

## The European Procurement Directives

The rules surrounding the process are complicated and the information below is an overview behind which is a great deal of detail

Previously there were three Directives that affect Local Government purchasing. They were Works, Supplies and Services and were all incorporated into UK legislation. In January 2006 The Public Contracts Regulations 2006 incorporated the consolidated the previous procurement directives into one single Directive.

The Consolidated Directive has refined a number of existing provisions:

- Simplified thresholds expressed in euros
- Encouragement to use performance specifications and more emphasis on “ equivalence”
- Requirement to publish the relative importance of contract award criteria
- Environmental and social issues addressed
- Electronic means of communication

The additions to the new Directives are:

- The competitive dialogue
- Framework Agreements
- Central Purchasing bodies
- Electronic auctions
- Dynamic purchasing systems

The Directive and now the Public Contracts Regulations set out a process with set procedures how the procurements will be carried out. The aim of the process is to open markets up and increase competition across the Member States of Europe. The rules set out in the Directives are very similar in regard to the procurement regimes, the difference relates mainly to the financial thresholds, where they become applicable and the category of purchase.

The application of the Directives is primarily governed by the value of the Contract. The value is the total cost not the annual cost.

The value thresholds are set biennially. Although expressed in ECU and sterling the value is set at the biennial review not on a daily basis. The current thresholds are

<b>Works</b>	<b>ECU 5m</b>	<b>£ 3,497,313</b>
<b>Supplies/Services</b>	<b>ECU 200,000</b>	<b>£ 139,893</b>

If it is not clear that the purchase falls into any of the three categories then the category that represents the largest spend should determine whether it is works, supplies or services. For example, the provision of computer hardware and software and maintenance, the cost of the computer hardware and software is Supplies the maintenance is Services. As the cost (in this example) of the equipment far exceeds the cost of maintenance the overall category is Supplies.

If a number of contracts of the same product or service is to be made the total cost should be “**aggregated**” and if the total value exceeds the threshold then the procurement exercise should be carried out in accordance with the Directives. Breaking up the quantity to avoid hitting the threshold is at odds with the Directives and may be questioned by Audit.

The Works Directive covers mainly construction and civil engineering activities of high value.

The Supplies Directive covers all goods and supplies and each product or group of products has a unique classification found in the Directives.

The Services Directives cover Services however there are two lists of services which the Directives have different application. The A list sets out those services which the full regime will apply and “Residual List” that applies the other services to the Directive in relation to common standard and the publication of an award notice.

The threshold for the value of the Contract i.e. the total cost, not annual value is exceeded then the regime applies.

Once it is ascertained that the regime applies an “**award procedure**” must be selected. There are three procedures:

**Open**

**Restricted**

**Negotiated.**

**Competitive Dialogue**

All procedures require a notice (sometimes called an OJEU) being placed in the Official Journal of the European Community, “**the Journal or OJ**”.

Before commencing work online you are advised to seek guidance from the Central Procurement Unit.

The notice may be found in the online version of the Journal <http://ted.europa.eu.int>

Ideally, at the beginning of the financial year, or when it is known that a purchase is going to be made a **Prior Information Notice (PIN)** should be

placed in the **Journal**. This notice alerts Contractors that a Tender is to be put out to tender and gives limited information. The Directive requires that a PIN **should** be published in the Journal each time a tender is to be advertised and the timescales maybe reduced later.

Before selecting the notice the “**award procedure**” should be determined.

The Open Procedure invites all organisations that register their interest are invited to tender. All applicants must be provided with an invitation to tender within 6 days of request as long as the request leaves sufficient time to comply by no later than six days before the end of the tender period.

Under the Open regime a period of not less than **52 calendar days** from the date of despatch of the contract notice must be allowed for the submission of tenders, subject to the above. This is a minimum period and may be extended if Contractors need to visit sites or the documentation is very bulky. However this period can be reduced to **36** calendar days if a PIN has been published.

The **Restricted Procedure** can be considered as a version of selective tendering since prospective tenderers are vetted prior to inclusion on any “**restricted list of Tenderers**”.

The process has two clear stages i.e. the selection of tenderers and evaluation of tenders. A notice as set out in Appendix (A) must be completed with the necessary dates inserted. The restricted regime requires a minimum period of **37 calendar days** from the date of despatch of the notice for applications to be made. An application can be construed as supplying all information necessary for the authority to be able to subject the company to the selection criteria for inclusion on the restricted list of Tenderers.

Applicants are required to complete a “Pre qualification questionnaire “ that seeks conformation that will enable the authority to assess its technical capability, capacity and financial good standing. Unless the service is outsourced to say Dunn and Bradstreet applicants should submit two year’s audited accounts for scrutiny and testing together with evidence of valid insurance within the 37 calendar days as part of the selection process. The Applicants will be unsuccessful if they do not achieve the authority’s minimum standards of “**financial and economic standing and technical , professional capability and capacity**”. Selection can only be made using these criteria and must be demonstrable.

Successful applicants will be invited to tender and must be allowed a minimum of **40 calendar days** to submit their tender commencing from the date of despatch of the invitation to tender. This is a minimum period and may be extended if there is a need to inspect sites or documents relating to contract documents. However if a **PIN** has been published the tender period can be reduced to **26 calendar days**. Reasonable requests, in writing, must

be met as long as the request leaves the authority sufficient time to comply by no later than six days from the end of the tender period.

The **Negotiated Procedure** allows for occasions where the buyer negotiates the terms of the Contract with one or more companies selected to negotiate. This process is to be used in very exceptional circumstances. If it is considered that the Negotiated Procedure is to be used guidance must be sought from CPU and Legal Services at the earliest opportunity .

There are two procedures within Negotiated Procedure:

Negotiation preceded by the publication of a notice; or

Negotiation without prior publication of a notice.

A negotiated procedure **with the publication of a notice** may be used when;

An open or restricted procedure was “discontinued” because of “irregular tenders” e.g. only one returned, failure to provide all the goods or services.

The nature or the risks involved do not permit overall pricing. This is very exceptional must be considered as an option if and when such a case arises.

Or, when it is impossible to set out the specification in such a way as to enable an open or restricted tender exercise and would be. Typically this would be for conceptual services or R& D.

A negotiated procedure **without a publication of a notice** may be used when;

An open or restricted exercise produced no tenders or irregular tenders (as long as the terms of the contract remain unaltered)

There is only one service provider or supplier in a position to supply (i.e. for artistic or technical reasons because of exclusive rights) or

The contract follows a design contest and the rules require it to be awarded to the successful contestant or one of the successful contestants (as long as all the successful contestants are invited to negotiate). Design contests have a separate procedure and advice should be sought before proceeding down this route; or

For reasons of extreme urgency the time limits required for open or restricted and advertised negotiated procedures cannot be met. Urgency means “due to unforeseen circumstances” and must not be considered as an option if the purchase has been left late e.g. clearing up after an environmental disaster; or

Additional Services or goods “which cannot be technically or economically separated from the main contract” without “great difficulty” which because of unforeseen circumstances had not been included in the original project or contract. The aggregate value of all contracts for additional service or goods must not exceed 50 per cent of the value of the original contract; or

New services or goods are required which is a repetition of a purchase carried out under the original contract.

If the negotiated procedure is selected a report must be produced in anticipation of a request for such from the Commission by way of the DETR recording the justification for selection of the negotiated procedure.

In any event if a notice is to be published in the Journal applicants will have a minimum of **37** days from the date of despatch of the notice to register their interest in being invited to negotiate. This period can be reduced to 15 days under urgency rules. The reasons for the reduction of the timescales must be set out in the notice. Those applicants who do not meet the County Council’s minimum standards of financial and economic standing and technical capability can be excluded. There must (where practicable) be at least three organisations invited to negotiate.

There are no stipulations as to length of tender periods and the nature of the purchase must be considered in setting the period- be reasonable

The Directives require the basis for the contract award to be set out in the notice and subsequently in the Invitation to Tender.

### **Competitive Dialogue**

The competitive dialogue procedure is a new procedure introduced in the public sector procurement directive (2004/18/EC), which has been implemented in the Public Contracts Regulations (SI 2006/5) with effect from 31 January 2006. It is for use in the award of complex contracts, where there is a need for the contracting authorities to discuss all aspects of the proposed contract with candidates. Such dialogue would not be possible under open and restricted procedures.

The structure of the procedure changed considerably during the course of the negotiations leading to the adoption of 2004/18/EC. Lobbying by UK stakeholders, both public and private sector, helped to ensure that the final text fitted better with existing UK PFI practice. The end result is a structured negotiated procedure, which is similar in many ways to the existing practice of letting PFI contracts.

The main features of the new procedure are:

- dialogue is allowed with selected suppliers to identify and define solutions to meet the needs and requirements of the contracting authority;

- the award is made only on the most economically advantageous tender criteria;
- dialogue may be conducted in successive stages, with the aim of reducing the number of solutions/bidders, and
- there are explicit rules on post-tender discussion.

The main differences from the competitive negotiated procedure are that a structured tendering approach is provided for and, as mentioned above, there are rules on the conduct of discussions at the post tender stage both with tenderers who have submitted final bids and subsequently with the tenderer who has provided the most economically advantageous tender (preferred bidder).

Again guidance and advice must be sought from CPU or Legal Services before commencing the competitive dialogue procedure

There are two sets of award criteria. The first relates specifically to price and is **the lowest price only**. The second will take into account other factors such as technical merit, quality and service and is expressed as the “**most economic advantageous tender**”. The elements making up the “MEAT” must be clearly set out in respect of how this assessed in the Invitation to Tender.

Finally following the award of the Contract a notice must be placed in the Journal (as the model notice) no later than **48 days** from the date of award. Tenderers should be given every assistance in relation to their tender insofar, as is permissible in relation to commercial confidentiality.

If no award is made or the DSO/DLO is to perform the Contract a notice should still be sent to the Commission advising that no award have been made. This is because the authority is in fact contracting with itself.

Further Information can be obtained from the Office of Government and Commerce

[Introduction to the EU Procurement Rules](#) - **revised** - January 2006

[Guidance on Framework Agreements](#) - January 2006

[Guidance on dynamic purchasing systems](#) - January 2006

[Guidance on the mandatory exclusion of economic operators](#) - January 2006

[Guidance on central purchasing bodies](#) - January 2006

[Guidance on electronic auctions](#) - January 2006

[Guidance on the competitive dialogue procedure](#) - January 2006

[Guidance on the 10-day mandatory standstill period](#) (PDF) - **new** - March 2006

***For clarification and guidance do not hesitate to contact the Central Procurement Unit.***