



No. 51 Introduction to the EC Procurement Rules

This is one of a series of guidances issued by CUP on purchasing and supply procedures and practices. Departments should consider incorporating it into their purchasing and supply manuals.

References to “the EC rules” are to the EEC Treaty, the EC procurement directives as implemented

in UK legislation, rulings of the European Court of Justice and other relevant EC law. Departments can obtain advice and guidance on the EC rules from Procurement Policy (PP) Division, HM Treasury.

INTRODUCTION

1.1 The Procurement Policy Division of the Treasury has prepared the attached note (Annex A) setting out where the EC procurement rules apply, when they require competition in accordance with prescribed procedure and what the principal effects of that requirement will be. Drafted in response to questions about private finance projects, the note also applies to the generality of public contracts.

1.2 Even where competition is not required under the EC rules, for example because the estimated value of a project falls below the relevant threshold, departments will still need to consider whether they should acquire goods, works or services by means of competition in order to obtain best value for money (see the Consolidated Guidelines - Government Accounting paragraph 3 1.1, 1),

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**AN INTRODUCTION TO
THE EC PROCUREMENT RULES**

Note by the Treasury

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SECTION 1 - THE EC PROCUREMENT RULES: AN OVERVIEW

INTRODUCTION

1.1 This section describes briefly the main characteristics of the EC rules which apply when public authorities, and utilities, acquire goods, works or services.

1.2 The rules set out procedures for the award of contracts above certain values throughout the Community. Their purpose is to open up the public procurement market and to ensure the free movement of goods and services within the EU, thereby increasing opportunities for competitive suppliers, contractors and service-providers. In most cases they require competition. They go with the grain of the Government's policy that procurement decisions should be based on value for money through competition. Under the European Economic Area Agreement and various multilateral and bilateral agreements the benefits of the EC rules, or their equivalent, are extended to suppliers and contractors from certain other countries. Most Government Departments also have obligations under a GATT Agreement on Government Procurement. At present this applies to supplies contracts but its coverage will be extended to other bodies, works and certain services from 1 January 1996.

1.3 Council Directives under the EEC Treaty set out a legal framework to which public authorities and utilities must adapt their contract award procedures. They have been implemented in UK law by Regulations made by the Treasury under section 2(2) of the European Communities Act 1972. There are four sets of Regulations covering respectively:

Public authorities (the State, regional and local authorities and other public bodies)

Supplies (the purchase or hire of goods)

The Public Supply Contracts Regulations 1995 (SI 1995/20 1)

Works (civil engineering or building services)

The Public Works Contracts Regulations 1991 (SI 1991/2680)

Services

The Public Services Contracts Regulations 1993 (SI 1993/3228),

Utilities (Certain operators in the water, energy, transport and telecommunications sectors).

The Utilities Supply and Works Regulations 1992 (SI 1992/3279) shortly to be replaced by the Utilities Contracts Regulations 1995 (in draft) to reflect the extension of the Directive to services from 1 July 1994.

1.4 The Regulations apply when public authorities or utilities propose to award contracts:

- a. where the value of the consideration estimated in accordance with the rules exceeds a specified threshold (see Figure 1); and
- b. which are not otherwise specifically excluded, for example on grounds of secrecy.

1.5 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 Official Journal of the EC and its electronic equivalent Tenders Electronic Daily. In most cases the time allowed for responses or tenders must be no less than a specified period. Utilities can alternatively call for competition either by publishing sufficiently specific periodic information notices or by publishing a notice of a qualification system (see paragraph 2.10). For service contracts, the rules apply in full only to contracts for certain categories of services (Part A services) - see Figure 2.

1.6 The Regulations set out detailed criteria for:

- a. the specification of requirements, referring wherever possible to relevant European specifications, and avoiding references which would have the effect of favouring or eliminating particular suppliers, contractors, products or services;
- b. the rejection or selection of tenderers based on:
 - evidence of their personal position-that they are not unsuitable to be selected on grounds, for example, of bankruptcy, conviction of a criminal offence or failure to pay taxes;
 - their economic and financial standing - for example that they are judged to be financially sound on the basis of their annual accounts;
 - their technical capacity - for example that they will be adequately equipped to do the job and that their track record is satisfactory (for public authorities the evidence is prescribed); and
 - for services, their ability;

- c. the award of contracts - either various criteria for determining which offer is “the most economically advantageous” to the purchaser (ie best value for money) or “lowest price” alone.

The criteria are designed to avoid discrimination on grounds of origin in a particular Member State and to ensure that all suppliers or contractors established in the Member States are treated on equal terms.

1.7 Only three award procedures are provided for:

- a. the **open procedure** under which all interested persons may tender for the contract.
- b. the **restricted** procedure under which only selected persons may submit tenders for the contract.
- c. the **negotiated** procedure under which a purchaser may negotiate the terms of the contract with one or more persons selected by it. As a general rule there must be a call for competition. But in certain specified cases the negotiated procedure may be used without a call for competition.

Public authorities have a free choice between the open and restricted procedures but may only use the negotiated procedure in limited circumstances.

Utilities have a free choice between the open, restricted and negotiated procedures.

1.8 Under restricted procedures and competitive negotiated procedures (those where a call for competition is required) there must be a sufficient number of participants to ensure genuine competition. Normally, the minimum will be three, but where a public authority specifies the range in which the number of participants will fall the minimum will be five.

1.9 The Regulations provide for various information requirements, including contract award notices, statistical returns and, for public authorities, the debriefing of unsuccessful applicants or tenderers. They also provide for Government Departments to obtain information for the European Commission, particularly where the Commission has evidence of a clear breach of the rules.

EC Treaty obligations

1.10 Even in cases where the EC procurement rules do not require competition, public authorities and other parts of the State, in its broadest sense, must comply with EC Treaty obligations, in particular not to discriminate against suppliers or contractors on the grounds of their nationality or the Member State in which they are based.

Enforcement

1.11 The principal means of enforcement for a breach of the Regulations and other enforceable EC 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 European Court of Justice.

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 Court of Justice has demonstrated that, in appropriate circumstances, it is prepared to overturn a contract.

1.12 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. The Regulations set out the procedures to be followed.

Other procedures

1.13 In the utilities sector the Directive makes provision for:

- utilities to have voluntary access to a system for the external audit (**attestation**) of their procurement systems and practice; and
- for utilities and suppliers or contractors to resolve disputes about the application of the EC rules through a Community-level system for **conciliation**.

1.14 Preparations are being made for the introduction of an attestation system

1.15 The Regulations provide for applications for conciliation to be sent to the Treasury so that they can be forwarded to the Commission as quickly as possible.

Figure 1 EC Public Procurement Thresholds

Contract	Purchaser	ECU	£*
Public authorities			
Supplies	GATT bodies	128,771 ^f	96,403
	Other contracting authorities	200,000	149,728
Works	All contracting authorities	5,000,000	3,743,203
Services	All contracting authorities	200,000	149,728
Utilities			
Supplies and Services	Energy water and transport sectors	400,000	299,456
	Telecoms sector	600,000	449,184
Works	All	5,000,000	3,743,203

*Sterling equivalent(1.1.94-31 12.95)

ECU equivalent of 130,000 Special Drawing Rights (1.1 94 3 1.12 95)

Figure 2 Categories of Services

PART A

Category Reference	Services	CPC Reference+
1	Maintenance and repair of vehicles and equipment	6112, 6122, 633,886
2	Transport by land, including armoured car services and courier services but not including transport of mail and transport by rail	712 (except 71235), 7512, 87304
3	Transport by air but not transport of mail	73 (except 7321)
4	Transport of mail by land, other than by rail and by air	71235, 7321
5	Telecommunications services other than voice telephony, telex, radiotelephony paging and satellite services	752
6	Financial services	81 (Part), 812, 814
	(a) Insurance services	
	(b) Banking and Investment services other than financial services* in connection with issue, sale, purchase or transfer of securities or other financial instruments, and central bank services	
7	Computer and related services	84
8	R & D services where the benefits accrue exclusively to the purchaser for its use in the conduct of its own affairs and the services are to be wholly paid for by the purchaser	85

CPC stands for the Central Classification of the United Nations

* This exception does not apply in the utilities sector.

Figure 2 Categories of Services - continued**PART A**

Category Reference	Services	CPC Reference
9	Accounting, auditing and book-keeping services	862
10	Market research and public opinion polling services	864
11	Management consultancy services and related services, but not arbitration and conciliation services	865,866
12	Architectural services: engineering services and integrated engineering services: urban planning and landscape architectural services: related scientific and technical consulting services: technical testing and analysis services	867
13	Advertising services	871
14	Building-cleaning services and property management services	874,82201 to 82206
15	Publishing and printing services on a fee or contract basis	88442
16	Sewerage and refuse disposal service: sanitation and similar services	94

PART B

17	Hotel and restaurant services	64
18	Transport by rail	711
19	Transport by water	72
20	Supporting and auxiliary transport services	74
21	Legal services	861
22	Personnel placement and supply services	872
23	Investigation and security services, other than armoured car services	873, (except 87304)
24	Education and vocational education services	92
25	Health and social services	93
26	Recreational, cultural and sporting services	96
27	Other services	

SECTION 2-THE EC PROCUREMENT RULES: THE REQUIREMENT FOR COMPETITION

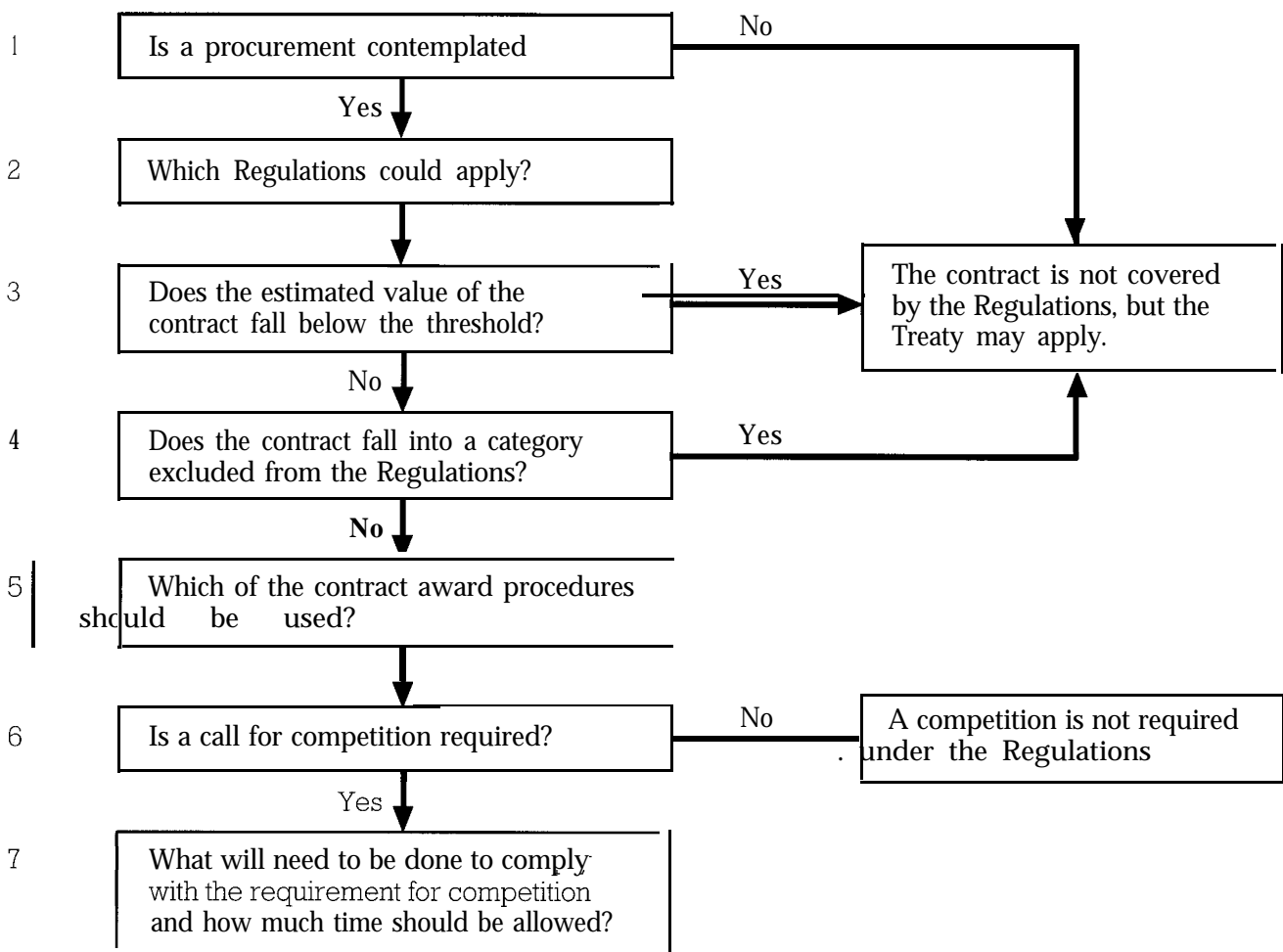
INTRODUCTION

2.1 This section sets out a framework for considering whether particular contracts for the acquisition of goods, works or services are subject to the EC procurement rules and, if so, how the procedures for awarding them will be affected by a requirement for competition. It is assumed that the contract, if any, will be awarded by, or on behalf of, a purchaser subject to the rules.

2.2 It must be emphasised that it provides only a brief summary. It will be necessary to consider carefully, case by case, how the rules should be applied for individual contracts. In doing so the Regulations which implement the relevant EC Directive should be consulted. The purchaser's "purchasing unit" or legal advisers will be able to provide advice on the application of the rules.

2.3 Whether the EC rules affect particular contracts, and if so, how they should be applied should be considered from the outset. This will enable the rules, and the flexibilities which are available under them, to be taken fully into account at the initial planning stage and ensure that prescribed timescales are built into procurement timetables

2.4 The following questions should be considered in sequence:



IS A PROCUREMENT CONTEMPLATED?

2.5 The first step is to establish whether the public authority or utility (the purchaser) proposes to seek offers which may lead to the award of a contract for the acquisition of goods, works or services. This might involve a straightforward purchase, a market test, a contracting out, or part of a major procurement. But the Regulations can only apply if the purchaser contemplates awarding a written contract for the provision of goods, works or services in exchange for consideration of some sort.

WHICH REGULATIONS COULD APPLY?

2.6 The next step is to establish into which of the definitions in the Regulations a proposed contract falls. This will determine which Regulations could apply. The main types of contracts and the relevant Regulations are as follows:

Public authorities

Works contracts are contracts for the carrying out of civil engineering or building works or under which such facilities are provided to meet specific user requirements

Public Works Contracts Regulations

Works concession contracts are works contracts under which the consideration given by a public authority consists of or includes the right to exploit the work or works to be carried out under the contract:

Public Works Contracts Regulations

Subsidised works contracts are works contracts to be awarded by a body other than a public authority for certain types of works where a public authority contributes more than half the cost;

Public Works Contracts Regulations

(If a proposed contract is not a works contract, is it a supply contract or a service contract?)

Supply contracts are contracts for the purchase or hire of goods and for any siting or installation of those goods.

Public Supply Contracts Regulations

Service contracts are contracts under which the purchaser engages a contractor (service provider) to provide services. There are two categories (see Figure 2): Part A (to which the Regulations apply in full) ; Part B (which are only subject to the requirements in the Regulations applying to technical specifications and post award information);

public Services Contracts Regulations

Service concession contracts are contracts under which a purchaser engages a person to provide services lying within its responsibility and under which the consideration consists of or includes the right to exploit the provision of the services to the public ;

None - excluded from the Public Services Contracts Regulations

Design contests are procedures for obtaining plans or designs, which involve a jury and offer prizes or payments or which may lead to the award of a services contract;

Public Services Contracts Regulations

(The public sector Regulations do not apply to utilities contracts)

Utilities

Utilities contracts are supplies, works or service contracts as above for relevant activities in the water, energy transport and telecommunications sectors.

Utilities Supply and Works Contracts Regulations (to be replaced by the Utilities Contracts Regulations - in draft).

2.7 In most cases the classification of contracts will be straightforward. The Regulations provide that where a contract covers both services and supplies, including any siting and installation of the goods, the classification should be determined by the respective values of the two elements. Where a contract provides for the supply of equipment and an operator it should be regarded as a services contract. Contracts for software are considered to be for services if bespoke, supplies if off-the-shelf, except that contracts placed by utilities for telecommunications software are for supplies.

2.8 There is, however, no value-based formula for determining into which category a mixed works/supplies or works/services contract falls. In such cases the contract should be classified according to its predominant purpose.

2.9 Financial transactions. While the EC procurement rules apply to certain contracts for financial services they do not apply to financial transactions as such. For example, the making of arrangements for a loan is a financial service, but the sale and lease-back of equipment is considered to be a financial transaction. For purchasers other than utilities there is an exclusion for financial services in connection with transactions in securities or other financial instruments. The precise scope of the terms “financial service”, “financial transaction” or “other financial instruments” has not yet been clarified by the courts.

APPLYING THE RULES

2.10 In applying steps 3-7 in paragraph 2.4 above, the following issues should be considered:

Does the estimated value of the contract fall below the threshold?

Does the contract fall into a category excluded from the Regulations?

A contract may fall outside the scope of the EC procurement rules because it falls below the threshold or is specifically excluded. There are general exclusions in all the Regulations (eg covering contracts which are secret) and specific exclusions in particular Regulations.

Which of the contract award procedures should be used?

Public authorities are free to choose between the open and restricted procedures, but they may only use the negotiated procedure in the limited circumstances described in the Regulations. Utilities are free to use open, restricted or competitive negotiated procedures ie. negotiated procedures with a call for competition,

Is a call for competition required?

In some limited circumstances the negotiated procedure may be used without a call for competition. However, a purchaser may still wish to run a competition as a means of ensuring best value for money.

What will need to be done to comply with the requirements for competition and how much time should be allowed for responses?

Where competition is required purchasers should adapt their procedures to comply with the Regulations. Utilities can use contract notices, PINs and qualification systems to call for competition. All notices are to be published in the Official Journal of the European Union (OJ), Prescribed timescales are the minimum allowed - more time should be allowed where necessary.

Framework agreements

2.11 The Utilities Regulations contain specific provisions for framework agreements, establishing the terms under which contracts can be entered into, within the limits of the agreement, when a need arises. Provided the framework agreement is awarded in accordance with the rules and is not used to hinder, limit or distort competition, there is no need for a further competition when a contract is awarded. There is no specific provision for framework agreements in the public sector Regulations. There is, however, an understanding with the Commission and other Member States that similar arrangements can apply. Advertising a framework agreement is in effect the advertisement of a number of contracts at the same time. It is considered that if the conditions under which utilities may use such agreements are complied with, the risk of a successful challenge is slight.

Consortia

2.12 A consortium which has not formed a legal entity may not be ruled out of the field of consideration on that account. However, formation of a legal entity may be made a condition of the award of contract where this would be justified for satisfactory performance of the contract.

Corporations

2.13 Under the Services Regulations public authorities may not rule out a service-provider on the grounds that he is required by national law to be an individual, a corporation or other type of body if, under the law of the Member State in which the service-provider is established, he is authorised to provide such services.

Examples of cases where competition is not needed

2.14 Examples of circumstances in which competition is not needed are as follows:

- works contracts - cases where for technical or artistic reasons or for reasons connected with the protection of exclusive rights the contract can only be carried out by a particular person;
- public works concession contracts - requirements are required to be advertised in the OJ, Expressions of interest cannot be rejected on grounds of nationality, but there is no requirement for a competition;
- service contracts - competition is not required for Part B services and, in addition to the artistic reasons/exclusive rights exemption, competition is not required where the rules of a design contest require a service contract to be awarded to a successful contestant or contestants. There is also greater scope for public authorities to use the competitive negotiated procedure than for works or supplies;
- service concession contracts - these fall outside the scope of the EC procurement rules and
- supply contracts - competition is not required where the artistic reasons/exclusive rights exemption applies. In addition goods manufactured for certain research, experiment, study or development purposes do not have to be procured competitively.

Post tender negotiation

2.16 There are restrictions on the use of post tender negotiation under the open and restricted procedures. It is not, however, precluded provided it does not involve discrimination or distort competition,

Further information

2.15 Section 3 of this note sets out, where relevant, for each of the main types of contract described in paragraph 2,6 above:

- which contracts are excluded from the Regulations as a whole;
- the threshold at which the EC procurement rules apply;
- the circumstances in which the different contract award procedures may be used;
- examples of the types of contract which exceptionally are exempted from the normal requirements for competition;
- the requirements for the publication of prior information notices, contract notices and contract award notices in the OJ; and
- the minimum periods of time to be allowed for responses

SECTION 3-APPLICATION OF THE COMPETITION RULES

3.1 PUBLIC WORKS CONTRACTS

Definition

3.1.1 Public works contracts are contracts for the carrying out of civil engineering or building works, or under which a purchaser engages a person to procure by any means the carrying out for the purchaser of a work corresponding to specified requirements. Activities constituting works are described in Schedule 1 of the Regulations. A contract for the lease of a customised new building is considered to be a works contract,

Thresholds

3.1.2 The threshold is 5,000,000 ECU (£3,743,203). Where a single work involves more than one contract the estimated value of all the contracts must be aggregated in deciding 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) whose value falls below the de minimis level provided for in the Regulations. Separate contracts for supplies or services are treated under other Regulations.

Exclusions from the Regulations

3.1.3 Apart from the standard exclusions (eg secret projects) there are no general exclusions from the Regulations as a whole.

Which award procedures may be used?

3.1.4 The open procedure or the restricted procedure should normally be used. However, the negotiated procedure **with** a call for competition may exceptionally be used:

when the work or works are to be carried out under the contract purely for the purposes of research, experiment or development, but not where the works are to be carried out to establish commercial viability or to recover R&D costs; or

where the nature of the work or works, or the risks involved, are such as not to permit prior overall pricing.

Exceptions from the requirements for competition

3.1.5 The circumstances in which the negotiated procedure can be used without a call for competition include cases where for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract can only be carried out by a particular person. In such circumstances the negotiated procedure **without** a call for competition may be used.

Publication of notices in the OJ and deadlines for responses

3.1.6 A prior information notice (PIN) must be sent to the OJ as soon as possible after the decision approving the planning of the work or works.

3.1.7 Contract notices should be sent to the OJ as follows:

Open procedure allowing not less than 52 days from despatch, or 36 days where a PIN has been published, for responses.

Restricted procedure allowing not less than 37 days from despatch (or 15 days in cases of genuine urgency) for requests to be selected to tender. After invitations to tender have been issued a minimum of 40 days, or 26 where a PIN has been published, (or 10 days in cases of urgency) should be allowed for receipt of tenders.

Negotiated procedure allowing not less than 37 days from despatch (or 15 days in cases of genuine urgency) for requests to be selected to negotiate.

3.1.8 A contract award notice should be sent to the OJ no later than 48 days after a contract has been awarded.

3.2 PUBLIC WORKS CONCESSION CONTRACTS

Definition

3.2.1 Public works concession contracts are public works contracts under which the consideration given by the public authority consists of or includes the right to exploit the work or works to be carried out under the contract.

Thresholds

3.2.2 The threshold is 5,000,000 ECU (£3,743,203) and is subject to the same aggregation rules as for public works contracts.

Exclusions from the Regulations

3.2.3 Apart from the standard exclusions (eg secret projects) there are no general exclusions from the Regulations as a whole.

Publication of notices in the OJ and deadline for responses

3.2.4 Contract notices should be submitted to the OJ allowing not less than 52 days from despatch for responses from potential concessionaires.

Other relevant issues

3.2.5 Expressions of interest cannot be rejected on grounds of nationality but there is no requirement for a competition to be held.

3.2.6 The winning concessionaire is required to comply with certain OJ advertising requirements in relation to works contracts which it intends to award to third parties (ie other than to affiliated undertakings) allowing minimum periods for responses:

- of 40 days from despatch where a notice invites tenders;
- of 37 days from despatch where a notice invites applications to be selected to tender or to negotiate the contract, and a further 40 days between invitation to tender and the deadline for the receipt of tenders.

3.3 SUBSIDISED WORKS CONTRACTS

Definition

3.3.1 Subsidised works contracts are contracts for certain types of works which are awarded by a body other than another public authority, where a public authority undertakes to contribute more than half the consideration.

Requirements

3.3.2 The types of work are civil engineering activities (as defined in Schedule 1, Group 502 of the Regulations), 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. There is a similar requirement for subsidised service contracts in connection with subsidised works.

3.4 PUBLIC SUPPLY CONTRACTS

Definition

3.4.1 A public supply contract is a contract for the purchase or hire of goods and for any siting or installation of those goods.

Thresholds

3.4.2 The thresholds are:

- for GATT contracting authorities (subject to special provisions for Ministry of Defence) - 130,000 SDR (296,403);

- for other contracting authorities - 200,000 ECU (£149,728).

3.4.3 In determining whether the threshold has been reached the rules require aggregation of:

- i. the estimated value of separate contracts for meeting a single requirement; and
- ii. in particular defined circumstances, the consideration paid or expected to be paid where a series of contracts or a renewable contract is entered into for supplies of the same type.

Where a public authority is divided into a number of discrete operational units, as defined in the Regulations, only the requirements of that unit need be aggregated. There are special provisions for calculating the value of hire contracts which run for an indefinite period or for a period which is uncertain when the contract is entered into.

Exclusions from the Regulations

3.4.4 Apart from the standard exclusions (eg secret projects) there are no general exclusions from the Regulations as a whole.

Which award procedure may be used?

3.4.5 The open procedure or the restricted procedure should normally be used. The negotiated procedure may only be used in exceptional circumstances.

Exceptions from the requirement for competition

3.4.6 The circumstances in which the negotiated procedure may be used **without** a call for competition include:

- a. goods manufactured purely for the purpose of research, experiment, study or development but not where the goods are to be purchased or hired to establish their commercial viability or to recover their research and development costs; and
- b. where for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the goods to be acquired may only be manufactured or supplied by a particular person.

Publication of notices in the O J and deadlines for responses

3.4.7 A prior information notice (PIN) is required to be sent to the OJ as soon as possible after the start of an authority's financial year in respect of contracts coming within the scope of the Regulations where the total consideration which the authority expects to give under all such contracts for a particular product area is 750,000 ECU (£56 1,480) or more.

3.4.8 Contract notices should be sent to the OJ as follows:

Open procedure allowing not less than 52 days from despatch for responses.

Restricted procedure allowing not less than 37 days from despatch (or 15 days in cases of urgency) for requests to be selected to tender, After invitations to tender have been despatched a minimum of 40 days (or 10 days in cases of urgency) should be allowed for receipt of tenders.

Negotiated procedure allowing not less than 37 days from despatch (15 days in cases of urgency) for requests to be selected to negotiate.

3.4.9 A contract award notice should be sent to the OJ no later than 48 days after a contract has been awarded.

3.5 PUBLIC SERVICES CONTRACTS

Definitions

3.5.1 A public services contract is a contract under which a contracting authority engages a person to provide services. other than a service concession contract.

Categories of service

3.5.2 Services are divided into two categories:

- Part A - to which the full rules apply;

- Part B - where the only obligations relate to technical specifications and post-award information. Therefore there is no requirement in the EC rules for contracts for Part B services to be subject to competition.

The division is set out in Figure 2.

Thresholds

3.5.3 The threshold is 200,000 ECU (£149,728). In determining whether the threshold has been reached the rules require aggregation of:

- i. the estimated value of separate contracts for meeting a single requirement; and
- ii. in particular defined circumstances the consideration paid or expected to be paid where a series of contracts or a renewable contract is entered into for services of the same type.

Where a public authority is divided into a number of discrete operational units, as defined in the Regulations, only the requirements of the unit need be aggregated. There are special rules for calculating the value of contracts which run for more than 4 years or for indefinite periods.

Exclusions from the Regulations

3.5.4 In addition to the standard exclusions (eg secret projects) the Regulations provide a number of exclusions from the procurement rules as a whole. These include employment contracts, contracts for certain telecommunications services, for land, for broadcasting material and broadcasting time, for arbitration or conciliation services, for certain financial and research services and for contracts with another public authority which has an exclusive right to provide the service as necessary for its provision,

Which award procedure may be used?

3.5.5 The open or restricted procedure should normally be used. However, the negotiated procedure **with** a call for competition may be used:

- a. exceptionally, when the nature of the services to be provided, or the risk involved, are such as not to permit overall pricing; or
- b. when the nature of the services to be provided is such that specifications cannot be drawn up with sufficient precision to permit the use of the open or restricted procedure.

Exceptions from the requirement for competition

3.5.6 The circumstances in which the negotiated procedure can be used **without** a call for competition are set out in the Regulations. These include:

- contracts where for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the services to be provided may only be provided by a particular person; and
- where the rules of a design contest require the contract to be awarded to the successful contestant or one of the successful contestants if all are invited to negotiate it.

Publication of notices in the O J and deadlines for responses

3.5.7 A prior information notice (PIN) is required to be sent to the OJ, as soon as possible after the start of an authority's financial year, for Part A services coming within the scope of the Regulations in respect of each category of service for which the total requirement for the year is expected to exceed 750,000 ECU (2561,480).

3.5.8 Contract notices should be sent to the OJ as follows:

Open procedure allowing not less than 52 days from despatch, or 36 days where a relevant PIN has been published, for responses.

Retricted procedure allowing not less than **37** days from despatch (or 15 days in cases of urgency) for requests to be selected to tender. After invitations to tender have been issued a minimum of 40 days, or 26 where a PIN has been published, (or 10 days in cases of urgency) should be allowed for receipt of tenders.

Negotiated procedure allowing not less than 37 days from despatch (or 15 days in cases of urgency) for requests to be selected to negotiate.

3.5.9 A contract award notice must be sent to the OJ no later than 48 days after a contract has been awarded. For Part B services the purchaser can say whether the notice is to be published.

3.6 PUBLIC SERVICE CONCESSION CONTRACTS

Definition

3.6.1 A public service concession contract is a contract under which a public authority engages a person to provide services to the public lying within its responsibility and under which the consideration given by the public authority consists of or includes the right to charge the public for the services.

Application of the EC procurement rules

3.6.2 The EC Directives do not apply to the award of service concession contracts. Therefore there is no EC requirement for competition. However, there is a provision in the Supplies Directive which applies when a public authority grants to a person other than a public authority special or exclusive rights to carry on a service for the benefit of the public. The public authority is required to impose an express condition on that person that in awarding its own supplies contracts it is not to discriminate on grounds of nationality, against a person who is a national of and established in a Member State, or on the grounds that the goods to be supplied under the contract originate in another Member State.

3.1 DESIGN CONTESTS

Definition

3.7.1 Design contests are procedures for obtaining plans or designs, which involve a jury, which is autonomous in making its decisions, and offer prizes or payments, or which may lead to the award of a services contract.

Thresholds

3.7.2 The rules apply to contests which are expected to lead to public service contracts valued at 200,000 ECU (2149,728) or more; or where the value of prizes or payments for the contest equals or exceeds that amount.

Publication of notices in the OJ

3.7.3 The intention to hold the design contest has to be advertised in the OJ

Selection of participants

3.7.4 The number of participants may be restricted, but they must be selected on the basis of clear and non-discriminatory criteria.

Subsequent procedures

3.7.5 Where the rules of the contest require a services contract to be awarded to the successful contestant or one of the successful contestants, the negotiated procedure can be used without a call for competition, provided all the successful contestants are invited to negotiate the contract.

3.8 UTILITIES CONTRACTS

Definition of contracts

3.8.1 The definitions for utilities contracts are the same as those for public authorities' contracts with the following exceptions:

- there is no distinction between works contracts and works concession contracts, and the latter should therefore be treated as works contracts;
contracts for financial services in connection with the issue, sale, purchase or transfer of securities or other financial instruments and central bank services are not excluded from the Utilities Regulations and
- there is no exclusion for broadcasting time or material

Service contracts are divided into Parts A and B, as for public authorities; and there is no requirement in the EC rules for contracts for Part B services to be subject to competition. Service concession contracts as defined in section 3.6 are also excluded.

3.8.2 There is specific provision for framework agreements to be treated as if they were contracts. Provided an agreement is awarded in accordance with the rules, there is no need for a further call for competition when individual contracts are awarded.

Coverage

3.8.3 The rules apply to:

- 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;

if they undertake relevant activities.

3.8.4 The relevant 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 exploring for, or extracting of, 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 provision or operation of telecommunications networks or the provision of telecommunications services.

Thresholds

3.8.5 The thresholds are:

- for works 5,000,000 ECU (£3,743,203);
- for supplies and services in the energy water and transport sectors 400,000 ECU (£299,456); and
- for supplies and services in the telecommunications sector 600,000 ECU (2449,184).

In determining whether the threshold has been reached, there are aggregation rules similar to those for public authorities. Where a utility is divided into a number of discrete operational units, which act independently, the aggregation rules apply at that level.

Exclusions from the Regulations

3.8.6 In addition to the standard exclusions (eg projects certified as secret) there are a number of exclusions from the procurement rules as a whole. These include employment contracts, contracts for land, for arbitration and conciliation services, for certain telecommunications services and for certain research and development services.

3.8.7 Contracts are also excluded, subject to certain conditions, for:

- activities other than relevant activities;
- the carrying out of activities outside the EC;
- the acquisition of goods, works or services for competitive resale;
- the purchase by water utilities of water, and by energy utilities of energy or fuel for the production of energy;
- in connection with the provision of bus services in areas where others are free to provide those services under substantially the same conditions;
- exclusively in relation to the provision of telecommunications services in areas in which others are free to provide those services under substantially the same conditions.

3.8.8 The EC rules do not apply to service contracts awarded to affiliated undertakings, where 80 per cent or

more of the average turnover in the EC of the affiliated undertaking and any other affiliated undertaking derives from the provision of services to undertakings with which it is affiliated.

3.8.9 Similarly, the EC rules do not apply to service contracts which a joint venture utility awards to one of its members provided that member is itself a utility, or to an affiliated undertaking of such a member.

Exemptions

3.8.10

HMG's

Which award procedure may be used?

3 . 8 . 1 1 Utilities have

Exceptions from the competition rules

3.8.12 The circumstances in which a negotiated procedure may be used without a call for competition include:

- contracts to be awarded purely for the purposes of research, experiment study or development but not where their purpose is to ensure profit or to recover research and development costs;
- contracts when for technical or artistic reasons, or for reasons connected with the protection of exclusive rights, the contract may only be performed by a particular person
- contracts awarded under a framework agreement which has been awarded in accordance with the Regulations; and
- where required under the rules of a design contest, the contract to be awarded to the successful contestant or to one of the successful contestants if all are invited to negotiate it.

Publication of notices in the O J and deadline for responses

3.8.13 A periodic indicative notice (PIN) is required at least once every twelve months in respect of:

- those supply and Part A services contracts above the threshold which the utility expects to award in the coming twelve months, where the total value for the product area or category of service will be 150,000 ECU (£56 1,480) or more; and
- works contracts which are above the threshold.

Calls for competition may be made:

- in a contract notice published in the OJ; or
- where the restricted or negotiated procedure is to be used:
 - a PIN which is sufficiently detailed. Where a PIN is used all initial expressions of interest have to be confirmed when the award procedure starts;
 - by means of a notice on the existence of a qualification system. Where a qualification system is used, those invited to tender or negotiate have to be selected from those who have qualified in accordance with the system.

3.8.14 The time to be allowed for responses is as follows:

- **Open procedure:** not less than 52 days from despatch of the contract notice, (36 days where a PIN has been published);
- **Restricted and negotiated procedures:** where a contract has been published in the OJ in a contract notice or in a PIN:
 - for requests to be selected to tender or to negotiate the contract, in general at least five weeks from despatch of the notice and in any case not less than 22 days;

- for the receipt of tenders following despatch of the invitation to tender either by agreement with the participants, or failing that in general at least three weeks and in any case not less than 10 days,

A contract award notice must be sent to the OJ no later than two months after the award.

Rejection of third country offers

3.8.15 The rules impose a limitation on the acceptance of offers involving goods, including telecommunications software, of third country origin. The limitation applies only where an offer of EC products and an offer of third country products are equivalent and within 3 per cent on price. If so, preference is to be given to the offer of EC products.