

# INTRODUCTION TO THE EU PROCUREMENT RULES – UPDATED

**T**he 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, contracts must be advertised in the Official Journal of the European Union (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

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 the contract qualifies for a specific exemption – eg on grounds of secrecy. Details of the current thresholds can be found at OGC's website [www.ogc.gov.uk](http://www.ogc.gov.uk) in the Procurement Policy and EU Rules section.

## IMPLEMENTATION OF THE DIRECTIVES INTO NATIONAL LAW

The procurement Directives were implemented into UK national law by revised Regulations on 31 January 2006. These new Directives clarify, simplify and update the previous regime and introduce a number of new provisions, detailed below. The revised Regulations, which replace the previous four, can be viewed at OGC's website.



*The revised Regulations are:*

**Public authorities** (state, regional and local authorities and other public bodies) *The Public Contracts Regulations 2006 (SI 2006 No. 5)* These Regulations replace the previously separate Supply, Works and Services Regulations.

**Utilities** (certain operators in the water, energy, transport and telecommunications sectors) *The Utilities Contracts Regulations 2006 (SI 2006 No. 6)* These Regulations do not extend to Scotland where separate 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.

## PURPOSE

The purpose of the EU procurement 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 (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.

## NEW PROVISIONS

The revised Regulations include a number of procedures and requirements not included in the previous rules.

The main changes are:

- The previously separate public sector supply, works and services 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 bidders before seeking final tenders from them. It is expected that this procedure will be appropriate for many cases where hitherto the Negotiated procedure had been used
- Introduction of rules for a Dynamic Purchasing System, a wholly electronic system for commonly used purchases. The system is open to new bidders through its lifetime. Call-offs are made by means of a simplified notice to all those on the system
- Contracts may be reserved to supported factories and businesses (those 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 goods, works or services)
- The Regulations provide clarification on the use of social and environmental issues
- The Regulations now require mandatory exclusion of candidates who have been convicted of the following offences – participation in a criminal organisation, corruption, bribery and fraud – as defined in the Regulations
- There is a requirement for a ten calendar days standstill period at the award stage to permit unsuccessful tenderers to seek further information about an award decision and enable them to take action in the courts should they feel that they have sufficient grounds



It is important that contracting authorities look at the detailed requirements of the above issues in the Regulations themselves. In addition, specific guidance on the new aspects of the procurement rules has been provided on the procurement policy and EU rules pages of the OGC website. Also contained there is a training module on the new regulations (<http://www.ogc.gov.uk/index.as~?docid=1002185>).

## TRAINING

The EU procurement rules are detailed and are the subject of a variety of training courses, including a module on the Certificate of Competence in Purchasing & Supply which is owned by OGC and available through the National School for Government (<http://www.nationalschool.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

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:

### European Agreements

Bulgaria, Romania

### World Trade Organisation – GPA

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

Compliance with the EU rules ensures compliance with the WTO Agreement on Government Procurement (GPA) where it applies; GPA suppliers have the same rights as EU suppliers.

## CONTRACTS OUTSIDE THE SCOPE OF THE DIRECTIVES

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, the EC 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 those procurements covered by the Directives (see above and *Government Accounting* Chapter 22, which can be viewed at the OGC’s website).

### IDENTIFYING HOW THE REGULATIONS APPLY TO MIXED CONTRACTS, SUCH AS SUPPLIES AND SERVICES

Although the public sector Regulations have been consolidated some differences in treatment remain for works, supplies or services 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, 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 a contract covers works and supplies or works and 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 to be considered supplies contracts unless they have to be tailored to the purchaser’s specification, in which case they are to be considered services contracts

### AGGREGATION RULES FOR ESTABLISHING WHETHER OR NOT VALUE EXCEEDS THE RELEVANT THRESHOLD

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 the threshold table on the OGC’s website.

*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 12-month period.

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 (ie where authority is not devolved) the public authority as a whole must be considered for aggregation purposes.

### THE OJEU ADVERTISING REQUIREMENT

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 contract notices are mandatory and 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:*

- where a Prior Information Notice (PIN) was published sufficiently far in advance of the procurement or when Accelerated procedures are used;
- if the OJEU notice was submitted electronically in accordance with the requirements set out on the SIMAP website (see above);
- where authorities offer full and unrestricted access to tender documents (in accordance with specific requirements set out in the Regulations).

### REDUCED ADVERTISING REQUIREMENTS FOR CERTAIN CATEGORIES OF SERVICE CONTRACT

*Service contracts are divided into two categories:*

**Part A:** to which the full EU 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

The services that fall within Part A and Part B are listed in Schedule 3 of the Regulations (which can be viewed at the OGC’s website). The Part A and Part B categories are broken down further on the SIMAP website (see above).

## CHOICE OF PROCUREMENT PROCEDURE

The time allowed for responses or tenders depends on which award procedure is used.

Four 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 avoids purchasers having to deal with an overwhelmingly large number of tenders
- The Competitive Dialogue procedure, under which the authority enters into dialogue with bidders, following an OJEU notice and a selection process, to develop one or more suitable solutions for its requirements and to determine which chosen bidders will be invited to tender
- 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 the contract can only be carried out by a particular person

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 or Negotiated procedures.

Under Restricted procedures, 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 ensure genuine competition, with a minimum of five for Restricted procedures and three for Competitive Dialogue and Negotiated procedures.



## STAGES IN THE PROCUREMENT PROCESS

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. 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 is available on the OGC's website.

**Selection stage** – the rejection or selection of candidates based on:

- evidence that they are not unsuitable on certain grounds, eg of bankruptcy, criminal conviction or failure to pay taxes. Certain offences now require, in normal circumstances, a mandatory exclusion;
- their economic and financial standing, eg that they are judged to be financially sound on the basis of their annual accounts;
- their technical capacity, eg that they will be adequately equipped to do the job and that their track record is satisfactory.

**Award stage** – the award of contracts is either on the basis of 'lowest price' or various criteria for determining which offer is 'the most economically advantageous' to the purchaser (ie best value for money). Government policy is to use the latter criterion.

## 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."



## ENFORCEMENT

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.

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.

The Regulations now require all purchases to include a ten calendar days standstill period at the point at which the decision on the award of the contract is made. The standstill period allows tenderers to seek additional debriefing from authorities. This must be asked for and provided within set periods. The requirement for a standstill period was introduced as a consequence of an ECJ judgement which clarified that there had to be sufficient period for an aggrieved provider to challenge the award decision before the contract is entered into.

## APPLICATION OF THE RULES TO PRIVATE SECTOR PURCHASERS

For public works concession contracts (ie contracts under which the contractor is given the right to exploit the works, for example 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

The rules apply to the following if they undertake relevant activities:

- 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.

The 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.

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 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 concerning the application of the EU rules through a Community-level system for conciliation.

The revised utilities Regulations incorporate some of the changes introduced into the public sector Regulations, in particular Dynamic Purchasing Systems, e-Auctions, central purchasing bodies and the standstill period. They also allow for 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.

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Our consultants can provide you with bespoke training packages to suit your needs. Consultancy and training is available for the following: environmental purchasing, partnering, evaluation, e-government, supplier debriefing, UK legal processes and precedents, contract management, EU-compliant tendering and much more.

## PASS ONLINE GUIDANCE

The PASS service provides online guidances on all aspects of the public procurement process and legal requirements: [www.bipsolutions.com/html/briefing.php](http://www.bipsolutions.com/html/briefing.php)

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Contractual and procurement-related disputes are time-consuming, expensive and unpleasant. They can destroy client/contractor relationships, can add substantially to the cost of the contract, and can nullify some or all of its benefits or advantages. They can also have an impact on value for money. It is therefore in everyone's interest to work at avoiding disputes in the first place. Inevitably, however, disputes do occur and when they do the importance of a fast, efficient and cost-effective Alternative Dispute Resolution (ADR) procedure cannot be overstated. If a dispute arises, it is important to manage it actively and positively and at the right level in order to encourage early and effective settlement. Unnecessary delays and inefficiency can lead to rapid deterioration in relations and entrenchment of opinions. ADR through PADRE mediation involves the use of a trusted expert third party and is an effective alternative to litigation. PADRE mediation is provided by experts in contracting and public procurement. If you would like more details on how PADRE can help your organisation and become your mediation service of choice, telephone the PASS team on 0845 270 7055 or email [pass@bipsolutions.com](mailto:pass@bipsolutions.com).

## PASS HEALTH CHECK

The PASS service can help your organisation examine its current procurement organisational structures, strategies, processes, practices and related strengths and weaknesses. It delivers a detailed PASS Mark Health Check Outcome Highlight Report (OHR) that outlines areas of strength as well as those requiring further attention, and provides an outline Project Initiation Document (PID) designed to deliver a more effective and efficient tendering process that will help you achieve optimum performance and better value-for-money procurement.

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