

Committee:	Date:
Projects Sub-Committee Finance Committee	25 February 2016 15 March 2016
Subject: Review of UK Public Contract Regulations and EU Procurement Directives	Public
Report of: Joint report of the Chamberlain and Comptroller and City Solicitor	For Information
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Summary

The Head of City Procurement and the Comptroller and City Solicitor were asked to review the current UK and City of London Procurement regulations and procedures to ascertain whether there is a tendency to 'Gold-plate' the interpretation of the EU Procurement Directives in comparison to other EU member states. This key findings of this review are:

- The research findings do not point to the UK (and the City Corporation) "gold plating" procurement activity with a negative impact other than the early introduction of the UK Public Contract Regulations 2015.
- The UK Public Contract Regulations 2015 was introduced 14 months prior to the EU Directives deadline; the majority of other members will introduce their new contract law in April 2016 (including Scotland).
- Any "gold plating" of UK regulations have been positive steps to ensure more opportunity for SME/Social Enterprise businesses and greater powers to negotiate in specific critical contract areas.
- Research shows the UK procurement is on average more time consuming than other EU member states but it also has the lowest number of legal challenges with respect it procurement processes.
- The Corporation has run six open OJEU tenders in the last two years with a value of £130M. This is 1.7% of all contracts let in this period.
- The introduction of City Procurement and the City Procurement Code 2015 provides the Corporation with a modern, flexible, innovative and commercially focused procurement service that operates within a regulated environment.
- Early planning and consultation with City Procurement is the key to the success of procurement activity, ensuring all options are fully explored and not limited by time or risk.
- Our default position is to follow the Procurement Code for all activity but there is a decision making process in place to consider alternative procurement strategies for non-local authority or non-police authority spend if there are specific risk, sensitivity or commercial reasons to do so.

Recommendation

Members are asked to note the report.

Background

1. At Projects Sub-Committee in July, The Chairman reported the receipt of an email from the Deputy Chairman concerning a recent meeting that had referred to differences in the way that EU countries interpreted EU procurement regulations, with the UK interpreting the requirements in a more onerous way than other member states. He suggested that a review of the issue be undertaken, drawing on whatever research has been undertaken and the practices of other public bodies. The follow report prepared by City Procurement and the Comptroller's Department outlines the findings of this review. The report aims to answer the following three questions in covering the entire topic:
 - I. Has the UK interpreted the requirements of the EU Procurement Directives more onerously than other EU Member States?
 - II. What is the practice of other public bodies?
 - III. Could the City of London Corporation be more "innovative and liberal" in the way it interprets EU and UK Procurement Regulations?

Has the UK interpreted the requirements of the EU Procurement Directives more onerously than other EU Member States?

2. There has been a long standing perception amongst some policy makers and industry leaders that the EU procurement directives are applied more rigorously (or gold plated) in the UK compared to other Member States to the detriment of industry, the public purse and the economy as a whole.
3. This was emphasised in the House of Commons Public Accounts Select (PASC) Committee Report on Government Procurement published in July 2013 which was concerned that the UK's £227 billion procurement budget was not being used efficiently. The report stated "We (UK) are concerned that (EU) Directives reinforce a process-oriented, risk averse culture in procurement, which in the UK has resulted in delay, increased costs and a failure to focus on outcome. It is intolerable that UK public procurement takes on average 50% longer than it does in France or Germany under the auspices of the same Directives."
4. The report cited a litany of procurement and contract failures such as the G4S and Serco Ministry of Justice contracts as examples of the problem and criticised the capability of public procurement. On the other hand the report conceded that the regulation of public procurement served a valid purpose and it would need to be regulated in the UK regardless of the EU Directives.
5. Whilst the perceptions and problems addressed in the report are real it was acknowledged that there was a dearth of comparative empirical data both within the UK and the EU as a whole, to aid analysis of the differences in the application of the regulations.
6. There could be numerous good and bad reasons why UK procurement is slower and they may not be wholly attributable to the EU Regulations themselves. These may include differences in the structure of public services, commercial, technical and project management capacity in terms of staffing and technology, cultural and economic differences.

7. However, critics of the report argue that the evidence considered by the committee is both incomplete and weighted towards the supplier perspective, although PASC took evidence from business, SME and the third sector it took little or no evidence from active procurement practitioners.
8. The evidence used in the report to suggest that UK business is disadvantaged was selective and contradicted by the most recent studies from the EU and University of Glasgow which indicated that the UK's application of the EU procurement directives is similar to other member states and there was no evidence to suggest that British firms were discriminated against in the process or by other member states in terms of contract awards.
9. The PASC report challenged civil servants for what was perceived to be unnecessarily strict adherence to process in the UK resulting in longer times to contract awards 161 days in the UK rather than 108 in the wider EU.
10. However, it could be that different procedures are used in the UK and in any event time to award is only one measure, quality of outcome is or equal if not greater importance and this wasn't discussed in the PASC report. It has been suggested for example that EU contract awards are subject to a far greater amount of legal challenges than in the UK so it could be that quality is compromised for speed.
11. Over and above this, some leading procurement and legal experts argue that EU procedures have made public procurement in the UK more, not less, professional and the imperative to act quickly and get a good deal must be balanced against the need to spend money in a responsible fair and transparent manner whilst minimising opportunities for fraud and corruption.
12. The UK government's accelerated transposition and the Public Contracts Regulations 2015 ("PCR 2015") were implemented in England and Wales on 26 February 2015, 14 months before the deadline, therefore the UK at present are more regulated than many of our EU colleagues. It is too early to make comparisons on how member states have implemented the new Regulations as many are not implementing until 2016. Interestingly Scotland, which has a separate legal system and devolved powers, is not planning to implement the new Regulations until April 2016.
13. There are significant parts of PCR 2015 which are unique to England and Wales which could amount to "gold plating". These provisions largely concern the implementation of specific SME-friendly recommendations from Lord Young, arising from his 'Growing Your Business' report in May 2013 (Regulations 105-114) such as simplified Pre Qualifying Questionnaire's, mandatory payment terms and a new Mystery Shopper regime to improve standards.
14. On the whole PCR 2015 is the result of years of consultation with a view to addressing any shortcomings from the previous UK regulations and to facilitate flexibility and innovation.

15. The UK brought in new provisions for framework agreements; greater scope for market engagement; light- touch procedures for social, health and other services below £625k and new tendering procedures to facilitate pre market engagement and negotiation for complex contracts.

What is the practice of other public bodies?

16. PCR 2015 is a statutory requirement and all UK public bodies are bound by the regulations. Aggrieved suppliers have the right to challenge non-compliance in the High Court via the Remedies Directive for above threshold contracts and the Mystery Shopper scheme for below threshold contracts that breach EU principles of fairness and transparency and the Lord Young reforms.
17. The new EU Directive required member states to each nominate a single body responsible for public procurement. In the UK this is the Cabinet Office working through Crown Commercial Services (CCS). CCS are responsible for improving standards and consistency in public procurement and also for addressing concerns raised about public sector procurements as well as managing the Mystery Shopper scheme.
18. There is at the moment no readily available comparative data on the performance of UK public bodies in relation to the application of the OJEU regulations regarding speed, efficiency and quality. However, the recent advent of developments such as the Local Government Transparency Code 2015, greater use of Freedom of Information rights and commonly used E-tendering applications will make benchmarking reporting easier and a publicly available “league table” environment will inevitably arise in the next 12 to 24 months.

Could the Corporation be more “imaginative and liberal” in the way it handles the requirements?

19. The Corporation’s Procurement Code acknowledges that PCR 2015 applies to the Corporation without distinguishing between its various functions. When acting in a capacity other than as a local authority or police authority, the PCR 2015 will be applicable to ensure transparency and fairness values are upheld unless approval from the appropriate Committee(s) and Performance and Strategy Summit Group has been granted to do otherwise. In such circumstances there will still be a requirement for a competition to be concluded ensuring value for money and transparency.
20. The new City of London Procurement Code (“the Code”), which was approved by Common Court of Council, went live on 1 November 2015.
21. The Code complies with EU Procurement Directives, PCR 2015 and Small Business Employment and Enterprise Act 2015 as well as other laws that govern public procurement and policing activity. The Code also supports our City of London Procurement Strategy 2015-18. The Code has been developed to allow the Corporation through the City Procurement function to be as innovative and commercially astute as allowed within the UK Public Contract Regulations.

22. It is important to place the number of OJEU tenders undertaken by the City into context. In financial year (FY) 2014/15 the newly formed City Procurement service undertook 531 requests for quotations (RFQs and tenders) with only one tender being advertised openly in the OJEU. In FY 2015/16 to date 320 RFQ's and tenders have been undertaken and only five were advertised openly in the OJEU, this represents 0.2% and 1.5% by volume for each year.
23. The total value of the six OJEU tenders undertaken during these two years was £130M giving an average OJEU advertised contract value of £19M. Of the six tenders, three (namely Police Accommodation, Corporate Cleaning and Action and Know Fraud) had a combined total value (over the life of the contracts) of more than £114M.
24. The figures indicate in the Corporation at least that the full OJEU procedure is used by exception for high value high risk projects where time and resources required when undertaking lengthy procurement processes, are proportionate to the technical and commercial complexity of the projects and the risks of challenge. This is opposed to using government approved Frameworks.
25. It is important to note also that the vast majority of the Corporation's tenders are below the OJEU thresholds of £164k for supplies and services and £4.1m for works.
26. Even when projects are above OJEU thresholds City Procurement and departmental officers at the planning stage consider alternative options to reduce costs and increase speed at the same time as achieving value for money.
27. In addition to external frameworks City Procurement is looking to increase the number of corporate contracts and in-house frameworks specifically tailored to the operational and commercial requirements of the Corporation. Once in place these can obviate the need to undertake numerous OJEU procurements.
28. In cases, such as urgency or highly sensitive projects, when acting in a non-local authority basis officers may after due consultation with the Comptroller and approval from Committee(s) and Performance and Strategy Summit Group may choose not to apply the OJEU process and undertake a negotiation or seek tenders from a select list, this process would be managed by City Procurement to ensure competitive principles are upheld.
29. Even when undertaking OJEU tenders the capacity and expertise of City Procurement enable such procurements to be undertaken efficiently using the expertise of officers and template forms and appropriate e-tendering applications and robust evaluation processes. Although a small number of contract awards have been challenged by aggrieved bidders the systems in place has meant that the Corporation has been well placed to resist them and proceed with the award.
30. It should be noted that the OJEU process is only part of the procurement cycle. Equally important is project management and governance, pre market engagement, careful budgetary control, specification and evaluation drafting and mobilising the correct level of expertise proportionate to risk and opportunity. If

these factors are not appropriately aligned the procurement will be at risk of not realising best value and in the worst case failing whatever process is chosen.

31. The Corporation's procurement processes are continuously reviewed so that the Corporation can introduce its own improvements as well as exploiting new opportunities or developments and responding to statutory requirements. This approach also includes the recruitment and development of the right people.

Conclusion

32. The UK Public Contract Regulations 2015, although introduced 14 months in advance of the EU deadline has a positive impact on topics such as fair competition for SME businesses, greater flexibility in ways to procure, clearer guidance on concession contracts and the introduction of a light touch regime of social care and education contracts. The Corporation, with the introduction of the Procurement Code 2015 and the service delivered by City Procurement, provides an innovative, commercially led service that ensures the services procured meet the quality required whilst managing risk and procedural requirements to comply with the regulated environment we work within.

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