

A brief guide to the European Union directives on supplies, services and works, and related legislation

Purpose and scope of this procedure

This document summarises the main provisions of the European Union directives on supplies, services and works as they affect NHS procurement. It is not a definitive statement of the law or a substitute for legal advice.

1. The aim and scope of the legislation

- 1.1 It is the aim of the European Union (EU) member states to create a single European market devoid of all trading restrictions and barriers in which all businesses have an opportunity to compete equally.
- 1.2 The EU regulates and monitors all large-scale public sector procurement through EU directives covering the supply of goods, services and works. In the UK the directives apply to all NHS contracting authorities, including health authorities and NHS trusts.
- 1.3 Compliance with the EU directives is mandatory. Any breach of the directives is actionable in law and may lead to significant costs for the Agency, including the award of damages.

2. The legislation

- 2.1 As a member of the EU, and a party to the agreements of the World Trade Organisation, the UK is bound by the following treaties and directives:
- 2.2 **The Treaty of Rome.** The directives listed below were promulgated as part of the EU single-market initiative. However, for the most part they are simply a specific application of general principles stated in the Treaty, including: Article 12 (prohibition of discrimination on grounds of nationality), Article 28 (free movement of goods within the EU), Article 49 (freedom to provide services within the EU), and Article 81 (prohibition of agreements that prevent, restrict or distort competition). [Note: Prior to 1 May 1999 articles 12, 28, 49 and 81 appeared in the Treaty as articles 6, 30, 59 and 85, respectively.] Buyers are bound by the general principles laid down in these provisions, even in circumstances in which the specific directives do not apply: for example, in regard to purchases below the financial thresholds of the directives.

- 2.3 Public Sector Directive (2004/18/EC).** The new Public Sector Directive (2004/18/EC) (also known as the Consolidated Directive), which brings together the three previous Directives on public sector procurement (supplies, works and services) has been adopted by the European Parliament. The Regulation includes a new competitive dialogue procedure (to be used for more complex contracts), framework agreements, e-procurement and mini competitions. There is also now a requirement for a 10 day standstill period (Alcatel) between the date of notifying tenderers of the contract start date and the contract start date. The new directive also allows for reduced OJEU timescales where there is full and unrestricted access to contract documents.
- 2.4 The Government Procurement Agreement.** This was signed on 15 April 1994 and imposes a number of duties on Procurement in relation to candidates (i.e. offerors in a competitive tendering exercise) from countries that have ratified the Government Procurement Agreement (GPA), including the duty not to treat such candidates less favourably than EU candidates.
- 2.5 Directive 97/52/EEC.** Following the GPA, the detail of the obligations owed by EU buyers differed slightly between candidates from GPA countries and those from other EU member states. Directive 97/52/EEC therefore amended the directives on supplies, services and works to align them with the GPA. Directive 97/52/EEC was implemented by the UK government with effect from 16 August 2000. Compliance with the EU regime (as amended) will ensure compliance with the GPA regime.
- 2.6 The Compliance Directive 89/665/EEC.** This enables aggrieved candidates to take action against public sector purchasing bodies if they breach the EU rules.
- 2.7 EC Decision 87/95/EEC.** This established the need for health authorities to set their requirements for information technology against public standards.

3. Main requirements of the EU and GPA regimes

- 3.1** The main requirements of the EU and GPA regimes are as follows:
- 3.1.1** Large public contracts must be advertised in a standard format in the Official Journal of the European Union (OJEU) so that potential suppliers from all EU and GPA countries have the opportunity to declare an interest.
- 3.1.2** There must be a prescribed minimum period for responses.
- 3.1.3** Technical specifications which are non-discriminatory and which refer to EU or other recognised international standards must be used wherever possible.
- 3.1.4** Objective criteria must be used when selecting suppliers and awarding contracts.

4. Legal advice on EU procurement regulations

4.1 Procurement has the ability to seek legal advice from the Trust's solicitors.

5. 'Priority services' and 'residual services'

5.1 All categories of services that fell within the scope of the old Services Directive are covered by the new Consolidated Directive. However, only so-called 'priority services' are subject to the full requirements of competitive tendering. Appendix 1.

5.2 All other services are 'residual services'. For the time being, when awarding a contract for residual services there is a need only to ensure that there is no discrimination against potential service providers from other EU member states and that a post-award notice is published in the *OJEU*. (Note: An award notice is required only when the procurement exceeds specific financial thresholds - see paragraph 6.1, below.) There is no requirement for competitive tendering, but it is recommended as good practice. Appendix 2

5.3 Where a contract involves both priority services and residual services it will be classed overall as a priority services contract if the value of the priority services is greater than the value of the residual services; otherwise, it will be classed as a residual services contract.

5.3.1 Note: Even if a service falls into the priority services category it is likely to escape the requirements of the directives if the relevant contract is structured as a concession, i.e. if the consideration given by the buyer consists of or includes the right to exploit the provision of the service (e.g. by charging the public).

5.4 Procurements often contain elements of both supplies and services. Where the value of the supplies equals or exceeds 50 per cent of the total contract value (excluding VAT) the procurement will be caught by the supplies rules; otherwise, it will be classified as a service procurement. However, this only applies where the supplies and the services have to be procured together. If the supplies can be disassociated from the services and procured separately, the fact that the contract overall might be classified as a residual services contract will not enable the buyer to avoid inviting competitive offers for the supplies element.

6. Financial thresholds

6.1 The EU directives only apply where the value of the procurement exceeds specific financial thresholds. These can be found on the OGC website at: [OGC - EU Procurement Thresholds](#)

6.2 The European Commission publishes the equivalent figures in £sterling. The figures are fixed for a period of two calendar years and are revised on 1 January in every even year.

7. Estimating contract values

- 7.1** Value is defined as the total consideration excluding VAT that is to be paid over the lifetime of the contract (e.g. a three-year supplies contract with an anticipated annual expenditure of £50,000 has a value of £150,000).
- 7.2** Where the contract includes options, the value of these options must be taken into account in determining whether the threshold has been reached.
- 7.3** In the case of contracts for lease, rental or hire purchase the relevant figure is the aggregate of the consideration that will be paid throughout the duration of the contract. Where the term exceeds 12 months the estimated residual value must also be included. Where the duration is indefinite or uncertain the relevant figure is the monthly contract value multiplied by 48.
- 7.4** In the case of regular or renewable contracts the relevant figure is either the aggregate of the consideration to be paid during the anticipated duration of the contract (or over the first 12 months if the duration is indefinite) or the consideration paid by the buyer under similar contracts for goods of the same type during the preceding 12 months (adjusted for any expected changes), whichever is the more appropriate. A single contract providing for a regular supply over a period of time and a series of separate contracts concluded over a period of time for the same type of goods are both regarded as 'regular' contracts for these purposes.
- 7.5** Contracts must not be split or sub-divided to avoid the application of the EU directives.

8. Prior Indication Notices

- 8.1** The directives require buyers to give advance notice of the procurements that they are likely to make in any given year, with the object of enabling candidates to plan ahead.
- 8.2** If the total contract value (see paragraph 8.7, below) exceeds specific financial thresholds, either individually or when aggregated with actual or prospective purchases of goods and/or services of the same type in the current financial year, a Prior Indication Notice (PIN) must be published in the *OJEU*.
- 8.3** Timescales for offer notices and invitations to offer can be reduced if a PIN has been published.
- 8.4** In order to issue a PIN, purchasing must forecast expenditure over the financial year on contracts and framework agreements for each group of goods and 'priority / Part A' services. (Where necessary, these groups may be broken down to provide a more appropriate level of detail.)
- 8.5** The following information should be provided

- 8.5.1 The name of the awarding authority
- 8.5.2 The name of the Procurement Manager
- 8.5.3 The name of the contract/s
- 8.5.4 The relevant CPV codes
- 8.5.5 The annual value of the contract/s (excluding VAT)
- 8.5.6 The term of the contract/s (including any options to extend)
- 8.6 Any new areas of expenditure that may be identified during the year should be subjected to the above procedure where it is possible to provide advance notice before the call for competition.
- 8.7 When preparing a PIN, procurement needs to take account of the following points:
 - 8.7.1 Procurements on the basis of lease, rental or hire purchase, with or without the option to buy, are also covered by the rules.
 - 8.7.2 Procurements can be broken into lots, but the total value of all the lots must be taken into account for the purpose of determining whether the relevant financial threshold has been reached
 - 8.7.3 The Procurement is to be regarded as supplies contract or a services contract depending on whether the value of the goods or the value of the services is the greater. It must be stressed that this criterion alone is not sufficient to determine what a contracting authority should do when it wants to award a contract in which the value of the services exceeds the value of the supplies but where Consolidated Directive does not apply. In such cases advice should be sought.

9. Contract-specific notices

- 9.1 If the value of any procurement equals or exceeds the relevant threshold the buyer must advertise it in the *OJEU* (notwithstanding that the procurement might already have been the subject of a PIN) unless the circumstances allow the use of the 'negotiated procedure' without a prior advertisement
- 9.2 Proof of despatch is always required.
- 9.3 In calculating minimum periods (e.g. for the receipt of expressions of interest) it should be borne in mind that the first day of the period is always the day following the date of despatch of the notice to the *OJEU*. Where a minimum period expires on a Saturday or Sunday the period should be extended to the following working day.

10. CPV codes

- 10.1** The EU directives are supported by a common coding system to describe goods and services. The Common Procurement Vocabulary (CPV) codes are arranged in a logical sequence to provide increasingly detailed descriptions as more digits are added (up to a maximum of eight).
- 10.2** The use of CPV codes is mandatory in all *OJEU* advertisements. The most appropriate code to describe the goods or services under consideration should be used. (Where a contract contains many CPV codes, the highest-level code under which all the other codes can be subsumed should be used.) Where necessary, more than one code may be used, provided they are listed in order of priority.
- 10.3** More information on the CPV codes can be found on the Systeme d'Information pour les Marchés Publics (SIMAP) Web site.

11. Choosing an awards procedure

- 11.1** There are four procedures that can be used: the **open procedure** (see paragraph 11.2), the **restricted procedure** (11.3) the **negotiated procedure** (11.4) and the competitive dialogue procedure (11.5)
- 11.2 Open procedure.** This procedure is available in all circumstances and involves only a single stage, i.e. all candidates may respond to the *OJEU* advertisement by submitting an offer. All offers received must be considered, providing that candidates have passed any minimum shortlisting criteria (see paragraph 12, below). A minimum of 52 days must elapse from the despatch of the notice to the closing date for the receipt of offers. This period can be reduced when a PIN has been issued to “a period sufficiently long to permit responsive tendering which as a general rule shall not be less than 36 days and in any event not less than 22 days from the date on which the contract notice was despatched”. Two provisos exist for this reduction from 52 days:
- 11.2.1** (i) the PIN must have been published a minimum of 52 days and a maximum of 12 months before the date on which the contract notice was despatched to the *OJEU*;
- 11.2.2** (ii) the PIN must have contained at least as much of the information referred to in the standard *OJEU* notice as was available at the time of the publication of the PIN.
- 11.2.3** The overriding factor in choosing whether to allow 36 or 22 days is that the period must be sufficient to allow for effective tendering.
- 11.2.4** The advantage of the open procedure is that it can be conducted quicker than the restricted procedure. The disadvantage is that there is no possibility of limiting the number of offers received. Its use is therefore recommended only for straightforward procurements where comparatively few offers are expected.

11.3 Restricted procedure. This procedure is also available for use in all circumstances. There are two-stages: (1) the buyer must allow a minimum of 37 days from the date of despatch of the *OJEU* notice to the closing date for the receipt of expressions of interest; (2) from the candidates expressing an interest a limited number are shortlisted and invited to submit offers. The buyer must allow a minimum of 40 days for offers to be returned (or 26 days for procurements where a PIN has been issued). Two provisos exist for this reduction from 40 days:

11.3.1 (i) the PIN must have been published a minimum of 52 days and a maximum of 12 months before the date on which the contract notice was despatched to the *OJEU*;

11.3.2 (ii) the PIN must have contained at least as much of the information referred to in the standard *OJEU* notice as was available at the time of the publication of the PIN.

11.3.3 Where, for reasons of urgency, compliance with these timescales is not practicable, buyers may use the 'accelerated restricted procedure' which reduces the deadlines to 15 days for the receipt of expressions of interest and 10 days for the receipt of offers. 'Reasons of urgency' are not defined but would certainly exclude circumstances attributable to a lack of advance planning on the part of the buyer.

11.4 Negotiated procedure. This is the most flexible and least transparent of the three procedures. Use of the negotiated procedure is permitted only:

11.4.1 (i) (services or works only) where the nature of the services or works makes it impossible to determine a pricing mechanism at the start of the procedure or (services only) where the nature of the services makes it impossible at the outset to draw up a specification with sufficient precision to permit the use of the open or restricted procedures;

11.4.2 (ii) (goods only) where the goods required are purely for research or development work;

11.4.3 (iii) where the goods, services or works can only be provided by one supplier because of technical or artistic reasons, or on account of exclusive rights;

11.4.4 (iv) where the goods, services or works are needed extremely urgently due to reasons that were unforeseeable by, and not attributable to, the buyer;

11.4.5 (v) where additional goods, services or works which were not foreseen at the outset are needed from the original supplier and any change of supplier would cause severe technical or operational difficulties.

11.5 Competitive Dialogue This procedure should only be used when there is a particularly complex contract and the open or restricted procedures will not allow the contracting authority to award the contract. When using the competitive dialogue procedures buyer must remember:

11.5.1 The needs and requirements must be defined in the *OJEU* notice;

- 11.5.2** All aspects of the contract may be discussed during the dialogue period;
- 11.5.3** They should not provide information in a discriminatory manner or reveal to other participant proposed or confidential information form other candidates participating in the dialogue without agreement;
- 11.5.4** The final tenders are to be submitted on the basis of the solution(s) presented and specified during the dialogue, however they may be clarified or fine-tuned as long as it does not involved changes to the basic feature of the tender or have a discriminatory effect;
- 11.5.5** The contracting authority may specify prices or payments to the participants in the dialogue;
- 11.5.6** The tenders shall be assessed on the award criteria in the OJEU notice.
- 11.6** All of the above circumstances are construed very narrowly against the procurement and many are subject to conditions. Reference should always be made to the specific wording of the directives before the procedures are invoked.
- 11.7** Private Finance Initiative (PFI) contracts will invariably involve the supply of a work or a service. It will usually be possible to use the negotiated procedure for these procurements, relying on paragraph 11.4.1, above.
- 11.8** Contracts let under POISE (Purchase of Information Solutions Effectively) will use the negotiated procedure.

12. Supplier pre-selection (shortlisting)

- 12.1** The efficacy of the rules would be seriously undermined if buyers were free to reject candidates or offers arbitrarily. Accordingly, the EU directives specify the grounds on which candidates may be automatically disqualified and also the criteria buyers must use in determining the shortlist of candidates from whom to invite offers.
- 12.2** In determining the shortlist of candidates to be invited to offer, the buyer is free to set whatever standards he or she considers appropriate, providing they are proportionate to the contract. But the rules do prescribe the factors which the buyer must consider in determining whether individual candidates meet these standards. The factors include:
- 12.2.1** Appropriate bankers' statements.
- 12.2.2** Financial accounts.
- 12.2.3** Statements of turnover relevant to the goods, services or works concerned.
- 12.2.4** Any other information demonstrating a candidate's economic and financial standing that is appropriate to the procurement in question.

- 12.2.5** Statements of previous relevant experience.
- 12.2.6** The presence of recognised quality assurance systems.
- 12.2.7** The acceptability of their goods and/or services.
- 12.2.8** Their track record of past service.
- 12.2.9** In the case of services procurements, the buyer can also seek evidence of a candidate's 'ability', which may allow more wide-ranging questions to be asked.
- 12.3** The issues that may be legitimately probed at the shortlisting stage must be 'generic' in nature, i.e. they must relate to a candidate's circumstances generally. At the shortlisting stage buyers must not ask questions about a candidate's approach to the procurement in question; such issues must be confined to the offer stage.
- 12.4** The information that is to be requested from a candidate for shortlisting purposes should be stated in the *OJEU* advertisement. When either the restricted procedure or the negotiated procedure with advertisement is being used it is on the basis of this information that the buyer must select the candidates who are to be invited to offer. When the open procedure is being used the buyer will consider this information before proceeding to consider the candidates' offers.

13. Invitations to offer and specifications

- 13.1** When either the restricted procedure or the negotiated procedure with advertisement is being used the buyer will contact the candidates who have emerged successfully from the shortlisting process and notify them that they are being invited to submit an offer. The directives prescribe the information that must be included in the Invitation to Offer package.
- 13.2** The buyer must specify in the contract documents all of the technical specifications relevant to the goods, services or works to be procured.
 - 13.2.1** The chosen specifications must not have the object or the effect of discriminating against any class of candidate (e.g. foreign candidates). The EU rules reinforce this general requirement by stipulating that specifications must be defined by reference to European specifications wherever these exist and are relevant to the procurement.
 - 13.2.2** The term 'European specifications' is defined in the directives. Procurement may derogate from the use of these specifications only in very limited circumstances — for example, if their use would cause compatibility problems or technical problems, or involve disproportionately high costs.
- 13.3** When describing products, either for the initial *OJEU* advertisement or in the detailed contract documents, reference to specific makes, sources or trade marks (e.g. 'Coca Cola') should be avoided unless it is impossible to define

the requirements in any other way. Such references must always be followed by the words 'or equivalent'.

14. Offer evaluation

- 14.1** The EU directives require that the contract must be awarded to the candidate who submits either (a) the lowest priced offer, or (b) the offer which is the most economically advantageous.
- 14.2** Buyers almost invariably select option (b) because it gives them greater flexibility. The choice must be made at the outset and specified in the *OJEU* advertisement. The factors that may be used to determine economic advantage include: price, running costs, cost effectiveness, quality, functional and aesthetic features, technical merit, after-sales service and technical support. The chosen factors must be stated in the *OJEU* advertisement or the contract documents.
- 14.3** Where the open procedure or the restricted procedure is being used, the rules forbid buyers to engage in 'post-offer negotiations' with candidates. These are defined as negotiations on fundamental aspects of a candidate's offer, such as price. On the other hand, discussions aimed at clarifying or supplementing the contents of an offer are permitted, providing that all candidates are treated equally.

15. Publishing results

- 15.1** There is a requirement for a 10 calendar day standstill period (Alcatel) between the date of notifying tenderers of the contract start date and the contract start date. This is to permit unsuccessful tenderers to seek further information about the award decision
- 15.2** Following completion of the competition, a notice of the award must be sent to OJEU within 48 days of the contract award date. Suppliers that have been unsuccessful must be notified and have the right to a debriefing on request.

16. Statistical returns

- 16.1** Trusts and health authorities are required to submit annual returns on contracts awarded above and below the financial thresholds. Records should be kept on all contract awards in order to provide this information when requested by the Agency. This information is forwarded to HM treasury who in turn collate information for the whole of the UK and send it to the European Commission.

Appendix 1. PRIORITY SERVICES

- Maintenance and repair of equipment
- Land transport services (including armoured car and courier services except transport of mail)
- Air transport services of passengers and freight (except transport of mail)
- Transport of mail by land (except rail) and by air
- Telecommunications services
- Financial services (insurance, banking and investment)
- Computer and related services (including bespoke software – standard software is generally thought to be covered by Supplies Directive)
- Research and development services paid for by the contracting authority and solely for its benefit
- Accounting, auditing and bookkeeping
- Market research and public opinion polling
- Management consultancy and related services
- Architectural services (as defined)
- Advertising
- Building cleaning and property management
- Publishing and printing
- Sewage and refuse disposal; sanitation and similar services

Appendix 2. RESIDUAL SERVICES

- Hotel and restaurant services
- Transport services by rail
- Water transport
- Supporting and auxiliary transport
- Legal services
- Placement and supply services of personnel
- Security services
- Education and vocational educational services
- Health and social services
- Recreational, cultural and sporting services
- Other services