

Response to Consultation on the New Procurement Directives

Introduction

This document summarises and provides some commentary on the responses to a consultation exercise on the implementation of two new EC procurement Directives.¹ The consultation exercise, which finished on 9 August, was designed to invite views on OGC's proposed approach to implementation. In particular, comments were invited on how OGC intends to implement some specific provisions and text in the new Directives.

In total, 255 responses were received from a range of interested parties including Government departments, local authorities, law firms, suppliers, trade unions and pressure groups. The majority of these (188 responses) were from those supporting a position taken by Remploy, a UK sheltered workshop, which relates to concerns about the implementation of Article 19. Given the extent of these concerns, OGC is issuing a separate letter in reply to those who responded specifically on this matter as well as discussing these issues in the summary below.

The aim of this document is to summarise the responses received and to draw out key issues raised. OGC has tried to provide clarification where requested or where it was felt that there was a misunderstanding. However, it is not possible, at this stage, to give definitive decisions on how all of the issues raised in this exercise will be addressed in implementation. There will be a second round of consultation on the draft Regulations themselves, in 2005, which will take account of this consultation exercise.

OGC would like to thank all those who sent in responses. All the points made have been noted even if they are not explicitly referred to in this summary document. Numerous requests for specific guidance were made. OGC's priority will be to ensure effective transposition of the new Directives, supported by appropriate guidance.

Public Sector Directive

General

The general view from the responses received was that the new Directive was helpful in clarifying a number of procurement issues and that the approach to implementation set out in the consultation document was sensible. On many of the issues covered by the new Directive, guidance was seen as a vital supplement to the implementing Regulations themselves.

Section 4. Article 9, Method of calculating contract value

Section 4.2²

- A majority of responses (62%) explicitly agreed with the proposal to transpose "amount payable" to "consideration payable".³

¹ Directive 2004/18/EC, on the Coordination on Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts, and Directive 2004/17/EC, Coordinating the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Postal Services Sectors.

² These section numbers refer to the original consultation documents issued. These documents are still available at <http://www.ogc.gov.uk/index.asp?id=1000084> for information.

- The main concern was that "consideration payable" might lead to confusion because the "consideration" might be difficult to quantify - yet it needs to be quantified to establish whether the Regulations will apply. There was a view that there should be a definition and guidelines for calculating the monetary value of "consideration".
- Other alternatives offered were:
 - "valuable consideration payable" and this should only apply where values is capable of being subjectively realised.
 - simply "consideration".
 - "consideration passing" because "payable" still implies monetary.

Section 4.3

- A majority of responses (81%) explicitly agreed with the proposal to use "value" rather than "cost" throughout.
- The main concern was that "value" and "cost" were not in general thought to have the same meaning. However, the majority of respondents took the view that there was no distinction intended in the Directive text between these two terms. Some responses suggested looking at the French text and asking the Commission.
- "anticipated cost" was offered as an alternative.

Section 4.4

- No respondents thought that the wording "or during the financial year if that is longer than twelve months" was clear. Nearly all supported going back to using "contract term" or asking the Commission for clarification.
- Other alternatives offered included:
 - "contract period"
 - "the calendar year or the twelve months following the commencement of the performance of the contract"
 - simply delete the phrase "or during the financial year if that is longer than twelve months"
 - "twelve months"
- Clarification was sought on situations when one valuation method brings a contract outside of the procurement directives whereas it might have been caught under the other valuation method.
- One response suggested that it ought to be made clear in the Regulations that the total contract term includes any extensions.
- The point was made that "the first delivery" sits more easily with a contract for goods than a contract for services.

Section 5. Article 11, Central Purchasing Bodies

- No respondents explicitly objected to the full implementation of this Article, which will therefore be implemented as proposed. However several concerns and queries were raised and a sample of those have been listed and commented on below.
- *How should CPB's best follow advertising rules on aggregate contract value?*
In principle, the application of this aspect to a CPB should not be any different to the situation with any other contracting authority. However, as the CPB is likely to be awarding more contracts than other contracting authorities, the total estimated value of

³ The percentages used in this summary are calculated on the basis of all those responses, which actually commented on the Article or provision in question.

similar contracts is more likely to exceed the relevant thresholds.

- *How should CPBs organise frameworks in a manner that is compliant with the rules? Can a contracting authority join a CPB framework if this was not provisioned when the framework was set up?*

A CPB, as a contracting authority itself, must apply the rules on framework agreements set out in Article 32. The need to identify the authorities which will make use of the framework, at the time it is set up, using generic or specific names of the authorities concerned, applies whether it is a CPB awarding the framework or any other contracting authority. There was some concern that frameworks run by CPBs blurred the distinction between a) the selection process for the framework b) the evaluation process for the award of the framework and c) the evaluation process for the award of the contract. There was also concern that contracting authorities could not join CPB frameworks if they were not party to the arrangement when the framework was established. Again, these are not issues specific to CPBs but rather issues about the rules on frameworks more generally.

- *The new article on CPBs means a move towards bulk buying thereby compromising quality and the ability of SMEs to compete.*

There will be circumstances where buying through CPBs is the best option on value for money grounds, and the Regulations should therefore allow for this option. In other cases, an individual contract or framework awarded by the authority might be more appropriate. The implementation of the Directives is not the appropriate vehicle for addressing these decisions. The Directives simply allow for all of these possibilities.

- *There should be a requirement to publish contracts below thresholds on a national basis to balance the disadvantage of CPBs for SMEs*

Below threshold procurement is not addressed in the new Directive and will not, therefore, be covered in implementation. However, the issue of advertising below threshold is being considered generally in the context of EC Treaty obligations and in relation to support for SMEs.

- *There is interest in finding out more about any plans to strengthen the UK's central buying units and create new ones.*

The implementation of the explicit provision covering CPBs does not require the UK to have plans to strengthen such bodies or create new ones. It simply explains how contracting authorities can make use of such bodies under the rules. Questions about future plans for such bodies would need to be addressed to those responsible for them.

- *This Article disadvantages private sector agents by giving CPBs, such as OGC Buying Solutions, an unfair advantage.*

This Article is not addressing the issue of using private sector agents which buy on behalf of contracting authorities, and for which such authorities are therefore contracting directly with the suppliers. Where a body, which is not a contracting authority, purchases on behalf of a contracting authority, it is the contracting authority which is ultimately responsible for ensuring that the EC rules are applied. This article is covering the situation in which a contracting authority is, itself, acting as a central purchasing body. It makes clear that, where contracting authorities purchase from or through such bodies, they will be deemed to have complied with the requirements of the Directive where the CPB, as a contracting authority itself, has complied with them. It is not clear why this can be seen as an advantage in relation to the use of private sector agents which are acting on behalf of contracting authorities. The two situations are different.

- *There is confusion about the legal status of CPBs (joint ventures, virtual consortiums etc.) and about the arrangements between contracting authorities and CPBs.*

Please see Article 1 (9) & (10) for the definitions of contracting authorities and central purchasing bodies. The Regulations will not be able to change these definitions or broaden them as this would go beyond the Directive text. Whether a body is a CPB will depend in each case on legal status and their activities and intended purpose. The key issue is that the CPB must be a contracting authority.

- *The use of CPBs is likely to be an important issue in terms of the Efficiency Agenda, in particular for local authorities.*
The concerns raised in this area have been noted and the Efficiency Team will be made aware of these issues. However, this Article only addresses how relations with CPBs should be handled under the EC rules. It does not seek to either promote or discourage the use of CPBs generally.
- *Will contracting authorities escape their Duty to Promote Race Equality by buying through CPBs?*
The applicability of the Duty to Promote Race Equality will need to be considered regardless of whether or not a contracting authority is procuring from a CPB. The implications will depend on the nature of the contract and on any actions that the CPB has already taken.

Section 6. Article 19, Sheltered Workshops

- All responses welcomed this Article and most supported the proposal to fully implement it as permissive. As mentioned in the introduction, because of the quantity of responses received on this issue, we are also replying directly.
- Several contracting authorities expressed a keen interest in advocating the use of this Article within their organisations.
- Most responses commented on the importance of the definitions of key terms in this Article. "Sheltered Workshops" and "Sheltered Employment Programmes" and "handicapped persons" were all highlighted as terms which needed clear definitions. There was also a question about whether those with mental disabilities or other disadvantaged groups in society could be included in the definitions. Some thought the definitions ought to extend to how a "sheltered workshop" is established e.g. limiting the size of the organisation, clarifying whether it must be a social enterprise / registered charity / an SME etc.
- It was commented that there needed to be a consistent set of definitions across the EU. However others highlighted that definitions should not be weakened or diluted to accommodate other EU members with less transparent support systems.
- The definition of "most employees" was also questioned. It was suggested that we aim for an EU-wide definition of "most" as meaning 50% + 1.
- There were suggestions regarding the terminology used in the Article. "Persons with a disability" was preferred to "handicapped persons". "Sheltered Workshops", "Sheltered Employment Programmes" and "handicapped persons" were recognised as giving wider understanding at an EU level but not as currently being used in the UK. The terms "supported employment factories and programmes" and "disabled people" were instead suggested and the current UK programme called "Workstep" was highlighted. One response defined sheltered bodies as "a continuum of supported employment provisions for people who are not ready or can not operate in the mainstream labour market". Another response suggested "supported enterprise".
- There was some criticism of the terminology used in the consultation documents. The use of phrases highlighting "relevant contracts", "such organisations will only have certain capacity and capability to meet the requirements of the public sector" or "relatively small proportion of public sector contracts" raised the concerns that there was an intention to restrict the scope of this provision. This is not the case. The consultation documents reflected a practical, factual point that sheltered workshops would not be able to meet **all** the needs of **all** public sector procurement contracts. More generally, the consultation documents were designed to invite discussion not to set out a fixed Government position and the wording, which was objected to, will not appear in the Regulations themselves.

- In terms of the contracts to be reserved, there were questions as to whether each authority should define these contracts, whether they should be defined centrally or whether they needed to be defined individually on a contract by contract basis. OGC feels that the latter would be the most sensible approach and will promote this through guidance. OGC believe it would be too rigid and unhelpful to attempt to define the type of contracts in the Regulations themselves.
- A few responses requested some form of obligation imposed on the contracting authorities to reserve a target proportion of contracts for sheltered organisations. This is not an issue for the Regulations. In any event, this would go against the devolved approach to procurement decisions - ie each Accounting Officer is responsible for his/her own procurement decisions and for achieving value for money for the taxpayer. Moreover it is also worth remembering that other organisations like SMEs, black and ethnic minority businesses and the voluntary and community sector, which do not benefit from a similar Article but which the Government is also keen to support, could be disadvantaged by such an approach.
- The majority of responses supported and encouraged our proposal for guidance. It was felt that because the reserving of contracts was a new concept, detailed procedural rules would need to be provided to serve both contracting authorities and the sheltered suppliers. Clarification was requested on the information to be sought from these bodies because this might depend on the status (e.g. registered charity) of the sheltered workshop, e.g. financial records.
- There was concern that, because contracting authorities would need to confirm early on that a contract was for sheltered workshops only, if none responded, they would need to start the process again from scratch. The need for Government to look at capacity in this market was therefore highlighted so that contracting authorities could determine the likely response rate from the outset. Some saw the need for a national register of supported businesses including details of services offered. It was suggested that Job Centre Plus may be able to produce such a database.
- The guidance on this Article will seek to address how it fits with other new Articles such as Article 11 (Central Purchasing Bodies), Article 32 (Framework Agreements) and Article 33 (Dynamic Purchasing Systems) which could all have implications for the use of sheltered workshops. The guidance will also need to address the scope to promote the use of sheltered workshops as sub-contractors.
- The importance of marketing this scheme to contracting authorities was highlighted in some responses, as lack of awareness was felt to be a main failing of the current scheme, the Special Contracts Arrangement (SCA). It was commented that sheltered workshops should not be portrayed as needing the "sympathy vote" but rather as being a commercially viable option.

Section 7. Article 25, Information on Sub-contracting

- The majority (62%) of responses explicitly agreed with the proposal to make Article 25 optional for contracting authorities.
- Several responses highlighted the fact that this information was already being requested in many circumstances and that this Article fitted well with a general public sector effort to make sub-contracting opportunities more transparent to encourage SMEs.
- Several responses indicated a misunderstanding of the scope of this Article and its relationship to the selection stage. It is important to emphasise that this Article allows contracting authorities to request the **share** of a contract that will be sub-contracted. It does not allow contracting authorities to request the **identity and details** of individual sub-contractors nor to take this information into consideration in evaluating the bids. In other words, contracting authorities who ask about the proportion of sub-contracting cannot give preference to (or disadvantage) those bidders which will sub-contract a larger

proportion of the contract than others. If the issue of sub contracting is actually relevant - eg there is a need to ask about the technical capacity of sub-contractors delivering the contract, the information should be requested and taken into account at **selection stage**. At no point can a contracting authority require a main contractor to use a particular sub-contractor or a particular group of companies e.g. SMEs. This is not allowed under the EC rules.

- Several responses questioned the real benefit of this Article for SMEs if the information could not be taken into account during the procurement.
- The valid point was made that SMEs can often be main contractors and that making this mandatory would in fact act as a further regulatory burden for them.
- A clarification of the term “sub-contracting” was requested - in particular, whether it referred just to the initial subcontractors or could include the subcontractors' subcontractors as well. It was also queried whether it would be restricted only to those subcontractors delivering the service direct to the end user. OGC would point out here that the Article is allowing contracting authorities to find out what proportion of their contract will be subcontracted. This should therefore not be restricted in the Regulations to the proportion of the contract delivered to end users by subcontractors. Nor should it need to address the subcontractors of subcontractors, as that work has already been subcontracted.
- Some respondents were interested in further exploration of the effect of requesting this information on SMEs. Those contracting authorities already requesting such information may be able to report a quantifiable effect, but no details were submitted in the consultation. Further investigation would go beyond the remit to implement the Directives but Departments may wish to monitor the effects once this provision has been implemented.
- There was a question about the meaning of the phrase "This shall be without prejudice to the question of the principal economic operator's liability". It was suggested that it might mean that the stated proportion of subcontracting is not binding or that the contracting authority is not responsible for the sub contractors.
- The issue was raised that many contracting authorities may see a large proportion of subcontracting as a risk, e.g. for health & safety and quality implications, rather than as a benefit because it offers opportunities for SMEs.
- In response to another point raised, it will not be possible to include "a clear obligation in the implementing Regulations requiring sub-contractors to comply with the social, employment and environmental laws". Consistent with the scope of the Directives, the Regulations (as now) will apply to the relationship between a contracting authority and a supplier. They do not apply to the relationships between a supplier and its subcontractors. Of course, all companies are already required to comply with relevant social, employment, environmental and other legislation.
- The contracting authorities will not be able to insist that a proportion of a contract is sub contracted to sheltered workshops. The issue of sheltered workshops should be considered in relation to the main supplier or contractor.

Section 8. Article 27, Obligations relating to taxes, environment protection etc

- The majority of responses (70%) agreed with the proposal to make Article 27 optional on contracting authorities. However, there was some concern that making this Article optional would lead to a piecemeal approach by contractors in understanding and meeting national obligations.
- The Article provides that contracting authorities can state the body or bodies - i.e. the source - from which a tenderer can obtain appropriate information on obligations relating

to taxes, to environmental protection, to the employment protection provisions and to the working conditions which are in force in the Member State, region or locality for the works or services in question. It does not cover other legislation and does not relate to the use of clauses to require contractors to adhere to certain employment or environmental obligations as conditions of the contract.

- One view expressed was that SMEs might benefit from having the bodies which can supply information on obligations stated in the contract documents because this would make legislation easily accessible. On the other hand, another view was that this could act as a discouragement to SMEs by creating more work for them in indicating that they have taken account of the relevant legislation.
- On definitions, OGC believes that "taxes" could be taken to include environmental taxes and levies such as the climate change levy if these are legal obligations. Even if they were not included in this term, they could fall under the category of obligations relating to "environmental protection". This will be considered further during implementation.
- It will be clearly stated in the Regulations that, where contracting authorities have stated the source or sources of legislation, they shall request that tenderers indicate that they have taken their obligations into account when drawing up their tenders.
- It will not be possible to include in the Regulations themselves, information on where bidders can find contractor obligations because obligations will vary depending on the contract in question and the bodies and legislation involved may change. It was suggested that it would be helpful for the relevant Departments to put the information about obligations clearly on their websites or on one single website.

Section 9. Article 29. Competitive Dialogue

- The general view was that, although the Regulations themselves should stick closely to the text of the Article in the Directive, guidance was needed to cover a range of issues raised in the responses. A number of these issues, which OGC will need to consider further, are set out below.
- It was considered important to explain the relative merits of, and differences between, the new competitive dialogue procedure and the existing negotiated procedure (which will still be available in the new Regulations). In which situations should one be preferred over the other? Will the negotiated procedure remain possible for PFI/PPPs?
- There was a view that the restrictions on negotiations with the preferred bidder in this procedure impose greater costs and risks on bidders, who will have to come up with near final "solutions" before the final shortlist. This could allow purchasers to cherry pick ideas from various bidders without adequate protection of IP rights and the possibility for bidders to recover upfront bidding costs. Guidelines need to clarify which changes or adjustments will be possible after the selection of preferred bidders.
- Clarification would be needed of terms which are not defined in the Directives - eg "particularly complex contracts", "technical means" and "legal and/or financial make-up" (the latter two from Article 1). Also, clarification would be needed on whether Article 29(8) means that a contracting authority may charge bidders for taking part in the dialogue or make a payment to them.
- It was not clear whether this procedure was meant for PPP/PFI projects only.
- It was felt to be vital that the Regulations reflect the flexibility that the Article provides for discussions to continue at the preferred bidder stage.
- Given that as few as three bidders could be invited to begin a dialogue, there was a view that it would be pragmatic and cost effective (for both contracting authorities and bidders)

for the number of bidders ultimately to be invited to submit final tenders to be as low as two.

- There was concern that the availability of the competitive dialogue procedure could lead to a more restrictive approach to the use of the negotiated procedure with advertising.
- It was not clear how the process of applying the award criteria to reduce the number of potential solutions, prior to the issue of the final ITT, would work (Article 29.4).
- It was not clear what, if any, further negotiations or changes to the documentation can be made after the choice of the contractor. The new Directive suggests that some clarification may be possible. Depending on how the Directive is implemented, the effect of the new procedure could be to restrict significantly the scope of any changes after the choice of contractor.
- There was a concern that this Article was agreed in order to protect procedures for PFI contracts. However, it was felt that PFI contracts had not met the necessary quality, value for money considerations and employment conditions and protections. It was argued that the text of the Article neither helps to ensure the provision of quality works and services, nor to ensure good employment and working conditions.
- In order to calm private sector fears about rising costs, it was suggested that it would be useful if there was a statement on how 29 (6), which covers the submission of final tenders, will be applied by authorities.

Section 10. Article 32. Framework Agreements

- Many of the responses stated that the new Article was helpful in explaining how framework agreements should be awarded and conducted in conformity with the EC rules. They also considered that the existing guidance on framework agreements, on the OGC website, was helpful in explaining the new Article.
- A number of the specific points raised concerned the need for additional guidance, to supplement the existing guidance, rather than the need to amend the approach to implementation of the Article itself. These points cover issues such as categorisation of goods and services within a framework, aspects of running a mini competition, the use of negotiation at the call-off stage, the implications of the length and size of frameworks for SMEs, the contracting out of services under framework agreements, further clarity on what constitutes “exceptional circumstances” for agreeing a framework of more than four years, whether the four year limit provides for extension options beyond four years and difficulties in estimating potential take up of a framework. All of these issues will be considered in drafting new guidance on framework agreements at the appropriate time.
- A particular point raised was whether the wording, “contracting authorities shall consult in writing the economic operators capable of performing the contract” means that the purchaser can select which framework agreement suppliers he or she wants to include in the mini competition. The answer is that you cannot “select” in the sense of inviting, say, four out of ten suppliers simply because four is a reasonable number. The test is “capable of performing the contract”. If all ten are capable of meeting the specific requirement, as indicated in their bids at the time the framework was awarded, then they should all be invited.
- Another question was whether there must be a specified period of time and value attached to a contract called off under the framework. The answer is “yes”. There must be a value, based on the application of the award criteria under which the framework itself was set up. There must also be a time limit. Otherwise, a contract could extend indefinitely beyond the time of the framework itself. The time limit - or contract length - should reflect what is reasonable for the product or service being procured and the contracting authority’s normal approach to the length of such contracts.

- There was a view expressed that mini competitions, under framework agreements, are required in all cases. They are not. They apply where terms and conditions are being refined or supplemented to meet a particular need. This is to ensure that the best provider, in relation to the refined terms, is awarded the contract. The guidance, on OGC's website, covers this point.
- There was some concern that contracting authorities, which award framework agreements as defined in the new Article, do not have to use them for all their needs. The point is that, as defined, a framework agreement normally places no obligation on the authority to purchase. It simply sets out the terms and conditions which apply if it does purchase. This gives the authority the scope to go elsewhere if it can achieve better value for money in that way. If that flexibility is not required, a framework agreement may not necessarily be the best option.
- Questions on the ability to reserve contracts to sheltered workshops under framework agreements will need to be considered further.

Section 11. Article 33. Dynamic Purchasing Systems

- Responses generally welcomed the inclusion of the Dynamic Purchasing System (DPS) option in the new Directive. However, virtually all of them called for further clarification and guidance on this article.
- On the specific areas needing clarification, it was felt that the "exceptional circumstances", to justify having a DPS longer than four years, needed further explanation. It was also important to be clear about the rules on the length of contracts within the DPS. Are there any restrictions to the length of those contracts? Was there a definition for "commonly used purchases"? How does the simplified contract notice get published? What does "solely electronic means" mean? Does it mean that no manual processes may be employed at any stage, or simply that all communications between participating parties must be made electronically? Can customers be charged for using a DPS by the authority setting up the system?
- There was some concern to ensure that SMEs and sheltered workshops can be included in these kinds of systems. One issue here was whether smaller firms (or larger firms and authorities, for that matter) yet had the e-systems necessary to take part. This linked to a need to ensure that documentation was made available in a format which could be accessed by disabled people.
- Another concern related to the need to keep the DPS open to new suppliers throughout its life. One response saw this as cumbersome.

Section 12. Article 40, Contract Documents

- The majority of responses (76%) agreed with the proposal to keep the term "contract documents" and its definition in the Regulations.
- The main concern related to whether "contract documents" and "descriptive documents" had the same meaning. It was pointed out that the definition of "contract documents" is in fact broader than what is meant by "descriptive documents" in the Directive. For example, "contract documents" includes specifications whereas the Directive refers to "the specifications or the descriptive document and any supporting documents".
- In the same way, "contract documents" was believed by some to refer to the documentation used throughout the procurement, from ITT to conditions of contract to description of goods required. This might cause a problem where the Directive requires information to be set out in the contract notice or the descriptive documents because transposing this as "contract documents" would include other documents issued later in the process which the Directive does not allow for. In these instances, we may need to clarify in the Regulations at what stage the information needs to be made available.

- There was a question about whether the definition of "contract documents" should be extended to include suppliers' proposals and cost schedules. The current definition only includes documentation issued by the contracting authority and the Directive term "descriptive documents" similarly originates from contracting authorities. The Directive text keeps the documentation from suppliers separate. We therefore aim to repeat the Directive approach.
- It was considered to be important that whatever term is chosen should be used consistently. The Directive refers variously to the "descriptive document", the "contract documentation" and the "contract documents".
- A request was made to replace the phrase "technical specification" with "technical requirements" or "technical requirements in the specification" because "specification" is the word used for the whole document setting out what the contractor is required to do. The phrase "technical specification" might therefore give the incorrect impression that specification only deals with "technical" matters rather than additional issues like quality or delivery.
- An alternative definition for "contract documents" was suggested: "The commercial terms and conditions for trading together with the supply and/or service schedules which define what, how, where and when goods/services are to be delivered and at what price".
- One respondent wished to clarify that "all documents supplementary thereto" would cover Pre Qualification Questionnaires, Information Memoranda and Prospectus.
- There was a request to maximise information requirements relating to the specification of social, employment and environmental considerations in the contract documents.

Section 13. Article 45, Mandatory Exclusion

- OGC would point out that it is mandatory on Member States to implement this provision and the comments received therefore focused on what information the Regulations or guidance on this Article would need to contain. Most responses expressed an interest in the outcome of ongoing discussions with the Home Office on how this Article could work in practice.
- It was felt that guidance would need to explain what being aware of relevant convictions of candidates entails. It would also need to make clear what the test would be to show that candidates had made a reasonable effort to rectify matters related to their convictions.
- Several responses additionally requested a definition of "competent authorities". The identification and contact details of competent authorities in all Member States was requested.
- Another point raised was whether contracting authorities should only make themselves aware of suppliers convicted in Member States or should they also make themselves aware of suppliers convicted worldwide?
- It was felt that any guidance would need to clarify what is meant by the derogation on the basis of general interest. One response requested that this derogation should not be implemented.
- There was a question as to whether the convictions under Article 45 were time bound. There was also a question about what to do if a conviction subsequently comes to light after contract award.
- Clarification was also requested on what is meant by "candidate or tenderer" e.g. does this apply to the owners or managers of an economic operator, does it apply to any

employees involved on the contract or does it apply to all employees?

- Several responses questioned the effectiveness of this Article in practice. It was felt that a national list of compulsorily disqualified contractors would be the only way to make this Article effective.
- Several responses also questioned how other Member States were intending to implement this Article. Again the effectiveness of this Article was questioned if there was not a consistent approach within the EU and if the information on exclusions across Europe was not collected and made available to others.
- There was also a concern that referring queries about convictions to competent authorities would lead to undue delays.
- There was a request for additional guidance on the voluntary exclusions, which already exist in the current Directives and Regulations.

Section 14. Article 54. e-Auctions

- None of the responses actually objected to the proposal to fully implement this Article and the majority explicitly welcomed this provision.
- The longstanding concern that e-auctions are not suitable for construction contracts was again raised in this consultation. OGC has already pointed out that e-auctions do not have to be used for works contracts or, for that matter, for any contracts. The article simply clarifies their use under the EC rules.
- Several responses called for clear, practical guidance. There was one request for guidance on the use of e-auctions under a framework agreement, where qualitative evaluation criteria are not tested as part of the e-auction process. There is already guidance on e-auctions but this will be reviewed in the light of implementation and this consultation.
- One response raised a concern about accessibility for the disabled. They felt that contracting authorities should be prepared to make the tendering documentation available in formats which can be accessed by disabled people who may be involved in the tendering exercise e.g. as bidders, employees of tenderers or employees of contracting authorities.
- There was concern expressed in one response that the use of e-auctions might work against the government policies aimed at assisting SMEs. However, as most of the consultation responses recognised, e-auctions can bring substantial benefits when used appropriately. And there is no obligation to use them. The extent contracting authorities choose to use this Article is not within the control of implementation and respondents need to look for other ways to influence decisions on their use.
- There was a concern that e-auctions will lead to the disregard of the significance of qualitative evaluation. OGC has already made clear that e-auctions fit with value for money and the need to take account of qualitative criteria where appropriate. The new Article provides for this. Guidance on e-auctions should already make this clear.

Utility Directive

There were a large number of consultation issues that were common to both the utilities and public sector consultation documents. Many responses therefore stated that their comments related to both Directives and it is not worth restating those responses here. There were however nine responses which explicitly responded to the utilities consultation document, and the key points from these responses are recorded below. Responses on the three issues which were exclusive to the utilities Directive are also discussed below.

Section 4. Signalling Coverage

- More responses were in agreement with our proposals to maintain the structure in the existing Regulations to indicate coverage than were against it.
- Some respondents commented that the approach in the existing Regulations was easy to follow and suitable for a business sector which continues to experience structural change. Others found the current system cumbersome and prefer the simplified approach in the new Directive. They would like a list of entities to which the Regulations would apply and also a provision in the Regulations as to how, when and by whom updates of this listing would be undertaken.
- The only other issue raised was the amended definition of special or exclusive rights. It was felt that it would be helpful to the contracting community for implementation or accompanying guidance to clarify that there is a difference between a) contractual rights under a contract awarded by the state and b) special or exclusive rights which derive from legislative / administrative action by the state. This distinction was said to be made clear in Recital 25.

Section 5. Article 14, Framework Agreements

- All respondents were in favour of the proposal to spell out, rather than to cross refer to, points about not needing calls for competition for call-offs where the framework itself has been advertised and awarded under the rules. The importance of this point being clearly signalled was emphasised.

Section 6. Article 15, Dynamic Purchasing Systems

- All responses supported the proposal to implement this Article although several had doubts about whether Dynamic Purchasing Systems would be useful.
- It was commented that there was little difference between this and the existing qualification system yet, with DPS, the requirement to advertise twice seemed administratively onerous and complex. The four-year limit was not seen as consistent with the principle that, unlike with a framework agreement, a DPS is continually open to new economic operators.
- Although the process was recognised as complex, it was felt that it was sufficiently clear and should not be refined given the risk of going beyond the Directive text or limiting the flexibility of the Article.

Section 7. Article 17, Method of Calculating Contract Value

- The majority of respondents agreed with the three proposals made regarding terminology in this Article.
- "Consideration" was thought to represent the intent of the drafters and it was commented that, as the idea of this Article is to regulate all procurements, it would be counter to that aim if entities could avoid the Regulation by not paying sums e.g. granting rights in relation to intellectual property. On the other hand, there was concern that this substitution would put the Government in danger of over implementation and that this term was ambiguous and could lead to argument over the monetary equivalent.
- "Value" was thought to fit best with the concept of "consideration". It was highlighted that "cost" and "value" do not mean the same thing: value being what something is worth to a customer and cost being what a customer has to pay. One respondent therefore thought that "cost" should be used since that is actually what is measured in practice.
- It was agreed that the Commission needs to be consulted regarding "financial year". However, two respondents questioned whether it was actually in our interest to implement

the text as it stands because it could be seen to give more flexibility.

Section 8. Article 23, Affiliated Undertakings

- The majority of responses agreed with our proposal to copy out the Directive text because it was believed to be sufficiently clear. There was an additional concern that elaboration might actually cause confusion.
- The only other clarification sought concerned the wording on joint ventures (Article 23 (4) (b)) as to whether the exception would be available in a situation where a joint venture formed is not itself performing a utility function covered by Articles 3 to 7. The question revolved around the wording "for the purposes of carrying out activities within the meaning of Article 3 to 7" which could imply that the joint venture must be carrying out these activities or simply that the joint venture is contributing to the performance by the parents of their utilities activities. It was requested that clarification on this issue should be in the Regulations themselves rather than in accompanying guidance.

Section 9. Article 28, Reserved Contracts and Sheltered Workshops

- Only one respondent commented on this Article and supported the proposal that utilities should be free to choose whether to use this Article without being compelled to do so.

Section 10. Article 29, Central Purchasing Bodies

- No objections were made to the implementation of this Article.
- There was concern expressed about arrangements with other bodies which are not contracting authorities. There was a request that the Regulations spell out that, although this Article applies to CPBs which are contracting authorities, arrangements with other purchasing organisations are free to continue under the principle that the contracting entity using such organisations is responsible for compliance with the EC rules, as is the case at present.
- The use of CPBs by utilities was thought to be unlikely because agreements would be restricted by other rules such as cross default provisions contained within licences.

Section 11. Article 30, Exemption Mechanism

- This Article was well received and all responses were in favour of allowing utilities to make direct requests to the Commission for exemption as well as being able to go through the Government. In particular, respondents welcomed the possibility of cutting out a bureaucratic stage and of being able to demonstrate directly to the Commission that the market in question is operating on a commercial basis and not run by the Government. One respondent thought that all utilities should be obliged to consult with the Government before making a direct request in order to ensure a co-ordinated approach.
- Several respondents took the opportunity to give the Government advanced notice of forthcoming exemption requests which they are planning to make. On this point, it should be highlighted that requests from Utilities direct to the Commission will not be possible until the Directive has been implemented. In the same way, the Commission is still in discussion with Member States about what information will be necessary for exemption requests and it is therefore not yet possible to give out these details. You will however be consulted / advised about procedures as soon as it is appropriate.
- Several responses expressed concern about the Commission's capability in dealing with these requests and asked that the Government emphasise to the Commission the importance of administering this process in a transparent and timely fashion.

- There was a question about what would happen if the Government refused an application and whether it could still be taken to the Commission. One respondent thought that the decision on this needed to be written into the Regulations.
- There was a request made for OGC to establish a single point of contact or help desk for dealing with exemptions. This would be to ensure the collation of all intelligence and know-how at one point within OGC and facilitate communication with industry.
- There was also a question concerning the effect of the “market access” legislation (Annex 11 of the new Directive) and whether implementation of this legislation will be considered sufficient evidence alone of non-restricted access to a market.

Section 12. Contract Documents

- All respondents agreed with the proposal to use "contract documents" and retain the definition used in the current Regulations. It was thought that the change in wording in the new Directive was not significant, that it is better to keep the definition broad and that the current terminology is already understood and should therefore be left in place.

Section 13. Article 39, Obligations relating to tax, environmental protection etc.

- All respondents supported the proposal to retain the current discretion, rather than obligation, in deciding whether to state where information on taxes etc. may be found.

Section 14. Article 56, e-Auctions

- All responses welcomed this Article and the proposal to fully implement it and retain the flexibility which the Directive text allows.
- A request was made for a range of mathematical models to be made available for evaluation of non-prices criteria. This is outside the remit of the implementation of the Directive and will not be included in the Regulations. However, OGC will consider whether to include this in guidance.

A question was also asked about the wording allowed for e-Auctions in OJEU notices. This issue had separately been raised in relation to the public sector directive. OGC has advised that the phrase "The Contracting Authority/Entity intends to use an electronic reverse auction in this procurement exercise" is used.

Other issues raised

- There was strong interest in the separate implementation of the new Directives in Scotland. OGC is working closely with the Scottish Executive to achieve consistent implementation.
- Some responses requested the early implementation of certain Articles. However, it will not be possible practically to implement the Directives significantly before the deadline of January 2006 and, indeed, early implementation would be unlikely to give sufficient time to procurers to prepare for the new elements. There are, however, several elements of the new Directives which are “clarifications” rather than substantive new requirements. Central Purchasing Bodies, Framework Agreements, e-Auctions and social and environmental factors can all be included in this category. This means that contracting authorities are able to make use of these elements before implementation. Where contracting authorities choose to make use of these elements, we are recommending that they follow the rules as set out in the new Directive text until the Regulations are implemented.
- There was concern and confusion about the impact of the Teckal Case C – 107/98. This was a European Court of Justice case where one of the issues, which the judgement had implications for, was in-house arrangements. Several respondents pointed out that this

may have considerable implications for local government and the Efficiency plans because these depend to a large extent on partnering, joint ventures etc which need to be carefully considered in the light of Teckal. The importance of this issue will be drawn to the attention of the Efficiency Team.

- There was a query about what would be considered as meeting a standard “in an equivalent manner” and whether OGC could supply general criteria that would be considered acceptable for the measurement of equivalency. The principle of equivalence is not new under the EC rules, although the new Directives strengthen the requirements here. OGC cannot supply these criteria as they will obviously vary from contract to contract. The bids should be judged on the basis of whether they meet the underlying need as articulated in the specification. If the evidence supplied is evaluated and it is believed that what is being offered does not comply, there is no need to proceed with the evaluation of that bid.
- There were responses which highlighted the accessibility element of Article 23. Respondents were keen to ensure that public procurers took account of the phrase “Whenever possible these technical specifications should be defined so as to take into account of accessibility criteria”. OGC is currently producing guidance for public procurers on social issues in purchasing and this will highlight the importance of considering and incorporating accessibility requirements as early as possible in procurements. This guidance will also cover the scope to take account of social and environmental considerations in contract conditions, as outlined in Article 26, and on the scope to consider these issues at the award stage.
- In relation to Article 26, on contract conditions, there have been suggestions that the inclusion of social and other issues should be made obligatory. It is important to remember that the article is simply making it clear that, although contract conditions are not covered specifically by the procedural rules in the directives, there is scope to include relevant environmental and social matters in them where they are in conformity with EC Treaty principles.
- OGC would like to clarify that the provision of “public telecommunications networks or ...services” is not a reference to the call centres set up by Government Departments and agencies to deal with the public. It is referring to the telecommunications industries which used to be nationalised in many Member States but which are now subject to competitive markets and accompanying legislation. Compliance with EC procurement rules has, therefore, been judged unnecessary. Contracting authorities procuring telecommunications goods and services are however still covered.

Office of Government Commerce
27 October 2004