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Reform of the EU procurement rules – utilities sector

Briefing for Procurement Practitioners



Welcome

Introductions, domestic arrangements and safety briefing

The timings for the day (start, finish, breaks, the 8-session structure of the day)

Opportunity for questions at the end of each session (the answers to some questions may not yet be available)



The Crown Commercial Service

- The new commercial and procurement function for the UK Government
 - Responsible for procurement policy and includes the team that successfully negotiated the reforms to the directives. Also provides expert commercial services and advice
- Brings together:
 - Commercial function of the Cabinet Office, including Government procurement policy
 - The Government Procurement Service (GPS)
 - Common goods and services procurement undertaken by departments

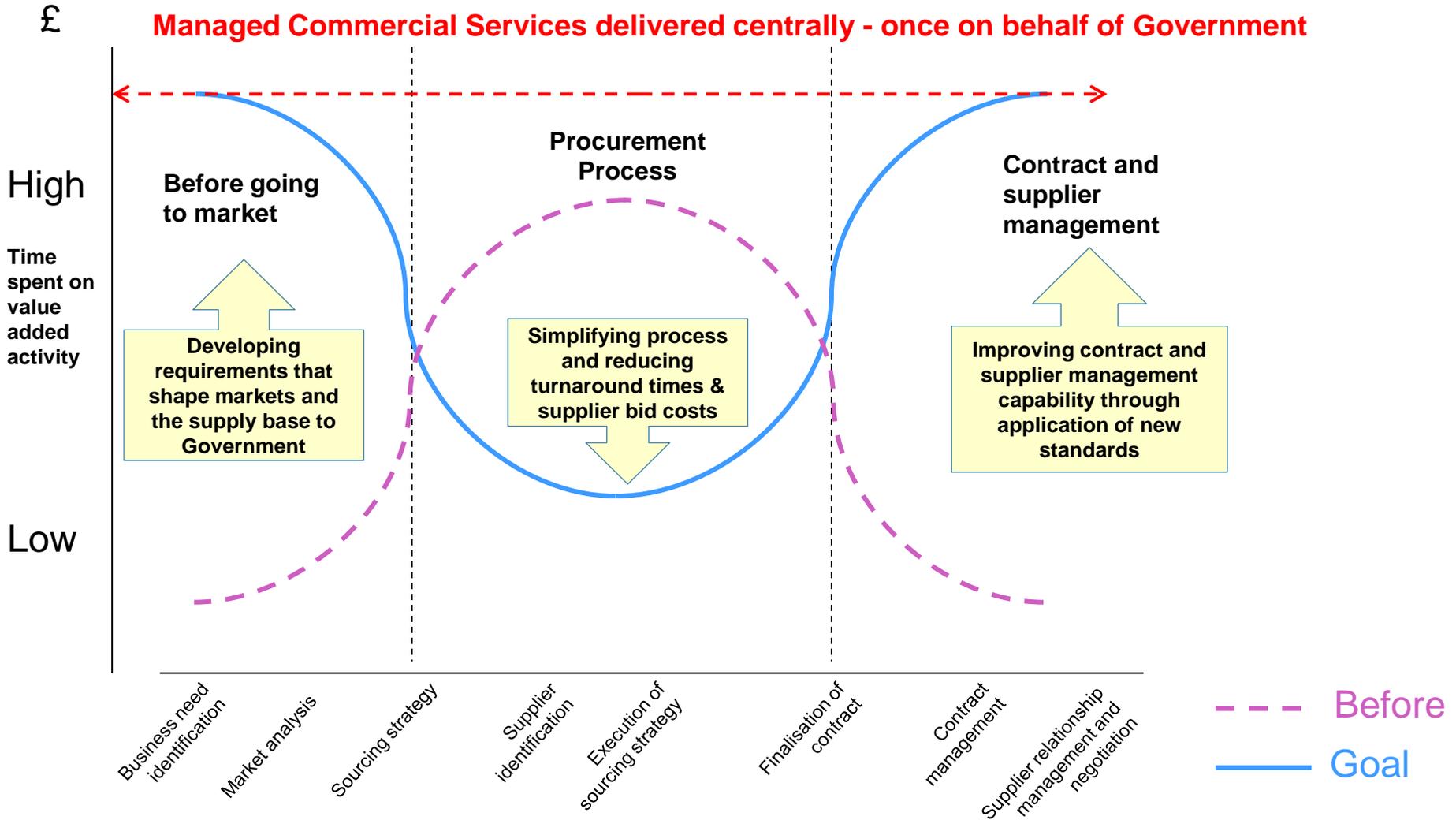


The Crown Commercial Service

- The new organisation will offer:
 - A fully managed, end-to-end commercial and procurement service
 - An expert commercial advisory service
- The Crown Commercial Service will enable us to get better value from the £40 billion spent by central government each year
- Note that the Central Procurement Directorate (CPD) has responsibility for procurement policy in Northern Ireland. This is formulated in consultation with stakeholders and agreed by the Procurement Board before dissemination by CPD
- CPD policies include a requirement for NI departments/agencies/NDPBs to award certain contracts using Centres of Procurement Excellence



The new DNA for commercial activities





Introduction

- Legislative proposals to change the EU directives by European Commission in Dec 2011
- Following detailed negotiations between the European Parliament the Commission and Council the texts of the directives have been finalised
- The new directives were adopted on 28 March 2014 and must be transposed into national law during the next 2 years
- Crown Commercial Service is preparing to transpose the new rules, through Regulations, earlier than the time allowed
- These briefing materials aim to assist utilities more easily to prepare for the changes



Important note

- These briefing materials relate principally to the implications of the new utilities contracts directive.
- These materials summarise the new rules and do not refer to every relevant requirement. You should refer to the new directives and (when available) regulations and where appropriate obtain independent legal advice as necessary
- New UK regulations to implement these changes are currently being prepared and formal consultation will be carried out in due course – the Crown Commercial Service welcomes comments on this



Important note

- Until the new regulations have come into force, utilities must continue to apply the current regulations - the Utilities Contracts Regulation 2006 (SI 2006 No. 6, as amended)



The benefits of early transposition of the directives into UK law

- The Crown Commercial Service team (formerly Cabinet Office) has delivered an excellent negotiating outcome for the UK
- The term 'Special or exclusive rights' has been clarified with the probable result that fewer UK bodies will be subject to the utilities rules (where adequate publicity when granting the rights)
- More flexible rules to allow utilities to apply for exemption where sufficient competition in the sector
- Shorter, less burdensome, procurement processes reducing costs to business and barriers to competition
- Better access to public procurement for SMEs, consistent with non-discrimination and a value for money approach



What does not change?

- No immediate change to thresholds of application of the directive (but Commission commitment to review by 2019 the economic effects on the internal market as a result of the application of the thresholds which could lead to an increase in the thresholds)
- As now utilities must comply with principles of transparency, non-discrimination, equal treatment and proportionality
- No changes to remedies
- The regulations will continue to provide a transparent process aimed at maximising opportunity for suppliers whilst allowing achievement of value for money by utilities



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Questions



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Does the Utilities Sector Directive apply to the contract?



What is a utility?

- As now, the utilities directive may apply to public bodies (e.g. contracting authorities which operate tramways) and private bodies carrying out utility 'activities (water, energy, transport, postal services). Private sector bodies are only caught, however, where they enjoy 'special or exclusive rights' to carry out the activity
- Rights are 'special or exclusive rights' where they limit the exercise of utility activities to one or more entities and substantially affect the abilities of other entities to carry out such activities
- When are 'rights' not 'special or exclusive rights'?



When are rights not 'special or exclusive rights (SER)?

- New directive makes clear that rights are **not** SER when granted by means of a procedure involving adequate publicity where the rights were granted on the basis of objective criteria. Various sectors are already excluded from the directive and these exclusions will remain.
- This could be by using one of the procedures of the new procurement directives (the Concessions Directive (2014/23/EU) or the Public Sector Directive (2014/24/EU) or under the Defence and Security Directive (2011/81/EC))
- Alternatively this could be achieved by using other procedures listed in Annex II which ensure adequate prior transparency for granting authorisations on the basis of objective criteria (e.g. Regulation (EC) No 1370/2007 for the provision of public passenger transport services by bus, tramway, rail or metro)



Can a utility sector be exempted?

- As now the Commission may exempt a utility sector, where it is directly exposed to competition and access to the market is not restricted based on the extent of competition in the sector (the oil and gas sector and the supply and trading in gas and electricity is already excluded, except in Northern Ireland)
- Note that the new directive also provides for greater flexibility in the procedure to allow Member States or utility bodies to apply to the Commission for the exclusion of a utility sector
- The process of achieving exclusion can be speeded up where the view of the independent national authority (e.g. the regulator) has been included in the application to the Commission



Exemptions for ‘public-public’ contracts – contracting authorities only

- A number of judgments by the Court of Justice of the European Union in the series of cases following the ‘Teckal’ case (C-107/98) have identified circumstances where a contract between two public bodies can be exempted from the EU rules. This also applies to contracts between two public utilities
- The new directive codifies these conditions, which must all be met
 - where the authority exerts on the ‘supplying authority’ a control similar to that which it exercises over its own departments *and*
 - where 80% of the activities of the ‘supplying authority’ are for the ‘buying authority’ or other bodies controlled by it *and*
 - where there is no direct private capital participation in the ‘supplying authority’



Exemptions for 'public-public' contracts – contracting authorities only

- A judgment by the Court of Justice of the European Union in the 'Hamburg' case (C-480/06) identified other circumstances where a contract between two public bodies can be exempted from the EU rules. This also applies to contracts between two public utilities
- The new directive also codifies these conditions, which must all be met
 - the participating authorities co-operate to perform public services they must provide, meeting common objectives *and*
 - the co-operation is for public interest reasons only *and*
 - the participating authorities perform less than 20% of the activities on the open market



Exemption for affiliated undertakings – private utilities only

- The existing exemption of ‘in-group companies’ also applies in the new directive
- As now a contract awarded by a utility to an ‘affiliated undertaking’ is not covered by the directive if at least 80% of the affiliated undertaking’s turnover derives from provision of works/services/supplies to ‘group’ companies
- A similar exemption applies to contracts between utilities that are part of a joint venture company where this JV’s purpose is to perform a utility activity



Contracts with defence/security implications

- Neither the public contracts directive nor the utilities directive applies to contracts in the field of defence and security which fall within the scope of Directive 2009/81/EC (implemented in the UK by the Defence & Security Public Contracts Regulations 2011) or are excluded by that directive
- The Defence & Security Public Contracts Regulations apply to contracts for purposes that are military or ‘sensitive’ (i.e. involving, requiring and/or containing classified information) – e.g. contracts to protect infrastructure from terrorist attack



Contracts with defence/security implications

- Even where the Defence & Security Public Contracts Regulations do not apply the Utilities Directive does not apply to contracts
 - where essential security interests cannot be protected by less intrusive measures than exemption; or
 - for contracts that are declared secret or must be accompanied by special security measures; or
 - where application would oblige a Member State to supply information the disclosure of which it considers contrary to its essential security interests



Concession contracts

- A new directive has also been agreed at EU level to cover concessions (2014/23/EU) This will be transposed separately in due course.
- The Concessions Directive provides a relatively light touch regime which will apply to both works and services concessions . The threshold of application of the directive to both works *and services* concessions contracts will be identical to that for works contracts
- Note that water concessions are excluded from the Concessions Directive.



Reservation of certain contracts for mutuals and social enterprises

- The directive provides that certain services contracts (mainly social, health and educational) can be reserved to organisations that meet *all* of the following conditions
 - has as its objective the pursuit of a public service mission linked to the delivery of these services *and*
 - reinvests profits to meet this objective (where profits are distributed this should be based on participatory considerations) *and*
 - owned/managed on the basis of employee ownership/participatory principles or the active participation of employees, users or stakeholders *and*
 - not have been awarded a contract for the services concerned by the utility concerned pursuant to this reservation within the past three years.



Reservation of certain contracts for mutuals and social enterprises

- The duration of the contract to be reserved must not exceed 3 years
- Such ‘reserved’ contracts must be open to all relevant suppliers with rights under the directive and must be awarded using the procedures in the directive, including a call for competition in OJEU
- The contracts will be awarded using the ‘light touch’ regime described later (this applies to mainly health and social services contracts listed in Annex XVII of the directive)
- The OJEU call for competition for the contract must make reference to the relevant article of the directive.



Reservation of certain contracts for sheltered workshops

- *Any contract may be reserved to organisations that provide sheltered workshops or to suppliers who's main aim is the social and professional integration of disabled or disadvantaged persons. However:*
- The term 'disadvantaged' is a new provision
- The percentage of the workforce that must be represented by those persons is also new - this will *reduce* from 50% of the workforce to 30%
- Such contracts could also be required "to be performed in the context of sheltered employment programmes"
- Such 'reserved' contracts must be open to all relevant suppliers with rights under the directive and must be awarded using the procedures in the directive, including a call for competition in OJEU



The new light touch regime (social, health and other services)

- The distinction between part A and part B services will be abolished thus the normal rules will apply to many former part B services contracts, formerly subject to a very light regime
- However some services *defined by CPV code in Annex XVII* (mainly social and health services) will be subject to a new 'light touch' regime to reflect their limited cross-border interest (e.g. they relate to legal services in the context of national law) or are sensitive (e.g. services to the person)



The new light touch regime (social, health and other services)

- These contracts will only be covered by the directive if their value exceeds 1,000,000 Euro (a much higher threshold than for other services)
- Contracts below this threshold are assumed to be of no cross border interest, so no OJEU advertising is necessary.



The new light touch regime (social, health and other services)

- The directive requires that utilities award contracts for these services in the following way:
 - Publication in OJEU of a call for competition (either a contract notice or periodic indicative notice or a qualification system notice)
 - Publication in OJEU of a contract award notice (or quarterly submission of batches of contract award notices)
 - The directive also requires Member States to establish their own rules for the award of these contracts, within the framework of Treaty obligations



The new light touch regime (social, health and other services)

- The UK has prepared a minimalistic approach to avoid unnecessary regulation
- Beyond the new OJEU advertising requirement, the UK's light-touch regime rules will be very flexible
- So utilities will, as now, be able to use procedures and tools analogous to those in the main rules, or use simpler or otherwise modified techniques, providing they comply with the essential principles of the EU Treaty (i.e. ensuring transparency, equal treatment, non-discrimination etc)



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Encouraging greater access to contracts



Preliminary market consultations with suppliers

- The new rules explicitly allow prior discussions with suppliers and expert bodies prior to starting a procurement procedure both to inform suppliers and to allow the utility to seek advice in the planning and conduct of the procurement procedure
- Government has for some time encouraged this 'pre-market engagement' as the current rules do not prevent such discussions and such engagement has been found to increase the number of SMEs applying for contracts, widening competition and improving value for money
- Care must however be taken to ensure such contact does not distort competition or violate the transparency and non-discrimination principles



Benefits of preliminary market consultation

- Helps to manage the market – through stimulating increased competition which can reduce dependency on a limited number of suppliers
- Helps to define the requirement – by informing the business case and helping to identify or develop the contract's requirements.
- Helps to provide a better understanding of the feasibility of the requirement, the best approach, the capacity of the market to deliver and possible risks involved
- Reduces procurement timescales by minimising the dialogue needed during the formal procurement process.
- Encourages a more responsive market and allows suppliers to ask questions/raise queries at an early stage.



Setting appropriate scope and specification

- The new directive requires that technical specifications for contracts intended for use by staff or the public must include accessibility criteria in respect of “disabled” persons. Design for all users must also be taken into account
- There is greater flexibility to include in the specification requirements characteristics that are related to methods of production/provision of the contract outcome in any stage of the life cycle (provided linked to subject matter and proportionate to value/objectives)



Setting appropriate scope and specification

- The directive recognises the potential benefits of dividing contracts into lots, in order to assist access by SMEs.
- No obligation for utilities to divide contracts into lots or to record, as in the public sector directive, why it has decided not to
- Utilities have discretion in applying lotting strategy – they may award more than one lot for a contract to the same supplier and may limit suppliers to one lot



Using environmental and social labels

- Social/environmental labels are permitted as part of specification, award criteria or terms and conditions as proof of compliance with a requirement with specific characteristics that are *linked to the subject matter of the contract* (e.g. working conditions of the employees producing coffee to be supplied to the utility)
- However, suppliers must be allowed to offer compliance with equivalent labels or offer other proofs (e.g. technical dossiers) where the label cannot be obtained within the relevant time limits
- Labels must also, as now, meet certain conditions such as being based on transparent and non-discriminatory criteria and awarded by a body independent of the supplier applying for the label



Use of electronic procurement

- Current EU rules already allow/encourage electronic communication: the new directive *mandates* electronic methods in parts of the award process (and mandates safeguards on interoperability and data integrity)
- Electronic OJEU notification and electronic availability of procurement documents to suppliers from date of notice publication will be *mandatory* from when the regulations come into force
- Utilities must in due course allow electronic submission of tenders and requests to participate but to allow utilities and suppliers to adapt to the new requirements this will be deferred
 - for most utilities until October 2018
 - for Central Purchasing Bodies until April 2017



Use of electronic procurement

- The directive does not normally require electronic processing/evaluation of tenders or during post award period
- Oral communication is permitted provided it does not affect essential elements of procurement e.g. tender documents) and provided a record is kept of decisions made
- Other methods of communication are permitted for sensitive information or where special equipment/file formats are required or where a information is so confidential that generally available tools cannot be used



Electronic catalogues

- Tenders can be sought by utilities in catalogue form provided the OJEU call for competition makes this clear and also specifies the required technical format, equipment, connection requirements etc.
- Where multi-supplier frameworks have been concluded on the basis of catalogues the reopening of competition for a particular contract may be achieved by seeking resubmission of the catalogues
- Alternatively the framework might allow the award of the contract by comparing the information already submitted
 - Note that suppliers must be allowed each time to verify that the information used for the comparison is accurate



Setting up a dynamic purchasing system (DPS)

- Like a framework in that an utility may use it to award contracts by competition between those suppliers appointed to the system in response to an OJEU call for competition – unlike a framework in that new suppliers can be added to a DPS over its duration
- The duration of the DPS should be indicated in the OJEU notice. The current 4-year limit is removed
- A modified version of the restricted procedure must be used to set up this entirely electronic system, rather than the open procedure as is the case now.



Setting up a dynamic purchasing system (DPS)

- When establishing a DPS, the minimum time limit for receipt of requests to participate is 30 days from despatch of the OJEU contract notice or 15 days from the invitation to confirm interest (where a PIN is used as a call for competition) – note that **tenders** are not sought at this stage.
- No 'award notice' is needed for a DPS (the notice will continue to be available in OJEU during the lifetime of the DPS). The utility must however notify OJEU if the DPS has been terminated or its duration altered



Making call-off contracts from a DPS

- The UK has secured a major simplification: the old EU rules required an OJEU notice for DPS call-offs of any value, which was unnecessarily burdensome and made DPS unattractive.
- In the new rules, the process is much simpler. Once a DPS is established the utility must allow a supplier to apply to join it at any time - a decision to admit it must generally be made within 10 days (or within 15 days where verification is needed or additional documentation needs to be assessed)



Making call-off contracts from a DPS

- To award a contract the utility must seek tenders from all suppliers admitted to the DPS (or to an appropriate category within it) - minimum time limit for receipt of tenders is 10 days
- The contract must be awarded on the basis of the award criteria in the OJEU notice, where appropriate formulated more precisely in the invitation to tender
- Notices for each contract *awarded under* the DPS must be sent to OJEU within 30 days (although these can be grouped in quarterly batches)



Central purchasing bodies (CPBs)

- It is proposed to continue to give flexibility to utilities to *award* supplies, services or works contracts *to* CPBs acting as wholesalers. Such CPBs could be contracting authorities or utilities.
- It is also proposed that utilities may continue to award supplies, services or works contracts using dynamic purchasing systems (DPS) or frameworks *operated by* a CPB
- Utilities must comply with the directive when awarding a contract under a DPS operated by a CPB, or determining which supplier should perform a task under a framework



Frameworks

- More detailed requirements than in current utilities directive
- Frameworks cannot exceed 8 years
- Call offs must be awarded using ‘objective rules and criteria’ which ensure equal treatment of the suppliers party to the agreement. These must be set out in the procurement documents for the framework
- Call off methods may include reopening competition between framework suppliers (in which case adequate bidding time must be allowed and award must be based on the award criteria set out in the framework agreement)
- As now utilities shall not use frameworks ‘improperly’ or in a way that ‘prevents, hinders or distorts competition’



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Streamlining the EU procurement process



Changes to procedures

- Five main procedures involving competition rather than three:
 - The open procedure
 - The restricted procedure
 - The negotiated procedure
 - The competitive dialogue procedure (new to utilities sector)
 - The innovation partnerships procedure (a new procedure for public and utilities sectors)
- Note that the directive makes no significant changes to the situations where contracts may be negotiated without prior call for competition, which are deliberately very limited



Choice of procedures

- The directive allows a utility free choice between the 5 procedures
- Most UK utilities currently use the negotiated procedure routinely for all procurements
- No changes to procedures (except in respect of time limits, see later)



The new competitive dialogue procedure

- The procedure currently available only in the public sector directive is also made available to utilities
- Following a call for competition suppliers are selected following evaluation of qualification information requested by the utility (numbers may be limited to balance adequate competition with appropriate use of resources)
- Using a 'descriptive document' usually contained in an 'invitation to take part in dialogue' the utility invites suppliers to discuss with it possible solutions to its requirements (suppliers must be treated equally during the dialogue, which could be structured in separate stages)



The new competitive dialogue procedure

- The contract may only be awarded using a price-quality ratio (=value for money)
- During the dialogue the utility may 'down-select' solutions using the award criteria set out in the descriptive document
- The process concludes with tenders from the remaining suppliers, evaluated against the award criteria to determine the 'preferred bidder'
- Further negotiations are permitted with the preferred bidder (e.g. to confirm financial commitments) provided changes are not 'material' and do not distort competition or cause discrimination
- Utility must not disclose suppliers' confidential information without agreement



Innovation partnerships

- New procedure allowing utilities to encourage suppliers to develop works, supplies or services not currently available on the market, through long term partnerships
- Awarded to one or more suppliers probably using the negotiated procedure – utility must disclose required selection information and minimum capacity requirements for tenderers as well as award criteria
- Procedure may be constructed in phases to match the research/innovation process – utility could reserve right to terminate process or reduce the number of partners
- Utility must make clear the position on intellectual property rights and must not disclose suppliers' confidential information without agreement



Revised OJEU notices

- The new directive introduces some new forms and all forms must be sent electronically
- It also requires some additional information to be provided on existing forms such as the contract award notice, where statistics on the number of SMEs tendering, number of tenders received electronically etc will be gathered
- The Commission is working to amend/supplement the existing standard forms but it is possible this will not be complete by the time the UK implements the directive
- The Crown Commercial Service is working with the Commission to agree that the existing forms may be used initially by taking advantage of free text boxes (to be the subject of CCS guidance in due course)



Negotiation without prior OJEU publication

- As now this is allowed only in certain circumstances. Subject to formal consultation it is proposed to maintain this flexibility. Justifications include:
- no tenders/suitable tenders or requests to participate
- only one supplier could apply for artistic/technical/exclusive rights reasons (in the last two cases provided no reasonable alternative exists and that the absence of competition is not the result of an artificial narrowing of the requirement)
- extreme urgency from events unforeseeable by the utility, mean the time limits for competitive procedures cannot be complied with.
- products involved are manufactured purely for the purpose of research, experimentation, study or development
- Note that the directive also includes some other existing justifications (e.g. supplies quoted and purchased on a commodities market)



Availability of procurement documents

- New requirement that all procurement documentation *must* be available via Internet from date of publication of the contract notice (date of invitation to confirm interest where PIN is used as call for competition, date of ITT/ITN where qualification system is used)
- Exceptions only:
 - where practical limitations arise from specific file formats, tools, equipment or the need for physical/scale models
 - where the utility needs to place limits on the confidential information involved
- If the documentation is not available five days must be *added* to the minimum response times for suppliers set out in the directive



Shorter minimum time limits for responses to adverts/tenders

- Unnecessarily long time limits can increase the costs of procurement and deter suppliers from taking part
- The new rules include shorter *minimum* time limits than at present. These can be shortened further in certain cases (see later).
- **However** when setting time limits utilities must as now take into account the complexity of the contract and the time required for suppliers to respond.
- a notice of contract award must be sent to OJEU within 30 days of conclusion of the framework or contract



Minimum time limits – open procedure

- Normally a minimum of 35 days for receipt of tenders (30 days if electronic tenders permitted)
- If preceded by suitable Periodic Indicative Notice (PIN) minimum 15 days
- If urgent (whether or not suitable PIN published) minimum 15 days
 - “Where a state of urgency duly substantiated by the utility renders impracticable the [normal] time limit...”
- Note this is not the ‘urgency’ referred to in the justifications for awarding a contract without competition



Minimum time limits – restricted procedure and negotiated procedure with prior call for competition and innovation partnerships

- Normally, minimum of 30 days for requests to participate, in any event minimum of 15 days
- Time limit for tendering may be agreed with tenderers (in the absence of agreement the time limit must be no less than 10 days)



Minimum time limits – competitive dialogue – utilities sector

- Normally minimum of 30 days for requests to participate, in any event minimum of 15 days



Publishing a call for competition in OJEU

- As now utilities will have a choice of three different notices as a call for competition
 - The individual contract notice
 - The periodic indicative notice
 - The qualification system notice
- The rules for using qualification systems will change slightly
- The directive makes it explicit that “any charges that are billed in connection with requests for qualification or with updating or conserving an already obtained qualification pursuant to the system shall be proportionate to the generated costs”



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Rules for selection of suppliers



Selecting suppliers and seeking tenders - principles

- As now the directive allows utilities discretion to determine the objective rules and criteria to be used to determine which suppliers should be allowed to tender for a contract. These must be provided to suppliers in advance.
- These rules and criteria may reflect the need to balance adequate competition with appropriate use of resources, thus limits can be placed on the number of suppliers to be admitted
- Private utilities rules *may* include the mandatory and discretionary reasons for exclusion set out in the public contracts directive which include criminal convictions for fraud, and bankruptcy. Contracting authorities *must* exclude using the mandatory reasons



Mandatory exclusions included in Public Sector Directive

- Suppliers may be excluded from contracts if convicted of offences related to organised crime, corruption, fraud, money laundering,
- New exclusions for convictions for terrorist, child labour and human trafficking related offences
- New exclusions for a supplier which has been subject of a *binding legal decision* which found a breach of legal obligations to pay tax or social security obligations (except where disproportionate, e.g. only minor amounts involved)



Discretionary exclusions in Public Sector Directive

- Suppliers may be excluded if grave professional misconduct can be demonstrated (including any conviction related to its business) which affects the supplier's integrity or where the supplier is guilty of serious misrepresentation
- There are also a number of new exclusions, e.g. where:
 - the utility can demonstrate violations of social, labour or environmental conventions listed in Annex X to the directive e.g. ILO Convention 29 on Forced Labour
 - there are 'plausible indications' of agreements aimed at distorting competition
 - there are conflicts of interest, including those arising from prior involvement of the supplier in preparation of the procedure (e.g. specifications) that cannot be remedied by less intrusive measures (e.g. 'ethical walls')



Discretionary exclusions in Public Sector Directive

- A supplier may also be excluded where
 - there are 'significant or persistent' deficiencies in performance of a contract or concession for an authority or utility body that led to early termination of the contract or other sanctions
 - supplier has tried to unduly influence the utility/seek confidential information (e.g. canvassing)
 - supplier has negligently provided misleading information
 - the utility can demonstrate the supplier's non-payment of taxes/social security contributions where *no* binding legal decision has been taken (see earlier mandatory exclusions slide)



Application of mandatory and discretionary exclusions

- Suppliers *must not* be excluded if they have provided sufficient evidence of reform (e.g. payment of compensation, changes in organisation/personnel) – ‘self cleaning’
- The maximum period of exclusion allowed is 5 years from the exclusion event in the case of mandatory exclusions or 3 years if exclusion is discretionary
- Exclusions can be applied after the selection stage. Supplier could be excluded if necessary evidence (e.g. of conviction) arises at any part of the procedure (e.g. at the stage where tenders are being evaluated)



Other points about selecting suppliers

- In open procedures, utilities may assess tenders in advance of checking capability (only the 'winning' supplier need supply proofs)
- In all procedures utilities may allow suppliers to supplement or clarify their submissions (subject to preserving equal treatment in order to allow correction of errors etc.)



Other points about selecting suppliers

- Where turnover used as a measure of financial capacity this *must not* exceed twice the value of the contract except in justified cases (e.g. where high risk) - reasons must be declared in procurement documents or utility's reports



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Tender assessment and contract award



Award Criteria

- The award of the contract must be based solely on the ‘most economically advantageous tender’, however this includes price; cost (including life cycle costs); and the best price/quality ratio (= value for money)
- The directive sets out some rules for costs that may be included in a life cycle approach (e.g. environmental externalities provided their monetary value can be determined and verified)
- There is, as now, no exhaustive list of award criteria but these must be linked to the subject matter of the contract. Examples given in the directive explicitly include *social as well as environmental aspects*. Amongst other examples are quality, accessibility, design for all users, and innovative characteristics



Award Criteria

- Award criteria are considered to be ‘linked to the subject matter’ of a contract where they relate in any respect to the works/supplies/services in question at any stage of their life cycle including
 - the process of production of goods (e.g. no toxic chemicals)
 - the provision of services (e.g. energy efficiency of machines)
 - trading (e.g. the use of ‘fair trade’ products in the contract)
- Note: award criteria must be contract-specific rather than aimed at assessing the *corporate policy* of the tenderer (e.g. It would be wrong to award extra points to a supplier that supplied fair trade products to *all* its customers)



Award Criteria

- The new directive confirms that award criteria can include the organisation, qualification and experience of staff to perform the contract (where this significantly impacts the supplier's level of performance)
- Criteria should be structured such that the information in tenders can be verified effectively against the criteria
- As now the contract notice or ITT must disclose the relative weighting of each of the award criteria (including the use weighting or range of weighting or, exceptionally, ranking)



Challenging abnormally low tenders

- Utilities will be *required* to seek explanations from suppliers that submit a tender which ‘appears’ to be abnormally low
- Examples of ‘explanations’ that could be accepted include the economics of the method of construction to be used and the technical solutions chosen. The utility may reject the tender where the evidence supplied is not satisfactory
- If the utility has established that the low price is the result of a breach of social and environmental law listed in Annex X the utility *shall* reject the tender
- If it is discovered that the low price is the result of State Aid the utility *may* reject the tender if the supplier is unable to prove that the aid is compatible with the rules of the EU Treaty



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Other points



Conflicts of interest

- For contracting authorities only, the directive requires that Member States take 'appropriate measures' against conflicts of interest in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all suppliers.
- Subject to formal consultation, this obligation will be met by the provision of appropriate guidance to utilities.
- This guidance will cover situations where staff members of the utility or of a procurement service provider acting on its behalf may have a financial, economic or other personal interest which might be perceived to compromise their impartiality and independence in the context of the procurement procedure.



Contract conditions

- Greater clarity that conditions for performing contracts can include ‘special’ conditions in particular those relating to innovation, or environmental, social or employment related considerations.
- Subject to formal consultation it is proposed to issue guidance, together with a standard contract condition, to allow utilities to ensure that suppliers comply with international legal obligations in relation to social/environmental/labour laws referred to in Annex X to the directive
- The directive makes it clear that all conditions must be linked to the subject matter of the contract (as is the case with criteria for contract award)
- The conditions could thus not relate to actions by the supplier unrelated to that contract (e.g. employment conditions of the supplier’s workforce on contracts for other customers)



Sub-contractors

- Where it has verified that one of the conditions of mandatory exclusion applies to a sub-contractor (e.g. breach of labour laws) the utility *must* require its substitution
- Where a discretionary exclusion is concerned the utility *may* require its substitution



Changes to contracts/frameworks

- A contract/framework *may* change without re-advertisement in OJEU where:
 - minor changes that do not affect its nature *and* not exceed the relevant threshold *and* not exceed 10% (services/supplies) or 15% (works) of the initial value
 - minor changes that do not affect its nature and are explicitly provided for in review or option clauses in the procurement documents (continued)



Changes to contracts/frameworks

- A contract/framework *may* change without re-advertisement in OJEU where:
 - additional works, services or supplies that ‘have become necessary’ where a change of supplier would not be practicable (for economic, technical or interoperability reasons) or involve substantial inconvenience/duplication of costs
 - the change that arises is unforeseeable by a ‘diligent’ utility, provided these changes do not affect its nature
 - in these two cases the utility must publish in OJEU a ‘Notice of modifications of a contract during its term’ (continued)



Changes to contracts/frameworks

- A contract/framework *may* change without re-advertisement in OJEU where
- Certain corporate changes have occurred in the supplier linked to merger, takeover or insolvency
- The modification is not ‘substantial’ i.e. would not
 - have led to other suppliers participating, becoming qualified or having an offer accepted if known initially
 - have changed the economic balance in favour of the supplier
 - have extended the contract/framework ‘considerably’



Termination of contracts

- Utilities must include in contracts a condition that allows, but does not require, termination where
 - the contract has been ‘substantially’ modified, constituting a new award *or*
 - the Court of Justice of the European Union has decided that the contract should not have been awarded because the utility committed a serious breach of its obligations *or*
 - the supplier should have been excluded on mandatory exclusion grounds (e.g. as a result of conviction for corruption)
- The regulations will also include a ‘deeming’ provision to ensure the obligation is complied with



Questions and feedback

Please remember to provide feedback using the ‘Survey Monkey’ application on the internet

https://www.surveymonkey.com/s/EU_Directives_Feedback_Quiz