

EU procurement guidance

Introduction to the EU procurement rules



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Executive summary

The European Union (EU) procurement Directives, and the Regulations that implement them in the UK, set out the law on public procurement. Their purpose is to open up the public procurement market and to ensure the free movement of goods and services within the EU.

The rules apply to purchases by public bodies and certain utilities which are above set monetary thresholds. They cover all EU member states and, as a result of international agreements, their benefits also extend to a number of other countries worldwide.

Where the Regulations apply, contacts must be advertised in the Official Journal of the EU (OJEU) and there are other detailed rules that must be followed. The rules are enforced through the courts, including the European Court of Justice (ECJ).

The Directives

- 1 The EU procurement Directives set out the legal framework for public procurement. They apply when public authorities and utilities seek to acquire goods, services, civil engineering or building works. They set out procedures which must be followed before awarding a contract when its value exceeds set thresholds, unless it qualifies for a specific exemption e.g. on grounds of secrecy. Details of the current thresholds can be found at OGC's website www.ogc.gov.uk in the *Procurement Policy and EU Rules* section.

Implementation of the Directives into national law

- 2 The Directives have been implemented into national law in the UK by Regulations. The current Regulations, which can be viewed at OGC's website, cover:

Public authorities (the State, regional and local authorities and other public bodies)

- Works (civil engineering/building works)
The Public Works Contracts Regulations 1991 (SI 1991/2680)
- Supplies (the purchase or hire of goods)
The Public Supply Contracts Regulations 1995 (SI 1995/201)
- Services
The Public Services Contracts Regulations 1993 (SI 1993/3228)

Utilities (i.e. certain operators in the water, energy, transport and telecommunications sectors)

- The Utilities Contracts Regulations 1996 (SI 1996/2911) covering works, supplies and services contracts.

- 3 There are also amendments to the Regulations covering the co-ordination of procedures with the World Trade Organisation's Government Procurement Agreement (WTO GPA, see paragraph 6 below), and introducing standard notices for publication in the OJEU (see paragraph 12 below).

Purpose

- 4 The purpose of the rules is to open up the public procurement market and to ensure the free movement of goods and services within the EU. In most cases they require competition. The EU rules reflect and reinforce the value for money focus of the government's procurement policy. This requires that all public procurement must be based on vfm (defined as the optimum combination of whole-life cost and quality to meet the user's requirement) which should be achieved through competition, unless there are compelling reasons to the contrary.

Training

- 5 The EU procurement rules* are detailed and are the subject of a variety of training courses, including a module in the Certificate of Competence in Purchasing & Supply which is owned by OGC and available through CMPS (the 'Centre for Management and Policy Studies', www.cmps.gov.uk). This guidance cannot substitute for the training required by those who work in public procurement. Instead, it provides an overview of when the EU rules apply, when they require competition and what the requirement will involve, including the need to advertise contracts in the OJEU where appropriate.

Geographical coverage

- 6 In addition to the 25 EU member states, the benefits of the EU public procurement rules also apply to a number of other countries as a result of international agreements. The countries are:

Europe agreements	Bulgaria, Romania.
WTO GPA (Compliance with the EU rules ensures compliance with the WTO GPA where it applies and GPA providers have the same rights as EU providers.)	Aruba, Canada, Hong Kong China, Iceland, Israel, Japan, Republic of Korea, Liechtenstein, Norway, Singapore, Switzerland, United States.

Contracts outside of the scope of the Directives

- 7 Even when a tender process is not required under the Directives, for example because the estimated value of a contract falls below the relevant threshold, EU Treaty-based principles of non-discrimination, equal treatment, transparency, mutual recognition and proportionality apply and some degree of advertising, appropriate to the scale of the contract, is likely to be necessary to demonstrate transparency. This is in line with the UK objective of achieving value for money in *all* public procurement, not just that which is covered by the procurement Directives, (see paragraph 4 above) and *Government Accounting* Chapter 22, which can be viewed at the OGC website.

* References to the "EU procurement rules" are to the EU Treaty, and EU procurement Directives as implemented in UK legislation, ECJ rulings and other relevant EU law see <http://europa.eu.int>.

Identifying which Regulations apply to mixed contracts e.g. supply and service

- 8 For public authorities, the first step in the process is to establish which of the Regulations apply i.e. Works, Supplies or Services. Usually that will be clear from the contract's subject matter but there are occasions when contracts contain elements covered by more than one of the Regulations. In those cases, the Regulations provide that:
- where a contract covers both services and supplies, the classification should be determined by the respective values of the two elements;
 - where it covers works/supplies or works/services, it should be classified according to its predominant purpose;
 - where a contract provides for the supply of equipment and an operator, it should be regarded as a services contract;
 - contracts for software are considered to be for supplies unless they have to be tailored to the purchaser's specification in which case they are services.

Aggregation rules for establishing whether or not value exceeds the relevant threshold

- 9 Where a single work involves more than one contract the estimated value of all the contracts must be aggregated to decide whether the threshold is reached. Where the threshold is reached each of the works contracts will be covered by the rules except small contracts (known as small lots) the value of which fall below the de minimis level provided for in the Regulations - see threshold table on OGC's website.
- 10 In determining whether the threshold has been or is likely to be reached for public supplies or services contracts, the rules require aggregation:
- of the estimated value of separate contracts for meeting a single requirement; and,
 - in particular defined circumstances, where a series of contracts or a renewable contract is entered into for supplies/services of the same type⁺ during a twelve month period.
- 11 Where a public authority is divided into a number of discrete operational units with devolved authority to decide independently whether or not to enter into procurement contracts, then aggregation need only be applied to each unit. In other cases (i.e. where authority is not devolved) the public authority as a whole must be considered for aggregation purposes.

⁺ In judging whether supplies/services are "of the same type" account should be taken, for instance, of whether they would normally be ordered together and/or from the same suppliers.

The OJEU advertising requirement

- 12 As a general rule contracts which are covered by the Regulations must be the subject of a call for competition by publishing a contract notice in the OJEU. Standard forms for OJEU notices are available at <http://simap.eu.int>. In most cases the time allowed for responses or tenders must be no less than a set period, although some times can be reduced if a prior information notice (PIN) was published sufficiently far in advance of the procurement or when accelerated procedures are used. A table setting out the timetable for each procedure is attached at Annex A.

Reduced advertising requirements for certain categories of service contract

- 13 Service contracts are divided into two categories:
- Part A - to which the full rules apply;
 - Part B - where the only obligations relate to technical specifications and post-award information and there is no requirement for contracts to be advertised in the OJEU.
- 14 The services which fall within Part A and Part B are listed in Schedule 1 of the Regulations (which can be viewed on the OGC website).

Choice of procurement procedure

- 15 The time allowed for responses or tenders depends on which award procedure is used. Three award procedures are provided for:
- the **open procedure**, under which all those interested may respond to the advertisement in the OJEU by tendering for the contract;
 - the **restricted procedure**, under which a selection is made of those who respond to the advertisement and only they are invited to submit a tender for the contract. This allows purchasers to avoid having to deal with an overwhelmingly large number of tenders;
 - the **negotiated procedure**, under which a purchaser may select one or more persons with whom to negotiate the terms of the contract. An advertisement in the OJEU is usually required but, in certain circumstances, described in the Regulations, the contract does not have to be advertised in the OJEU. An example is when, for technical or artistic reasons or because of the protection of exclusive rights, only a particular person can carry out the contract.
- 16 Public authorities have a free choice between the open and restricted procedures but may only use the negotiated procedure in the limited circumstances described in the Regulations. Utilities have a free choice between the open, restricted and negotiated procedures.

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- 17 Under restricted procedures and competitive negotiated procedures (those where a call for competition is required by advertising in the OJEU) there must be a sufficient number of participants to ensure genuine competition, with a minimum of five for restricted procedures and three for competitive negotiated procedures.

Stages in the procurement process

- 18 The Regulations set out detailed criteria which are designed to avoid discrimination on grounds of origin in a particular Member State and to ensure that all suppliers or contractors established in countries covered by the rules are treated on equal terms. The criteria cover:
- Specification stage - how requirements must be specified, avoiding brand names and other references which would have the effect of favouring or eliminating particular providers, products or services - and the requirement to accept equivalence. Guidance on technical specifications is available on the OGC website.
 - Selection stage - the rejection or selection of candidates based on:
 - evidence that they are not unsuitable on grounds e.g. of bankruptcy, criminal conviction or failure to pay taxes;
 - their economic and financial standing e.g. that they are judged to be financially sound on the basis of their annual accounts;
 - their technical capacity e.g. that they will be adequately equipped to do the job and that their track record is satisfactory.
 - Award stage - the award of contracts either on the basis of “lowest price” or various criteria for determining which offer is “the most economically advantageous” to the purchaser (i.e. best value for money). Government policy is to use the latter criterion.

Post-tender negotiations

- 19 There are restrictions on the use of post tender negotiation under the open and restricted procedures. The European Commission has issued a statement on post tender negotiations in which it specifically rules out any negotiation on price, i.e.

“In open and restricted procedures all negotiations with candidates or tenderers on fundamental aspects of contracts, variations in which are likely to distort competition, and in particular on prices, shall be ruled out; however, discussions with candidates or tenderers may be held only for the purpose of clarifying or supplementing the content of their tenders or the requirements of the contracting authorities, and provided this does not involve discrimination”.

^o OJ L111, 30.4.94, p.114.

Enforcement

- 20 The principal means of enforcement for a breach of the Regulations and other enforceable EU law such as the Treaty are:
- action by suppliers or contractors against individual purchasers in the High Court; and
 - action by the European Commission against the member state in the ECJ.
- 21 Either way the result might be the suspension of an incomplete contract award procedure or the setting aside of a decision in an incomplete contract award procedure. The High Court also has powers to award damages. In cases where a contract has been entered into, an award of damages is the only remedy which the High Court can provide. However, the ECJ has demonstrated that, in appropriate circumstances, it is prepared to overturn a contract.

Application of the rules to private sector purchasers

- 22 For public works concession contracts (i.e. contracts under which the contractor is given the right to exploit the works, e.g. tolled river crossings), the winning concessionaire is required to comply with certain OJEU advertising requirements for works contracts which it intends to award to third parties. For some subsidised works contracts (civil engineering activities, building work for hospitals, facilities intended for sports, recreation and leisure, school and university building or buildings for administrative purposes) the public authority awarding the grant is obliged to require the subsidised body to comply with the Regulations, as if it were a public authority, as a condition of grant. This provision has, for example, been invoked for many Lottery funded projects. There is a similar requirement for subsidised service contracts in connection with subsidised works.

Utilities contracts

- 23 The rules apply to
- Public authorities;
 - Public undertakings (undertakings over which public authorities may exercise directly or indirectly a dominant influence); and,
 - Private sector bodies which operate on the basis of special or exclusive rights or which are deemed to do so;

where they undertake relevant activities.

The relevant activities are:

- the provision or operation of fixed networks for the provision of services to the public in connection with the production transport or distribution of drinking water, electricity or gas or heat;
- the supply of drinking water, electricity, gas or heat to such networks;
- sewerage and hydraulic engineering activities by water network operators;
- the exploitation of a geographical area for the purpose of exploring for, or extracting, oil, gas, coal or other solid fuels;
- the exploitation of a geographical area for the provision of airport, maritime or inland port facilities;
- the operation of networks providing transport services to the public by rail, tramway, trolley-bus, bus, cable or automated systems.

24 The utilities rules are similar to those for the public sector, but there are some differences, for instance:

- utilities can call for competition either by advertising in the OJEU, publishing sufficiently detailed PINs or by publishing a notice of a qualification system. Where a qualification system is used, those invited to tender or negotiate for a particular contract have to be selected from those who have qualified in accordance with the system;
- utilities have a free choice between the open, restricted and competitive negotiated procedures;
- utilities have voluntary access to a system for the external audit (attestation) of their procurement systems and practice; and they and their suppliers or contractors may resolve disputes about the application of the EU rules through a Community-level system for conciliation.

The new Directives

25 New procurement Directives (one covering the public sector and another covering utilities) have recently been agreed in the EU and must be implemented in Regulations by 31 January 2006, when they will replace the current Regulations. From 2006, UK Regulations will cover England, Wales and Northern Ireland with separate Scottish Regulations for public bodies in Scotland.

26 The new Directives build on the current regime whilst simplifying and updating it. Changes arising from the new Directives have not been included in this guidance but will be included in a revision when the new Regulations take effect. In the meantime, a training module which describes the new Directive changes is available at OGC's website in the *Procurement Policy and EU Rules* section. It includes information about new provisions which can be (but do not have to be) used before implementation takes place in January 2006.

Enquiries

- 27 Any enquiries should be addressed to: (OGC Service Desk, tel: 0845 000 4999 (GTN 3040 4999), Email: ServiceDesk@ogc.gsi.gov.uk)
- 28 If you have found this guidance useful, please let us know. If you have not found it useful, we would also be grateful to know of it, and to have any suggestions for improvements.

ANNEX A – Procurement Directives: OJEU advertising timescales

Procedure	Text	Days
Open	Minimum time for receipt of tenders from date contract notice sent	52
	Reduced when prior information notice (PIN) published (subject to restrictions) to, generally, –	36
	And no less than –	22
Restricted		
Restricted	Minimum time for receipt of requests to participate from the date contract notice sent	37
	Minimum time for receipt of tenders from the date invitation sent	40
	Reduced when PIN published (subject to restrictions) to, generally	26
Restricted Accelerated		
Restricted Accelerated	Minimum time for receipt of requests to participate from the date contract notice sent	15
	Minimum time for receipt of tenders from the date invitation sent	10
Competitive Negotiated		
Competitive Negotiated	Minimum time for receipt of requests to participate from the date contract notice sent	37
Competitive Negotiated Accelerated	Minimum time for receipt of requests to participate from the date contract notice sent	15

ANNEX B – Flowchart of the EU procurement process

