



The Public Procurement Directives



Business Support on Your Doorstep

Enterprise Europe Network London

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1. Introduction

This factsheet provides an overview of the regulatory framework relating to public procurement in the European Union. In 2008, the value of public procurement in the EU reached 3.14% of the combined GDP of the 27 EU member states. This represents more than 23,000 public sector contracts worth €393 billion advertised in the Official Journal of the EU.

Public procurement across the 27 EU member states is governed by two main EU Directives and the Regulations that implement them in the UK. These rules apply to public organisations and some utilities where their purchases are above pre-determined monetary thresholds. The Directives contain a clear set of procedures that public bodies and utilities must follow if they want to award a contract.

All calls for competition for the award of public sector contracts where the value exceeds the thresholds set by the EU have to be published in the Official Journal of the European Union (OJEU). The threshold values are updated every two years by the EU and the current thresholds applicable from 1 January 2010 to 31 December 2012 are outlined in Annex 2.

2. The Public Procurement Directives

In 2004, the European Parliament and Council of Ministers adopted two Public Procurement Directives replacing the four 'old' Public Procurement Directives. These two Directives came into force in the UK on 31 January 2006. The Directives are:

The Public Sector Directive¹: Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

The Utilities Directive²: Directive 2004/17/EC coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors.

The objectives of the Directives are as follows:

- To take account of new technologies and changes in the economic environment, including liberalisations under way or set to take place in some of the activities covered by the Utilities Directive,
- To make the current texts easier to understand so that contracts are awarded in complete conformity with the standards and the principles governing public procurement and so that suppliers and purchasers are in a better position to know their rights,
- To make the public procurement regime more flexible by introducing new procedures.

The Public Sector Directive simplifies and consolidates the three 'old' Directives covering public works, supplies and services. Many of the basic provisions remain the same as in the 'old' Directives but new provisions have been included to take account of modern procurement methods and best practice developments. The changes to the Utilities Directive are less extensive, mainly because the use of framework agreements was already included in the 'old' Utilities Directive.

3. The Public Sector Directive (2004/18)

Thresholds

- Now expressed in euros.
- Sterling equivalent to euro values will apply.
- Up to date rates are available on the Office of Government Commerce's website.

¹ Implemented by The Public Contracts Regulations 2006 (SI 2006 No. 5)

² Implemented by The Utilities Contracts Regulations 2006 (SI 2006 No. 6)

Timescales

- Timescales for the open, restricted and negotiated procedures have not changed. They may be shortened considerably when notices are compiled and transmitted electronically and when unrestricted electronic access to all contract documentation is provided.
- The competitive dialogue procedure timescales follow the timescales for expressions of interest in the restricted and negotiated procedures with prior publication of contract notice.
- Where notices are compiled and transmitted electronically, timescales for the open, restricted and negotiated procedures and for the competitive dialogue request to participate may be shortened by seven days.
- A reduction of five days to the time limit for receipt of bids in the open and restricted procedures can also be made where unrestricted electronic access to all contract documentation is provided and access details have been provided in the contract notice.

These timescales are reproduced in table form in Annex A

- Prior Information Notices (PINs) are only compulsory where the purchaser wishes to take advantage of the reduction in timescales that is available with their publication.

Explicit reference to the Common Procurement Vocabulary (CPV)

- CPV codes are now included in the Directive and must be quoted in PINs and contract notices.

Possibility to use electronic forms of communication

- The Public Sector Directive now makes explicit provision for communication by a variety of means including post, fax, telephone and electronic means (e.g. email).
- The chosen means of communication must be generally available and must not be discriminatory or restrict access to the procurement procedure adopted.
- Telephone communication is limited to requests to participate and must be confirmed in writing within the stated timescale.
- Where fax is used, purchasers may require written confirmation if this is necessary for reasons of legal proof.

Use of electronic auctions

- Electronic auctions are on-line auctions where selected bidders submit offers electronically against the purchaser's specification. All communication following and including the invitation to pre-qualified bidders to submit new prices and/or values must be electronic.
- Auctions should only be used when the requirement subject to auction can be specified precisely.
- The use of auctions for intellectual services, i.e. contracts with a creative or development component is discouraged.

Introduction of dynamic purchasing systems

- Dynamic purchasing systems are intended to address commonly used purchases. They are a kind of electronic framework which bidders can apply to join at any point during its lifetime.
- A separate competition, open to all who have satisfied the pre-qualification selection criteria for entry to the system itself, is held each time a purchase is made.
- Unlike frameworks, any bidder who meets the selection criteria can apply to join the system at any time during its life (maximum four years).

Possibility of concluding framework agreements

- Framework agreements are used in the case of repetitive purchases to choose suppliers who, when the time comes, will be able to meet the purchaser's needs, in particular with regards to price and quality.
- The Public Sector Directive now explicitly provides for framework agreements.
- Frameworks may be used in conjunction with any procedure.
- The duration of a framework agreement is limited to four years.
- Where there is only one framework supplier, work may be awarded directly, provided the terms of the framework agreement are applicable.
- There must be a minimum of three suppliers if a framework agreement is concluded with more contractors.

Central Purchasing Bodies

- Central Purchasing Bodies (CPBs) already exist. The provisions in the Directive reflect UK practice.
- The CPB must be a contracting authority for this provision to apply.
- Organisations are free to buy through private sector bodies acting as agents, i.e. CPBs. However, in this case the public body is still responsible for ensuring compliance with European procurement legislation.

Introduction of procedure: Competitive dialogue

- This is a flexible negotiating procedure for particularly complex projects such as PFI (Private Finance Initiative).
- It is an additional option to the open, restricted and negotiated procedures and can only be used with the most economic advantageous award criteria.
- The competitive dialogue procedure always requires the placing of a contract notice. The selection of those to be involved in the dialogue must be made from all respondents fulfilling the selection criteria.
- The dialogue may embrace all aspects of the contract for the purpose of identifying one or more solutions which meet the purchaser's needs. Bids are then sought from those remaining in the dialogue. Although bids received may be clarified, negotiation in the context of the negotiated procedure is not permitted.

Takes account of environmental and social aspects

- Relevant environmental and social requirements may be specified but must be defined sufficiently precisely to allow bidders to understand the requirement and to allow award of the contract.
- Production process standards and eco label criteria can be referenced but alternatives which demonstrate equivalence must be considered.

Strengthens the provisions relating to award and selection criteria

- Objective and non-discriminatory criteria must be used by the contracting authorities and must be announced in advance.
- When the award is made to the most economically advantageous tender, the contracting authority must have used criteria linked to the subject matter of the contract.
- The contracting authority shall specify the relative weighting given to each criterion chosen to determine the most economically advantageous tender in the contract notice or in the contract documents.
- When weighting is not possible, the contracting authority must indicate the criteria in descending order of importance.

Clarification of technical standards

- Technical specifications should afford equal access for bidders.
- Contracting authorities can define specifications by reference to performance or functional requirements as opposed to referring to standards.
- If specifications have been defined by reference to performance or functional requirements and a bidder responds with reference to standards, the tender may not be rejected if it satisfies the performance or functional requirements. In particular, bidders will be able to use any form of evidence to demonstrate equivalence and contracting authorities must be able to provide reasons for deciding that equivalence does not exist.
- If standards are referred to, the Public Sector Directive now provides a more developed hierarchy to follow and prioritises the different forms of specifications.

4. The Utilities Directive (2004/17)

Scope

Inclusion of postal services

Removal of telecoms operators

Provisions

Many of the provisions in the Public Sector Directive are also included in the Utilities Directive. Provisions for Central Purchasing Bodies (CPBs), electronic auctions and dynamic purchasing systems are identical to Public Sector Directive provisions. Rules relating to communication, use of codes, technical specifications, award criteria and ways in which environmental issues can be taken into account are also the same as the Public Sector Directive.

There is no provision for competitive dialogue. The provisions for framework agreements and the use of the negotiated procedure in the existing Utilities Directive have not changed.

The major change for utilities is the exemption mechanism which enables utility activity subject to competition in markets to which access is not restricted to be removed from application of the Directive.

Either the member state or the utility (where the legislation of the member state allows for this) may seek a decision from the European Commission on the nature of competition within the relevant market with a view to remove the requirement to comply with the Directive. Generally, the Commission is allowed three months from the first working day on which it receives the request to decide. The Commission may also instigate this process on its own initiative.

The Directive will not apply to the activity, unless the Commission decides on the contrary within the required timescale, if free access to a market is presumed on the basis of European legislation opening up that market and a competent independent national authority is of the view that the utility activity is subject to the required standard of competition.

5. Useful information sources

Public Contracts Regulations 2006 (SI 2006 No. 5)
www.opsi.gov.uk/si/si2006/uksi_20060005_en.pdf

Utilities Contracts Regulations 2006 (SI 2006 No. 6)
www.opsi.gov.uk/si/si2006/uksi_20060005_en.pdf

OGC guidance on the EU procurement legislation
www.ogc.gov.uk/documents/Introduction_to_the_EU_rules.pdf

OGC guidance documents on the competitive dialogue procedure, framework agreements and electronic auctions, etc.
www.ogc.gov.uk/procurement_policy_and_application_of_eu_rules_specific_application_issues.asp

Summary of the Public Services Directive
europa.eu/legislation_summaries/internal_market/businesses/public_procurement/l22009_en.htm

Summary of the Utilities Directive
europa.eu/legislation_summaries/internal_market/businesses/public_procurement/l22010_en.htm

The European Commission's public procurement portal
ec.europa.eu/internal_market/publicprocurement/index_en.htm

Thresholds
www.ogc.gov.uk/procurement_policy_and_application_of_eu_rules_eu_procurement_thresholds.asp

SIMAP – Information system for European public procurement
simap.europa.eu/index_en.htm

Annex A

Timescales

| Procedure | Article | Text | Days |
|---|----------|---|-------|
| Open | 38(2) | Minimum time for receipt of tenders from date contract notice sent | 52 |
| | 38(4) | Reduced when PIN published (subject to restrictions) to, generally, – | 36 |
| | | And no less than - | 22 |
| | 38(5) | Electronic transmission reduces all the above by 7 days so 52 becomes – | 45 |
| | | And 36/22 become - | 29/22 |
| | 38(6) | Full electronic access to contract docs reduces 52 by 5 days so it becomes – | 47 |
| This can also be added to the reduction for 52 days to 45 for electronic transmission so can become - | | 40 | |
| | | | |
| Restricted | 38(3)(a) | Minimum time for receipt of requests to participate from the date contract notice sent | 37 |
| | 38(5) | Electronic transmission reduces the 37 days by 7 days so becomes - | 30 |
| | 38(3)(b) | Minimum time for receipt of tenders from the date invitation sent | 40 |
| | 38(4) | Reduced when PIN published (subject to restrictions) to, generally, - | 36 |
| | | And no less than - | 22 |
| | 38(6) | Full electronic access to contract docs reduces 40 by 5 days so it becomes – | 35 |

Annex B

EU Thresholds

Applicable from 1 January 2010 to 31 December 2012

| | Supplies | Services | Works |
|--|------------------------|-------------------------------------|----------------------------|
| Entities listed in Schedule 1 (central government bodies and any successor bodies) | £101,323 (€125,000) | £101,323 ¹ (€125,000) | £3,927,260 (€4,845,000) |
| Other public sector contracting authorities | £156,442 (€193,000) | £156,442 (€193,000) | £3,927,260 (€4,845,000) |
| Prior Information Notices | £607,935 (€750,000) | £607,935 (€750,000) | £3,927,260 (€4,845,000) |
| Small lots | £64,846 (€ 80,000) | £64,846 (€ 80,000) | £810,580 (€1,000,000) |

¹ With the exception of the following services, which have a threshold of £156,442 (€193,000): Part B (residual) services, Research & Development Services, Telecommunications services (television and radio broadcast services, interconnection services, integrated telecommunications services) and Subsidised services contracts.



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