

Procurement: Regulatory framework and potential for Bristol innovation

1) Background

The European Union commenced a review of public procurement regulations in April 2011. The key objectives of the review were:

- Simplify the rules and procedures and make them more flexible.
- Increased recourse to carry out negotiations.
- Increased use of e-procurement.
- Reduce administrative burden on suppliers.
- Facilitate a qualitative improvement in the use of public procurement.
- Improved integrity in public procurement.
- Appointment of national review body to monitor public procurement practices.
- Creation of a Concession Contracts Directive to complete the legal framework for European public procurement.

On 15 January 2014 the European Parliament approved the following three new directives on Public Procurement which came into force on 17 April 2014:

- Public Contracts Directive 2014/24/EU <http://goo.gl/rhNSlz>
- Utility Contracts Directive 2014/25/EU <http://goo.gl/ucNJph>
- Concession Contracts Directive 2014/23/EU <http://goo.gl/JeXASy>

Nation states were allowed two years to transpose these directives into national law. The UK government signalled its intention to do so quickly and commenced several reviews. It then published the Public Contracts Regulations 2015 (<http://goo.gl/hfOy3x>) in February 2015. Public procurement bodies are considering the new regulatory framework and updating their own regulations. This paper focusses on the Public Contracts Directive, which is most relevant to Voluntary and Community Sector (VCS) in Bristol.

2) Bristol VCS experiences of commissioning and procurement

Voscur and Bristol Compact have been working on commissioning for several years, on behalf of the sector. The key priorities for this work are: #1 Commissioning intentions; #2 Equalities and impact; #3 Informed design; #4 Consistent practice; #5 Learning and improvement; #6 Fostering collaborations; #7 Proportionality; #8 Efficiency in procurement. For more detail, please refer to 'Voluntary and Community Sector experiences of commissioning – issues, priorities and potential solutions'.

3) The potential for Bristol innovation

The new EU procurement regulations describe a less bureaucratic framework for procurement. The relative lack of UK government guidance for local authorities and other public procurement bodies means that there are local opportunities to do things differently. There is great potential to open up commissioning/procurement so that social value is maximised. The following table includes some questions and suggestions – changes that would serve to include Bristol VCS organisations and SMEs in Bristol City Council's procurement processes and thus improve the city's social value.

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Changes in procurement regulatory framework = potential for Bristol innovation

EU Procurement Regulation	How relevant to smaller providers	UK government position	Comments	Bristol potential for innovation
<p>Lot management</p> <ul style="list-style-type: none"> Requirement of contracting authorities to describe reasons for not dividing contracts into lots. (Article 84) The division of contracts into smaller lots. The regulation allows nation states to make such a division compulsory. (Article 46) Permission to management lots specifically (for example, limit one or several lots per provider. (Article 46) 	<p>Large contracts exclude smaller providers; division into lots would mean greater opportunity for smaller providers.</p>	<p>No enhancement of the EU regulations.</p>	<ul style="list-style-type: none"> Market analyses would be required to inform lot management proposals by commissioners. Lot management proposals should be tested on market during consultations on commissioning plan. Risk of not dividing into lots is that the only option for smaller providers is to collaborate with each other/bigger providers. 	<p>BCC could explicitly:</p> <ul style="list-style-type: none"> Develop its lot management guidance for commissioners and standardise practice Require all lot management decisions to be informed by market analysis and subsequently tested on the market Establish a default of division into lots so that smaller providers are not automatically excluded.
<p>Light-touch regime</p> <p>There is a new category of services ('health, social and other') that broadly equates to services to the person and services to the community. Contracts greater than €750,000 (£625,050) are to be procured through a 'light-touch regime', which is not defined. (Articles 74-76)</p>	<p>Proportionate, standardised processes are important to encourage the participation of smaller providers.</p>	<p>Has not defined Quality:Cost but has stated that the principles of MEAT (Most Economically Advantageous Tender) should be applied.</p>	<ul style="list-style-type: none"> Such services have no cross-border interest (therefore no need to advertise across Europe) Nation states are free to secure such services in ways other than contracts, for example, through grant funding Risk of MEAT applying only a cost focus and no/limited consideration of quality. 	<p>BCC could explicitly:</p> <ul style="list-style-type: none"> Adopt a policy that services to the person and services to the community will always be awarded with a strong emphasis on quality and never on price alone. Develop a new, proportionate 'light-touch' procedure that incorporates social value and considerations of quality

<p>Sub-contracting The regulations allow for contracting authorities to require bidders to describe their sub-contracting arrangements in tenders.</p>	<p>Smaller providers report unfair treatment by larger providers, particularly when their only option is to sub-contract.</p>	<p>No enhancement of the EU regulations. (Reg 71)</p>	<ul style="list-style-type: none"> • Many small providers have experienced ‘bid candy’ (relating to their intellectual property and reputations), with no/little subsequent subcontracted delivery. • A requirement to describe actual arrangements will contribute to small providers being treated respectfully. 	<p>BCC could explicitly:</p> <ul style="list-style-type: none"> • Require disclosure of all sub-contracting arrangements in tenders/proposals • Require evidence (for example, declaration of agreements in principle) in tenders/proposals.
<p>Statutory time limits The regulation that defines the minimum time limits that apply to open (one-stage) and restricted (two-stage) procurement procedures. (Articles 26-28, 47-48)</p>	<p>Time allowed between advert and for completion of tenders/proposals can affect smaller providers.</p>	<p>No enhancement of the EU regulations.</p>	<ul style="list-style-type: none"> • Smaller providers already experience challenges with meeting procurement time periods <ul style="list-style-type: none"> ○ Restricted: 30-37days PQQ; 31-40 days tender ○ Open: 40-52 days. • Short time periods (in some cases, just 10 days) may deter smaller providers from bidding. 	<p>BCC could explicitly</p> <ul style="list-style-type: none"> • Undertake a risk analysis of different time limits, with a particular focus on impact on smaller providers’ capacities to respond • Revise its Financial Regulations to define time limits and options • Adopt a policy that proportionate time limits must be informed by market analysis and potential capacity to respond.
<p>Risk of unnecessary administration Without clarity for what should happen ‘below threshold’ and in the ‘light touch regime’, there is a risk of regulation being applied unnecessarily. This is exactly what happened in the application of former Part A (EU-wide</p>	<p>The application of over-burdensome administration excludes smaller providers.</p>	<p>No enhancement of the EU regulations.</p>	<p>Unnecessary administration:</p> <ul style="list-style-type: none"> • Wastes public funds • Excludes smaller providers • Stifles creativity • Delays solutions to emerging needs 	<p>BCC could explicitly:</p> <ul style="list-style-type: none"> • State that the procurement of ‘below threshold’ services sits outside EU procedures • Develop a new ‘below threshold’ procedure that encourages innovation (for example, the VCS Grants Prospectus tools could be used for ‘below threshold’ services)

advertisement) to Part B services (of interest only inside a nation state).				
<p>Advertisement of contracts The requirement for all* contracts greater than £25,000 on the National Contracts Finder**. (Articles 105 and 108)</p> <p>* subject to complex rules and exclusions ** Guidance on the new transparency requirements for publishing on Contracts Finder. Crown Commercial Service. March 2015. http://goo.gl/RtgqLN</p>	Forward notice of contract opportunities is an important issue for all providers but especially for smaller providers.	The Crown Commercial Service has published guidance (albeit non-statutory).	<ul style="list-style-type: none"> • Smaller providers when faced with multiple information sources must prioritise. This inevitably means that they miss out on some opportunities. • One potential source could help... but <ul style="list-style-type: none"> ○ the regulations allow for local non-publication and publication – this could mean that information is not accessible. ○ Providers will need to plough through national opportunities to find the local. ○ The advertisement of relatively small contracts on a national level may, perversely, favour larger national providers (who would not normally have been aware). 	<p>BCC could explicitly</p> <ul style="list-style-type: none"> • Undertake a risk analysis of advertising locally compared with nationally, with a particular focus on impact on smaller providers’ accessing smaller opportunities • Revise its Financial Regulations (for example, by threshold) to clarify local and national advertisement • Adopt a policy that grants and ‘below threshold’ contracts will be advertised locally* and in one place. <p>* It is worth noting that Bristol has already invested in and has established practice in e-procurement: the use of Proactis/Provide to Bristol.</p>