

Submission by Prospect on the consultation of the UK Transposition of new EU Procurement Directives – Public Contracts Regulations 2015

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www.prospect.org.uk

Background

Prospect is an independent and forward-looking trade union that represents over 113,400 professionals in the public and private sector. Our members are engineers, scientists, managers and specialists in areas as diverse as agriculture, defence, energy, environment, heritage, shipbuilding, telecoms and transport.

Prospect is the recognised union for representing specialist and professional staff in the UK government and in the devolved governments of Scotland, Wales and Northern Ireland. Members are spread across a large number of government departments, executive agencies, trading funds and non-departmental public bodies.

This submission builds on Prospect's long term commitment to advocating for responsible government procurement and to economic, social and environment sustainability of planetary and human resources and activity. Our initiatives, to name but a few, to this end include:

- **The Prospect Pledge:** a campaign aimed at capturing politicians' attention as they start to think about policies for the general election in 2015. Over 100 MP's have signed the overall pledge with 56 MP's specifically signed up to our responsible procurement pledge element.
http://www.prospect.org.uk/campaigns_and_events/national_campaigns/prospectpledge/procurement
- **Supply chain & international development:** working with the Ethical Trading Initiative (ETI) on public procurement that included training for procurement professionals on ILO conventions and the ETI base code. The DFID three year funded project report contains case studies on the pilot projects.
(<http://library.prospect.org.uk/id/2011/04095>)
- **Greening Government Commitments:** Contribution to various Cabinet Office & DEFRA forums dedicated to environmentally sustainable procurement.
- **London 2012 Olympics:** working with the Trades Union Congress and the FairPlay label to ensure ethical and sound labour practices in all related supply chains.
(<http://library.prospect.org.uk/id/2012/00275>)

Introduction

This submission does not aim to answer all the questions laid out in the consultation document for the UK implementation of the new package of EU Directives on Public Procurement. However we aim to provide evidence related to Prospect ambitions relating to apprenticeships, the social, environmental and labour law element of the draft regulations. Consideration is also given to the wider concerns of public procurement on supply chains both locally and internationally.

Prospect believes that public authorities have a responsibility to use taxpayers' money in a way that promotes cohesive social and economic development, good quality employment and high quality services, goods and works.

While, the new EU public procurement Directive has limitations, it provides an opportunity to achieve significant change in procurement in the UK and throughout the EU, through a stronger emphasis on the use of social, economic, quality and environmental criteria.

We believe that the new regulations provide opportunities to:

- Signal strong leadership by ensuring social and environment clauses are mandatory in committing public procurement to long term sustainability of local, national and international resources and,
- Be innovative in allowing public procurement to be the stimulus that addresses youth unemployment and skills shortages by including Apprenticeships in the procurement process.

We believe that the 2014 Directive provides scope for significant improvements in the public procurement framework in the UK, helping to promote intelligent commissioning and procurement that supports social, environmental and economic objectives. This we would argue will lead to better value outcomes for government, industry, and the wider public sector.

Prospect welcomes the improved safeguards against corruption and that the directive also allows for a limited number of policy choices that will support achieving better value from the £40billion spent by central government each year.

Equally, we acknowledge the considerable flexibility for contracting authorities to use procedures, tools and techniques of their own choosing, subject to the Treaty obligations of transparency, equal treatment and non-discrimination and welcome the move to allow prior discussions with suppliers and expert bodies prior to starting a procurement procedure both to inform suppliers and to allow the authority to seek advice in the planning and conduct of the procurement procedure.

We agree with the Trades Union Congress, that through its minimalist and non-regulatory approach, the UK government is failing to make full use of the opportunities that the new Directive provides in moving public procurement away from damaging price-only competition to a more quality based system that maximises economic, social and environmental outcomes such as the Living Wage; greater provision of apprenticeships; no zero-hour contracts; local skills and employment initiatives and support for local economies; as well as ensuring that contractors delivering public goods and services fully respect employment standards, collective agreements and trade union freedoms.

The consultation process

The consultation which focuses primarily on the new Public Sector Directive and applies principally to England, Wales and Northern Ireland is being undertaken within a truncated timescale of just 4 weeks from 19 September to 17 October.

In our view, this is an unnecessarily short and unhelpful timescale for an effective consultation on such a potentially important piece of new regulation. As such, the consultation process contravenes the government's own Consultation Principles, established in 2012, which states that "timeframes for consultation should be proportionate and realistic to allow stakeholders sufficient time to provide a considered response".

Issues arising from the draft regulations

a) Subject matter and scope

There is nothing in the EU Directive that requires the marketisation or outsourcing of public services by any Member State. The Directive is clear that Member States have the freedom to define how their public services and social security systems should be organised and financed and what obligations they should be subject to.

Article 1 of the Directive makes this point through reference to Article 14, Protocol 26 of the Treaty of the Functioning of the European Union (TFEU) which states, as a fundamental principle, the right of Member States to define and run their public services in their own interests and that those services are not subject to marketisation under EU law.

We are deeply concerned the UK government has failed to transpose this section and excluding any reference to this principle within the draft UK regulations.

b) Article 18(2)

The new Public Procurement Directive includes important new provisions which enable public authorities to invest public finances in a way which promotes social, economic and environmental development, good quality employment and quality services, goods and works.

Central to this new framework are the measures laid out in Article 18(2) and associated provisions throughout the Directive.

Article 18(2) places a new obligation on Member States to ensure that when performing public contracts, contractors comply with applicable environmental law and with social and labour standards set out in EU and national law and in collective agreements, as well as those safeguarded by international treaties and conventions.

The mandatory considerations in Article 18(2) lay down the labour law standards and working conditions which must be respected throughout the stages of the public procurement procedure. Additional social, economic, quality and environmental criteria are those that provide the flexibility to enable contracting authorities to promote sustainable public procurement.

Article 18(2) states that: "Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X."

The provisions listed in Annex X include ILO conventions 87 and 98 which promote the freedom of association, trade union organising and collective bargaining. We believe this places a significant and very positive obligation on the UK government to ensure that contracting authorities use procurement to promote these key freedoms and, of course, exclude contractors who engage in anti-union activities, including blacklisting and hiring staff on zero hour contracts.

The obligation on Member States to take "appropriate measures" is a mandatory requirement. However, we with the TUC, are seriously concerned that in its transposition, the UK government is proposing to take a minimalist approach to implementing Article 18(2).

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The government plans to issue guidance advising public authorities to mirror the obligations set out in Article 18(2) in contract clauses, backed up by a standard contract condition. It is anticipated that such guidance would be interpreted or applied inconsistently by contracting authorities.

We believe that the draft Regulations should be amended to ensure effective compliance with the Directive. In particular:

- The draft Regulations should expressly state that public contracts must include clauses requiring compliance with Art 18(2) of the Directive.
- The Regulations should also provide that non-compliance with Article 18(2) can be considered as grave misconduct on the part of the contractor.

b.1) Leadership opportunity for social and environmental sustainability

We believe that the new regulations are an opportunity for the UK government to follow the private sector example and demonstrate strong leadership and commitment to social and environmental sustainability.

In the PwC 17th Annual Global CEO survey¹, CEOs from around the world agreed that sustainability is at the core of business success, means it's also at the heart of decision making. A focus on financial performance alone results in important considerations being missed.

The report also states, "Sustainability is no longer a philanthropic afterthought or about installing low energy light-bulbs, but an approach to embed more forward thinking and responsible business practice into how a business produces and delivers its goods and services. It's about being 'able to sustain' your business responsibly, with one eye on 'new' external risks and the other on future consequences of your decisions."

It goes on to say that, "Understanding these impacts can drive improvements in corporate strategy, day to day operations and ultimately in financial performance. They're moving away from sustainability as an afterthought or something that helps them put right a problem they've caused, to a way of doing business.

In view of this business commitment we would encourage the UK government to ensure that the Article 18(2) is entrenched in mainstream thinking.

b.2) Labour and international standards

In line with the basic requirements of the Directive, Regulation 69(2) states that contracting authorities must reject a tender if found to be abnormally low because it does not comply with labour law standards set out in EU or national law or collective agreements or safeguarded under ILO Convention 87 and 98.

However the government has decided that it should only be optional for contracting authorities to decide not to award a contract to the tenderer submitting the most economically advantageous tender where they have established the tender does not comply with "applicable obligations in the fields of environmental, social and labour law

¹ <http://www.pwc.com/gx/en/ceo-survey/>

established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X." (Regulation 56(2)).

Prospect does not believe this approach is adequate to ensure that labour law standards are respected on public contracts.

Prospect believes the government should take a more proactive approach to ensure compliance with the Directive and respect for labour law and international standards. In particular, the draft regulations should place a mandatory requirement on contracting authorities to consider compliance with Article 18(2) in regard to award criteria and exclusion. Regulation 42 should also be amended to provide that the conditions set out in Article 18(2) should form part of the technical specification required of any awarded contract.

The business case for sound labour law application: The presence of unions in workplaces could be saving employers in the private and public sectors as much £701m a year or £2m a day, according to a TUC report written by Gregor Gall, Professor of Industrial Relations at the University of Hertfordshire².

In addition, in line with the government's wider policies on modern slavery, any contractor tendering for public contracts should also be required to report on measures which it has adopted to eradicate practices including modern slavery, human trafficking, forced labour, child labour and breaches of employment law standards within its supply chain. These also refer to the ILO Conventions 29, 105, 138 and 182.

b.3) Environment and climate change consideration: The evidence from the private sector indicates that where strong leadership and corporate commitment to reducing carbon emissions, for example, is taken seriously and is mainstreamed in procurement and operations that change is brought about.

A global non-profit organisation (CDP – Driving sustainable economies³) has incentivised companies and cities across the world's largest economies to measure and disclose their environmental information. Some of Britain's biggest companies have made it on to their first global "A list" of firms leading the way with action on climate change – these include Diageo, AstraZeneca, Aviva, J Sainsbury, Balfour Beatty and BT Group.

Another example cited by PwC is supermarket chain Asda⁴ which showed that over 90 percent of its food chain is at risk from climate change. This has prompted the company to start thinking about how it sources food and about building climate resistance for the farmers they buy from.

The draft regulations offer greater flexibility to include in the specification requirements such as carbon intensity that are related to methods of production and the provision of the contract outcome in any stage of the life cycle (provided linked to subject matter and proportionate to value/objectives). We believe that the draft Regulations should

² Facility Time for Union Reps : Separating fact from fiction <http://www.tuc.org.uk/workplace-issues/value-unions-uk-economy>

³ CDP <https://www.cdp.net/en-US/Pages/HomePage.aspx>

⁴ <http://uk.reuters.com/article/2014/10/14/climatechange-summit-pwc-idUKL6N0S92QD20141014>

expressly state that public contracts must include clauses requiring compliance and evidence on environmental performance.

b.4) Social innovation: apprenticeships

The “Innovation Partnership” procedure has been introduced and we welcome the transposition of Article 31 on ‘innovation partnerships’ and referenced in other provisions within the Regulations (notably the transposition of Article 70) that enables contracting authorities to identify the need for an innovative product, service or works that cannot be met by purchasing products, services or works already on the market and establish innovation partnerships with one or more partners with the aim of developing new products, services and works.

Prospect believes that inclusion of quality Apprenticeships in the Innovation Partnership procedure would be highly innovative and would be a stimulus to addressing youth unemployment and skills shortages applicable to large and small and medium-sized businesses.

A key area of Prospect campaigning includes responsible procurement⁵ and working with Members of Parliament to commit to a pledge that includes, “when awarding public contracts government should consider the number of apprenticeships and graduate traineeships that are created and the quality of working relationships”

Around one million young people are out of work. According to the Chartered Institute for Personnel and Development, a further million people are employed on zero hours contracts – though this seriously underestimates the scale of insecure and under-employment across the economy.

It is well documented that apprenticeships are key to reducing youth unemployment and a recent CIVITAS report⁶ indicates that British firms only employ apprenticeships equivalent to less than 1% of their workforce.

The National Infrastructure Plan, published in October 2010, acknowledges the urgent need for massive government expenditure on infrastructure projects. The Treasury's 2012 infrastructure pipeline update included 550 projects worth over £310 billion. Major programmes include highways, rail, nuclear, offshore wind and broadband. If these projects are delivered, a significant proportion will be paid for directly by taxpayers or financially underpinned, for example through economic regulation.

b.5) Social and environmental labels no substitute for conventions & treaties

We welcome that social/environmental labels are now permitted as part of specification, award criteria or terms and conditions as proof of compliance with a requirement with specific characteristics that are linked to the subject matter of the contract.

It is however worth noting that “labels” and certification are self-selected by companies and that both the monitoring and auditing of the label is paid for by the company. The tragic incidence of the death of garment workers in Bangladesh’s Rana Plaza factory demonstrates the flaws in the auditing process of a supply chain. Most of the UK Brands

⁵ The Prospect Pledge campaign: http://www.prospect.org.uk/campaigns_and_events/national_campaigns/prospectpledge/procurement

⁶ The Environment for Business in Germany: <http://www.civitas.org.uk/pdf/BusinessInGermany.pdf>
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sub-contracting in Rana Plaza held valid social audit reports. The current trade union led Bangladesh Accord⁷ aims to address these flaws.

Whilst guidance for award criteria must be contract-specific rather than aimed at assessing the corporate policy of the tenderer - evidence of corporate compliance to the plethora of sustainability indicators should not be viewed as evidence of compliance to the conventions and treaties listed in Annex X of the EU Directive. To name but a few these include:

- principles (for example UN Guiding principles on Business and Human Rights)
- standards (for example ISO 14001, ISO 26000)
- codes (for example Business in the Community & UN Global Compact) and
- reporting frameworks such as the Global Reporting Initiative⁸ (GRI).

Conclusion

We would strongly advocate a model similar to that in Scotland, where contracting authorities are required to comply with a sustainable procurement duty, where the authority must consider how in conducting procurement it can improve the social, economic and environmental wellbeing of the authority's area and where applicable wider society nationally, trans-nationally and globally.

Prospect believes that the UK government should make full use of the opportunities that new Directive provides in moving public procurement away from price-only competition to a more quality based system that maximises economic, social and environmental outcomes.

We would ask that the wherever possible the government makes it a mandatory requirement for contracting authorities to take social, economic, quality and environmental criteria into consideration at all stages of the procurement process, from specification to award criteria and a condition of contract performance.

⁷ <http://bangladeshaccord.org/>

⁸ <https://www.globalreporting.org/Pages/default.aspx>