

OGC Guidance on the Utilities Exemption Mechanism

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Title of this guidance is “Utilities Exemption Mechanism – OGC Guidance on the Utilities Exemption Mechanism in the new Procurement Regulations”.

Introduction

1. One of the key features of the European Union (EU) Utilities Directive¹ is a provision that allows utilities to seek exemption from the rules where competitive conditions apply. The tests that need to be met and the process that needs to be followed are set out in Article 30. This has been implemented in Regulation 9 of The Utilities Contracts Regulations 2006 (SI 2006/6)².
2. Under the Utilities Directive, procurement by telecommunications operators was removed from the application of the rules in recognition that liberalised market conditions apply. To allow other sectors to be taken out of the rules in similar market circumstances, the general exclusion mechanism of Article 30 was introduced.
3. Recital 40 of the Directive sets out that contracts relating to activities covered by the Directive should not be caught where the activity is directly exposed to competition on markets to which access is not restricted. The recital says that a mechanism/process is needed to evaluate whether these conditions are met, so that a standardised approach is followed across the EU.
4. This guidance is not intended as a substitute for project specific legal advice, which should always be sought by a Contracting Authority where required.

How is free access to markets and exposure to competition assessed?

5. Access to the market is not restricted if the Community legislation, which is relevant to the particular utility sector and set out in Annex XI to the Utilities Directive, has been implemented and applied. In other circumstances, free access is not presumed but can still be demonstrated. Direct exposure to competition is decided on the basis of criteria such as:
 - the characteristics of the goods or services concerned;
 - the existence of alternative goods or services; or
 - the prices and the actual or potential presence of more than one supplier of the goods or services concerned.
6. The relevance of the above criteria will vary from sector to sector. A more detailed description of the criteria and explanation of the application process generally is provided by Commission Decision 2005/15/EC, which was published in the Official Journal of the European Union (OJ L007, 11.01.2005, p.7).

Who can apply for an exemption?

The Directive provides that Member States may allow utilities to apply for an exemption direct to the Commission. As part of OGC's consultation on implementation, we asked for views on whether respondees considered this to be a good idea. Responses were favourable and this was included in the 2006

¹ Directive 2004/17/EC of the European Parliament and of the Council of 31st March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors. Please see: [Official Journal L 134](#)
² http://www.opsi.gov.uk/si/si2006/uksi_20060006_en.pdf

Regulations, in the expectation that utilities would apply direct from 31 January 2006. As the Regulations were not in place before 31 January 2006, the only UK application before that date was made by OGC on behalf of the Association of Electricity Producers (AEP). This covered the electricity generation industry in England, Wales and Scotland.

What is the process of applying for an exemption?

7. Annex A provides a diagram of the process. The application is made either by the utility or the member state as set out in paragraph 3 above. When the utility makes an application direct to the Commission, the Commission will inform the member state that an application has been made. The application should cover all the relevant facts, such as the national laws implementing the appropriate Community legislation and the competitive position of the sector. Where appropriate the view of an independent regulator should also be added. In the case of the AEP application, OFGEM provided its view on the application.
8. The Commission normally has three months to adopt its position on applications received. Where additional information is required, this can be extended by three months. Where, however, the relevant Community legislation has been given effect in national law and when an independent regulator has given its view, the extension can only be for one month. A contract will not be covered by the EU procurement rules after the time limit (including any extension) has expired, unless the Commission has adopted a negative position.

Utility Sectors in the UK which have gained exemption from the rules so far

9. Electricity generation in England, Scotland and Wales - Commission Decision of 8th March 2006 established that Article 30(1) of Directive 2004/17/EC applies to Electricity generation in England, Scotland and Wales. [See 2006/211/EC, OJ No L 76, dated 15th March 2006, p.6.]
10. Supply (both wholesale and retail) of electricity and gas in England, Scotland and Wales - Commission Decision of 26th February 2007 established that Article 30(1) of Directive 2004/17/EC applies to the Supply (both wholesale and retail) of electricity and gas in England, Scotland and Wales. [See 2007/141/EC, OJ No L 62 dated 1st March 2007, p.23.]

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Annex A

Applying for an exemption (Regulation 19 of the Utilities Contracts Regulations 2006)

