

# **IS PUBLIC PROCUREMENT THE KEY TO INNOVATION FOR ENERGY AND SUSTAINABLE DEVELOPMENT?**

Malcolm Dowden, Solicitor and Consultant

*Charles Russell LLP, 5 Fleet Place, London, United Kingdom*

malcolm.dowden@charlesrussell.co.uk

## **ABSTRACT**

Written from a professional practitioner's perspective, this paper examines the extent to which the approach and examples identified in the context of European Union (EU) procurement rules by projects such as "Innovation Through Sustainable Public Procurement" (published as "Smart SPP") might be applicable in other jurisdictions to support its aspiration to provide a globally applicable model of best practice for procuring the innovative technologies required for sustainable development and improved environmental performance. It considers the outcome and recommendations of Smart SPP as a means of engaging with small and medium-sized enterprise and with universities and technical institutions to stimulate research and to enable the commercialization of new technology. It identifies elements of India's Public Procurement Bill that would allow adoption of those best practice recommendations to ensure that the legislation, once in force, would have the capacity to move beyond its initial concern with the creation of robust anti-corruption measures to the broader social and economic benefits to be derived from public sector involvement in the innovation process. It concludes, however, that the adoption of an approach similar to that advocated by Smart SPP would create a significant requirement for training and professional development among procurement professionals to accommodate the complexity and sophistication of "outcome specification" and the evaluation of widely differing technical bids.

**Keywords:** Procurement, Outcome specification, Evaluation, Award criteria, Life-cycle costing, Training.

## **1. INTRODUCTION**

Globally, government and public sector procurement represents a significant market opportunity for innovative technologies designed to promote sustainable development, energy efficiency and energy security. Public sector real estate portfolios, ranging from national, regional and local government offices to transport and communications infrastructure provide the scale required to generate a return on investment on new and innovative products and services, and to commercialise the research and development skills of universities and of small and medium size enterprise. Access to public sector contracting opportunities can greatly accelerate the development of new products and, depending on the specific treatment of intellectual property rights, may also have the capacity to create revenue opportunities for public sector bodies.

However, promoting innovation is rarely the initial priority or principal driver for local, national or supra-national procurement laws. The first objective tends to be to produce a procurement regime that is better-regulated, more transparent and less vulnerable to corruption than existing procedures that are either unregulated or based on voluntary codes of practice.

A key question for legislators engaged in the design and implementation of procurement laws is whether it is possible to build into a framework designed to address corruption the flexibility to accommodate broader social and economic goals, including innovation, or whether there must inevitably be successive stages, with innovation becoming a viable goal only once corruption has been addressed and eradicated.

## **2. BEST PRACTICE?**

The European Union's procurement laws and procedures have developed from the Supply and Works directives of the 1960s and 1970s, which had as their main objectives open advertising of contracting opportunities, prohibition of discriminatory specifications and the use of objective criteria for tendering and award procedures.

Through successive revisions EU procurement has moved away from a process based primarily on price to a far more complex analysis of 'most economically advantageous tenders' (MEAT), allowing contracting authorities to include broader environmental and social factors when producing a procurement specification and when evaluating bids. Emerging models of best practice are characterized by:

- (i) Early market engagement, allowing the contracting authority to identify the range of technologies that are either currently available or in development
- (ii) 'Outcome specification' describing the result sought rather than prescribing the technology to be purchased
- (iii) Detailed and weighted evaluation criteria, designed to allow radically different technologies and solutions to be meaningfully compared against the desired outcomes.

Those elements of best practice have been identified through projects such as Smart SPP [1]. The project was funded by the European Commission and conducted by a consortium led by ICLEI (Local Governments for Sustainability). ICLEI is a global association of cities and local governments with membership including 12 mega-cities, 100 super-cities and urban regions, 450 large cities and 450 small and medium-sized cities and towns in 84 countries. It was founded in 1990 as "International Council for Local Environmental Initiatives", but is now formally known by its initials, ICLEI [2]. The Smart Sustainable Public Procurement project focused on Europe, where public authorities spend approximately €1.5 trillion a year on goods and services (equivalent to 16% EU GDP). ICLEI's case is that: *"From constructing energy efficient public buildings to buying low emission vehicles, from buying organic or Fair Trade food to installing water-saving toilets, public procurement can have a huge impact in driving the market towards sustainability"*

A key question is whether the best practice measures identified by Smart SPP are in fact applicable across jurisdictions, geographic and economic areas or whether they represent a specific response to the EU's legal framework.

### 3. SMART SPP

At the core of Smart SPP is the identification of a contracting authority's needs in terms of performance and function. The first step is for the contracting authority to decide upon and articulate the result it seeks, eg a percentage reduction in greenhouse gas emissions or in energy costs. The next critical step is communicating that requirement to the market in a way that allows bidders to suggest the best, most efficient way to achieve the stipulated result.

Inevitably, this approach is likely to elicit widely differing proposals, some involving the purchase of goods, others of services. In one example, a contracting authority's desire to reduce energy costs could have been met either by purchasing new voltage optimization equipment, or by contracting for management and consultancy services to secure the more efficient use and operation of existing building management systems.

A major advantage of the Smart SPP approach is that it is not constrained by the existing technical knowledge or market awareness of the contracting authorities' officers responsible for the procurement process. Identifying and communicating the desired outcome leaves it to bidders to introduce technologies and solutions that the contracting authorities would have had no other viable way of finding.

A major challenge for the contracting authority is to devise and implement evaluation and award criteria that allow comparison of the full range of proposed solutions. That creates a significant training requirement and a need for both proactive advice and a robust methodology to insulate the process from legal challenge. Smart SPP provides some examples of weighted criteria for various product lines, but demonstrated a pressing need for increased skill levels among procurement officers, and for the sharing of best practice within and between contracting authorities.

### 4. EARLY MARKET ENGAGEMENT

Early market engagement is a key element of Smart SPP. Providing a sufficiently long lead-in time allows potential bidders to consider what potential alternative solutions exist, or are close to market readiness. It may allow potential bidders to reallocate time and resource to accelerate the development and commercialization of particular products or innovations to meet a contracting authority's requirements.

To maximize the efficiency and effect of this process, it is vital for contacting authorities to engage not just with their regular suppliers, including university knowledge-transfer functions and SMEs. True innovation may be found in start-ups and small enterprise, and not just in the slick research operations of large corporations.

This stage of 'pre-commercial procurement' has the additional advantage of allowing contracting authorities to demonstrate a commitment to identifying potential suppliers from outside existing and established supplier relationships. Firmly pegged to objective criteria, that approach promotes transparency, economic inclusion and demonstrably fair process.

### 5. LIFE CYCLE COSTING

Smart SPP focuses attention of the life cycle cost and benefits of the technology to be purchased. The initial purchase price is no real guide to the whole-life benefits of a particular solution. The costs of operation (particularly energy and water consumption) must also be taken into account, along with the costs of maintenance and final decommissioning and disposal. A bid that 'wins' in terms of coming in with the lowest initial price may, over the full life-cycle, compare poorly to others that have a higher initial price. Within the EU, increasingly strict waste regulation means that end of life costs are rapidly emerging as a key, and sometimes determinative, criterion.

## 6. NON FINANCIAL CRITERIA

Smart SPP urges contracting authorities to allocate significant weighting to non-financial criteria, such as improved energy efficiency ratings or measurable and verifiable greenhouse gas reductions.

## 7. SME-FRIENDLY TENDERS

As well as early market engagement to identify, and potentially accelerate, innovation, Smart SPP recommends that contracting authorities should consider splitting tenders into lots in order to make the volume both manageable and worthwhile for SME bidders.

Where lot sizes cannot sensibly be reduced, contracting authorities may consider either public-private partnership models to facilitate volume (eg by contributing to the expansion of manufacturing facilities) or allocating significant weight to criteria promoting joint ventures between large corporations and SMEs.

## 8. RISK ALLOCATION

Smart SPP recognises that contracting authorities tend to be risk-averse, and that buying innovation inevitably entails a degree of risk, whether technical or financial. This element requires extremely careful management and legal protection.

Clear and accurate identification of the areas of risk allows for their contractual allocation between the parties. As well as considering the appropriate lot sizes for a tender, contracting authorities should consider whether a piloting phase might be included to allow for the testing at scale of the chosen technology or range of technologies.

## 9. MONITORING PERFORMANCE

Introducing an innovative solution cannot end with the signing of the contract. Monitoring performance and impact allows lessons to be learned and applied for future procurements, and may prompt improvements to or adaptation of the chosen technology to meet circumstances that were not originally taken into account (eg opportunities arising from the convergence of energy efficiency and electronic communications in window technologies). As with the other elements of Smart SPP, this places additional responsibilities on contracting authorities, and may require a step-change in the levels of training, advice and expertise required by those authorities to deliver an effective procurement regime.

## 10. IS SMART SPP GLOBALLY APPLICABLE?

India's Public Procurement Bill [3] was introduced to the Lok Sabha in May 2012 as the first Union-wide legislation on public sector contracts. Coverage and discussion of the Bill has tended to focus on the anti-corruption agenda.

However, the legislation is drawn in terms that from the outset recognize the broader role and potential benefits of the public sector as an economic actor.

The Bill identifies, in a non-exhaustive list, the general principles of public procurement that it seeks to promote. They are:

- (i) Ensure efficiency, economy and transparency
- (ii) Provide fair and equitable treatment to bidders
- (iii) Promote competition
- (iv) Ensure that the price of the successful bid is reasonable and consistent with the quality required, and
- (v) Evolve mechanisms to prevent corrupt practices

At other points (eg Clause 21) the Bill permits contracting authorities to have regard to factors such as 'environmental characteristics'.

Clause 8 of the Bill permits the splitting of procurement into "appropriate packages" in the interests of "efficiency, economy and timely completion or supply". That element is certainly consistent with Smart SPP recommendations.

Clause 16 of the Bill contemplates the splitting of bids to allow for the evaluation of "techno-commercial" issues before moving on to consider financial aspects. Again, that provides opportunities for promoting innovative approaches and for entering into discussions concerning the appropriate financial and/or corporate structures before addressing pricing issues.

Clause 9 of the Bill promotes an approach based on "outcome specification", describing the tender in terms that are objective functional and generic, and that do not indicate a requirement for a particular trade mark, trade name or brand (a list that could usefully extend to requirements for compliance with particular national or international standards or accreditations, though clause 9(2) would require a contracting authority to give written reasons for departing from existing national technical regulations or standards).

Clause 21 sets out a wide and useful range of evaluation criteria, including financial and non-financial matters.

## 11. CONCLUSION

India's Public Procurement Bill provides a flexible and highly adaptable framework for public sector procurement. Adoption of the key guidelines identified through the Smart SPP project would be consistent with its terms and objectives. However, the effective development and operation of those guidelines would, as in Europe, place great emphasis on the need for the training and professional development of contracting authorities' officers and procurement specialists. That need is explicitly recognised by clause 43, which allows the Central Government to prescribe professional standards to be achieved by officials dealing with procurement and to specify training and certification requirements for that purpose.

A shift from detailed and product-specific specification in public tenders does not eradicate the risk of legal challenge. Rather, it tends to transfer that risk from the initial specification to the identification, weighting and application of the evaluation and award criteria. Outcome specification provides an extremely useful means to overcome the lack of specific technical knowledge or expertise on the part of procuring officers within contracting authorities. It potentially allows contracting authorities and public funding to play a direct and creative role in creating a viable and scalable market for innovative technologies. However, where a procurement process attracts a wide range of bids, including proposals for new or unproven technologies, the evaluation process may be extremely vulnerable to legal challenge, and the tendency towards risk-averse decisions that characterizes public sector procedures may militate against the selection and encouragement of true innovation. Nonetheless, in terms of legal drafting and statutory interpretation, India's Public Procurement Bill 2012 is eminently capable of promoting innovation. A key issue in practice will be the effective use of the powers conferred by clause 43 to promote a trained and professionalised body of procurement specialists.

## AUTHOR BIOGRAPHY



College, London.

**Malcolm Dowden** is a Solicitor qualified and practising in England and Wales. He has experience both of legislative drafting and of training procurement officers at contracting authorities in the United Kingdom and Europe. He is the author of *Procuring Innovation* (Law2020 Books, 2103). He is a Guest Lecturer at Birkbeck

## REFERENCES

1. Smart SPP report, "Driving energy efficient innovation through procurement: A practical guide for public authorities" (available online at <http://www.smart-spp.eu>)
2. ICLEI (Local Governments for Sustainability) operates in accordance with its Charter, which is available online at: [http://www.iclei-europe.org/fileadmin/templates/iclei-europe/files/content/Membership/ICLEI\\_Charter/ICLEI\\_Charter\\_2011-Final.pdf](http://www.iclei-europe.org/fileadmin/templates/iclei-europe/files/content/Membership/ICLEI_Charter/ICLEI_Charter_2011-Final.pdf)
3. Bill No.58 of 2012. The text of the Bill as introduced in the Lok Sabha is available online at: [http://164.100.24.219/BillsTexts/LSBillTexts/asintroduced/58\\_2012\\_LS\\_EN.pdf](http://164.100.24.219/BillsTexts/LSBillTexts/asintroduced/58_2012_LS_EN.pdf)