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A guide to the public sector procurement rules

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Public procurement markets in the European Union are worth over €1,500 billion, more than 16% of total EU GDP. The operation of those markets is therefore a key part of the EU's agenda. This had led to the development of a field of law at EU level with the purpose of regulating public sector procurement.

> *"EU public procurement law aims to ensure that all European companies have a fair chance to bid for public contracts. Open and transparent tendering procedures mean more competition, stronger safeguards against corruption, better service and value for money for taxpayers and, ultimately, a more competitive Europe."*[1]

This statement from the European Commission reflects the main objectives of procurement law: to open up national markets for public contracts; to provide a level playing field for companies operating within those markets; and ultimately to benefit taxpayers through the delivery of value for money solutions under competitive tender processes.

These objectives are pursued through a number of established EU legal principles and more specifically under a set of detailed EU rules which prescribe when and how public bodies should open contracts to competitive tender.

The purpose of this guide is to provide a general understanding of how the public procurement rules have been implemented in the UK. The rules were changed from 31 January 2006 as a result of the introduction of the Public Procurement Regulations 2006.

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1 European Commission Press Release – Commission acts to enforce EU law in Spain, UK, Portugal and Italy – IP/05/314 – 15 March 2005

The legal background

The legal texts

At EU level the detailed rules for public sector procurement are contained in Directive 2004/18/EC (the "Directive"). The Directive consolidated and updated three earlier directives for works, supplies and services[2]. The rules on remedies for breach of the Directive are currently contained in Directive 89/665/EEC (the "Remedies Directive").

The Directive has now been implemented into UK law by The Public Contracts Regulations 2006[3] (the "Regulations"). The Regulations therefore consolidate and update the three separate regulations for works, supplies and services which were put in place to implement the old Directives[4]. The Regulations also incorporate the rules in the Remedies Directive.

The European Commission has begun a discussion on the potential revision of the Remedies Directive. This may lead to amendments to the Regulations in future.

"The detailed EU procurement rules derive from the more general provisions of the EU Treaty."

General principles underlie the detailed rules

The detailed EU procurement rules derive from the more general provisions of the EU Treaty:

- Free movement of goods under Article 28 of the EU Treaty. This prohibits in general measures which hinder or discourage free trade in goods.
- Freedom of establishment under Article 43 of the EU Treaty. This prohibits restrictions on access to government contracts by non-nationals established in another state.
- Freedom to provide services under Article 49 of the EU Treaty. This prohibits in general measures which restrict nationals from another Member State bidding to provide services.

General principles of EU law also underlie their application, the most relevant of which are:

- equal treatment;
- non-discrimination;
- mutual recognition;
- proportionality; and
- transparency.

There is some debate as to the extent of the practical impact of such legal principles where a competitive tender is not required under the Regulations. The case law of the European Court of Justice (ECJ) has been extending the obligations of contracting authorities in relation to contracts which are not covered by the Directive. In the case of *Telaustria*[5] the ECJ held that there was a requirement to advertise the existence of a new services concession even though this was not a form of procurement covered by the Directive. It is argued, particularly by the European Commission, that a competition can be required as a result of the application of general legal principles even where a procurement is not caught by the Directive.

2 Council Directive 93/37/EEC, Council Directive 93/36/EEC and Council Directive 92/50/EEC

3 Statutory Instrument 2006 No.5

4 The Public Works Contracts Regulations 1991, the Public Services Contracts Regulations 1993, and the Public Supply Contracts Regulations 1996

5 Telaustria (C-324/98)

The detailed rules also reflect obligations under the WTO

The EU has made commitments to open up contracts to providers from third countries under the provisions of the Government Procurement Agreement of the World Trade Organisation (the "GPA"). The commitments made by the EU bind the individual Member States. For the most part the detailed rules in the Directive reflect and are consistent with the commitments made under the GPA.

To whom do the rules apply?

"Contracting authorities"

The Regulations apply to contracts let by "contracting authorities". Bodies are considered to be contracting authorities if they fall within one of the following categories:

- Public bodies listed in Regulation 3(1) of the Regulations either by category (e.g. local authority) or name (e.g. the House of Commons). These bodies are mainly public authorities comprising part of the State, regional or local government.
- Bodies "governed by public law". These are bodies which:
  (a) are established to meet "needs in the general interest" (e.g. providing services directly to the public); and
  (b) do not have "a commercial or industrial character" (i.e. operating under commercial conditions); and
  (c) are controlled by another public body, i.e. either:
    (i) being financed wholly or mainly by another contracting authority;
    (ii) being subject to management supervision by another contracting authority; or
    (iii) having more than half of the board of directors, members or participating individuals appointed by another contracting authority.

  This means the definition of contracting authorities can catch notionally independent organisations such as museums and universities.
- Joint associations formed by one or more contracting authorities (see also box on Central Purchasing Bodies).
- Any other bodies listed in Schedule 1 of the Regulations (these are the bodies covered by the GPA).

"This means the definition of the contracting authorities can catch notionally independent organisations such as museums and universities."

Subsidised contracts

The procurement rules can also apply to private bodies which are not contracting authorities. Where a private company awards contracts for certain types of works (as well as services contracts relating to such works) and a contracting authority subsidises such a contract by more than half their value then the rules will apply. The types of works contracts to which the subsidised contracts rules apply are primarily civil engineering projects and building works for hospitals, sport and leisure facilities, schools and universities and administrative buildings.

The relevant contracting authority must make it a condition of its contribution that the subsidised body will follow the procurement rules.

Central purchasing bodies

For the first time there is an explicit provision in the rules (in Regulation 22) allowing contracting authorities to purchase through "central purchasing bodies". This codifies the collective purchasing techniques which are already a feature of public procurement in the UK – particularly within the NHS. Such central purchasing bodies must themselves be contracting authorities for the purposes of the new rules. If a contracting authority purchases through a central purchasing body it will be deemed to have complied with the rules provided that the central purchasing body has complied.

This provision clarifies that a group of contracting authorities can purchase on a collective basis through one of their number. A distinction must however be made between central purchasing bodies, which will contract for the relevant works/supplies/services and entities which act as **agents procuring on behalf** of a contracting authority. In the latter case the agent need not itself be a contracting authority and the contracting authority would still be responsible for ensuring its own compliance with the rules.

According to OGC guidance, the central practising body should indicate at the start of the tender process that it is buying for others and, in the case of a framework, the identity of the other bodies expected to utilise the procedure.

What contracts do the rules cover?

The Regulations require competitive processes to be run for contracts which:

- exceed the value thresholds; and
- are not covered by any of the relevant exclusions or exceptions.

Contract value exceeds the relevant threshold

The key value thresholds from 31 January 2006 are:

	Services	Supplies	Works
Central government bodies	£93,738 (€137,000)	£3,611,319 (€137,000)	£93,738 (€5,278,000)
Other public bodies	£144,371 (€211,000)	£144,371 (€211,000)	£3,611,319 (€5,278,000)

"The Regulations specifically prohibit the splitting of a contract into separate parts if this is done with the intention of avoiding the application of the rules."

Why do Central Government bodies have lower thresholds for services and supplies?

The rules apply a lower threshold for services and supplies contracts awarded by central government bodies. This distinction stems from the commitments made in the GPA. Schedule 1 of the Regulations lists the bodies which are subject to the higher threshold. This essentially covers government departments and organisations controlled directly by central government.

Splitting contracts to avoid the rules is not permitted

The Regulations specifically prohibit the splitting of a contract into separate parts if this is done with the intention of avoiding the application of the rules. To back up this principle there are a number of rules which require the aggregation of the value of separate contracts to determine if the Regulations apply.

The importance of the works/services distinction

Given that the threshold for works contracts is much higher than the threshold for services contracts, classifying a contract as being either for works or for services can be critical in determining if the rules apply. This can be difficult to do where a contract contains elements of both works and services. The rules on determining how to assess whether such mixed contracts pass the value thresholds are fairly detailed. As a general guide:

- where the services are "necessary" for the execution of the works, the contract will be a works contract (even if the services element is worth more than the works);
- where the works are incidental to the services, the contract will be a services contract;
- where the services are incidental to the works, the contract will be a works contract but the rules will still apply if the value of the services involved exceeds the relevant value threshold.

Is a competition required? - Exclusions and exceptions

There are a number of general exclusions from the Regulations where it is not necessary to issue a call for competition. The exclusions are restricted to particular circumstances and are interpreted narrowly. As a limited overview the relevant exclusions include contracts:

- let by utilities covered by the Utilities Contracts Regulations 2006;
- which are services concessions;
- involving national secrets/national security issues;
- for the acquisition of land;
- for some R&D services.

The distinction between "Part A" and "Part B" services

As well as these general exclusions it may not be necessary to run a call for competition for some particular types of services. The Regulations divide service contracts into two categories: Part A and Part B. If a contract is for services falling within Part B then no competition is required (although certain reporting requirements and the requirement to use non-discriminatory technical standards in awarding contracts must still be observed). If a contract is for services falling within Part A then a full call for competition must be advertised. Here are examples of services covered by Part A and Part B:

Part A	Part B
Computer and related services	Legal services
Management consultancy	Security services
Architectural and engineering services	Health and social services
Property management services	Educational services

Other circumstances where no call for competition is required

In addition to these exclusions there are also a limited number of exceptional circumstances under which it is not necessary to run a competition to award a contract. These limited exceptions are, again, interpreted narrowly and should therefore be used with caution by contracting authorities. These exceptions include situations where:

- for reasons of extreme urgency (which the contracting authority could not have foreseen) there is not time to run a normal tendering exercise;
  there have been no tenders/suitable tenders in response to a previous call for competition;
- for technical/artistic reasons the contract can only be performed by a particular person;
- one company possesses exclusive rights in relation to the required product/service;
- under certain limited circumstances, further contracts are entered into with an existing provider.

"There are a number of general exclusions from the Regulations where it is not necessary to issue a call for competition. The exclusions are restricted to particular circumstances and are interpreted narrowly."

Types of procurement procedure

This section looks at the four types of procurement procedure available for use under the Regulations. Section 5 explains some of the more detailed rules governing the running of these procedures.

Some of the additional tools available to the contracting authority, i.e: framework agreements, e-auctions and dynamic purchasing systems, are discussed in Sections 6 to 9.

Types of procurement procedure

There are four types of procurement procedure under the Regulations: open, restricted, negotiated and competitive dialogue.

The following table summarises the basic format of each procedure.

Stage	Open	Restricted	Negotiated	Competitive Dialogue
Advertisement	OJEU contract notice	OJEU contract notice	OJEU contract notice	OJEU contract notice
Pre-qulification		Requests to tender submitted	Requests to tender submitted	Requests to tender submitted
		Pre-qualification of tenderers	Pre-qualification of tenderers	Pre-qualification of tenderers
Tendering		Invitation to tender issued	Invitation to negotiate issued	Invitation to participate issued
		Negotiation phase	Dialogue phase	
	Submission of tenders	Submission of tenders	Submission of tenders	Submission of tenders
	Evaluation	Evaluation	Evaluation	Evaluation
Award	Clarification with preferred bidder	Clarification with preferred bidder	Clarification with preferred bidder	Clarification with preferred bidder
	Notification of award/ OJEU award notice	Notification of award/ OJEU award notice	Notification of award/ OJEU award notice	Notification of award/ OJEU award notice
	Entry into contract	Entry into contract	Entry into contract	Entry into contract

Minimum number of tenderers

Under the restricted, negotiated and competitive dialogue procedures there is a requirement for a sufficient number of participants to ensure genuine competition. In the case of the restricted procedure the minimum is five and in the case of the negotiated procedure and the competitive dialogue the minimum is three.

Post-tender negotiations

Negotiation with tenderers is not permitted under either the open or restricted

procedures. Clarification of tenders is however permitted. There is no clear distinction between what constitutes a clarificatory discussion and what constitutes a negotiation. The European Commission has provided some guidance on this issue but it is of limited value:

> "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".

The negotiated procedure is available only in limited circumstances

The negotiated procedure with advertisement is available only in exceptional circumstances as defined by Regulation 13:

- If an open or restricted procedure is discontinued as a result of irregular tenders or because no acceptable tenders were made.
- For works contracts carried out solely for research or testing purposes and on a not-for–profit basis.
- Where the nature of the works/services/supplies or the risks attaching to them do not permit prior overall pricing.
- If specifications for a service contract cannot be established with sufficient precision to enable an open or restricted procedure to be run.

It is important to note that these exceptions are likely to be narrowly construed. In particular use of the final two exceptions may be difficult to justify as a result of the introduction of the competitive dialogue procedure (see below). The OGC recommends that legal advice be sought before a negotiated procedure is used.

Conducting a negotiated procedure

The Regulations now provide some specific rules on the conduct of a negotiated procedure with advertisement. These rules confirm the existing practice for the conduct of negotiated procedures. Regulation 17 therefore provides that:

- contracting authorities shall negotiate tenders in order to adapt them to the requirements set out in the contract documents;
- contracting authorities must ensure that during these negotiations tenderers are treated equally – in particular in relation to provision of information; and
- the negotiations can be structured into successive rounds whereby the number of tenders being negotiated is reduced by applying the contract award criteria.

The Competitive Dialogue procedure

Regulation 18 introduces an award procedure, called the "competitive dialogue". This is the procedure under which most PFI/PPP contracts will be tendered (though its remit is wider). The details of the procedure were intensively negotiated between the UK and the European Commission. It represents a compromise to the European Commission's opposition to the routine use of the negotiated procedure for PFI/PPP contracts in the UK. PFI/PPP tender processes will therefore have to comply with the competitive dialogue procedure under which there may be less scope for negotiation with the contracting authority.

Regulation 18 keeps very closely to the text of the rules in the Directive. This is deliberate. The OGC has said that this is done to maintain maximum flexibility and avoid adverse action by the European Commission. It is however not possible to understand fully how the competitive dialogue procedure is intended to work simply from the text of Regulation 18 without the benefit of OGC and European Commission guidance.

The competitive dialogue procedure is available for "particularly complex

> *"The negotiated procedure with advertisement is available only in exceptional circumstances…"*

contracts". More specifically it is available where the contracting authority cannot in advance define the technical specification required or specify the "legal or financial make-up of the project".

The basic principle underlying the competitive dialogue procedure is that it allows the contracting authority to hold discussions with bidders in order to develop the desired technical solution before submission of final, priced bids. The procedure for the operation of a competitive dialogue as governed by Regulation 18 works as follows:

"The basic principle underlying the competitive dialogue procedure is that it allows the contracting authority to hold discussions with bidders in order to develop the desired technical solution before submission of final, priced bids."

- A contract notice is published setting out the contracting authority's requirements.
- There is then a pre-qualification stage and the desired number of candidates are selected to participate in the procedure.
- The contracting authority then conducts a dialogue with the selected candidates in order to identify potential solutions to its stated needs. The contracting authority must ensure there is no discriminatory treatment between the candidates - e.g. in relation to availability of information. The contracting authority must not divulge a proposed solution or other confidential information of one candidate to the others without that candidate's permission.
- This dialogue process can take place in a number of successive stages "in order to reduce the number of solutions to be discussed during the dialogue stage by applying the contract award criteria" - this could include the testing of prices.
- The contracting authority then compares the proposed solutions and identifies which are capable of meeting its needs.
- The contracting authority then invites the candidates to submit fund tenders based on "any" solution presented during the dialogue. These tenders should contain all the elements required and necessary for the performance of the contract and operate on the basis that price and risk allocation will not be subject to further amendment. There is no further negotiation with the tenderers on these bids. Tenders may however be "clarified, specified and fine-tuned" at the request of the contracting authority but without changing the "basic features of the tender".
- The contracting authority then evaluates the tenders on the basis of the award criteria specified in the contract notice. The contracting authority may go through a further (clarification only) stage with the preferred tenderer.

The new procedure raises a number of questions, including the following:

- How does the introduction of the competitive dialogue procedure affect the availability of the negotiated procedure? It is now clearly the view of the European Commission that routine PPPs/PFIs should be tendered under either the competitive dialogue procedure (where justifiable) or the restricted procedure. It appears that the test for the use of the negotiated procedure is now likely to be applied strictly.
- Will the potentially more limited scope for negotiation under the competitive dialogue make it unsuitable for the more complex projects?
- Does "dialogue" effectively mean the same as "negotiation"?
- There appears to be a conflict between the requirement to keep tenderers' proposed solutions confidential and the provision for the submission of tenders based on "any" solution.
- Will this lead to increased costs for tenderers and therefore dissuade participation? This may particularly be the case if more tenderers remain in the process for longer, thereby incurring greater costs.
- What are the "basic features" of a tender? The view taken on that issue will determine the extent to which the contracting authority and the tenderer can refine a bid.
- Will there be less scope for negotiation at preferred bidder stage under the competitive dialogue than under the negotiated procedure?
- What happens if the project develops into a concession? Must a competitive dialogue procedure still be followed?

The running of procurement procedures

The Regulations contain detailed rules on how procurement procedures should be run. This section summarises the rules relating to:

- Official Journal advertisement;
- minimum time periods for the running of procurements;
- use of specifications and standards;
- the pre-qualification/shortlisting phase; and
- the evaluation/award phase.

Official Journal advertisement

Where a call for competition is required in relation to a contract then a contract notice must be published in the Official Journal of the European Union (OJEU). The Regulations require that notices be published in the format prescribed under the Directive. These forms are available at: http://simap.eu.int.

The Regulations also require that contracting authorities should publish a "Prior Information Notice" relating to the contracts which are expected to be let in the forthcoming year. The publication of a prior information notice can lead to reductions in the minimum time periods for the running of tender processes.

Minimum time periods

The Regulations set out minimum time periods which must be observed by contracting authorities in the conduct of procurement procedures. These are summarised in the following chart. The minimum periods can be reduced where either (a) the OJEU notice is sent electronically and/or (b) the contracting authority provides for on-line access to the contract documents.

Procedure		Normal limit (days)	Electronic notification to OJEU	Electronic access to contract documents
Open	Minimum time from sending notification until tender return date	52	-7	- 5
	With PIN (usual)	36		
	With PIN (minimum)	22		
Restricted	Minimum time from despatch of notice to receipt of requests to be selected to tender	37	30	
	If urgent	15	10	
	Minimum time from despatch of invitation to tender until tender return date	40	35	
	If urgent	10		
	With PIN (usual)	36	31	
	With PIN (minimum)	22		
Negotiated Procedure	Minimum time from despatch of notice until receipt of requests to be invited to negotiate	37	30	
	If urgent	15	10	
Competitive Dialogue	Minimum time from despatch of notice until receipt of requests to be selected to participate	37	30	

Use of specifications and standards

There is now a general principle that technical specifications should not create obstacles to competition, followed by measures providing that specifications should be formulated either:

- by reference to accepted standards; or
- in terms of performance or functional requirements; or
- a combination of standards and performance/functional requirements.

This means that brand-specific terms, or terms which refer to goods of specific origin, or to a particular production process can only be used exceptionally and with the words "or equivalent".

Pre-qualification/shortlisting

The Regulations limit the types of information that contracting authorities can take into account in rejecting bidders at the pre-qualification phase. This information can be summarised as covering:

- general good standing – e.g. not having been declared bankrupt or not having committed a criminal offence

- information on financial capacity – e.g. statements on turnover going back over the past 3 years;
- technical capacity – e.g. experience of delivering similar contracts over the past 3 years;

Contracting authorities often make mistakes by drawing into the pre-qualification phase consideration of points that really belong in the award phase – for example evaluation of a particular solution which might be proposed by the contractor in the current process as opposed to information on past contracts.

Regulation 23 contains a new provision requiring the mandatory exclusion of candidates or tenderers who have been convicted for participation in a criminal organisation, corruption, fraud, or money laundering. Contracting authorities must exclude such persons where they have "actual knowledge" of the relevant convictions and will therefore seek comfort on this point in relation to senior personnel in pre-qualification questionnaires.

Evaluation/award

Contracting authorities can choose to award contracts covered by the rules either on the basis of the lowest price offered or on the basis of the "most economically advantageous tender".

Under Regulation 30 contracting authorities awarding a contract on the basis of the most economically advantageous tender must now indicate in the contract notice or contract documents the relative weighting given to each of the evaluation criteria. The weightings can be expressed as ranges. This requirement can only be avoided where weighting is not objectively possible.

This represents a significant change from the old rules under which contracting authorities had to state evaluation criteria in descending order of importance only "where possible". Contracting authorities will therefore have to devise and substantially divulge the weighting of evaluation criteria at an early stage in the planning of the procurement process in order to be able to comply with this requirement.

Regulation 30 contains a list of the types of criteria that can be taken into account in an assessment of the most economically advantageous tender. The list is not exhaustive but there is a principle that evaluation criteria must be connected directly to the tenderers' ability to perform the contract.

The Regulations now make it clear that environmental criteria may be used as part of an evaluation of the most economically advantageous tender. "Environmental characteristics" have been added to the list of criteria at Regulation 30. It is also made clear in the recitals to the Directive that criteria aimed to meet social requirements can be used – for example in relation to disadvantaged groups of people who would be receiving or using the works/ services/supplies which are the subject of the main contract.

"Regulation 23 contains a new provision requiring the mandatory exclusion of candidates or tenderers who have been convicted for participation in a criminal organisation, corruption, fraud, or money laundering."

Framework agreements

There was previously no explicit provision for the use of framework agreements by the public sector. There was a protracted debate between the UK Government and the European Commission as to whether framework agreements involving a number of contractors were permitted under the rules. That debate has now been resolved by the introduction of a specific regime for framework agreements.

What is a framework agreement?

Framework agreements in this context are agreements with one or more contractors setting out the terms and conditions under which specific call-offs can be made throughout the term of the agreement.

A framework agreement is defined in Regulation 2 as an agreement:

> "between one or more contracting authorities and one or more economic operators which establishes the terms (in particular the terms as to price and, where appropriate, quantity) under which the economic operator will enter into one or more contracts with a contracting authority in the period during which the framework agreement applies".

"The specification contained in the framework should also be detailed enough to cover all the works/services/supplies to be awarded under it…"

Award of framework agreements

The rules require that framework agreements are advertised and awarded in compliance with the standard tendering procedures. The specification contained in the framework should also be detailed enough to cover all the works/services/supplies to be awarded under it (for example, in the case of a construction project the individual projects involved, when it is envisaged they will take place, and the different categories of work being procured).

A framework agreement can be entered into with a single contractor or with a number of contractors. In relation to frameworks concluded with a single contractor, the contractor's tender can be supplemented before a call-off but the contract must be awarded within the limits of the original framework agreement. In general frameworks should be limited to four years' duration.

Operation of mini-competitions

In relation to frameworks concluded with a number of contractors (at least 3) there are essentially two options. The first option is to award call-offs simply by reapplying the original evaluation criteria. This would require that the framework agreement is detailed enough not to require supplemental information in additional tenders. A contracting authority which follows this option must take particular care to ensure that the award of the call-off is carried out in a fair and non-discriminatory manner.

The second option is to run a mini-competition between all the framework contractors **capable** of meeting the particular need (i.e. not just those whom the contracting authority wants to invite). The Regulations contain basic rules for the operation of mini-competitions. They key points are that:

- members of the framework should be invited in writing to submit written tenders within a specified time limit; and
- awards are made by reference to award criteria set out in the original framework process.

Mini-competitions can also involve the use of e-auctions (see section 7).

How far can contractual terms by altered at the call-off stage?

There is uncertainty as to how far contractual terms can be revisited under a mini-competition. The definition used in the Regulations suggests the framework agreement should set most of the basic terms and conditions. The Regulations then state that call-off contracts should not "substantially" amend the terms of the framework[6]. At call-off stage "more precisely formulated" terms can be used "if necessary" and "other terms" can be used where they have already been referred to in the previous framework documents[7]. On the face of it therefore there is perhaps less scope for revisiting contractual terms at call-off stage than might first be thought to be the case.

That accords with the view of the OGC. It has issued guidance[8] stating that the basic terms of a framework cannot be renegotiated, nor can the specification used in setting up the framework be substantively changed. The OGC has suggested a list of terms which would be suitable for refinement under a mini-competition, including:

- particular delivery timescales;
  particular invoicing arrangements and payment profiles;
  additional security needs;
- incidental charges;
- particular associated services, e.g. installation, maintenance and training;
- particular mixes of quality systems and rates.

As a general principle it appears that prices may be revisited at the mini-competition stage, but the OGC recommends that a pricing mechanism should be established under the framework agreement.

6 Regulation 19(4)

7 Regulation 19(8)

8 See http:/www.ogc.gov.uk/embedded_object.asp?docid=1004569

E-auctions

9. E-auctions for the purposes of the procurement rules are on-line auctions where selected bidders submit offers electronically against the contracting authority's specification. Regulation 21 contains detailed rules on the operation of e-auctions. E-auctions can be used under any of the available procurement procedures. In particular that means e-auctions can be used at the mini-competition stage of a framework (see above) or for call-offs under a dynamic purchasing system (see section 8).

There are two important limits on the use of e-auctions. First, e-auctions cannot be used for the award of service contracts where the subject matter is a product of "intellectual endeavour" such as a design contract.

Second, e-auctions can only be used to evaluate elements which can be automatically evaluated by reference to figures or percentages. That means that where an award is to be made under most economically advantageous criteria only those criteria which can be tested objectively by reference to numerical figures will be suitable for testing in the e-auction. That is likely to mean a division between criteria (e.g. on quality) tested in advance of the e-auction and criteria (e.g. price) tested inside the e-auction. The contracting authority will therefore need to ensure that it correctly measures the results obtained from the two different types of criteria before making the final judgment on award.

"E-auctions can be used under any of the available procurement procedures."

In summary the process set out in the Regulations requires that:

- The intended use of an electronic auction process is stated in the contract notice.
- The specifications for the contracts must include the long list of details set out in Regulation 21(7) (e.g. to describe those features whose values will be tested under the auction).
- The procedure is then run according to the normal rules and the contracting authority makes a "full initial evaluation" of the tenders.
- Tenderers who have submitted an admissible tender are then invited to participate in the electronic auction process. The invitation to participate must contain the procedural information for the operation of the auction (eg minimum uplift for a new bid). Where the contract is being awarded on the basis of the most economically advantageous tender each invitation must also contain the outcome of the initial evaluation of the relevant tender and the formula that will be used to determine the automatic re-ranking of tenders.
- The electronic auction can then take place in any number of rounds. Tenderers must be able to determine their relative ranking at any point in the process.
- The auction can be closed either with a guillotine time, after a fixed number of rounds, or when no new offers are made **exceeding the minimum difference** after a set period of time.

The OGC recommends that contracting authorities use expert consultants for the operation of e-auctions.

Dynamic purchasing systems

The Regulations introduce an entirely new tool for use by contracting authorities – the "dynamic purchasing system". A dynamic purchasing system is set up under an open procedure and is essentially an on-line framework agreement – with the difference that suppliers must be able to enter and exit the framework on an ongoing basis.

Under Regulation 2 a dynamic purchasing system is defined as a procedure established for purchase of "commonly used" goods, works or services. It remains to be seen how the term "commonly used" will be interpreted in practice.

A dynamic purchasing system is a completely electronic process. Suppliers submit indicative bids setting out the terms upon which they would be willing to contract in response to an Official Journal notice announcing the creation of the dynamic purchasing system. There must be on-line access to the relevant specifications and tender documents. On the basis of those indicative bids suppliers are selected for admission on to the system. Suppliers should be free to make or amend indicative bids at any time. Contracting authorities must also give notice of call-offs in the Official Journal in order to allow for new indicative bids to be submitted. The OGC considers that the dynamic purchasing system is essentially designed to cover regular "off the shelf" purchases.

At the call-off stage the contracting authority requests tenders from all those suppliers who are currently admitted to the system. Contracts are awarded on the basis of the award criteria published at the start of the process. An e-auction can be used to determine the award at call-off stage.

> *"A dynamic purchasing system is set up under an open procedure and is essentially an on-line framework agreement…"*

Enforcement of the regulations

If a contractor is aggrieved by a breach of the rules, and the issue has not been dealt with by the contracting authority, there are essentially three options available to it:

- make complaints to related public bodies (e.g. the responsible Government department);
- make a complaint to the European Commission;
- take court action.

The key issue for the aggrieved contractor is to act as promptly as possible. Once the procurement has been completed and the contract entered into it is unlikely that a successful remedy will be found.

"Observance of the rules is a matter of good governance and faulty procedures can lead to costly litigation."

Complaints to related public bodies

If a procurement procedure is still ongoing then often one of the most effective way of getting an authority to correct a fault is to bring the issue to the attention of supervisory organisations.

Observance of the rules is a matter of good governance and faulty procedures can lead to costly litigation. Representations can be made to the supervising Government department, the relevant audit body, or any other organisations interested in the contracting authority's performance to have the relevant procedure corrected.

Complaining to the European Commission

The European Commission has the power to take action in relation to breaches of the procurement rules. An action can be taken against the UK Government where there has been a breach as this would amount to a failure properly to implement the Directive. Given the speed at which the Commission moves it is unlikely that a complaint could be used to remedy an ongoing process.

If the Commission takes up the case it is a good way of putting pressure on the contracting authority for future procurements as the response to the investigation would require central government scrutiny. In theory it is also possible for the Commission to have the offending contract overturned.

Taking court action

Breach of the rules is actionable by an aggrieved contractor as a breach of statutory duty. There is an obligation on the aggrieved contractor to act promptly in bringing a claim and in any event within three months of the breach.

The key issue from the perspective of the contractor is whether or not a contract has been entered into. Before a contract has been entered into the available remedies are either an injunction or damages. An injunction could be used to have the offending process re-run. After a contract has been entered into damages is the only remedy. This can have a major impact on the contractor's decision-making because damages claims are relatively difficult to bring.

The position of the aggrieved contractor has been strengthened by the changes brought about as a result of the *Alcatel* case – incorporated into Regulation 32. Contracting authorities must now leave at least 10 days between announcing the name of the successful bidder and the entry into a contract with that bidder. This window therefore allows time for an aggrieved contractor to bring an injunction – if it acts quickly enough.

Procurement law advice is provided by the EU Competition Law team at CMS Cameron McKenna. The team advises both contracting authorities and suppliers/contractors on the procurement rules and their application to tender processes. This also involves the provision of advice in relation to litigation of procurement law disputes. The team has particular experience in advising on issues relating to PFI/PPP contracts.

In addition to procurement law the EU Competition Law team provides a full range of services in connection with competition law, including: merger control, anti-competitive agreements, conduct of dominant companies and state aid.

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