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Simplifying procurement for low value contracts

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Foreword

Obtaining work is key to most businesses, and, whatever field you operate in, one way to win new work is through public sector contracts.

Public sector procurement is big business, worth £4.3bn a year in Wales alone, and can be a valuable source of revenue for smaller businesses based within our communities.

However, the way that procurement works is one of the big concerns that we hear from many FSB members here in Wales. They tell us that obtaining contracts can be extremely time-consuming, with public bodies requiring considerable paperwork to be completed just to be entered into the process.

There is no doubt that such excessive bureaucracy can deter smaller businesses with potentially strong bids from engaging with the procurement process.

It is clearly in the public sector’s interest to ensure that our public bodies – be they schools, hospitals or local authorities – get the best value from their procurement. As for the business community it is in our interest that every business gets a truly fair opportunity to bid so that there is genuine competition for each contract.

In this paper Dr Pedro Telles looks at how these two interests might be reconciled, and what a better low-value procurement system which is in the best interests of business and the public sector might look like.

I hope that it will provide food for thought for all of us involved in procurement, whether we are those offering work, or those seeking it.

Janet Jones, Chair
FSB Welsh Policy Unit

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1. Introduction

Public contracts in the EU follow different rules depending on value and the awarding contracting authority. Contracts above the EU financial thresholds are subject to the whole body of EU law, including the Public Procurement Directives, whereas contracts below such values are in general only subject to national rules. Contracts below-thresholds are particularly important for micro (0 – 9 employees) and small (10 – 49 employees) suppliers as these are the ones they have the most realistic chance of winning given their resource constraints. Traditionally, such low value contracts have not been advertised widely and contractors historically have been selected via a (private) request for quotes procedure. Without transparency it becomes very difficult for new suppliers to enter into the (public) market and competition is hindered. The purpose of this paper is to illustrate the importance of awarding contracts below-thresholds in a transparent way and how to manage this with limited transactional and opportunity costs.

The practice of using requests for quotes in the UK is slowly changing, with the UK Central Government demanding since 2011 that contracts above £10,000 be advertised in ContractsFinder. The Welsh Government also adopted a similar policy but for contracts above £25,000.

Although ensuring such contracts are advertised is a step in the right direction, neither Government considered the development of a new methodology that would be suitable for awarding such contracts. As a result, contracting authorities have simply copied and pasted their existing practice developed for contracts above-threshold. To solve the problem of high transaction and opportunity costs for advertising low value contracts, at Bangor University a new Simplified Open Procedure was successfully piloted. Over 10 pilots were undertaken with Carmarthenshire and Gwynedd County Councils where it was shown that it is possible to award low value contracts transparently in 38 days without disadvantaging suppliers or contracting authorities.

The ultimate objective of public procurement is to identify the best bid for the contract being tendered. As such, the Simplified Open Procedure reduces timescales in comparison with traditional open procedures and only includes the elements necessary to identify the best bid and a cursory analysis of the quality of the bidder itself. In consequence, it does not include a selection stage (although the winner still has to provide evidence of the required supporting information) and only the questions strictly necessary to award the contract are asked. The Simplified Open Procedure offers a blueprint on how to transparently award low value contracts with limited transaction costs for both suppliers and for contracting authorities.
2. Public procurement rules

Public contracts are regulated by a mixture of EU and national (or regional) rules. The bulk of EU rules, EU principles, treaty provisions and the EU Directives, apply to public contracts with a value above certain financial thresholds which vary depending on contracting authority and contract subject matter. Supply and services contracts share the same financial thresholds (£111,676 and £172,514 depending on contracting authority),^1^ whereas works contracts are covered only above £4,322,000. The purpose of the financial thresholds is to ensure that EU rules apply to those contracts with a higher value and are expected to be more complex.

It is assumed that such higher value contracts are part of the internal market and need to benefit from the full protection of EU law to ensure that the internal market is achieved. Consequently, contracts above the aforementioned thresholds are subject to all of the rules, particularly the detailed requirements imposed by the new EU Directive 2014/24/EU which replaces Directive 2004/18/EC. Contracts with a smaller value are only subject to national and regional rules and only to EU principles and treaty provisions in very specific circumstances when they generate “cross-border” interest, ie where it is expected that they will generate interest from participants based in other EU Member States. In other words, it is up to individual Member States to decide how they want to regulate public procurement for contracts below thresholds.

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3. The importance of below thresholds public contracts

Contrary to popular belief, contracts above EU thresholds do not represent most of the spend in public procurement. Across the EU, in 2010 only 18.6 per cent of total procurement spend \(^2\) came from contracts above the thresholds. In the United Kingdom, the figure hovers around 24 – 25 per cent. Although data on public contracts is not entirely reliable, in Portugal where data is reliable due to the use of a central clearing system for all public contracts irrespective of value, at least 50 per cent of the public procurement spend is below thresholds and probably much higher. \(^3\)

With the odd exception, it appears that 75 per cent of procurement spend in the United Kingdom is only subject to national rules. However, the Public Contracts Regulations \(^4\) and the Public Contracts (Scotland) Regulations \(^5\) do not regulate low value contracts. It is up to contracting authorities to devise their own rules and practices in compliance with their general legal obligations. In consequence, practice for below-thresholds contracts varies widely according to each contracting authority’s culture, practice and traditions. This contrasts with what occurs above-thresholds where the legislation ensures a relatively consistent practice. The consequence is that any supplier wishing to tender for below-threshold contracts risks facing a different experience every time, even when dealing with the same contracting authority. To make matters worse, in most cases outside the central Government contracts are not advertised at all and are still being tendered via private request for quotes with one or few participants selected in advance.

Contracts below thresholds are particularly important for micro and small companies, which account for 98.1 per cent of the total number of companies in Wales and almost 25% of turnover \(^6\) as it is these contracts which micro and small companies stand most chance of winning. If contracts are not advertised or follow a procedure that is cumbersome then, effectively, smaller suppliers are being squeezed out of, or excluded from, the market.

\(^2\) According to Eurostat (online data codes: gov_oth_procur), representing 3.5% of the EU’s total GDP.
4. Current state of affairs in the UK

Since 2011, the UK Government has required all contracts above £10,000 to be advertised in ContractsFinder.\(^7\) This obligation only covers the departments and organisations under control of central Government such as ministerial departments or the NHS in England. All other public bodies, such as English local authorities, or local authorities in Scotland, Wales and Northern Ireland are not bound by a similar requirement. If complied with, this policy of advertising small contracts would alleviate the issue of how smaller suppliers find out about contracts.

Welsh Government adopted a similar policy in 2009 after the Barriers to Procurement report,\(^8\) where researchers identified the lack of advertising of contracts below EU thresholds as a key barrier to supplier participation. The Welsh Government decided to put a £25,000 threshold on its advertising policy. In similar fashion, Scotland also expects contracts above £50,000 to be advertised.

There are two problems with the approach followed by the three Governments: first, the lack of instructions on how to advertise low value contracts implies that the current practice developed for larger contracts will simply be adapted (or copied) to lower value opportunities; second, each Government is pushing its own public procurement portal, forcing suppliers to keep track of ContractsFinder, Sell2Wales\(^9\) and Public Contracts Scotland.\(^10\) These issues are addressed in the following section.

For small suppliers wishing to work in public procurement, the ever expanding use of frameworks and central purchasing bodies is another potential issue looming in the distance. Under the spirit of rationalisation, fewer contracting authorities and fewer contracts are perceived as a desirable outcome. The end result will be the aggregation of what used to be small contracts in bigger packages. Framework agreements (the number of which increased from 200 in 2008 to 1,177 in 2012) may last for up to four years and can be used to aggregate contracts for a number of contracting authorities in a limited number of suppliers, that is, only the ones that made it into such frameworks.

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7 https://online.contractsfinder.businesslink.gov.uk/
9 http://www.sell2wales.gov.uk/
10 http://www.publiccontractsscotland.gov.uk/
5. Simplifying open and transparent procurement for low value contracts

In order for contracting authorities to advertise and tender small value contracts, the transaction costs need to be reasonably low; certainly lower than what is usually achieved with a simple adaptation of the open procedure. For suppliers to be interested in taking part in low value contracts, similar care needs to be taken with their transaction and opportunity costs. How can practice be changed to benefit both sides?

5.1 The Simplified Open Procedure

To solve the identified problems, in the Winning in Tendering project a new Simplified Open Procedure aiming to solve this problem was piloted. The Simplified Open Procedure is a fully transparent award procedure that keeps transaction and opportunity costs to a minimum. It was designed from the ground up to tackle small value contracts (£5,000 – 50,000), particularly consultancy ones. More than 10 pilots were run with Carmarthenshire and Gwynedd Councils and it was possible to consistently award contracts within 38 calendar days of the notice being published. For a measure of comparison, the UK Government states 120 working days as the official target for open procedures, although this is limited by the timescales imposed by the 2004/18/EC Directive, which have been shortened somewhat in the new 2014/24/EU Directive.

5.2 Key characteristics of the Simplified Open Procedure

The Simplified Open Procedure is designed to limit the transaction costs for all parties involved by being simple and easy to use. Its key characteristics include the following:

a) no restriction on participants;
b) replacing selection stage with self-declaration;
c) providing an executive summary with all necessary information for a “go” or “no go” decision;
d) simple questions and wording;
e) word limits.

To ensure true equal treatment between larger and smaller suppliers the procedure is open and suppliers submit their bid from the start, without a prior selection of the ‘best’ bidders. The focus of the procedure is on the bid and not the bidder. Bids are assessed before any selection information that could bias the procedure in favour of larger or more established suppliers.

11 Winning in Tendering was a €3.7M project funded by the INTERREG Ireland-Wales 4A (2007-2013) programme.
The development of the Simplified Open Procedure was carried out at the Institute for Competition and Procurement Studies (Bangor University) between 2011 and 2013. The outputs from the Simplified Open Procedure workstream include two case studies and detailed guidance. They can be found at icps.bangor.ac.uk.
By removing the selection stage it is possible to introduce major time and cost savings into the procedure. First, the time that would have to be allocated for submission of selection information and its assessment is effectively not needed allowing the procedure to be shortened. This measure and the 21 day advertising period are the biggest net contributors to shortening the procedure duration. Second, filling in PQQs and marking them incurs transaction costs for suppliers and contracting authorities alike. In a traditional procedure, suppliers also incur costs in relation to the opportunity cost of deciding to submit one PQQ over another.

Removing the selection stage does not mean that the information usually collated by it is not important. It is, but only in the case of the actual winner of the contract: all the costs incurred with the PQQ of any non-winning bidder are just waste borne by suppliers and contracting authorities. As such, in a Simplified Open Procedure participating suppliers sign a declaration stating their compliance with whatever requirements are set (experience, financial, health and safety, insurance, etc.) and with the obligation of providing the necessary evidence within 10 days in case of being declared the preferred bidder. Consequence for compliance failure are exclusion and either moving to the second best bid or starting the process over again. So far no supplier has had any problems in complying with selection requirements. Due to the incentives of signing the contract as soon as possible, most comply with requirements within 24 or 48 hours, well in advance of the 10 calendar days deadline.

The Simplified Open Procedure also includes an executive summary in the first page with enough information to help suppliers looking at the notice in a portal to quickly make the “go” – “no go” decision. As an example, for a consultancy contract in Gwynedd the following information was provided:

a) Contract reference
b) Contract description including award criteria
c) Insurance requirements
d) Contract period
e) Submission instructions
f) Submission deadline.

In other pilots, extra information was included, for example the expected milestones and interim deadlines for the procedure and also the contract or even the contract value if the contracting authority considered it appropriate to divulge that information.

In the Simplified Open Procedure pilots, work was also undertaken on the questions that procurers wanted to include. This work covered both vetting questions according to their relevance for identifying the best bid and also the actual wording. By removing questions and associated details that had stayed in tender documentation only due to inertia and entropy it was possible to reduce the documentation set.
used by Carmarthenshire in one low value contract from over 100 pages to fewer than 20. On wording, the effort was focused on ensuring that the drafting was neutral and devoid of procurement jargon where possible and did not assume suppliers had procurement knowledge or experience. After all, smaller suppliers in particular are rarely procurement experts and probably do not have access to such experts for free or from inside their organisations.

The final key change introduced in the Simplified Open Procedure was simply the imposition of word limits in all answers. If used well, word limits are very useful for the respondent by providing guidance on the amount of effort one should put into each question. It can be argued that the weighting in each section already provides an indication of importance, but a word limit is a clearer signal of the detail expected. It also goes some way into avoiding suppliers copying and pasting “canned” responses into questions, fostering consideration of what information should actually be included in the answer.
6. Benefits and drawbacks of Simplified Open Procedure

6.1 Benefits

From the supplier perspective, the Simplified Open Procedure has a number of benefits but also some drawbacks. From the pilots run it has clearly achieved the stated aim of increasing advertising while keeping transaction costs down in comparison with a standard open procedure. On average, 15 suppliers looked at the opportunities online and only 3 – 4 actually submitted bids. This was a sign the procedure was working as intended: opening up competition by wide advertising but ensuring only committed and high quality bids were submitted. This was a clear aim of the procedure as a huge increase in the number of actual bids only increases transaction costs. Increasing numbers does not improve competition in itself as those extra suppliers are by definition less competitive than the best, hence the effort made in helping suppliers self-deselect by providing as much relevant information as possible up front.

In all pilots, small suppliers looked at contract opportunities and at least one submitted a bid, once more indicating the procedure worked as intended in terms of reaching a large number of smaller suppliers.

Another benefit of the Simplified Open Procedure for suppliers is the increase in competition. By increasing competition, suppliers need to become better at tendering. On the one hand, it increases the risk of them losing, but for the ones able to become more competitive it puts them in a better position to win business elsewhere in the UK or even abroad, for example, in Ireland.

6.2 Drawbacks (and risks)

The Simplified Open Procedure has some drawbacks for suppliers. Suppliers already winning business via private, non-advertised request for quotes do not benefit from the added visibility or competition. The same can be said for suppliers which thrive in relationships with procurers. However, the move towards more transparency in low value contracts and the increased aggregation of contracts in framework agreements indicates that they will have to adapt to survive and continue working with the public sector.

Although a marked increase in the total number of suppliers participating in the pilots was not observed, there is a risk that in larger public sector procuring organisations that may happen. If that indeed occurs, there will be a larger number of aggrieved suppliers and also additional waste from resources committed to contracts that are not won. Paradoxically, in a world with more contracts advertised, even when transaction costs are low, smaller suppliers will have to be even more selective in their “go” or “no go” decisions, as any other supplier may take part in that specific opportunity.

There is also a risk for increased collusion by suppliers, particularly in situations where the contracting authority binds itself towards moving to the second best bid if the first bidder was not able to produce
the necessary documentation. This system can be abused if contracting authorities are not careful in their wording.

It is also possible that word limits will be abused by contracting authorities to ensure they have an easy excuse to steer the award towards a preferred supplier. However, the same problem is evident in both a traditional open procedure and more obviously in requests for quotes where participants are hand picked.

The final risk the Simplified Open Procedure entails is that by being successful, contracting authorities will try to subvert its objectives, making it fit with previous practice. For example, contracting authorities may lobby governments to ensure procurement portals include an option to limit advertising to suppliers based in certain postcodes to avoid “being swamped with offers”. In effect, that would constitute an online request for quotes and not a transparent procedure.
7. Conclusion

Taking into consideration that the overall majority of public procurement spend occurs below the EU financial thresholds, ensuring that such contracts are awarded transparently is important in ensuring that smaller suppliers have a fair chance. The alternative is to keep on awarding contracts with limited transparency via requests for quotes which restrict competition and reward existing connections between suppliers and procurers.

Simply advertising by using the traditional open or restricted procedure practice developed for larger and more complex contracts is not effective in opening up opportunities to SMEs. Across the UK, work on simplifying the awarding of low value contracts still needs to be done as shown by the pilots carried out by the Institute for Competition and Procurement Studies at Bangor University.
8. Resources

Legislation
Public Contracts Regulations 2006 as amended, available:

Public Contracts (Scotland) Regulations 2012 as amended, available:
http://www.legislation.gov.uk/ssi/2012/88/made

UK Public Procurement Thresholds 2014:

Procurement Portals
Sell2Wales: http://www.sell2wales.gov.uk/

ContractsFinder: https://online.contractsfinder.businesslink.gov.uk/

Public Contracts Scotland: http://www.publiccontractsscotland.gov.uk/


Research and Statistics

Welsh Government, Barriers to Procurement Opportunity Research (2009), available:

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