



June 2016

CREATING A GOOD LOCAL ECONOMY THROUGH PROCUREMENT

Pre Meeting Briefing Note 1 prepared by

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Presented to

Procure network partners and URBACT



1 PRE MEETING BRIEFING NOTE 1 – RESPONDING TO EUROPEAN AND NATIONAL LEVEL LAW

1.1 Introduction to the theme and meeting

The first meeting of the Procure network will take place in [Lublin, Poland](#)¹ on Tuesday 28th and Wednesday 29th June 2016. The focus is upon European and National level law around public procurement and generally what cities can do around innovative procurement in both process and practice terms. The meeting will look to address six key questions (these have been previously identified by the partners):

- What is the content of the new EU Procurement Directives?
- What are the expectations of national procurement law in each city?
- How can EU, national, and local level requirements be balanced?
- How can corruption be recognised and limited?
- What are the regulations around engaging SMEs?
- What scope is there for innovation in procurement?

To answer the questions, the thematic element of the meeting will be split into two parts. First, there will be a 'Masterclass' on EU procurement regulations which will look to cover questions 1, 5, and 6. Second, there will be three 'Deep Dive Workshops' on: national procurement law commonalities and differences (questions 2 and 3); being innovative in procurement: what are we allowed to do (question 6); and addressing barriers in procurement: a focus on recognising and addressing corruption (question 4).

This 'pre workshop briefing note' provides some initial information about each of the above aspects, which will be covered in more depth at the meeting. It is designed to enable partners and their local stakeholder groups to discuss prior to the meeting, in order for them to formulate thoughts and questions.

1.2 Part 1 – Masterclass (EU Procurement Directives)

[The EC Treaty of 1957](#)² (also known as the Treaty of Rome) first introduced the principle of a 'single market' and a unified Europe when it came to the movement of goods, services, workforces and finance. The Treaty effectively sought to ensure a Europe wide commitment to enabling the movement of such commodities freely between countries and a commitment to supporting the economic development of all member countries through trade between countries. Under this principle of a 'single market', the EC Treaty effectively outlawed anti-competitiveness in the process of procurement that favoured national or local suppliers.

This emphasis upon a single market is also reflected in the latest iteration of the [EU Procurement Directives](#)³ (Directive 2014/24/EU which repealed Directive 2004/18/EC), which is focused upon the procurement of public services. The new Directives, however, do allow for some flexibility when it comes to wider benefits being achieved through procurement. The Directives are intrinsically linked to the Europe 2020 Strategy and the emphasis upon balancing the achievement of smart, sustainable and inclusive growth while ensuring the most efficient use of public funds. There is a focus in the Directives around 'increasing the efficiency of public spending, facilitating in particular the

¹ <http://lublin.eu/en/lublin/news/>

² http://ec.europa.eu/archives/emu_history/documents/treaties/rometreaty2.pdf

³ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32014L0024>

participation of small to medium sized enterprises (SMEs) in public procurement in support of common societal goals'. The Directives promote a number of means of addressing societal goals through procurement. For example (these have been sourced from [the European Commission](#)⁴):

- ❑ They encourage the awarding of contracts in a way that is no longer just solely dependent upon price. Public procurers can now choose the tenders that provide more social advantages, such as the organisation employing the greatest number of long-term unemployed;
- ❑ Tenders may be excluded from the procurement process if they do not comply with social or labour law obligations. This will be particularly the case when the cost is abnormally low as a result of neglecting such obligations;
- ❑ They enable contracting authorities to restrict some tendering procedures for all types of work services and supplies to 'sheltered workshops' and social enterprises. To participate in such tenders, 30% of an organisations workforce must be 'disadvantaged'.

Given the emphasis upon SMEs, the new Directives also more effectively encourage the use of pre-market engagement before a good or service goes to procurement and also promotes the potential engagement of social economy organisations (social enterprise and voluntary and community sector organisations) in the process. Specifically in relation to SMEs, the Directives (these have been sourced from [the European Commission](#)⁵ – and will be discussed in more depth in 'pre meeting briefing note' 4):

- ❑ Encourage contracting authorities to divide contracts into lots, making tenders more accessible to SMEs;
- ❑ Limit the turnover required to participate in tender procedures to allow more SMEs and start-ups to participate;
- ❑ Decrease the documentation requirements for procurement procedures considerably.

Within the EU, procurement policy and strategy, largely sits within [DG Growth](#)⁶ (Internal Market, Entrepreneurship and SMEs) with [four respective areas of responsibility](#)⁷: G1 – Public Procurement Strategy; G2 – Access to Procurement Markets; G3 – Procurement Legislation and Enforcement; and G4 – Innovation and E-Procurement.

1.3 Part 2 – Deep Dive Workshops

1.3.1 National procurement law commonalities and differences

Countries across the European Union are required to adhere to the principles of the European Procurement Directives when it comes to the purchasing of goods and services. In legal terms, they have had to ensure that those principles are embedded into national level law by April 18th 2016. This allows for a common

⁴ https://commission.europa.eu/index_en

⁵ https://commission.europa.eu/index_en

⁶ <http://ec.europa.eu/growth/>

⁷ <http://ec.europa.eu/growth/>

approach to be adopted across Europe and for the process of procurement to be transparent. It also allows for any national level requirements and innovation to complement European level law.

The cities and countries involved in the Procure network were at various stages of adopting the principles of the European Procurement Directives into national level law and responding accordingly (when the baseline study for this network was produced – a key emphasis of discussion at the transnational meeting on 28th and 29th June will be upon whether this has happened and the nature of that embedding).

Countries such as the United Kingdom and Italy have already adopted the Directives; with this often framed by existing national level legislation around procurement and also innovation in procurement. In Italy where innovative procurement has been evident for the last twenty years, this includes legislation around [Green Public Procurement \(GPP\)](#)⁸. In the United Kingdom, this includes the legislation of the [Public Services \(Social Value\) Act in 2012](#)⁹ which encourages public authorities to consider economic, social and environmental value in procurement processes and decisions. In these countries, European Procurement Directives have been both adhered to and supplemented so that issues of wider concern are embedded into national level law.

Other countries involved in the Procure network (as of the time of the baseline study) had yet to formally embed the principles of the new European Procurement Directives into national level law including Poland, Romania, and Croatia. In these countries, considerations detailed in the new Directives around SME involvement and the consideration of wider societal goals are new and have not been considered before in national level procurement law or bespoke legislation as described above for the United Kingdom and Italy. In these countries, the ability to innovate is minimal as a result of the primary emphasis in procurement being on price. This is changing and each of the countries in the Procure network should have had new national level law in place by April 2016, making the network even more relevant in how European and national level law translates to the city level.

The below details a key observation for each country around their national level procurement law (further information is available in Appendix 1 of the baseline study for [Procure](#)¹⁰):

- ❑ Croatia – national level law is framed by procedures around transparency and compliance; however the process is under review;
- ❑ Czech Republic – procurement is heavily monitored and inspected by specialist units;
- ❑ Hungary – has a new Public Procurement Act which came into effect in November 2015; it places greater emphasis on value for money considerations in procurement;
- ❑ Italy – has a strong history of innovating in public procurement and has specific considerations around the use of cooperatives and green procurement;
- ❑ Netherlands – the consideration of proportionality is key, meaning that decisions have to be appropriate and reasonable in relation to the object being tendered;

⁸ http://ec.europa.eu/environment/gpp/pdf/GPP_Good_Practices_Brochure.pdf

⁹ <http://www.legislation.gov.uk/ukpga/2012/3/enacted>

¹⁰ <https://urbact.eu/networks/procure>

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- ❑ Poland – has been developing an amendment to its Procurement Act with an objective to simplify and make the process more flexible;
 - ❑ Romania – has seen numerous changes to national level law over the years, with 2016 set to see further amends as a result of the new European Directives;
 - ❑ Spain – national level law is driven by eleven priorities including: guaranteeing transparency; promoting SMEs; and promoting social participation in the process;
 - ❑ United Kingdom – the Public Services (Social Value) Act requires procurers to consider how the services they procure might improve economic, social and environmental well-being.

1.3.2 Being innovative in procurement: what are we allowed to do?

The process of procurement is often split into four parts. There is the commissioning of the good or service; the development of procurement strategy; pre-procurement; and the delivery of the good or service and monitoring. The Lead Expert for Procure has previously done [work¹¹](#) in the United Kingdom identifying the ways in which municipalities and other anchor institutions can be innovative in procurement at the various stages (these largely relate to maximising benefit for city economies in socio-economic and environmental terms; and are compliant with the EU Procurement Directives). The specifics of these means (described briefly below) will be discussed further at future transnational meetings with further case studies identified (particularly for meetings 3 and 5).

Link procurement to wider corporate priorities

One of the most straightforward ways of being innovative in procurement is to link the process to the wider corporate priorities of a municipality. Most municipalities will have a priority around addressing unemployment, for example. They can raise awareness of this issue by detailing it in procurement strategy and making potential suppliers aware that it is an issue in the procurement process.

Reflect community need

They can seek to ensure that service design and commissioning is reflective of community need, by engaging and consulting communities upon the design of services. This is emerging in the concept of co-production, where institutions and residents design services collaboratively, and where communities can have responsibility for small elements of budgets. A good example of this is [Mondragon in the Basque Country¹²](#)

Develop procurement strategies with a common narrative

These set out a municipalities or organisation's priorities and processes in relation to procurement practice. They are a key means by which priorities and criteria relating to economic, social and environmental wellbeing can be embedded, ensuring that priorities feed into the decision making process for all contracts. They also highlight to suppliers the types of benefit city governments and others are expecting them to demonstrate in their response to tenders. A good example of this is [Cleveland in the United States¹³](#).

¹¹ <https://cles.org.uk/publications/the-power-of-procurement/>

¹² <http://www.mondragon-corporation.com/eng/>

¹³ <https://democracycollaborative.org/blog/where-is-cwb-happening?rq=Cleveland%20>

Develop accessible portals

They can develop a range of online activities which raise awareness amongst the local business base, SMEs, and social economy organisations, of upcoming tender opportunities. These can include online portals which provide alerts to relevant contract opportunities, and a means of uploading tender documents and guides that explain to small organisations what is expected in the tender process and how to complete procurement documentation. They can also develop portals specifically for sub-contracting opportunities.

Package contracts to make them more accessible

For contracts which are below the European thresholds, municipalities and anchor institutions can consider breaking contracts down into smaller lots to make them more attractive for local and small business. They can also break them down into more specific lots which enable different organisations to bid for different aspects of a contract.

Streamline procurement documentation

One of the biggest barriers preventing local and particularly small organisations from bidding for contract opportunities is a (often fair) perception that the process is too complex and bureaucratic. Municipalities and anchor institutions can overcome this through the streamlining of documentation and particularly by standardising Pre-Qualification Questionnaires (PQQs) and Invitation to Tenders (ITTs);

Use social and environmental criteria

Cities can also consider social and environmental criteria in procurement strategy and in the associated tender documents and decision. This can be done by assigning, for example, ten percent of the decision to the extent to which potential suppliers detail that they will address social and environmental issues. A good example of this is [Malmo in Sweden](#)¹⁴.

Work with local business to test markets

Procurement teams can work with economic development teams to identify local businesses, particularly SMEs, who might be suitable to bid for certain contract opportunities. Targeted market testing could be focused on businesses in specific sectors or based in particular parts of the city. They can follow up market testing with targeted capacity building. They can also engage with potential suppliers before formally putting a service out to tender through holding meetings and events.

Engagement work with business networks

They can make local businesses, particularly SMEs, aware of procurement opportunities through developing relationships with business representative bodies such as Chambers of Commerce and small business organisations. These organisations can also provide advice and guidance to their members about bidding for procurement opportunities, and also assist in developing capacity and capability.

Capacity building of social economy organisations

They can provide capacity building support for both SMEs and social economy organisations, which gives them the knowledge and skills to bid for contract opportunities. This approach is not about preferential treatment, but about local organisational development. Capacity building can focus upon raising awareness of opportunities, the process of completing a PQQ, or getting a social

¹⁴ http://malmo.se/download/18.d8bc6b31373089f7d9800018573/Foodpolicy_Malmo.pdf

economy organisation tender ready. It could also involve one-to-one tendering support.

Embed apprenticeships, labour and social clauses

They can enable benefit by stipulating in tender documentation the requirement for contractors to add value for communities beyond service delivery. In construction projects, this could include a requirement to create apprenticeships for every €1 million spent, or a desire to create jobs for those who are unemployed. In more service focused activities, it could include wider social benefits such as community work. A good example of this is [Nantes in France](#)¹⁵.

Developing supplier networks

Supplier networks ensure a continuous relationship between buyer and supplier. Historically, goods and services have gone out to contract and suppliers have gone away and delivered the required service. A supplier network enables these institutions to voluntarily influence the behaviour of suppliers by informing them of corporate priorities and wider expectations around economic, social and environmental benefit; and in turn ensure these aspects of benefit are being delivered.

Continuous spend analysis and outcomes monitoring

They can continuously seek to identify the impact their procurement spend brings for their locality through spend analysis and contract monitoring. Through geographical analysis, they can identify the extent to which spend lies with suppliers based in or within a branch in their municipality boundary; and spend within particular areas of the city. Through contract monitoring, institutions can identify the extent to which suppliers re-spend in the local economy upon local suppliers and employees of their own; and the extent to which they are adding value to wider local priorities and outcomes. Spend analysis can also be utilised to identify areas of spend which are 'influenceable' and 'non-influenceable'. A good example of this is [Manchester in the United Kingdom](#)¹⁶.

1.3.3 Addressing barriers in procurement: a focus on recognising and addressing corruption

Corruption is a key challenge facing Europe, not only in terms of the European Union, countries and municipalities but also business and other forms of organisation. According to a [report for the European Commission on anti-fraud](#)¹⁷, corruption costs society in the EU an estimated 120 billion Euros. Procurement can often be seen as a function where there is significant scope for corruption, with a [further report](#)¹⁸ suggesting that across just five sectors and eight countries, that procurement corruption costed around 2 billion Euros.

Addressing corruption is a key component of the EU Procurement Directives and as such countries should have embedded measures around tackling corruption into their national level law. There are six key elements to the EU Procurement Directives which are seeking to address corruption (these have been sourced from [the European Commission](#)¹⁹):

¹⁵ <http://www.eurocities.eu/eurocities/news/Cities-discuss-innovation-and-social-clauses-in-public-procurement-WSP0-A4CL8Y>

¹⁶ <http://www.cles.org.uk/wp-content/uploads/2011/01/The-power-of-procurement.pdf>

¹⁷ http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/index_en.htm

¹⁸ https://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/identifying_reducing_corruption_in_public_procurement_en.pdf

¹⁹ http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8594

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- 1) Fraud and conflict of interest occur when public procurement practitioners can be influenced by a private or personal interest that could lead them to attempt to gain a personal advantage. In response, the notion of 'conflicts of interest' is defined at EU level for the first time in the new Directives. The new definition will make it easier to identify and manage fraud and conflict of interest cases.
 - 2) The widespread practice that public purchasers undertake preliminary market consultations for the preparation of calls for tenders can lead to situations that favour the companies involved. In the future however, public purchasers must ensure that the participation of a previously consulted company does not affect competition within the tender procedure and that any information shared with a company as a result of its prior involvement must be sent to the other participating companies as well.
 - 3) Currently, companies convicted for fraud and corruption can be excluded from public procurement procedures. Under the new directives though, a company can also be excluded if it unduly influenced the decision-making process or made false statements.
 - 4) Since the post-award period is particularly vulnerable to corruption, the rules for modifying contracts during their term have been clarified and simplified to remove any doubts. In particular, a new call for tenders will not be required for any modifications where the modifications have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses and the changes are not substantive.
 - 5) With transparency being one of the most effective ways of fighting corruption and malpractice in public procurement, EU countries are required to report violations of rules to national authorities, make the results of their monitoring activities public and submit a report to the Commission every 3 years on the most common sources of misapplication or legal uncertainty. Public purchasers must also keep copies of contracts of higher value for their entire duration and make them available to the public. Moreover, any public procurement award procedure must be covered by a specific report by the public purchaser explaining the main decisions relating to the procedure concerned, reporting any conflict of interests detected and steps taken in this regard, and be forwarded to the Commission/national authorities upon request.
 - 6) The simplification of procedures and the greater use of electronic tools in public procurement are also important instruments in the fight against fraud and corruption. In particular:
 - e-procurement will be generalised and become mandatory by 2018;
 - the setting of a dedicated legal framework for concession contracts enhances transparency;
 - a standard form for the self-declaration for bidders, the 'European Single Procurement Document' will be introduced, which makes it more difficult to exclude tenders in the selection phase.
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1.4 Tasks for undertaking

Prior to attending the transnational meeting on 28th and 29th June in Lublin, Poland, all partners are asked to think about the following questions. If partners are holding local stakeholder group meetings before the meeting that would be a good place to consult on the questions. If not, project officers should look to discuss directly with their local stakeholder group coordinators and with other members of their local stakeholder group by email. There will be various opportunities to discuss thoughts on these over the course of the two days.

- 1) What difference will/are the EU Procurement Directives making to your city?
 - 2) How has national level law around procurement changed in your countries changed since the last transnational partner meeting and the production of the baseline study? Please come prepared to discuss your experiences
 - 3) What are the three key challenges that you/your local stakeholder group have in your cities with national level law around procurement?
 - 4) Looking at the means of being innovative in procurement in section 1.3.2, which of them are you/members of your local stakeholder group:
 - Already doing;
 - Have thought about;
 - Have not thought about.Are there any further means of being innovative in procurement?
 - 5) What concerns do you have around the potential for corruption in procurement in your country? Are there any examples from your country?
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