

THE
CHARTERED INSTITUTE OF
PURCHASING & SUPPLY®



Response Paper

CIPS RESPONSE
to
EU GREEN PAPER
on the modernisation of
EU public procurement policy
towards a more efficient
European Procurement Market

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1 INTRODUCTION

The Chartered Institute of Purchasing & Supply (CIPS) is the world's leading body representing and driving forward the field of procurement and supply chain management. CIPS has over 65,000 members in 150 countries worldwide and exists to promote and develop high standards of skill, ability and integrity within the procurement and supply chain profession.

CIPS promotes excellence, drives rigour, continuous improvement and delivers competitive advantage for CIPS' members and businesses customers. The Institute also works in the interests of the public to promote and develop best practice within the profession encompassing both public and private sectors.

Whilst CIPS has responded to all questions, the most important issue for CIPS is:

Rules should be simplified where possible and any changes that are introduced should be aimed at both:

1) making the legislation more effective for purchasers

and

2) making public sector contracts more attractive for all economic operators.

CIPS is pleased to enclose our detailed response to the questions included within the Green paper.

2 DETAILED RESPONSES

Q1

Question:

Do you think that the scope of the Public Procurement Directives should be limited to purchasing activities? Should any such limitation simply codify the criterion of the immediate economic benefit developed by the Court or should it provide additional/ alternative conditions and concepts?

Response:

The rules should be limited to purchasing activities. There is a need to clarify the situation relating to grants and when a grant becomes a contract. The current understanding is that a grant becomes a contract when the recipient of the grant has to provide a service in return to the donator of the grant or some other person or organisation.

Q2

Question:

Do you consider the current structure of the material scope, with its division into works, supplies and services contracts, appropriate? If not, which alternative structure would you propose?

Response:

We consider the division of purchases into three divisions, works, supplies and services appropriate but further clarity is required relating to which rules apply to contracts that cover two or more categories. Is the decision made on the highest value or the main purpose of the contract? This is particularly relevant for contracts that include works incidental to services, or the opposite. There should be a clear definition for the use of CPC, NACE and CPV and these nomenclatures should be made accessible. Definition of construction service contract: Appendix 5 GPA

Q3

Question:

Do you think that the definition of “works contract” should be reviewed and simplified? If so, would you propose to omit the reference to a specific list annexed to the Directive? What would be the elements of your proposed definition?

Response:

We consider the definition of works contracts should be simplified possibly by clearer reference to NACE and/or CPC. Refer also to Q2 above

Q4

Question:

Do you think that the distinction between A and B services should be reviewed?

Response:

Yes, there is the possibility of cross border trade for the majority of "B" services. The one exception would be social services related to the care of individuals when issues of locality, language and continuity/long term relationships apply.

Q5

Question:

Do you believe that the Public Procurement Directives should apply to all services, possibly on the basis of a more flexible standard regime? If not please indicate which service(s) should continue to follow the regime currently in place for B-services, and the reasons why.

Response:

We believe that the Directives should apply to all services. The courts currently apply the Treaty principles to B Contracts so in practice this would not be a significant change.

Q6

Question:

Would you advocate that the thresholds for the application of the EU Directives should be raised, despite the fact that this would entail at international level the consequences described above?

Response:

Yes, we believe that thresholds for services and goods should be raised for both sectors (Utilities and Public). Inflation has significantly reduced the real value of threshold levels since they were first introduced. The thresholds should be increased to take account of the inflation and the thresholds for the public sector should be increased to the levels applicable to the Utility Sector. There are no clear reasons for the differential and there would be benefits to purchasers and economic operators, particularly SMEs, if the Public Sector thresholds were brought in line with the Utility Sector thresholds.

Q7

Question:

Do you consider the current provisions on excluded contracts to be appropriate? Do you think that the relevant section should be restructured or that individual exclusions are in need of clarification?

Response:

Yes. The bigger issue for purchasers is the question of cross border trade relating to "B" Services and below threshold contracts. For these contracts and other contracts covered by the principles, some clarity or guidance (not more legislation) of what constitutes cross border trade or how it can be assessed would be helpful

Q8

Question:

Do you think that certain exclusions should be abolished, reconsidered or updated? If yes, which ones? What would you propose?

Response:

N/A

Q9

Question:

Do you consider that the current approach in defining public procurers is appropriate? In particular, do you think that the concept of "body governed by public law" should be clarified and updated in the light of the ECJ case-law? If so, what kind of updating would you consider appropriate?

Response:

We consider the overall approach to be appropriate but we would welcome clarity with regard to "bodies governed by public law". We consider that this is a national, not a EU issue and decisions/guidance on this should be issued by the individual member states and not by further legislation.

Q10

Question:

Do you think that there is still a need for EU rules on public procurement in respect of these sectors? Please explain the reasons for your answer.

Response:

Yes, for utilities wholly owned, or mainly owned, by the public sector or where they operate under exclusive rights but not for privately owned Utilities that operate in a competitive market or have obtained exclusive rights as a result of a competitive process.

Q10.1

Question:

If yes: Should certain sectors that are currently covered be excluded or, conversely, should other sectors also be subject to the provisions? Please explain which sectors should be covered and give the reasons for your answer

Response:

See Q10. For this purpose article 30 of the Utilities directive should be retained.

Q11

Question:

Currently, the scope of the Directive is defined on the basis of the activities that the Entities concerned carry out, their legal statute (public or private) and, where they are private, the existence or absence of special or exclusive rights. Do you consider these criteria to be relevant or should other criteria be used? Please give reasons for your answer.

Response:

We consider the activities are the correct basis for defining the scope of the directive and that transparent competition be the criterion that determines the application of the rules to specific Utilities. Refer to the comments under Q10 and 10.1

Q12

Question:

Can the profit-seeking or commercial ethos of private companies be presumed to be sufficient to guarantee objective and fair procurement by those entities (even where they operate on the basis of special or exclusive rights)?

Response:

We consider that Utilities, whom themselves are subject to competition, will be under commercial and shareholder pressures that will ensure they purchase on the grounds of best value for their particular requirements at the time in the same way as other private sector companies. For companies that operate on the basis of exclusive rights refer to Q10

Q13

Question:

Does the current provision in Article 30 of the Directive constitute an effective way of adapting the scope of the Directive to changing patterns of regulation and competition in the relevant (national and sectoral) markets?

Response:

Yes. We consider that this article should be retained.

Q14

Question:

Do you think that the current level of detail of the EU public procurement rules is appropriate? If not, are they too detailed or not detailed enough?

Response:

Purchasers, whilst understanding the reasons for the current detailed rules, would prefer to operate under a set of commercial principles outlining the main requirements, to ensure fair competition and value for money, instead of the detailed set of rules covering matters, such as the number of days required for the receipt of bids etc. If the rules are to be maintained, we consider that more flexible rules for the classical public sector, with facilities to use the negotiated procedure for all procurements, an increase in thresholds, and the ability to operate lists of qualified suppliers would lead to both better value for the contracting authorities and lower costs and reduced administration for economic entities. An increase in thresholds would also simplify procurement by both sectors and increase participation in public procurement by SMEs

Q15

Question:

Do you think that the procedures as set out in the current Directives allow contracting authorities to obtain the best possible procurement outcomes? If not: How should the procedures be improved in order to alleviate administrative burdens/ reduce transaction costs and duration of the procedures, while at the same time guaranteeing that contracting authorities obtain best value for money?

Response:

No. For public sector purchasers to obtain best value for money it would be beneficial if they could have access to the use of the negotiated procedure with a call for competition for all procurements. Within the member states the Dynamic Purchasing System (DPS) procedure is rarely if ever used because of the additional work and time delays introduced by the second notice. The removal of the need for a second notice would make the procedure more attractive to purchasers, encourage greater use of electronic procurement, reduce purchasing timescales and reduce costs for purchasers and economic operators.

Q16**Question:**

Can you think of other types of procedures which are not available under the current Directives and which could, in your view, increase the cost-effectiveness of public procurement procedures?

Response:

That the facility to operate a system of qualification of economic operators as currently available to purchasers from the Utility Sector under Article 53 of the Utilities Directive 2004/17/EC should be made available to Public Sector purchasers albeit with similar rules to ensure the regular advertising of the lists. We also accept the need to safeguard the interests of economic operators by not allowing purchasers to charge economic operators for inclusion on the lists. This procedure has been used successfully by the Utility Sector for many years and its use by the public sector would reduce their costs, shorten contracting timescales, to the benefit of both purchasers and suppliers in the current economic climate and, more significantly, would reduce the economic operators' costs of qualifying, making public sector contracts more attractive to Small to Medium Enterprises (SMEs) in particular.

Q17**Question:**

Do you think that the procedures and tools provided by the Directive to address specific needs and to facilitate private participation in public investment through public-private partnerships (e.g. dynamic purchasing system, competitive dialogue, electronic auctions, design contests) should be maintained in their current form, modified (if so, how) or abolished?

Response:

We consider that the current procedures should be maintained. That change in the use of the competitive dialogue procedure should be implemented to enable its use for a wider range of procurements, with more facilities to negotiate at the end of the process. This would not be necessary if the use of the negotiated procedure, with a call for competition, was more freely available for use by the public sector. Changes to the DPS, as covered under Q15, and changes to the electronic auctions allowing purchasers to undertake an auction on the auctionable elements before undertaking a full analysis of all award criteria would save time and reduce costs. For PPP contracts, the use of the negotiated procedure with a call for competition would be helpful, or the ability to undertake more negotiations after bids have been received under the competitive dialogue procedure, would facilitate better value contracts.

Q18

Question:

On the basis of your experience with the use of the accelerated procedure in 2009 and 2010, would you advocate a generalisation of this possibility of shortening the deadlines under certain circumstances? Would this be possible in your view without jeopardizing the quality of offers?

Response:

We consider that the opportunity to use the accelerated procedure should be more easily available to purchasers. We do not consider that this would jeopardise the quality of offers, providing purchasers comply with the overall requirement that they must allow sufficient time to bid. In our view the pressure on buyers to achieve best value would ensure that they comply with this requirement.

Q19

Question:

Would you be in favour of allowing more negotiation in public procurement procedures and/ or generalizing the use of the negotiated procedure with prior publication?

Response:

Yes, we consider that the Classical Public Sector should have the same access to the negotiated procedure, with a call for competition procedure as the Utility Sector, and more negotiation should be allowed under the competitive dialogue procedure. One of the unfortunate problems with the open and restricted procedures is that it is not unusual for the best bids received having to be rejected for some minor transgression of the rules applicable to those procedures. These transgressions could be corrected under the negotiated procedure without unfairly affecting the interests of the other bidders. We accept that there may be a need to introduce rules into the negotiated procedure with a call for competition similar to those in the competitive dialogue to safeguard the Intellectual Property Rights (IPR) of participating economic operators, otherwise the overriding rules of equal treatment of bidders, no discrimination and transparency should suffice.

Q20

Question:

In the latter case, do you think that this possibility should be allowed for all types of contracts/ all types of contracting authorities, or only under certain conditions?

Response:

For all types of contracts.

Q21

Question:

Do you share the view that a generalised use of the negotiated procedure might entail certain risks of abuse/ discrimination? In addition to the safeguards already provided EN 16 EN for in the Directives for the negotiated procedure, would additional safeguards for transparency and non-discrimination be necessary in order to compensate for the higher level of discretion? If so, what could such additional safeguards be?

Response:

Negotiations entail risks but in our view these are outweighed by the benefits to purchasers and economic operators. There is a need for negotiations to be undertaken by professional purchasers to ensure best practice is followed. There would also be a need for procedures to ensure transparency and non-discrimination. The inclusion of the safeguards already included in the Competitive Dialogue Procedures would help achieve this outcome.

Q22

Question:

Do you think that it would be appropriate to provide simplified procedures for the purchase of commercial goods and services? If so, which forms of simplification would you propose?

Response:

We consider that simplified procedures are required for this type of purchase although there may be problems in differentiating between commercial and other contracts We would prefer more flexibilities within the current rules to allow purchasers to use timescales appropriate to the contracts concerned.

Q23

Question:

Would you be in favour of a more flexible approach to the organisation and sequence of the examination of selection award criteria as part of the procurement procedure? If so, do you think that it should be possible to examine the award criteria before the selection criteria?

Response:

Yes, but only when using the Open Procedure or possibly any other procedure introduced for the procurement of commercial products. This issue would be partially resolved if the Classical Public Sector had access to the Pre-Qualification System available to the Utility Sector.

Q24

Question:

Do you consider that it could be justified in exceptional cases to allow contracting authorities to take into account criteria pertaining to the tenderer himself in the award phase? If so, in which cases, and which additional safeguards would in your view be needed to guarantee the fairness and objectivity of the award decision in such a system?

Response:

Yes. We believe that under the current procedures there is a facility to take into account how a supplier will make use of its resources in undertaking a contract, for example methodology, and we would like to see this more clearly covered in the rules. There is a need to go back to the selection criteria at the award stage, when the bids received are close and it is difficult to separate the offers. In the private sector in this situation the purchaser would revisit the selection criteria, because although all suppliers may have the resources to undertake the contract, some are better resourced or experienced. In this situation the supplier with the better resources would be awarded the contract. Prior to the recent court cases on selection and award criteria it was common practice for purchasers to reserve approximately 5% of the score allocated at the award stage, to the scores achieved at the selection stage, and we consider a facility to follow this type of controlled approach would provide best value whilst maintaining the principles.

Q25

Question:

Do you think the Directive should explicitly allow previous experience with one or several bidders to be taken into account? If yes, what safeguards would be needed to prevent discriminatory practices?

Response:

Yes. At the selection stage only with appropriate timescales and the need to justify the decision if called upon to do so.

Q26

Question:

Do you consider that specific rules are needed for procurement by utilities operators? Do the different rules applying to utilities operators and public undertakings adequately recognise the specific character of utilities procurement?

Response:

There is a need for flexible procedures for the Utility Sector. In general, we do not consider that the rules applicable to Utilities should be brought in line with the classical public sector rules. We do consider that the public sector rules should be brought more in line with the current rules applicable to Utilities, with the possible exception of the rules relating to Frameworks. The use of the negotiated procedure with a call for competition has proved beneficial for the utilities and they have demonstrated that this procedure may be safely used for the benefit of all parties.

Q27

Question:

Do you think that the full public procurement regime is appropriate or by contrast unsuitable for the needs of smaller contracting authorities? Please explain your answer.

Response:

We consider the same rules should apply to all public sector bodies. The rules should be appropriate to the value of purchases and not the size of the purchaser. The increases in thresholds suggested above would help the smaller purchaser

Q28

Question:

If so, would you be in favour of a simplified procurement regime for relatively small contract awards by local and regional authorities? What should be the characteristics of such a simplified regime in your view?

Response:

No. From our experience all purchasers would benefit from a simplified regime with the smaller purchasers possibly having a greater need for a simplified procurement regime because they do not have the purchasing resources available to the larger organisations. An increase in thresholds would help all purchasers and small suppliers.

Q29

Question:

Do you think that the case-law of the Court of Justice as explained in the Commission Interpretative Communication provides sufficient legal certainty for the award of contracts below the thresholds of the Directives? Or would you consider that additional guidance, for instance on the indications of a possible cross-border interest, or any other EU initiative, might be needed? On which points would you deem this relevant or necessary?

Response:

Purchasers from both sectors are currently unclear as to the rules relating to the letting of below threshold contracts. Guidance, not new legislation, is required to clarify what constitutes a tender, subject to cross border tendering and how to assess cross border interest, the types of contracts where no cross border interest is involved, and does cross border interest include non-domestic suppliers located in the country of the purchaser?

Q30**Question:**

In the light of the above, do you consider it useful to establish legislative rules at EU level regarding the scope and criteria for public-public cooperation?

Response:

In the current economic climate there are pressures on public sector bodies to reduce operating costs by the joint provision of services to the participating authorities. We consider that these types of arrangements should be excluded from the procurement legislation. Teckal and other recent court cases have laid down some principles to be followed when deciding whether or not services can be provided jointly without competition, but there is a need either for a general exception within the rules or some clearer rules and guidance that facilitate these types of arrangements.

Q31**Question:**

Would you agree that a concept with certain common criteria for exempted forms of public-public cooperation should be developed? What would in your view be the important elements of such a concept?

Response:

Yes. Issues, types of services, ie not generally available from the private sector, clear benefits to the participating authorities, easily understood rules. Also refer to Q30

Q32**Question:**

Or would you prefer specific rules for different forms of cooperation, following the case-law of the ECJ (e.g. in-house and horizontal cooperation)? If so, please explain why and which rules they should be.

Response:

In the current economic climate it is important that public sector bodies should be able to work together. Our most important requirement is clarity on the rules governing inter-authority cooperation. The principles of two or more authorities using a service provided by one of the authorities is clearly established. Rules are required concerning the ownership and control of the service provider. The rulings of the Teckal case, the Coditel Brabant v Commune d'Uccle and Region de Bruxelles – Capitale, the Commission v Federal Republic of Germany (Judgement June 2009) and the Sea Srl v Commune de Ponte Nossa case provide some guidance in this area but it would be helpful if the Directives could provide more certainty on these issues.

Q33

Question:

Should EU rules also cover transfers of competences? Please explain the reasons why.

Response:

Not if the responsibility is transferred in its entirety

Q34

Question:

In general, are you in favour of a stronger aggregation of demand/ more joint procurement? What are the benefits and/ or drawbacks in your view?

Response:

In principle, we are in favour of aggregated procurement as it provides the benefits of scale outlined in paragraph 2.4 of the Green Paper. In practice the ability to let joint contracts and frameworks meet this requirement. We consider that frameworks open for use by a wide number of authorities with committed usage provide the best results. Open frameworks let by central purchasing departments which are open to any users named in the OJEU Notice are also beneficial to smaller authorities in particular but can result in problems for Economic Entities who are not clear on the market value they are bidding for. We consider that the rules should be clearer on these frameworks particularly in relation to actual permitted expenditure against the estimated expenditure.

Q35

Question:

Are there in your view obstacles to an efficient aggregation of demand/ joint procurement? Do you think that the instruments that these Directives provide for aggregating demand (central purchasing bodies, framework contracts) work well and are sufficient? If not, how should these instruments be modified? What other instruments or provision would be necessary in your view?

Response:

We do not consider there are obstacles to aggregated procurements and in our view the current instruments work well taking into account the comments against Q34

Q36**Question:**

Do you think that a stronger aggregation of demand/ joint procurement might involve certain risks in terms of restricting competition and hampering access to public contracts by SMEs? If so, how could possible risks be mitigated?

Response:

Yes, but we do not consider this should be addressed within the Directives. This is a matter for professional procurement and procurement strategies to address. Clearly a monopoly purchaser can lead to a monopoly supplier but the structure of procurement within each member state has a greater influence on how contracts/frameworks are placed and competition from other member states can help avoid these problems. The facility for purchasers to award contracts limiting a supplier to a maximum share of a contract is another option.

Q37**Question:**

Do you think that joint public procurement would suit some specific product areas more than others? If yes, please specify some of these areas and the reasons.

Response:

No. In practice the benefits of joint procurement for standard products and services are well understood but in practice greater benefits can accrue from the savings achieved on complex contracts from reduced duplication on development and procurement costs

Q38**Question:**

Do you see specific problems for cross border joint procurement (e.g. in terms of applicable legislation and review procedures)? Specifically, do you think that your national law would allow a contracting authority to be subjected to a review procedure in another Member State?

Response:

There could be problems in relation to cross border joint procurement because some member states apply rules to public procurement that are more restrictive than the EU Procurement legislation. From our experience these problems can be overcome by applying the rules of the country with the most restrictive procedures to the contracting process. We do not consider that the purchaser should be subject to a review procedure in another member state. The current procedures using the European Court of Justice and the member states own courts would appear to be sufficient to ensure compliance.

Q39

Question:

Should the public procurement Directives regulate the issue of substantial modifications of a contract while it is still in force? If so, what elements of clarification would you propose?

Response:

The Directives should not limit the purchaser's right to amend contracts, but purchasers need to know what constitutes a substantial modification that requires a re-tender. The principles laid down by the Judge in the Presstext case appear to resolve this issue and in our view further legislation is not required.

Q40

Question:

Where a new competitive procedure has to be organised following an amendment of one or more essential conditions would the application of a more flexible procedure be justified? What procedure might this be?

Response:

Where a contract needs to be re-tendered there are short-term considerations to cover for the period required to commence a new procurement in accordance with the rules. Flexible requirements are required for the short term arrangements which could be negotiation or tenders outside the rules but the full procedures should apply to the new long-term procurement possibly using accelerated procedures.

Q41

Question:

Do you think that EU rules on changes in the context of the contract execution would have an added value? If so, what would be the added value of EU-level rules? In particular, should the EU rules make provision for the explicit obligation or right of contracting authorities to change the supplier/ terminate the contract in certain circumstances? If so, in which circumstances? Should the EU also lay down specific procedures on how the new supplier must/ may be chosen?

Response:

The directives should not lay down rules in relation to the obligations or rights of a purchaser to change suppliers/terminate contracts these matters are best dealt with by the purchasers own contract terms and conditions governed by contractual law. The procurement directives should lay down rules on how a new supplier is selected.

Q42

Question:

Do you agree that the EU public procurement Directives should require Member States to provide in their national law for a right to cancel contracts that have been awarded in breach of public procurement law?

Response:

Yes, but only where the breach is significant and has affected the award decision or has unfairly discriminated against the rights of the unsuccessful bidders

Q43

Do you think that certain aspects of the contract execution – and which aspects - should be regulated at EU level? Please explain.

Response:

No, this is a matter best left to the purchasing authorities or national governments.

Q44

Question:

Do you think that contracting authorities should have more possibilities to exert influence on subcontracting by the successful tenderer? If yes, which instruments would you propose?

Response:

Where it is essential for quality control purposes to control or eliminate the use of sub-contractors the right to do this should be incorporated within the Directive together with the right to cancel a contract if a specialist subcontractor who formed part of the original bid withdraws from the contract and the use of a different sub-contractor makes a significant difference in contract performance.

Q45

Question:

Do you think that the current Directives allow economic operators to avail themselves fully of procurement opportunities within the Internal Market? If not: Which provisions do you consider are not properly adapted to the needs of economic operators and why?

Response:

Yes, with the exception of SME's who find the costs of qualification and bidding in many instances outweighs the benefits achievable from low value contracts.

Q46**Question:**

Do you think that the EU public procurement rules and policy are already sufficiently SME-friendly? Or, alternatively, do you think that certain rules of the Directive should be reviewed or additional measures be introduced to foster SME participation in public procurement? Please explain your choice.

Response:

To attract SMEs to tender for more classical sector contracts there is a need to simplify the procedures in relation to supplier qualification and to reduce tendering costs. We consider that an increase in the thresholds and the use of the pre-qualification system by public authorities would make contracts more attractive to SMEs

Q47**Question:**

Would you be of the opinion that some of the measures set out in the Code of Best Practices should be made compulsory for contracting authorities, such as subdivision into lots (subject to certain caveats)?

Response:

No. The decision on how to go to the market should be left to the purchasing authority to ensure best value for money. This does not stop an authority from breaking their requirements down into lots to encourage participation by SMEs or to ensure adequate competition.

Q48**Question:**

Do you think that the rules relating to the choice of the bidder entail disproportionate administrative burdens for SMEs? If so, how could these rules be alleviated without jeopardizing guarantees for transparency, non-discrimination and high-quality implementation of contracts?

Response:

We consider the costs for all economic entities to be excessive particularly for low value and regularly tendered contracts. Apart from the suggestions under Q49 and Q50 the possibility of purchasers developing lists of qualified suppliers, as used by Utilities, would reduce these costs and save time for both purchasers and SMEs.

Q49**Question:**

Would you be in favour of a solution which would require submission and verification of evidence only by short-listed candidates/ the winning bidder?

Response:

We would be in favour of this procedure as an option but not as a mandatory requirement. In operational terms we consider this more appropriate to the Open Procedure

Q50**Question:**

Do you think that self-declarations are an appropriate way to alleviate administrative burdens with regard to evidence for selection criteria, or are they not reliable enough to replace certificates? On which issues could self-declarations be useful (particularly facts in the sphere of the undertaking itself) and on which not?

Response:

Yes. This could be an option available to purchasers but should not be mandatory. This could be used with verification sought from short-listed economic entities only or from preferred bidders as part of the due diligence process. The preferred option would be for the public sector to have the facility to maintain lists of pre-qualified suppliers.

Q51**Question:**

Do you agree that excessively strict turnover requirements for proving financial capacity are problematic for SMEs? Should EU legislation set a maximum ratio to ensure the proportionality of selection criteria (for instance: maximum turnover required may not exceed a certain multiple of the contract value)? Would you propose other instruments to ensure that selection criteria are proportionate to the value and the subject-matter of the contract?

Response:

We do not recommend the setting of mandatory multiples of turnover as these can vary with the type of contract concerned and the competition available in the market. Some general guidance may be helpful but in our view this is a commercial decision which should not be specified in the legislation

Q52**Question:**

What are the advantages and disadvantages of an option for Member States to allow or to require their contracting authorities to oblige the successful tenderer to subcontract a certain share of the main contract to third parties?

We consider that the purchaser should have the right to require or allow a successful tenderer to sub contract a share of the contract, but this should not be mandatory within the directives. Member states could require purchasers to adopt this approach where appropriate. The benefits and the risks would be the use of smaller contractors (SMEs), particularly by cross border bidders. The contractual risks would be in relation to overall responsibility for performance, standards/quality control

Q53

Question:

Do you agree that public procurement can have an important impact on market structures and that procurers should, where possible, seek to adjust their Procurement strategies in order to combat anti-competitive market structures?

Response:

Yes, this is an issue for all purchasers but for a purchasing authority to develop procurement strategies to combat an anti-competitive market place, it requires both a sound knowledge of the market and a professional procurement input. To combat anti-competitive markets, purchasers require the facility to break down their requirements into lots and to limit the number of lots awarded to a single supplier.

Q54

Question:

Do you think that European public procurement rules and policy should provide for (optional) instruments to encourage such pro-competitive procurement strategies? If so, which instruments would you suggest?

Response:

No. This is a matter for professional procurement. The current legislation lays down firm rules regarding supplier selection and contract award and in principle we agree with these rules. (refer to Q58) The award process ensures that the award is based on the basis of most economically advantageous bidder which can benefit the monopoly or dominant suppliers. However, purchasers have the tools within the existing rules to specify their requirements both in regard to product specification, the way in which they award contracts (to one or more suppliers) and the breakdown of requirements into lots.

Q55

Question:

In this context, do you think more specific instruments or initiatives are needed to encourage the participation of bidders from other Member States? If so, please describe them.

Response:

No. We do not consider that additional legislation is required. This is a matter for professional procurement and the marketing policies of economic operators

Q56

Question:

Do you think the mutual recognition of certificates needs to be improved? Would you be in favour of creating a Europe-wide pre-qualification system?

Response:

Yes to the former. The creation of a European wide qualification system may be helpful where the pre-qualification system can be directly related to contract performance but this should not be a compulsory system.

Q57

Question:

How would you propose to tackle the issue of language barriers? Do you take the view that contracting authorities should be obliged to draw up tender specifications for High-value contracts in a second language or to accept tenders in foreign languages?

Response:

No. We do not consider this should be mandatory. The market makes sure that language issues are dealt with and purchasers will tender in other languages where appropriate.

Q58

Question:

What instruments could public procurement rules put in place to prevent the development of dominant suppliers? How could contracting authorities be better protected against the power of dominant suppliers?

Response:

Refer to Q53 and 54.

Q59

Question:

Do you think that stronger safeguards against anti-competitive behaviours in tender procedures should be introduced into EU public procurement rules? If so, which new instruments/provisions would you suggest?

Response:

No, this is a matter for competition law not procurement law

Q60

Question:

In your view, can the attribution of exclusive rights jeopardise fair competition in procurement markets?

Response:

Yes, if not sufficiently limited in scope and time according to the nature of the specific exclusive right.

Q61**Question:**

If so, what instruments would you suggest in order to mitigate such risks / ensure fair competition? Do you think that the EU procurement rules should allow the award of contracts without procurement procedure on the basis of exclusive rights only on the condition that the exclusive right in question has itself been awarded in a transparent, competitive procedure?

Response:

In principle yes, but this is not a matter for professional purchasers to determine. Our need is for clear rules relating to the award of contracts without competition. The CIPS believes that this is a matter for national law but not procurement law.

Q62**Question:**

Do you consider that the rules on technical specifications make sufficient allowance for the introduction of considerations related to other policy objectives?

Response:

We consider that the current rules on technical specifications allow for the implementation of policies related to the environment and safety issues providing the requirements can be incorporated with the technical specification. They are clear and purchasers can purchase on a non-discriminatory basis under these rules. The decision as to whether or not specifications should allow process and production methods not related to the product, and not reflected in the characteristics of the product, is not one for professional purchasers. We consider that they should not be allowed, but if they are to be allowed the rules must be changed to reflect this option. We are concerned that allowing criteria not related to the performance of the contract to be included as part of the specification would make it difficult to ensure clarity, obtain value for money and to demonstrate non-discrimination in the award process.

Q63**Question:**

Do you share the view that the possibility of defining technical specifications in terms of performance or functional requirements might enable contracting authorities to achieve their policy needs better than defining them in terms of strict detailed technical requirements? If so, would you advocate making performance or functional requirements mandatory under certain conditions?

Response:

The use of output specifications can help achieve policy needs as well as innovation and better competition but the use of output specifications should not be mandatory. In certain circumstances, particularly where safety is involved, the use of EU and other technical standards is essential. We consider this to be a professional decision which does not require further legislation

Q64

Question:

By way of example, do you think that contracting authorities make sufficient use of the possibilities offered under Article 23 of Directive 2004/18/EC concerning accessibility criteria for persons with disabilities or design for all users? If not, what needs to be done? **Response:**

Response:

From our experience yes, but other bodies may be better able to respond to this item. Accessibility criteria has to become part of the design process for all products and services. Guidance on Article 23 of Directive should be issued to ensure the possibilities are well understood.

Q65

Question:

Do you think that some of the procedures provided under the current Directives (such as the competitive dialogue, design contests) are particularly suitable for taking into account environmental, social, accessibility and innovation policies?

Response:

We consider that the use of contracting procedures which allow for the development of innovative solutions, such as design contests, competitive dialogue and negotiation procedures with a call for competition do help achieve these objectives.

Q66

Question:

What changes would you suggest to the procedures provided under the current Directives to give the fullest possible consideration to the above policy objectives, whilst safeguarding the respect of the principles of non-discrimination and transparency ensuring a level playing field for European undertakings? Could the use of innovative information and communication technologies specifically help procurers in pursuing Europe 2020 objectives?

Response:

We do not consider changes to the directives are required. Guidance on how specifications can be developed to achieve these objectives would be helpful.

Q67

Question:

Do you see cases where a restriction to local or regional suppliers could be justified by legitimate and objective reasons that are not based on purely economic considerations?

Response:

In principle we do not agree with preferences being given to local suppliers but we do consider that total costs related to the contract during its lifetime should be taken into account, which can legitimately make local suppliers more competitive for some goods and services. User requirements for social services may need such a restriction.

Q68**Question:**

Do you think that allowing the use of the negotiated procedure with prior publication as a standard procedure could help in taking better account of policy-related considerations, such as environmental, social, innovation, etc.? Or would the risk of discrimination and restricting competition be too high?

Response:

Yes. As commented elsewhere, we consider the use of the negotiated procedure with a call for competition should be made generally available to public sector purchasers. The use of this procedure with appropriate specifications would facilitate innovation and other solutions. We accept the need for safeguards to ensure transparency and non-discrimination in the use of this procedure. In our view the inclusion of the safeguards already included in the Competitive Dialogue Procedures, particularly in relation to protecting the IPR of economic operators would help achieve this outcome.

Q69**Question:**

What would you suggest as useful examples of technical competence or other selection criteria aimed at fostering the achievement of objectives such as protection of environment, promotion of social inclusion, improving accessibility for disabled people and enhancing innovation?

Response:

We do not consider that competencies/criteria not related to the performance of the contract should be included as their inclusion can lead to discriminatory awards not based on best value. We consider that bidders should demonstrate that they comply with the law on issues not related to the performance of the contract and no additional scores should be added for going beyond the legal requirements.

Q70**Question:**

The criterion of the most economically advantageous tender seems to be best suited for pursuing other policy objectives. Do you think that, in order to take best account of such policy objectives, it would be useful to change the existing rules (for certain types of contracts/ some specific sectors/ in certain circumstances):

Response:

We consider that the environmental, energy efficiency, accessibility requirements should be part of the original specification. Not necessarily as specific requirements, but as objectives, and the award criteria should make it clear that within the weightings allocated to a criterion, that additional marks will be given for exceeding the minimum standards set in the specification. We consider this should be general and not specific to any one type of contract.

Q70.1.1

Question:

to eliminate the criterion of the lowest price only;

Response:

We consider that the use of "lowest price only" should not be eliminated totally, It is not appropriate for complex procurements or when using the competitive dialogue or negotiated procedures, but for standard products when the specification is sufficiently tight that purchasers are prepared to purchase at the lowest price from approved economic operators any product that meets the specification

Q70.1.2

Question:

to limit the use of the price criterion or the weight which contracting authorities can give to the price;

Response:

We consider this should be determined by the purchasing authority,

Q70.1.3

Question:

to introduce a third possibility of award criteria in addition to the lowest price and the economically most advantageous offer? If so, which alternative criterion would you propose that would make it possible to both pursue other policy objectives more effectively and guarantee a level playing field and fair competition between European undertakings?

Response:

We do not consider that a third possibility is required

Q71

Question:

Do you think that in any event the score attributed to environmental, social or innovative criteria, for example, should be limited to a set maximum, so that the criterion does not become more important than the performance or cost criteria?

Response:

No, not when linked to the subject of the contract. We consider that the basis of the award should be value for money for the provision of the goods, services or works that comply with the specification. We consider that the inclusion of compliance with environmental and social criteria when these aspects are not related to the performance of the contract should be limited to the mandatory requirements laid down by national laws. Providing economic operators can demonstrate compliance with the laws, they should qualify and no additional scores should be awarded for exceeding the legal requirements.

Q72

Question:

Do you think that the possibility of including environmental or social criteria in the award phase is understood and used? Should it in your view be better spelt out in the Directive?

Response:

We consider there is uncertainty on this issue within authorities which could better be resolved by guidance at EU and national level rather than by additional legislation.

Q73

Question:

In your view, should it be mandatory to take life-cycle costs into Account when determining the economically most advantageous offer, especially in the case of big projects? In this case, would you consider it necessary/ appropriate for the Commission services to develop a methodology for life-cycle costing?

Response:

No. We do not consider life cycle costing should be made mandatory for all projects. It is clearly good practice for most projects but there are occasions when the budgets available for a project are insufficient to pay a higher price at the start of the contract to gain benefits in the long term. We do not consider that the Commission should develop a methodology for life cycle costing; there are already established procedures for this purpose.

Q74

Question:

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 involved in the execution of the contract. Do you agree? If not, please suggest what might be the best alternative solution.

Response:

We agree

Q75

Question:

What kind of contract performance clauses would be particularly appropriate in your view in terms of taking social, environmental and energy efficiency considerations into account?

Response:

The current rules already cover this issue but guidelines rather than new legislation could be helpful.

Q76

Question:

Should certain general contract performance clauses, in particular those relating to employment and labour conditions of the workers involved in the execution of the contract, be already specified at EU level?

Response:

No. We believe this should be left to the purchaser. It may be appropriate to issue model clauses.

Q77

Question:

Do you think that the current EU public procurement framework should provide for specific solutions to deal with the issue of verification of the requirements throughout the supply chain? If so, which solutions would you propose to tackle this issue?

Response:

No, this is a professional procurement issue not an issue for the directives

Q78

Question:

How could contracting authorities best be helped to verify the requirements? Would the development of "standardised" conformity assessment schemes and documentation, as well as labels facilitate their work? When adopting such an approach, what can be done to minimise administrative burdens?

Response:

We do not consider these necessary. The requirements vary with the type and size of contracts concerned and is a procurement, not a legislative issue.

Q79

Question:

Some stakeholders suggest softening or even dropping the condition that requirements imposed by the contracting authority must be linked to the subject matter of the contract this could make it possible to require, for instance, that tenderers have a gender-equal employment policy in place or employ a certain quota of specific categories of people, such as jobseekers, persons with disabilities, etc.).

Do you agree with this suggestion? In your view, what could be the advantages or disadvantages of loosening or dropping the link with the subject matter?

Response:

We do not agree with this suggestion. If the link is dropped it can lead to purchasers awarding contracts on the basis of criteria that do not reflect best value and which can lead to discriminatory awards, particularly if purchasers set conditions that are more easily complied with in some countries. There would also be the issue of transparency, equal treatment and discrimination on the grounds of nationality.

Q80

Question:

If the link with the subject matter is to be loosened, which corrective mechanisms, if any, should be put in place in order to mitigate the risks of creating discrimination and of considerably restricting competition?

Response:

We do not consider it should be removed. As stated above, these requirements should be incorporated within the specification of requirements and the rules relating to the link with the subject of the contract applied.

Q81

Question:

Do you believe that SMEs might have problems complying with the various requirements? If so, how should this issue be dealt with in your view?

Response:

We consider that all suppliers would have problems complying with the requirements if the links to the subject matter of the contract as removed.

Q82

Question:

If you believe that the link with the subject matter should be loosened or eliminated, at which of the successive stages of the procurement process should this occur?

Response:

We do not consider that it should be removed.

Q82.1

Question:

Do you consider that, in defining the technical specifications, there is a case for relaxing the requirement that specifications relating to the process and production methods must be linked to the characteristics of the product, in order to encompass elements that are not reflected in the product's characteristics (such as for example - when buying coffee - requesting the supplier to pay the producers a premium to be invested in activities aimed at fostering the socio-economic development of local communities)?

Response:

The CIPS support ethical and sustainable procurement and would welcome any changes that help achieve these objectives, but we consider that production methods must be linked to the subject of the contract and that contracts must be awarded on the basis of the most economically advantageous tender. The important issue for purchasers is that if any changes are made to the rules, that they should be clear and optional with guidelines issued.

Q82.2

Question:

Do you think that EU public procurement legislation should allow contracting authorities to apply selection criteria based on characteristics of undertakings that are not linked to the subject of the contract (e.g. requiring tenderers to have a gender-equal employment policy in place, or a general policy of employing certain quotas of specific categories of people, such as jobseekers, persons with disabilities, etc.)?

Response:

No. This is not appropriate as a selection criteria. In our view it may be appropriate for a purchaser to specify that suppliers meet these requirements as part of the specification providing they are not discriminatory. Applicants/Tenderers either meet these requirements or do not, in which case they are non-compliant and their application is rejected.

Q82.3

Question:

Do you consider that the link with the subject matter of the contract should be loosened or eliminated at the award stage in order to take other policy considerations into account (e.g. extra points for tenderers who employ jobseekers or persons with disabilities)?

Response:

No. For the same reasons given above. Where applicable these requirements should be mandatory parts of the contract specification not an award criterion

Q82.3.1

Question:

Award criteria other than the lowest price/ the economically most advantageous tender/ criteria not linked to the subject-matter of the contract might separate the application of the EU public procurement rules from that of the State aid rules, in the sense that contracts awarded on the basis of other than economic criteria could entail the award of State aids, potentially problematic under EU State aid rules. Do you share this concern? If so, how should this issue be addressed?

Response:

Yes. We do not consider that award criteria not linked to the subject of the contract should be permitted.

Q82.4

Question:

Do you think that the EU public procurement legislation should allow contracting authorities to impose contract execution clauses that are not strictly linked to the provision of the goods and services in question (e.g. requiring the contractor to put in place child care services for the his employees or requiring them to allocate a certain amount of the remuneration to social projects)?

Response:

No, unless they are necessary for the performance of the contract in which case they should be part of the specification and no discrimination is involved

Q83

Question:

Do you think that EU level obligations on "what to buy" are a good way to achieve other policy objectives? What would be the main advantages and disadvantages of such an approach? For which specific product or service areas or for which specific policies do you think obligations on "what to buy" would be useful? Please explain your choice. Please give examples of Member State Procurement practices that could be replicated at EU level.

Response:

EU level obligations on "what to buy" may be an effective way of achieving other policies but the decision to follow this approach is one for the member states, not professional purchasing officers. For purchasers the important issue is that the requirements should be part of a specification and that only criteria related to the performance of the contract should be allowed.

Q84

Question:

Do you think that further obligations on "what to buy" at EU level should be enshrined in policy specific legislation (environmental, energy-related, social, accessibility, etc) or be imposed under general EU public procurement legislation instead?

Response:

If the member states adopt this approach we consider it should be by policy specific legislation and not in public procurement legislation, although the procurement legislation must be amended to facilitate compliance with the policy specific legislation

Q85

Question:

Do you think that obligations on "what to buy" should be imposed at national level? Do you consider that such national obligations could lead to a potential fragmentation of the internal market? If so, what would be the most appropriate way to mitigate this risk?

Response:

We consider that if imposed at national level it could lead to an unequal playing field for economic entities from the different member states and distort the market and lead to unfair competition.

Q86

Question:

Do you think that obligations on what to buy should lay down rather obligations for contracting authorities as regards the level of uptake (e.g. of GPP), the characteristics of the Goods/services/works they should purchase or specific criteria to be taken into account as one of a number of elements of the tender?

Response:

No. We consider that having set the policy objectives by means of policy specific legislation, the purchasing authorities should determine the criteria to be taken into account when specifying requirements and awarding the contract.

Q86.1

Question:

What room for manoeuvre should be left to contracting authorities when making purchasing decisions?

Response:

We consider the current rules relating to most economically advantageous offer for the purchasing authority should remain.

Q86.2

Question:

Should mandatory requirements set the minimum level only so the individual contracting authorities could set more ambitious requirements?

Response:

Yes

Q87**Question:**

In your view, what would be the best instrument for dealing with technology development in terms of the most advanced technology (for example, tasking an entity to monitor which technology has developed to the most advanced stage, or requiring contracting authorities to take the most advanced technology into account as one of the award criteria, or any other means)?

Response:

We consider this to be a decision to be made by the purchaser. The aims of the authority should be clearly outlined in the specification. This could specify a minimum standard but making it clear that additional marks would be achieved for exceeding the minimum. We are concerned that if authorities can only take the most advanced technology into consideration this will have adverse effects on overall value for money. There may be situations when the technology that can be purchased is limited by the available funding. An additional problem would be that smaller purchasing authorities in particular would not have the resources to keep up to date with developments in the areas concerned. There would also be problems concerning what is or is not the most advanced technology.

Q88**Question:**

The introduction of mandatory criteria or mandatory targets on what to buy should not lead to the elimination of competition in procurement markets. How could the aim of not eliminating competition be taken into account when setting those criteria or targets?

Response:

By setting output/performance targets not detailed procedural targets.

Q89**Question:**

Do you consider that imposing obligations on "what to buy" would increase the administrative burden, particularly for small businesses? If so, how could this risk be mitigated? What kind of implementation measures and/or guidance should accompany such obligations?

Response:

Providing purchasers are given policy targets to achieve then the answer is no, but if specific obligations are imposed this will increase the burden for all purchasers and suppliers. If the most advanced technologies are imposed this could work against the interests of SMEs

Q90

Question:

If you are not in favour of obligations on "what to buy", would you consider any other instruments (e.g. recommendations or other incentives) to be appropriate?

Response:

The use of other incentives to encourage purchasing authorities to achieve policy objectives could be appropriate providing they do not distort the market or lead to purchasing decisions not based on overall value for money/most economically advantageous tender.

Q91

Question:

Do you think there is a need for further promote and stimulate innovation through public procurement? Which incentives/ measures would support and speed up the take-up of innovation by public sector bodies?

Response:

Yes. The current legislation contains the tools necessary to stimulate innovation, particularly the negotiated procedure with a call for competition and the competitive dialogue and the facility to accept variants. The use of the negotiated procedure with a call for competition and the competitive dialogue is limited by the current rules and it would help purchasers encourage innovation if the use of this procedure was more widely available. Currently, purchasers encourage economic operators to bring forward innovative solutions purchasers by the use of long term development and supply contracts.

Q92

Question:

Do you think that the competitive dialogue allows sufficient protection of intellectual property rights and innovative solutions, such as to ensure that the tenderers are not deprived of the benefits from their innovative ideas?

Response:

We consider that if properly implemented the competitive dialogue procedure does protect the interest of tenderers. We do not accept the point in the Green Paper that "the best solution is presented to all participants who are then invited to submit their tenders on the basis of this solution" It is our understanding of the procedure that this approach would be in direct contradiction of the rules. Clearly it may happen but further clarity in the rules would help eliminate this problem.

Q93**Question:**

Do you think that other procedures would better meet the requirement of strengthening innovation by protecting original solutions? If so, which kind of procedures would be the most appropriate?

Response:

No. The current procedures including design contests, competitive dialogue and the negotiated procedure with a call for competition are sufficient to encourage innovation and the interests of economic operators are protected if these procedures are implemented in accordance with the rules.

Q94**Question:**

In your view, is the approach of pre-commercial procurement, which involves contracting authorities procuring R&D services for the development of products that are not yet available on the market, suited to stimulating innovation? Is there a need for further best practice sharing and/or benchmarking of R&D procurement practices used across Member States to facilitate the wider usage of pre-commercial procurement? Might there be any other ways not covered explicitly in the current legal framework in which contracting authorities could request the development of products or services not yet available on the market? Do you see any specific ways that contracting authorities could encourage SMEs and start-ups to participate to pre-commercial procurement?

Response:

Pre-commercial procurement is a useful tool for the purpose of developing new products providing the selection of economic operator to undertake the research is transparent and non-discriminatory. In practice the market for such services consists of the suppliers that will sell the actual products or services developed. For this reason there is a need for clear rules for the procurement of R&D related to pre-commercial procurement. From our experience SMEs and start-ups are protected by long-term contracts with product design protection where appropriate.

Q95**Question:**

Are other measures needed to foster the innovation capacity of SMEs? If so, what kind of specific measures would you suggest?

Response:

No. Other than the facility for public sector purchasers to use the negotiated procedure with a call for competition and the keeping of lists of qualified suppliers which would make public sector contracts more attractive.

Q96**Question:**

What kind of performance measures would you suggest to monitor progress and impact of innovative public procurement? What data would be required for this performance measures and how it can be collected without creating an additional burden on contracting authorities and / or economic operators?

Response:

The provision of a CPV code for this type of contract or a suffix to existing codes for development contracts would enable the numbers of these types of contracts issued to be monitored from the award notice. The success of each contract could not be monitored.

Q97**Question:**

Do you consider that the specific features of social services should be taken more fully into account in EU public procurement legislation? If so, how should this be done?

Response:

Yes, but not for all social services. We consider that there is a need to simplify the tendering procedures for lower value personalised services to encourage/enable smaller service providers and charitable organisations to bid for these services. We also consider that when purchasing personal services for individual clients there is the need to take a client's personal requirements into account such as communication problems, travel limitations, relationship problems and similar requirements which may conflict with the current rules relating to the award of contracts and the involvement of local suppliers.

Q97.1**Question:**

Do you believe that certain aspects concerning the procurement of social services should be regulated to a greater extent at EU level with the aim of further enhancing the quality of these services? In particular:

Response:

No, because we consider that more regulation does not necessarily lead to an enhancement of the quality of services

Q97.1.1**Question:**

Should the Directives prohibit the criterion of lowest price for the award of contracts / limit the use of the price criterion / limit the weight which contracting authorities can give to the price / introduce a third possibility of award criteria in addition to the lowest price and the economically most advantageous offer?

Response:

No. Providing specifications are sufficiently precise there are occasions when it is appropriate to award contracts on the basis of lowest price or to give price a high weighting. For example this may apply to energy contracts where the product is the same for all bidders, the delivery is made through the same distributor and price is the only competitive element, particularly when the contracts are awarded under a framework agreement.

Q97.1.2

Question:

Should the Directives allow the possibility of reserving contracts involving social services to non-profit organisations / should there be other privileges for such organisations in the context of the award of social services contracts?

Response:

No. We consider the award of contracts should be based on the basis of the bids received and not the status of the tenderer.

Q97.1.3

Question:

Loosening the award criteria or reserving contracts to certain types of organisations could prejudice the ability of procurement procedures to ensure acquisition of such services "at least cost to the community" and thus carry the risk of the resulting contracts involving State aid. Do you share these concerns?

Response:

Yes, although we would use the term best value rather than least cost

Q97.2

Question:

Do you believe that other aspects of the procurement of social services should be less regulated (for instance through higher thresholds or de minimise type rules for such services)? What would be the justification for such special treatment of social services?

Response:

We can see no general grounds for having fewer regulations for contracts related to social services although it is important that the rules should allow purchasers to take into account the requirements of the recipients of social services.

Q98

Question:

Would you be in favour of introducing an EU definition of conflict of interest in public procurement? What activities/ situations harbouring a potential risk should be covered (personal relationships, business interests such as shareholdings, incompatibilities with external activities/ etc.)?

Response:

We consider this issue should be dealt with by the provision of guidance not legislation. The CIPS Code of Ethics provides guidance for members of CIPS and lays down clear guidelines requiring them to maintain the highest standard of integrity in all business relationships.

Q99

Question:

Do you think that there is a need for safeguards to prevent, identify and resolve conflict-of-interest situations effectively at EU level? If so, which kind of safeguards would you consider useful?

Response:

We consider this issue should be dealt with by the provision of guidance not legislation

Q100

Question:

Do you share the view that procurement markets are exposed to a risk of corruption and favouritism? Do you think EU action in this field is needed or should this be left to Member States alone?

Response:

All procurements are subject to some risk of corruption and favouritism and the preference to reduce operating risks by dealing with economic operators you know. This risk is reduced if professional purchasers are employed to undertake the procurements. We consider the risks are minimal if the current rules and the Treaty principles are complied with throughout the contracting process. This field should be left to Member States. The UK now has the Bribery Act and all Member States should be encouraged to bring their own anti-corruption legislation to achieve similar objectives.

Q101

Question:

In your view, what are the critical risks for integrity at each of the different stages of the public procurement process (definition of the subject-matter, preparation of the tender, selection stage, award stage, performance of the contract)?

Response:

The main risk areas are the way requirements are specified and the selection of suppliers to bid. Transparency requirements at selection and award stages minimizes risks at these stages. The design stage and the award stage carry considerable risks. Performance of contracts are often poorly monitored in the public sector as many are managed by people who do not have sufficient training to manage suppliers.

Q102

Question:

Which of the identified risks should, in your opinion, be addressed by introducing more specific/ additional rules in the EU public procurement Directives, and how (which rules/ safeguards)?

Response:

We do not consider that additional legislation is required. The broad principles of equal treatment, no discrimination and transparency are sufficient.

Q103

Question:

What additional instruments could be provided by the Directives to tackle organised crime in public procurement? Would you be in favour, for instance, of establishing an ex-ante control on subcontracting?

Response:

We do not consider that the procurement legislation is the right vehicle to tackle this issue which is better left to criminal law and maybe competition law.

Q104

Question:

Do you think that Article 45 of Directive 2004/18/EC concerning the exclusion of bidders is a useful instrument to sanction unsound business behaviours? What improvements to this mechanism and/or alternative mechanisms would you propose?

Response:

We do not consider article 45 helps in this respect as in practice it is difficult for purchasers to apply. If it is to be retained, further guidance on its application is required.

Q105

Question:

How could the cooperation among contracting authorities in obtaining the information on the personal situation of candidates and tenderers be strengthened?

Response:

Refer to previous question

Q106

Question:

Do you think that the issue of "self-cleaning measures" should be expressly addressed in Article 45 or it should be regulated only at national level?

Response:

We consider that these are best applied at national level

Q107

Question:

Is a reasoned decision to reject a tender or an application an appropriate sanction to improve observance of the principle of equality of treatment?

Response:

Yes

Q108

Question:

Do you think that in light of the Lisbon Treaty, minimum standards for criminal sanctions should be developed at EU level, in particular circumstances, such as corruption or undeclared conflicts of interest?

Response:

We consider this to be a national issue. The important issue for purchasers is that the rules should be clearly understood and operable.

Q109

Question:

Should there be specific rules at EU level to address the issue of advantages of certain tenderers because of their prior association with the design of the project subject of the call for tenders? Which safeguards would you propose?

Response:

No. Clearly tenderers with prior association of the project have some advantages but this is not an uncommon scenario in both private and public sector procurement and, whilst you cannot take away from those economic operators the benefits of having prior knowledge, you can minimise the benefits by ensuring that the specifications are objective and do not favour any individual bidders; that all bidders are fully aware of the requirements and that the award process is transparent

Q110

Question:

Do you think that the problem of possible advantages of incumbent bidders needs to be addressed at EU level and, if so, how?

Response:

No. Clearly incumbent suppliers have some inbuilt advantages, plus some disadvantages, but these are there for all procurements in both the private and public sectors and we consider they are best dealt with in a flexible way, using best procurement practice backed up by the current rules on transparency and equal treatment rather than detailed legislation

Q111

Question:

What are your experiences with and/or your views on the mechanisms set out in Articles 58 and 59 of Directive 2004/17/EC?

Response:

From our experience these provisions are rarely used. In practice purchasers do not consider these articles helpful or relevant to the procurement process when contract decisions are made on the basis of most economically advantageous offer.

Q111.1

Question:

Should these provisions be further improved? If so, how? Could it be appropriate to expand the scope of these provisions beyond the area of utilities procurement?

Response:

Refer to Q111

Q112

Question:

What other mechanisms would you propose to achieve improved symmetry in access to procurement markets?

Response:

None

Q113

Question:

Are there any other issues which you think should be addressed in a future reform of the EU public procurement Directives? Which issues are these, what are - in your view - the problems to be addressed and what could possible solutions to these problems look like?

Response:

CIPS believe that there should be a review of the effects of the Remedies Directive. The review should be conducted in December 2011. The review should seek to establish if the implementation of the Directive has led to a sharp rise in litigation and/or has directly increased procurement costs as widely predicted.

Q114

Question:

Please indicate a ranking of the importance of the various issues raised in this Green Paper and other issues that you consider important. If you had to choose three priority issues to be tackled first, which would you choose? Please explain your choice.

Response:

Please refer to our attached letter.

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