

# EU procurement guidance

## Introduction to the EU procurement rules



## Contents

1. Introduction .....	3
2. Directives in national law .....	3
3. Purpose .....	3
4. New Provisions .....	3
5. Training.....	4
6. Geographical coverage .....	4
7. Contracts outside the scope of the Directives .....	5
8. Mixed contracts.....	5
9. Aggregation rules and thresholds.....	5
10. OJEU advertising requirement .....	6
11. Reduced advertising requirement – Part A and Part B services .....	6
12. Choice of procurement procedure .....	6
13. Stages in the procurement process.....	7
14. Post tender negotiations.....	7
15. Enforcement .....	8
16. Regulations and the private sector.....	8
17. Utilities Contracts.....	8
18. Further Information .....	9
Annex A - OJEU Advertising Timescales .....	11

## Executive Summary

The European Union (EU) Procurement Directives<sup>1</sup>, and the Regulations<sup>2</sup> 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, because of international agreements, their benefits extend to a number of other countries worldwide.

Where the Regulations apply, contracts 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 Member States' courts, and the European Court of Justice (ECJ).

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<sup>1</sup> Directive 2004/18/EC of the European Parliament and of the Council of 31<sup>st</sup> March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts; and Directive 2004/17/EC of the European Parliament and of the Council of 31<sup>st</sup> March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors. Please see: [Official Journal L 134](#).

<sup>2</sup> The Public Contracts Regulations 2006 and the Utilities Contracts Regulations 2006

## 1. Introduction

- 1.1 The EU Procurement Directives set out the legal framework for public procurement. They apply when public authorities and utilities seek to acquire supplies, services, or works (e.g. civil engineering or building). They set out procedures which must be followed before awarding a contract when its value exceeds set thresholds, unless it qualifies for a specific exclusion - e.g. on grounds of national security. Details of the current thresholds can be found at OGC's website<sup>3</sup>.
- 1.2 This guidance is not intended as a substitute for project specific legal advice, which should always be sought by a public authority where required.
- 1.3 The EU procurement regime, described by the Directives and Regulations and set out in this guidance, is not static. It is subject to change, driven by evolving European and domestic case law, European Commission communications, new and revised Directives and amendments to the existing UK Regulations.

## 2. Directives in national law

- 2.1 The Directives have been implemented into national law in the UK by Regulations. The current Regulations came into force on 31 January 2006 to implement new procurement Directives. These Regulations (and Directives) clarify, simplify and update the previous regime and introduce a number of new provisions, detailed below in paragraph 4. The Regulations can be viewed at OGC's website:
  - Public authorities (the State, regional and local authorities and other public bodies)  
*The Public Contracts Regulations 2006 (SI 2006 No.5)*  
[http://www.opsi.gov.uk/si/si2006/uksi\\_20060005\\_en.pdf](http://www.opsi.gov.uk/si/si2006/uksi_20060005_en.pdf)
  - Utilities (i.e. certain operators in the water, energy, transport sectors)  
*The Utilities Contracts Regulations 2006 (SI 2006 No.6)*  
[http://www.opsi.gov.uk/si/si2006/uksi\\_20060006\\_en.pdf](http://www.opsi.gov.uk/si/si2006/uksi_20060006_en.pdf)
- 2.2 These Regulations do not extend to Scotland where separate, but similar, Regulations have been made. Any authority entering into a contract that is to be carried out in Scotland would need to consider the application of the Scottish Regulations. Please see the Devolved Administrations page on the OGC website<sup>4</sup>, where the Scottish Regulations for public authorities and utilities can be found, together with specifically-tailored guidance from the Scottish Executive, for more information.

## 3. Purpose

The purpose of the EU procurement rules is to open up the public procurement market and to ensure the free movement of supplies, services and works within the EU. In most cases they require competition. The EU rules reflect and reinforce the value for money (vfm) 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.

## 4. New provisions

- 4.1 The Regulations include a number of changes to procedures and requirements not included in the previous rules. A detailed explanation of the main changes (listed in paragraph 18.2) can be found on OGC's website<sup>5</sup>. In outline, the main changes are:

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<sup>3</sup> [http://www.ogc.gov.uk/procurement\\_policy\\_and\\_application\\_of\\_eu\\_rules\\_eu\\_procurement\\_thresholds\\_.asp](http://www.ogc.gov.uk/procurement_policy_and_application_of_eu_rules_eu_procurement_thresholds_.asp)

<sup>4</sup> [http://www.ogc.gov.uk/procurement\\_policy\\_and\\_application\\_of\\_eu\\_rules\\_devolved\\_administrations\\_.asp](http://www.ogc.gov.uk/procurement_policy_and_application_of_eu_rules_devolved_administrations_.asp)

<sup>5</sup> <http://www.ogc.gov.uk/>

- The previously separate supply, services and works public sector Regulations are **consolidated** into a single set of Regulations;
- The public sector Regulations expressly provide for **framework agreements** and **electronic auctions** for the first time;
- A new **competitive dialogue procedure** in the public sector Regulations is available for complex procurements where the authority does not consider that the open or restricted procedures will allow the award of a contract. This procedure will allow authorities to enter into a dialogue with potential bidders before seeking final tenders from them. This procedure is appropriate for many cases where hitherto the negotiated procedure had been used;
- Introduction of rules for **Dynamic Purchasing Systems**, a wholly electronic system for commonly used purchases. The system is open to new potential bidders through its lifetime. Call offs are made by means of a simplified notice in the Official Journal of the European Union (OJEU);
- Contracts may be reserved to **supported factories and businesses** where more than 50% of the workers are disabled persons;
- Specific provisions are included for **Central Purchasing Bodies** whereby contracting authorities can purchase from or through such bodies, which must be contracting authorities who have been set up to provide those supplies, services or works;
- Clarification on **social and environmental issues**;
- **Mandatory exclusion** of companies or other bodies whose Directors or other decision makers have been convicted of the following offences – participation in a criminal organisation, corruption, bribery and fraud, as defined in the Regulations; and
- A 10 calendar day **standstill period** at the award stage prior to contract signature to permit unsuccessful tenderers to seek further information about an award decision, and enable them to take action in the courts where they have sufficient grounds.

4.2 It is important that contracting authorities consider the detailed requirements on the above issues in the Regulations themselves.

## 5. Training

5.1 The EU procurement rules are detailed and are the subject of a variety of training courses<sup>6</sup>. This guidance document 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.

5.2 An overview presentation of the Public Sector and Utilities Procurement Regulations 2006 is available on the OGC website<sup>7</sup>.

## 6. Geographical coverage

In addition to the 27 EU Member States, the benefits of the EU public procurement rules also apply to a number of other countries because of an international agreement negotiated by the World Trade Organisation (WTO) titled the Government Procurement Agreement (GPA). Compliance with the EU rules ensures compliance with the GPA, where it applies, and GPA suppliers etc. have the same rights as EU suppliers. The countries who are signatories to the GPA are:

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<sup>6</sup> Procurement training is available from the Chartered Institute of Purchasing & Supply (<http://www.cips.org/>) or the National School of Government (<http://www.nationalschool.gov.uk/>) plus others.

<sup>7</sup> <http://www.ogc.gov.uk/>

- Aruba; Canada; Hong Kong, China; Iceland; Israel; Japan; Republic of Korea; Liechtenstein; Norway; Singapore; Switzerland; and USA.

## 7. Contracts outside the scope of the Directives

- 7.1 Even when a tender process is not subject to 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. Some degree of advertising, which is 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 those covered by the EU Procurement Directives.
- 7.2 As a result of various ECJ cases, the European Commission has sought to clarify matters around below threshold procurements, by publishing an Interpretive Communication <sup>8</sup>.

## 8. Mixed contracts

Although the public sector Regulations have been consolidated, some differences in treatment remain for supplies, services and works contracts. Usually it will be clear how to categorise a requirement from its subject matter but there are occasions when contracts contain elements of both supplies and services, for example. In those cases:

- 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.

## 9. Aggregation rules and thresholds

- 9.1 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 falls below the de minimis level provided for in the Regulations – see threshold value table <sup>9</sup>.
- 9.2 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
  - where a series of contracts or a renewable contract is entered into for supplies/services of the same type<sup>10</sup> during a twelve month period.
- 9.3 Where a public authority is divided into a number of discrete operational units with devolved authority to decide independently whether 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.

<sup>8</sup> [http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/c\\_179/c\\_17920060801en00020007.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/c_179/c_17920060801en00020007.pdf)

<sup>9</sup> [http://www.ogc.gov.uk/procurement\\_policy\\_and\\_application\\_of\\_eu\\_rules\\_eu\\_procurement\\_thresholds\\_.asp](http://www.ogc.gov.uk/procurement_policy_and_application_of_eu_rules_eu_procurement_thresholds_.asp)

<sup>10</sup> 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

## 10. OJEU advertising requirement

10.1 Generally contracts covered by the Regulations must be the subject of a call for competition by publishing a Contract Notice in the OJEU. Use of the Standard Forms for OJEU notices (e.g. a Contract Notice or a Contract Award Notice) is mandatory. They are available at the Commission's website, SIMAP<sup>11</sup>. In most cases the time allowed for responses or tenders must be no less than a set period, although some reduction is possible where:

- A prior information notice (PIN) has been published sufficiently far in advance of the procurement or when accelerated procedures are used.
- If the OJEU Contract Notice has been submitted electronically in accordance with the requirements set out on the SIMAP website.
- Where authorities offer full and unrestricted website access to tender documents (in accordance with specific requirements set out in the Regulations).

10.2 A table setting out the timescale for each procurement procedure is at Annex A.

## 11. Reduced advertising requirement - Part A and Part B services

11.1 For services contracts, there may be a reduced requirement to advertise the procurement. Services contracts are divided into two categories:

- Part A - to which the full EU rules apply; and
- Part B - where only some of the EU procurement rules apply – namely, obligations relating to technical specifications and post-award information. There is no requirement for a Contract Notice to be published in the OJEU, but there is a requirement to send a Contract Award Notice to the Office of Publication of the OJEU.

11.2 The services that fall within Part A and Part B are listed in Schedule 3 of the Regulations (which can be viewed at OGC's website).

## 12. Choice of procurement procedure

12.1 Four award procedures are provided for in the Regulations:

- 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 **competitive dialogue procedure**, following an OJEU Contract Notice and a selection process, the authority then enters into dialogue with potential bidders, to develop one or more suitable solutions for its requirements and on which chosen bidders will be invited to tender; and
- the **negotiated procedure**, under which a purchaser may select one or more potential bidders 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

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<sup>11</sup> <http://simap.europa.eu/>

to be advertised in the OJEU. An example is when, for technical or artistic reasons or because of the protection of exclusive rights, the contract can only be carried out by a particular bidder.

12.2 Public authorities have a free choice between the open and restricted procedures. The competitive dialogue procedure is available where the contract cannot be awarded under open or restricted procedures. The negotiated procedure may only be used in the limited circumstances described in the Regulations. Utilities have a free choice between the open, restricted and negotiated procedures, but the Competitive Dialogue procedure is not available to them.

12.3 Under restricted, competitive dialogue 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 be selected to proceed to the tender stage to ensure genuine competition. The Regulations require a minimum of five for the restricted procedure, and three for competitive dialogue and negotiated procedures.

### **13. Stages in the procurement process**

The Regulations set out criteria designed to ensure all suppliers or contractors established in countries covered by the rules are treated on equal terms, to avoid discrimination on the grounds of origin in a particular Member State. 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. The Regulations now make it clear that authorities may use performance specifications rather than technical specifications. They also provide clarification on the scope to reflect environmental issues in specifications. Guidance on technical specifications<sup>12</sup> 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. Certain offences now require, in normal circumstances, a mandatory exclusion;
  - their economic and financial standing – e.g. that they are judged to be financially sound on the basis of their annual accounts; and
  - their technical capacity and ability – e.g. that they will be adequately equipped to do the job and that their track record is satisfactory.
- Award stage - the award of contract is either on the basis of “lowest price” or various criteria for determining which is the “most economically advantageous tender (MEAT)” to the purchaser. Government policy is to use the latter criterion, as this is consistent with the obligation to achieve value for money.

### **14. Post tender negotiations**

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:

“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”.

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<sup>12</sup> <http://www.ogc.gov.uk/documents/NonDiscriminationInTechnicalSpecifications.pdf>

## 15. Enforcement

- 15.1 The enforcement regime is contained in the Regulations, and derives from the Remedies Directives<sup>13</sup>. 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 Commission against the Member State in the ECJ.
- 15.2 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 currently the only remedy that the High Court can provide. However, the ECJ has demonstrated that, in appropriate circumstances, it is prepared to overturn a contract. In addition, the new Remedies Directive<sup>14</sup>, which was published in the OJEU on 20 December 2007, will allow for contracts to be ruled ineffective in specific circumstances<sup>15</sup>. The UK has two years to implement the new remedies rules into UK legislation.
- 15.3 The Regulations require all purchasers to include a 10-calendar day standstill period between the point when the decision on the award of the contract is made and the signature of the contract. The standstill period allows participants to seek additional debriefing from authorities. This must be asked for and provided within set periods. The requirement for a standstill period was introduced because of an European Court of Justice judgement<sup>16</sup> which clarified that there had to be sufficient period for an aggrieved provider to challenge the award decision before the contract is entered into.

## 16. The Regulations and the private sector

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.

## 17. Utilities contracts

- 17.1 The Regulations apply to:
- public authorities;
  - public undertakings (undertakings over which public authorities may exercise directly or indirectly a dominant influence);
  - private sector bodies which operate on the basis of special or exclusive rights or which are deemed to do so;

if they undertake relevant activities. The activities are:

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<sup>13</sup> Council Directive 89/665/EEC (Public Supply and Public Works) and Council Directive 92/13/EEC (Utilities)

<sup>14</sup> Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007, amending Council Directives 98/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.

<sup>15</sup> For more information on this and other key aspects of the Remedies Directive, please see:

<http://www.ogc.gov.uk/documents/PPNremedies.pdf>

<sup>16</sup> The 'Alcatel' case ECJ reference C-81/98 Alcatel Austria v Bundesministerium fuer Wissenschaft und Verkehr

- 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; and
- the operation of networks providing transport services to the public by rail, tramway, trolley-bus, bus, cable or automated systems.

17.2 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.

17.3 The revised Utilities Regulations incorporate some of the changes introduced into the Public Sector Regulations, in particular, Dynamic Purchasing Systems, Electronic Auctions, Central Purchasing Bodies and the Standstill period. The Utilities Regulations do not, however, contain the new Competitive Dialogue procedure. They also allow Utilities to apply for an exemption from the rules altogether where it can be shown that the activity they undertake is directly exposed to competition.

## 18. Further information

18.1 Any enquiries should be addressed to:

OGC Service Desk  
tel: 0845 000 4999 or GTN: 3040 4999  
Email: [ServiceDesk@ogc.gsi.gov.uk](mailto:ServiceDesk@ogc.gsi.gov.uk)

18.2 Further detailed guidance on 10 particular aspects of the current Regulations is available on OGC's website:

- 10 day mandatory standstill period
- Central Purchasing Bodies
- Competitive Dialogue Procedure
- Dynamic Purchasing Systems
- eAuctions
- Framework Agreements
- Mandatory Exclusion of Economic Operators
- Overview presentation on the Public Procurement Regulations 2006
- Supported Factories, Businesses & Programmes
- Utilities Exemption Mechanism

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### Annex A - OJEU Advertising Timescales

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

Note: timescales for expressions of interest may be further reduced by 7 days (5 days for accelerated procedure) where the OJEU Contract Notice has been prepared and submitted electronically in a way that is compliant with the requirements of the Office of the Official Publications of the European Union. Standard Forms for notices are available from the SIMAP website - <http://simap.europa.eu/>

Timescales for returns of tenders may be further reduced by 5 days where the authority provides for full and unrestricted electronic access (via a website) to contract documents from the date of publication of the OJEU Contract Notice and that notice specifies the internet address where those documents will be made available.