

ClientAlert

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European Commission consults on major overhaul of EU Public Procurement Rules

On 27 January 2011, the European Commission opened a wide public consultation, intended to inform about a legislative proposal for 2012 to revise the EU public procurement directives.¹

The Commission's objective is to make public spending more efficient by streamlining the procedures and tapping into the potential of the internal market. It also aims to make better use of public procurement to support wider policy goals, such as environmental protection, resource and energy efficiency, promoting innovation and social inclusion.

For this review to lead to genuinely clearer and more efficient procedures, rather than simply a tightening of the current procurement regime, it is important that users of procurement rules are involved in this process and make use of this opportunity to bring to the Commission's attention the problems they currently face.

What are the key issues?

The Green Paper is comprehensive, identifying various opportunities for reform and questioning how the current public procurement rules could be improved. It identifies a number of the key problems associated with the current rules. These include:

- **Modifications in project requirements:** Although the need for modifications arises frequently, the current directives do not provide for this eventuality. According to case-law, 'material' changes to public contracts after its award requires that a new contract award procedure be carried out. A recurrent problem for businesses and contracting authorities alike is to determine whether a change is 'material'. The paper asks whether more clarity on this is needed.
- **A/B Services:** The directives make a distinction between priority "A-services" (such as financial services) and non-priority "B-services" (such as healthcare services). While the former are subject to the full application of the procurement rules, the latter have only to comply with a lighter regime. The paper asks whether this distinction is still valid.



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¹ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 134/1, 30.4.2004 and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134/114, 30.4.2004.

- **Thresholds:** The paper asks whether the current thresholds for the application of the EU rules are too low, whether they should remain constant or be increased, so that more contracts are published at an EU-level.
- **Defining public procurers:** The paper considers the definition of public bodies which are subject to the EU procurement rules, and asks whether this is appropriate, and whether it might be further clarified or updated.

What happens next?

- The public consultation is open until **18 April 2011**. Any interested parties are invited to comment. Further information is available online at: http://ec.europa.eu/internal_market/consultations/2011/public_procurement_en.htm.
- In parallel, the Commission is undertaking an evaluation to determine how efficient and cost-effective the EU public procurement rules are at present.
- An analysis of replies to the Green Paper and results of the evaluation will be discussed at a public conference in Brussels on **30 June 2011**.
- The Commission is expected to make a legislative proposal **during the course of 2012**.
- The proposal will then pass to the Council and the European Parliament, who may reject the proposal, negotiate amendments, or adopt the proposal as it stands. That process can take more than a year. If any revised directive were to be adopted, Member States would then have a time period, usually two years, to implement it into national laws. A change to the rules governing public procurement is therefore some way off.

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