursuing other agendas rather than serving the purpose of procuring the goods/service that is needed. Procurement should remain about what is being procured, but if other policy aims that are relevant to the procurement can be achieved at the same time, then that is a bonus. We do not think that procurement should be used as a main lever to achieve a particular policy line.

What to buy

The Green Paper asks whether EU level obligations on what to buy are a good way to achieve other policy objectives. Obligations on what to buy are only really appropriate when looking at environmental performance criteria such as energy using products, construction materials, paper, furniture etc. They can have the effects cited in the Green Paper, but the

Commission should think whether more creative ways may have a greater impact, e.g. by setting out in advance a trajectory of energy consumption that certain classes of product should meet (increase of x% energy efficiency in 5 years), and make it applicable to the single market, not just to public procurers. What to buy obligations should not stray into other policy areas such as social issues, it is the place of contracting authorities to cater for social issues if they choose to do so.

In relation to the specific questions in this section, we consider that:

- national obligations could potentially cause internal market fragmentation (question 85). This is mitigated, however, by the fact that all national schemes develop such criteria by reference to voluntary EU-wide GPP criteria which act as a useful benchmark. In the UK, we use them to help develop Government Buying Standards, but take the trouble to carefully assess the costs and benefits, consult with stakeholders and conduct market analysis. It is very difficult to do this on an EU-wide basis, but it would be helpful for the Commission to work with Member States to share experience and best practice, so that harmonisation could be achieved in this area without recourse to legislation

- any obligations on the level of uptake (for example, of GPP) should not jeopardise the contracting authority's ability to achieve value for money (question 86)

- contracting authorities should not be more constrained than is absolutely necessary in their decisions about what to buy (question 86.1)

- any mandatory requirements should be set at the minimum level only so that individual contracting authorities could set more ambitious requirements (question 86.2)

- there should not be a requirement to take the most advanced technology into account as this might jeopradise value for money or afforadability in some instances (question 87)

- imposing obligations on "what to buy" could increase the administrative burden, particularly for SMEs and it is difficult to see how this could be mitigated (question 89).

Innovation

The Green Paper comments that public procurement of innovative goods and services is crucial to improve the quality and efficiency of public services at a time of budget constraints. We would agree with this and also that an important way to stimulate innovation can be for contracting authorities to request the development of products or services that are not yet available on the market (pre-commercial procurement). The Green Paper asks which incentives/measures would support and speed up the take up of innovation by public sector bodies. In our view, innovation in public procurement can be achieved through opening up the market to smaller and more innovative suppliers through adopting measures to simplify and streamline the procurement process, and the use of outcome-based specifications (question 91).

The Green Paper comments on the use of competitive dialogue and intellectual property rights. It suggests that the best solution is inevitably presented to participants, but this does not take fully take account of the provisions of Article 29 of Directive 2004/18/EC, which allows for alternative solutions to be assessed and for innovative ideas to be protected (question 92).

In relation to the specific elements of question 94, we think that:

- the approach of pre-commercial procurement is suited to stimulating innovation,
- there is a need for further best practice sharing and/or benchmarking of R&D procurement services across member states to facilitate the wider use of pre-commercial procurement,
- we are not aware of other ways not covered explicitly in the current legal framework in which contracting authorities could request the development of products and services not yet available on the market, and
- we think that transparency of opportunity would be the best way that contracting authorities could encourage SMEs and start-ups to participate in pre-commercial procurement.

The UK has provided greater transparency of opportunities for SMEs and introduced product surgeries, where SMEs can pitch ideas to public sector procureres. These measures will help foster the innovation capacity of SMEs (question 95).

Ensuring sound procurement procedures: preventing and fighting corruption (questions 98 – 110)

The Green Paper acknowledges that increasing the procedural guarantees against unsound business practices in public procurement would often entail additional administrative burdens for procurers and undertakings, which could have a possible negative impact on the overall objective of a simplification of the procedures. As different conditions and problems occur in Member States it is best to address issues such as conflict of interest at the Member State level.

It should also be recalled that much has already been done to tackle corruption. The transparency provided by the rules and the complementary enforcement provisions provide a bulwark against corruption. As the Green paper says, the inclusion of Article 45 in 2004/18/EC already sets out an obligation to exclude bidders convicted of certain offences (notably corruption), as well as the possibility of excluding bidders for a number of unsound business practices (including "grave professional misconduct").

The UK has led detailed discussion amongst Member States about issues arising from the application of Article 45 in the Public Procurement Network. These exchanges, for instance on how self-cleaning works in practice, have allowed Member States to consider what would best fit national circumstances and it is expected that these exchanges will continue. We do not consider that further harmonising measures at the EU level would be beneficial at this stage.

Accessing markets outside of the EU (questions 111 - 112)

The Green Paper comments on how open the EU public procurement market is. This helps public purchasers get value for money, although the figures for GPA suppliers winning contracts, not surprisingly, are similar to the very low percentage of direct cross border activity within the EU. In the context of difficult economic times, it is generally acknowledged that any move towards protectionism would not help economic recovery.

The idea of a Commission proposal concerning tenders from third countries was raised in the Single Market Act. The UK response to the SMA commented that, in the context of the current economic environment, it is important that purchasers should get value for money. The UK would not support any proposal which prevented purchasers from considering bids from third countries as this would run counter to a value for money approach.

There is no evidence that the Community preferences in Articles 58 and 59 of the Utilities Directive (2004/17/EC) have ever had any effect, they have certainly not led to any

negotiating gains for the EU. As a result, there would NOT be any point in expanding their application. It is already the case that Member States can provide that only those suppliers bidding for contracts covered by international obligations, such as contracts covered by the WTO GPA, can have access to enforcement provisions. Those not covered by international obligations would not have guaranteed access.

Conclusions

Summary of UK proposals

The Commission should look at all the provisions of the public sector Directive (2004/18/EC), with a view to radical simplification. The proposals drafted by the Commission following the review should moreover address the following specific concerns:

- Raise the threshold for goods and services procurement substantially and a mechanism for indexation introduced
- The revised Directives should make clear that, in circumstances, such as the development of employee led organisations/mutuals, employees should be able to gain experience of running public services for a period of, for instance, three years, prior to full and open competition
- Remove private utilities from the application of public procurement rules, with serious consideration being given to the deletion of the Utilities Directive
- Provide for a single tool, which enables prospective procurements to be advertised up front, so that they don't have to be re-competed, and includes the flexibilities provided by frameworks, DPSs and qualification systems in the Utilities, but not their defects
- Allow the accelerated restricted procedure to be used at the discretion of contracting authorities and that where tenders are (required to be) returned electronically that timescales could be reduced by an additional 5 – 10 days
- Allow the generalised use of the competitive negotiated procedure in the public sector Directive
- Allow the past performance of economic operators to be taken into account at the selection stage and allow the skills/quality of service providers to be taken into account, where appropriate, at the award stage

- Provide that only short-listed candidates/the winning bidder should be required to submit and verify supporting evidence regarding selection criteria
- Provide for the use of electronic marketplaces by public authorities

We also consider that the Directives should provide clarification and clearer guidance on how social and environmental issues can be taken into account, how they can help to achieve value for money, and in what circumstances they may be considered relevant to the subject matter.

We look forward to working with the Commission on this very important dossier, which will provide the framework for public procurement policy for many years to come.