

# EU Procurement Regulations

Procurement regulations apply across the whole of the European Union and are coordinated in the UK by the Office of Government Commerce (OGC). Where the regulations apply, detailed rules that must be followed are enforced through the courts. Procurement rules consist of:

- [EU Treaty](#) - the EU public procurement market is a fundamental part of the single market and is governed by rules intended to remove barriers and open up new, non-discriminatory and competitive markets for companies.
- [EU Procurement Directives](#) - establish detailed rules governing the award of public contracts over set thresholds.
- [EU Remedies Directives](#) - require that member states provide rapid and effective remedies for breach of the rules.
- [The Public Contracts Regulations 2006](#) - UK regulations give effect in UK law to the EU procurement directives. The revised regulations include a number of new provisions not included in the previous rules.
- Case law - there may also be judgements of the European Court of Justice and national UK courts which interpret EU and national law.

## Health & social care

Service contracts are divided into two categories:

- Part A - to which the full EU rules apply.
- Part B - where the only obligations relate to non discriminatory technical specifications, and notice of contract award. There is no requirement for contracts to be advertised in the Official Journal of the EU (OJEU), but Part B services should be subject to some form of appropriate advertised competition.

Health and social care services are Part B services. The regulations only apply if the contract is over a threshold amount (updated every 2 years). The thresholds differ for supplies, services and works and whether the purchasing body is a central government or other public sector one. For part B services it is £156,442 (net of VAT) from January 2010 to January 2012. There are EU rules for the valuation of contracts and care is therefore required. The contract value to be employed for the purposes of the thresholds is the estimated contract value and contracting authorities are required to aggregate the value of related or connected contracts. It is difficult to give general guidance as to when to aggregate contracts and the issue is best addressed on a case-by-case basis. In any event, contracting authorities are prohibited from "splitting" contracts with the intention of avoiding the directives.

## Choices of procurement procedure

Four award procedures can be used:

- **The open procedure.** This is a one stage process where the invitation to tender is advertised and all interested providers can submit their bids. This approach would be used to ensure fair competition when there is a developed market and a good chance of attracting lots of potential providers.

- **The restricted procedure.** This is a two stage process where a short list of providers who have been pre-vetted, usually using a pre-qualification questionnaire (PQQ), are asked to tender. Sometimes preferred provider lists are kept of organisations that have passed the legal and financial stability tests who can be contacted at any time for stage two of a tender. The invitations to tender would be sent to a short-list of accredited providers. The minimum number of tenderers is five. This process allows purchasers to avoid having to deal with an overwhelmingly large number of tenders.
- **The competitive dialogue procedure.** This is a new procedure for use where purchasers consider that the open or restricted procedures will not allow the award of the contract. It is intended for use in particularly complex contracts where purchasers may be aware of needs but do not know in advance what is the best technical, legal or financial solution for satisfying them. The purchasers may also want to allow innovative solutions or may be unable, objectively, to assess what the market has on offer. Therefore a dialogue during the tendering process is necessary. The aim of the provision is to enable a dialogue to take place in a single award procedure which results in the contract being carried out; this incorporates a phase during which specifications are established on the basis of dialogue with the selected participants. Tenders are then invited from participants remaining at the end of the dialogue. The contract is awarded to the participant submitting the most economically advantageous tender. The potential to use the competitive dialogue procedure should be considered before use of the negotiated procedure with prior publication of a contract notice. The minimum number of tenderers is three.
- **The negotiated procedure.** Direct negotiation with a single or a few select providers. The negotiated procedure with a call for competition can be used when the nature or risk involved are such that it does not permit prior overall pricing, or a specification cannot be drawn up with precision to allow the open or restricted procedure. In this case the minimum number of tenderers is three. However, in certain circumstances the contract does not have to be advertised and there is no minimum of tenderers:
  - for technical or artistic reasons or because of the protection of exclusive rights the contract can only be carried out by one particular supplier; or
  - the absence of suitable tenders in response to a previous invitation to tender using the open or restricted procedure, but only if the original terms of the proposed contract offered in the discontinued procedure have not been substantially altered; or
  - there is a need for extreme speed as a result of events unforeseeable by, and not attributable to, the contracting authority; or
  - when the rules of a design contest require the contract to be awarded to the successful contestant, or to one of the successful contestants provided that all successful contestants are invited to negotiate the contract.

### Stages in the procurement process

EU regulations set out detailed criteria for the procurement process. The criteria cover:

1. Specification stage - how requirements must be specified, avoiding brand names and other references which would have the effect of favouring or

- eliminating particular providers or services - and the requirement to accept equivalence. Contracting authorities must publicise the selection criteria and be transparent in decisions to ensure that the process of evaluation doesn't discriminate in favour of or against any tenderer.
2. Selection stage - the rejection or selection of candidates based upon legal, financial or technical grounds:
    - evidence that they are unsuitable on grounds e.g. of bankruptcy, criminal conviction or failure to pay taxes;
    - their economic and financial standing e.g. that they are judged to be financially sound on the basis of their annual accounts; or
    - their technical capacity e.g. that they will be adequately equipped to do the job and that their track record is satisfactory.
  3. The award stage - the award of contracts is on the basis of "most economically advantageous" to the purchaser i.e. overall best value. Purchasers do not have to accept the lowest price if they have stated the award criteria in advance. Contracting authorities must state in advance the criteria that will be used to evaluate tenders, either in the advert or in the tender documentation, and state the relative weighting given to each criterion used to judge the most economically advantageous tender e.g. price 40%. When the decision is made, contracting authorities must send a contract award notice to the OJEU with 48 days of the award, but the award notice does not have to be published. Information and on-line forms are available at the OJEU web site <http://simap.eu.int>
  4. Post tender negotiations - there are restrictions on the use of post-tender negotiation under the open and restricted procedures. Following selection, the purchasing agency is entitled to enter into discussions with tenderers for the purpose of clarifying or supplementing the tenders or the agency's specifications. However, the agency is prohibited at this stage from negotiating the principal terms and conditions of the contract, including prices and specifications. The agency must be particularly wary of allowing individual tenderers to revise their tenders in the light of post-tender discussions, although the position is slightly different where the negotiated procedure has been used.

### **Guidance on good procurement practice**

The EU Treaty principles of equal treatment, transparency, proportionality and free movement of goods apply to all public sector contracts regardless of whether the EU regulations apply. Therefore you should adhere to the principles of good procurement in all tendering:

- The decision to tender accords with the commissioning strategy.
- The process complies with local financial regulations and/or standing orders.
- Patient/service user or carer involvement in the process is agreed.
- The market is tested if new services are involved or little information is available on the likely response from providers.
- Contract opportunities are publicised, especially to small and voluntary organisations, with good notice via a sufficiently accessible advert e.g. the organisation's website, portal websites such as [The Chest](#), OJEU or Supply2.gov.uk.

- A performance specification (defines the performance required) or outcome-based specification is used, so as to encourage innovation.
- All tenderers, and enquiries, are responded to equally and fairly.
- The documentation strikes a balance between enabling tenders to be objectively evaluated and making too many demands on providers.
- The decision making process is transparent; using the key criteria of legal and financial stability and technical competence.
- Tenders are evaluated on an equal footing by using a standard methodology e.g. a method statement template, which would ask for a response to a scenario or pose a series of questions. Responses are evaluated on the tenderer's ability to demonstrate that they can meet the specific requirements of the service.
- Feedback is given to unsuccessful tenderers.
- A comprehensive record is kept of the procurement activities undertaken e.g. contract details, selection decisions and reasons, justification for use of the selection procedure, names of all tenderers.

**Sources of further help**

The Office of Government Commerce (OGC) has published a wide range of guidance on the OGC website [www.ogc.gov.uk](http://www.ogc.gov.uk). The following guides, accessible via the website, are particularly relevant:

- Introduction to the EU Procurement Rules
- Guidance on the competitive dialogue procedure
- Think Smart, Think Voluntary Sector
- Guidance on central purchasing bodies
- Guidance on framework agreements

The DCSF's Commercial and Procurement Group has also published a wide range of information about procurement skills that can be downloaded from [www.dcsf.gov.uk/everychildmatters/strategy/managersandleaders/planningandcommissioning/skills/procureskills/](http://www.dcsf.gov.uk/everychildmatters/strategy/managersandleaders/planningandcommissioning/skills/procureskills/).