



MARTINEAU JOHNSON

EC PUBLIC PROCUREMENT

A Guide For Local Authorities



An Introduction To The EC Public Procurement Rules For Local Authorities

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INTRODUCTION

When awarding contracts for supplies, works or services, local authorities are required to consider compliance with the EC Public Procurement rules. These rules regulate the way in which local authorities purchase works, goods and services and require transparency, objectivity, equality of treatment of bidders and non-discrimination on the grounds of the nationality of the contractors - irrespective of the value of the contract. These rules are in addition to the local authorities own requirements and purely national rules.



SECTION 1 - REGIME

The idea underpinning the EC public procurement regime is to open up the public sector markets to competition from abroad. They also enable free movement of goods and services within the European Union by ensuring that local authorities, other public bodies and specified private bodies do so in an **open** and **non-discriminatory** competitive environment.

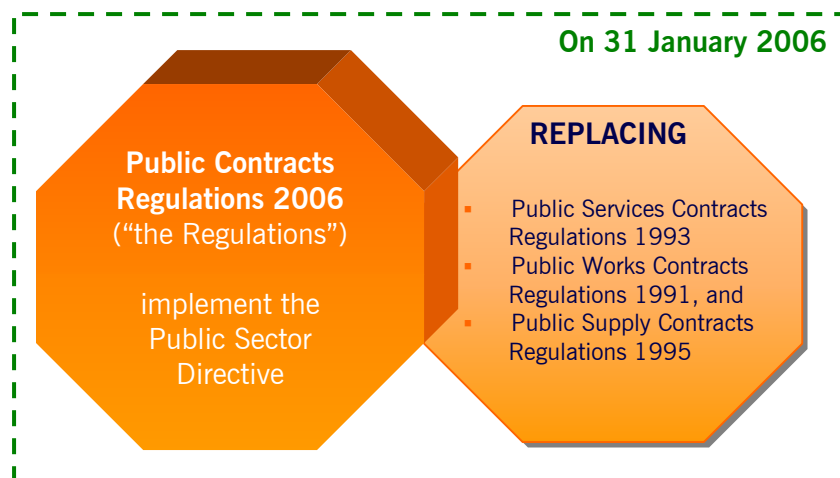
The European Commission has recently issued an Interpretative Communication which applies:



The Communication to a large degree reflects recent court decisions that the EC Treaty applies to such contracts. This means rules on transparency and non-discrimination apply to them.

SECTION 2 - SCOPE OF THE PUBLIC PROCUREMENT RULES

Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (“the Public Sector Directive”) simplifies and consolidates the three previous directives for public works, supplies and services into a single text. It is implemented in the UK by the Public Contracts Regulations 2006.



The Public Sector Directive and the Regulations are based on the principles that:

- advertisement of contracts in the Official Journal of the European Union (OJEU) gives firms throughout the European Union an equal opportunity to tender;
- bidders are treated equally with no discrimination on the grounds of nationality or origin of the goods or services; and
- objective criteria are applied to tendering and award procedures.

SECTION 3 - CONTRACTING ENTITIES

The Regulations apply to local authorities as public bodies. In broad terms, where a private body acts as an agent for a local authority or where more than 50% of funding is provided by a local authority in relation to certain contracts connected with some building works, the Regulations will also apply.

SECTION 4 - CONTRACT THRESHOLDS UNDER THE REGULATIONS

The rules only apply where the estimated value of a contract is above a defined threshold. The figures are net of VAT.

The thresholds in the Directive are in euros but are given a fixed conversion rate into member state currency for those who are not part of the monetary union. The rate is recalculated every two years. The current sterling equivalents of these thresholds are:

- £3,497,313 for public works contracts (essentially building and construction);
- £139,893 for public supplies contracts (essentially goods and materials); and
- £139,893 for most public services contracts.

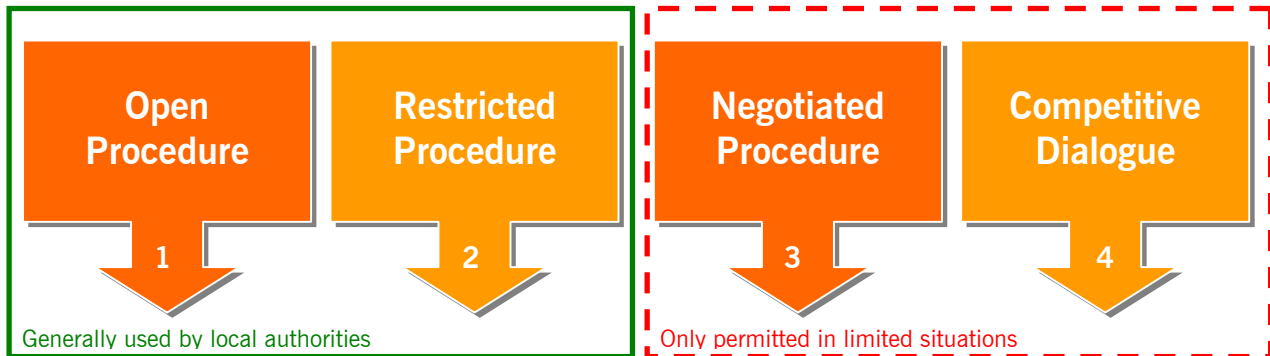


The European Commission Interpretative Communication states that it does not create any new obligations and merely requires that local authorities comply with existing EC Treaty rules and principles, such as free movement of goods, right of establishment, freedom to provide services, non-discrimination and equal treatment, transparency, proportionality and mutual recognition. In fact it goes rather further in terms of practical implementation. In theory it is non-binding but in practice is likely to become so, by adoption in due course by the European Court of Justice.

Therefore, even where a contract falls under the thresholds, a local authority still needs to advertise (not necessarily in the OJEU) and run a fair competition whilst applying objective selection and award criteria.

SECTION 5 - AWARD PROCEDURES

There are four types of award procedure (open, restricted, negotiated and the competitive dialogue). The relevant type should be identified in the contract notice. The competitive dialogue procedure was introduced by the Regulations for particularly complex public sector contracts or projects. The European Commission is encouraging the use of the competitive dialogue procedure instead of the negotiated procedure in such complex contracts.



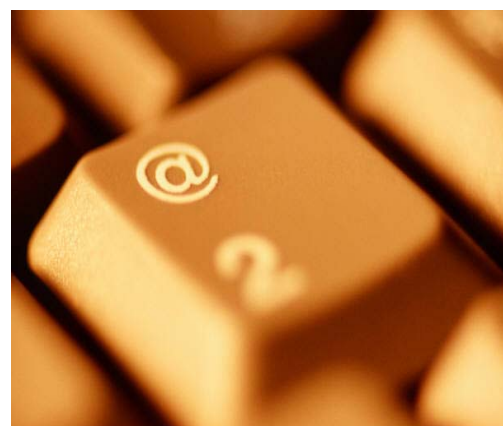
The open procedure

An open procedure is one where a local authority invites providers to bid directly for a contract in response to the contract notice. All interested contractors may submit tenders and the winning provider is selected directly from the bidders. This is suitable for items which are easily specified and likely to be bought on price alone or price plus quality.

The restricted procedure

The restricted procedure is a two-stage procedure where, the contractors express their interest following publication of the contract notice, but only those so invited by the local authority may submit tenders after a “screening” process.

Thus the restricted procedure consists of two distinct stages - selection of suitable bidders and evaluation of tenders. At the first stage, the only criteria which may be used to select prospective bidders are economic and financial standing or technical knowledge or capability.



A local authority shall exclude a bidder who they have “actual knowledge” has been convicted of one of the following offences: conspiracy, corruption, fraud, money laundering and participation in a criminal organisation.

A selection process restricts the number of bidders invited to submit a formal tender. The minimum number of bidders invited to tender must be not less than five and the Regulations do not refer to a maximum number but the local authority must ensure that the number of providers invited to tender is sufficient to ensure genuine competition. If the local authority states a maximum number of contractors in the OJEU notice, it must adhere to that number.

The **restricted procedure** works best where the local authority is clear at the start of the process as to what it wants to procure, in terms of pricing and other award criteria.

The negotiated procedure

The negotiated procedure is exceptional and may only be used in a limited number of carefully defined cases. The negotiated procedure with advertisement can be used where the nature of the works or services, or the risks attaching to performance are such “as not to permit overall pricing”. The negotiated procedure with advertisement can also be used for services where the nature of the services is such that “specifications cannot be drawn up with sufficient precision to permit the award of the contract using the open or the restricted procedure”. The procedure without advertisement is even more limited.



The procedure consists of a pre-qualifying stage, followed by an invitation to negotiate where at least three contractors are invited to negotiate. No negotiation is permitted after Best and Final Offers.

The use of the negotiated procedure on PPP projects had become common in the UK and its use is still supported by the UK Treasury and standard guidance issued by UK government departments is based upon this. However, the European Commission is now very clearly trying to encourage the use of the competitive dialogue rather than the negotiated procedure for major projects and has also expressed the view that the negotiated procedure should apply only to a very narrow range of projects.

The competitive dialogue procedure

The competitive dialogue procedure may only be used in the case of particularly complex contracts where the local authority is not objectively able to define the technical means satisfying its needs or objectives and/or is not objectively able to specify the legal and/or financial make up of a project. The types of complex projects envisaged by the European Commission as suited to this procedure are integrated transport infrastructure projects, computer networks or projects involving complex and structure financing where the legal and financial make up cannot be determined without dialogue with suppliers.



Following a pre-qualification procedure, the local authority discusses the form of contract and the technical specifications of the project with at least three potential bidders before the key tender documents are issued. The dialogue ends when the local authority can identify the solution or solutions which meet its needs. Bidders then submit tenders based on the solution(s) resulting from the dialogue.

SECTION 6 - CONTRACT AWARD CRITERIA

The Contract Award Criteria must be set out in the invitation to tender or contract documents in descending order of their importance. Weighting for each award criteria must be stated early in the procurement process (for example in the original Contract Notice in the OJEU or in the contract documents). The local authority should complete an objective-marking matrix which shows how each bidder which has submitted a tender has scored, in case any disappointed tenderers should challenge the award of the contract to another party.

Permissible contract award criteria

The only permissible criteria for award of a public contract are:

- lowest price; or
- Most Economically Advantageous Tender (“MEAT”).

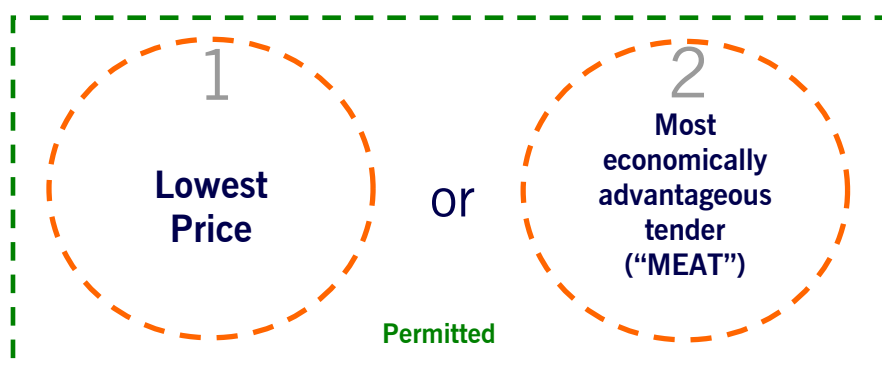
MEAT can cover:

- quality;
- deliverability of the services within the agreed time scale;
- technical merit;
- innovation;
- level of risk accepted by the tenderer;
- proposals relating to health and safety;
- experience of dealing with environmental issues (protection of the environment);
- service assistance; and
- certain social considerations.



Social considerations include positive action towards disabled persons, promotion of equality between men and women and promotion of ethnic/racial diversity. They do not include “Buy Local”.

Weighting of contract award criteria



Value for money or quality or warranties cannot be taken into consideration when awarding a contract “on lowest price”. When awarding a contract on “most economically advantageous tender”, which is the more commonly used, the criteria must be listed in the original contract notice or in the invitation to tender and the criteria must be weighted either as an exact number (eg price: 25%) or within a meaningful range (eg price: 20%-30%).

SECTION 7 - TIMING REQUIREMENTS UNDER THE EC PUBLIC PROCUREMENT RULES

The EC public procurement rules lay down **strict** timetables. The restricted procedure, which is the procedure most used by local authorities, gives candidates a period of 37 days from the date of despatch of the Contract Notice to the OJEU to notify the local authority of their interest in being invited to tender. The period of 37 days may be reduced to 30 days when the contract notice is drawn up and transmitted electronically. Following the sending out of invitations to tender, tenderers must be allowed a minimum of 40 days to prepare their tenders. Extra time (2 days) is required where site visits are called for.



If there has been a prior information notice other shorter time periods apply. In cases of “**urgency**”, the time limits can be reduced, in which case the minimum period of time involved would be 25 days. However, the urgency procedure can only be utilised where it is strictly necessary and the reasons for its application relate to unforeseeable events not the fault of the local authority.

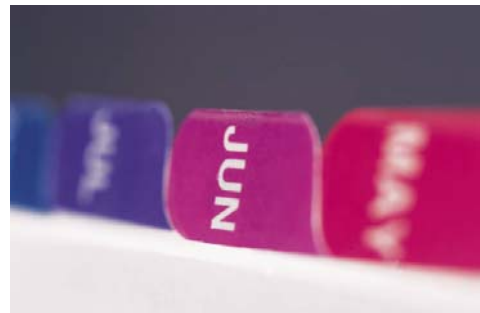
Once the contract has been awarded, the local authority will need to send a **Contract Award Notice** to the OJEU no later than 48 days after contract award.

SECTION 8 - ALCATEL AND THE 10-DAY STANDSTILL PERIOD

The European Court of Justice ruled in the Alcatel decision that there should be a period of time between the contract award decision and the start of the contract to ensure that unsuccessful bidders are able, in duly justified cases, to bring a legal action in the national courts before the contract is signed.

10-day standstill procedure

The Regulations introduced the 10-day mandatory standstill period in UK law. Once the public authority has decided who to award the contract to, all the bidders must be notified of the public authority's decision. The award decision notice, which is sent out to all candidates and bidders must contain the award criteria, where practicable the score the bidder obtained against those award criteria, where practicable the score the winning bidder obtained and the name of the winning bidder.



There must be a minimum of 10 calendar days between the despatch of the award decision notice and the conclusion of the contract. A detailed debrief describing the reasons for the award decision must be sent at least 3 working days before the end of the standstill period if requested by a disappointed bidder by midnight on the second working day of the standstill period.

If a legal challenge is brought during the 10-day standstill period, public authorities should wait to see whether interim measures are granted before concluding the contract.

In late 2007, a new EU Directive was agreed, intended to resolve concerns that the remedies for breach of the Procurement regime are not fully effective ("the 2007 Directive"). We deal with remedies in section 10 of this brochure. The 2007 Directive requires all member states to adopt at least a 10-day standstill period, where the intention to award a contract is notified to the disappointed bidders by email or fax, and at least a 15-day standstill in other cases. Certain information must be provided to unsuccessful bidders, such as the period for seeking review of the procurement process. EU member states have until December 2009 to implement the new Directive. The existing UK rules will need to be amended to take account of the new requirements.

SECTION 9 - PROCUREMENT PRACTICE

Electronic award procedures

A reduction of 7 days is allowed in the time periods of 52 and 37 days for the open, restricted and negotiated procedures where the contract notice is drawn up and sent electronically.

Electronic auctions

These are online auctions where selected bidders submit offers electronically against the local authority's specifications. Electronic auctions may only be used when the contract specifications can be established with precision and where the local authority's intention to use an electronic auction has been stated in the contract notice. Electronic auctions cannot be used where the subject matter is intellectual performance (i.e. design of works). An electronic auction is a method of conducting part of the award phase under the chosen procedure and the auctions are conducted using the ordinary rules of the chosen procedure with certain special rules relating to electronic auctions.



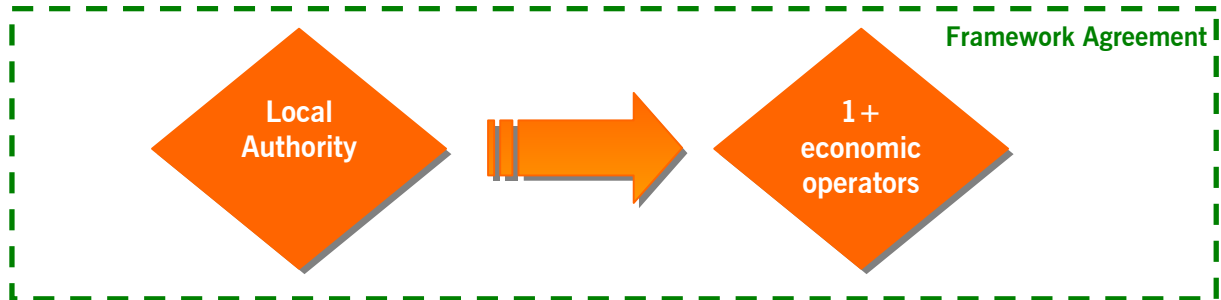
Dynamic purchasing system

This is a completely electronic process that a local authority can use for making commonly used purchases using the open procedure. Unless there are exceptional circumstances, a local authority cannot operate a dynamic purchasing system for more than four years.

The system must be wholly electronic. Local authorities must publish a contract notice with the specifications of the purchases, and offer, by electronic means, unrestricted, direct and full access to the specifications. Under a dynamic purchasing system, there is constant competition between bidders who can update their indicative tenders throughout the life of the dynamic purchasing system. All the bidders that satisfy the selection criteria are then invited to a list and they then become entitled to receive future invitations to tender.

Framework agreements

Framework agreements are arrangements between a local authority and one or more economic operators.



They establish 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 the local authority in the period during which the framework agreement applies. Framework agreements must not exceed four years except in exceptional circumstances.

Where a contract is concluded with several providers (multi-provider framework), the minimum number of bidders shall be three and there needs to be a sufficient number of economic operators to satisfy the selection criteria or admissible tenders which meet the award criteria.

The framework agreement must comply with the Regulations, but the contracts subsequently awarded under it are exempt.

SECTION 10 - SANCTIONS FOR BREACH OF EC PUBLIC PROCUREMENT RULES

In the event of a breach of the EC public procurement rules, a local authority may face:

Action by aggrieved bidders

The UK High Court currently has the power to prevent the award of a contract by setting aside the contract award decision or to award damages to any provider who has suffered loss or damage as a result of the breach.

The 2007 Directive for the first time will require all EU member states to give national courts the power to strike down contracts awarded in serious breach of the rules. This covers cases where the regime was not followed at all or was followed in a faulty manner, including in particular cases when the standstill period was not respected. It is left up to member states to decide when invalidity takes effect - from the date of the contract or from the decision to declare the contract invalid. This could be very important in cases where work is due to start immediately after the contract is made. The Directive also introduces the possibility that overriding general interests may take priority over a request for a declaration of invalidity. It is specifically provided that such general interests cannot simply relate to the costs involved in stopping a contract from proceeding, once it has been awarded. The UK has yet to implement the 2007 Directive.

Action by the European Commission

An aggrieved bidder may bring a breach of the EC public procurement rules to the attention of the European Commission by lodging a complaint with it. The European Commission can take action against the UK Government in the European Court of Justice. A finding of infringement against the UK will require the UK to take appropriate measures to comply with the judgement. Exactly what that might mean will depend on what remedy could realistically be required by the Commission at that point under English law.



The 2007 Directive introduces the possibility for the Commission to issue fines on those who have entered into a contract unlawfully or in breach the Public Procurement rules. Such fines can be in addition to any award for damages in favour of a successful plaintiff. As an alternative to a fine, the duration of the contract may be shortened. It is open for EU members to introduce stricter rules, if they choose to do so. The UK has yet to implement the 2007 Directive.

Public funding

Joint ventures

Generally the public procurement rules do not apply to contracts which are awarded by a local authority as part of an in-house arrangement. This is because the local authority is deemed as a matter of law to be incapable of contracting with itself.

Where, however, the local authority enters into a joint venture with a private sector contractor then unless that private sector contractor is under local authority control similar to that exercised by it over its own departments then the shareholding of the private sector body is sufficient to bring a contract awarded to the joint venture within the public procurement rules.

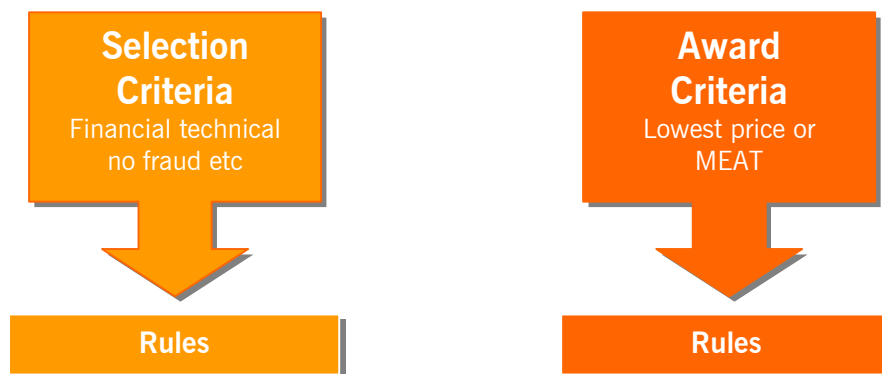
In most cases the opportunity to enter a joint venture with a local authority should also be advertised under the procurement regime.

SECTION 11 - COMMON BREACHES OF THE EC PUBLIC PROCUREMENT RULES

Non-respect of the aggregation rules

Under the public procurement rules, a local authority cannot split purchases into separate contracts each of which falls below the threshold with a view to taking the purchase outside the ambit of the EC public procurement regime. The aggregation rules require that a local authority adds together the value of the purchases made under a number of similar contracts if they are a single requirement and the EC public procurement rules will apply if the value of the contracts taken together exceeds the thresholds.

Mixing selection and award criteria



Award criteria and selection criteria are governed by different sets of rules. Local authorities must ensure not to confuse criteria used to select providers to tender (selection criteria) and award criteria used later on in the procurement process to award the contract.

Stating criteria in wrong order

When publishing their evaluation criteria, local authorities must do so in order of importance with a weighting percentage attached to each: for example, 20% for quality of design solution, 15% experience of provider, 10% for strength of financial covenants and so on.



SECTION 12 - BRIEFINGS

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