

Response to Consultation

Draft Regulations implementing the new Public Sector and Utilities Procurement Directives

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1. Introduction

This document summarises and provides some commentary on the responses to a consultation exercise on the two sets of draft Regulations implementing the revised Public Sector and Utilities Procurement Directives¹. The consultation exercise, which ran from 20 June until 12 September 2005, invited views on the content, structure and ease of use of the draft Regulations, particularly on the new provisions².

In total, 79 responses were received from a wide range of interested parties including Central Civil Government, Local Authorities, NHS PASA, purchasing organisations, business and industry groups, anti-corruption bodies, trade unions, utilities, law firms and a small number of private individuals.

The Office of Government Commerce (OGC) would like to thank all those who sent in responses. All points made have been noted even if they are not explicitly referred to in this summary document.

In this note we have addressed the main issues raised, but individuals may need to pursue some of their more detailed points on the new Directives and Regulations with their legal advisors. Queries may also be directed to OGC via our Service Desk (telephone 0845 000 4999, email servicedesk@ogc.gsi.gov.uk).

This consultation followed an earlier exercise on the approach to take in implementing the Directives in 2004³. In this paper we do not generally repeat here points made in OGC's response to the earlier consultation.

As explained in the consultation document, the Directives have already been adopted at European level and cannot be changed in the implementation process. The Directives are based on the principles of transparency, non-discrimination, competitive procurement, and achieving value for money for the taxpayer, on whose behalf the public sector buys goods and services.

The Directives can be clarified in the implementing Regulations where appropriate, although in line with general government policy on the implementation of Directives and the better regulation agenda, we have avoided unnecessary elaboration, or any elaboration which risks being at odds with the meaning of the Directives. To add into the Regulations provisions that are not in the Articles of the Directives risks either non-compliance with the Directives or restricting the public sector's ability to take advantage of the flexibility permitted by the Directives. It should also be stressed that, whatever their merits, the Government does not have the power to include issues in these Regulations that are not covered in the Directives.

The Regulations will now be finalised and laid before Parliament to meet the implementation deadline of 31 January 2006. The final Regulations will be published on the website of the Office of Public Sector Information (<http://www.opsi.gov.uk/>). They are expected to come into force on 31 January 2006.

We intend to provide guidance to procurers on the new provisions in the Directives as soon as possible. This will be available on OGC's website (www.ogc.gov.uk) and will also be circulated to central Government Departments, for onward transmission to Local Authorities, Executive Agencies, Non-Departmental Public Bodies and other relevant organisations. In the meantime, detailed guidance on existing EU provisions is available in OGC's Introduction to the EU Rules and guidance on the new provisions is available in OGC's Training Module on the New Public Procurement Directives⁴.

¹ These are the revised Public Sector Procurement Directive, otherwise known as the 'Consolidated Directive', (2004/18/EC) and the revised Utilities Directive (2004/17/EC).

² New provisions on: reserved contracts; competitive dialogue; framework agreements; dynamic purchasing systems; electronic auctions; central purchasing bodies; mandatory exclusions for offences relating to fraud or corruption (personal situation of the candidate or tenderer); obligations relating to taxes etc; sub-contracting. The Utilities Regulations also include a new exemption mechanism.

³ This consultation document is available at: <http://www.ogc.gov.uk/index.asp?docid=1002407>.

⁴ These documents are available at: <http://www.ogc.gov.uk/index.asp?id=1000084>.

Northern Ireland and Wales will be implementing with England while Scotland has elected to implement the Directives separately. The draft Scottish Regulations have been the subject of separate consultation⁵.

Please note that unless otherwise stated, references below to particular Article and Regulation numbers refer to the Public Sector Directive and draft implementing Public Sector Regulations.

2. General comments

The general view from respondents was supportive of the draft Regulations and of OGC's approach to detailed implementation. In particular, a number of respondents commended the fact that the text of the Regulations keeps closely to that of the Articles in the Directives, with clarification largely planned for guidance. It was commented that this will minimise unhelpful differences of interpretation arising between the Regulations and the Directives. It also allows guidance to be developed to reflect EU jurisprudence, rather than having to amend the Regulations as further case law emerges.

The majority of responses agreed with our approach of making the Regulations as flexible as possible for contracting authorities by implementing all the optional provisions in the Directives.

Several respondents referred to the Recitals of the Directives and stated that particular sections of these should be included in the Regulations. Only the Articles and Schedules of Directives require transposing into implementing Regulations. As pointed out above, elaboration (eg by including Recital provisions in domestic law) only risks restricting, rather than enhancing, what public authorities are permitted to do. Consequently, to avoid this risk the content of the Recitals is more appropriately conveyed in guidance. Key points from the Recitals referring to social and environmental criteria, particularly Recitals 33 and 34, will be reflected in OGC's forthcoming Guidance Note on Social Issues in Purchasing. .

Some responses expressed concern about the cost of complying with provisions such as electronic auctions and framework agreements. We would like to stress that these provisions are all optional and should be used only where they represent value for money. As such, there are no compliance costs for contracting authorities.

3. Structure and ease of use of Regulations

The draft Regulations were structured to reflect the stages of the procurement process, in line with the current UK Procurement Regulations⁶. Several respondents explicitly approved of this structure, commenting that it is more logical and easier to follow than the structure of the Directives.

However, several respondents expressed concern that important provisions on social and environmental criteria⁷ appeared to be relegated to the end of the Regulations and listed under a section called 'Miscellaneous' (Part 7 of the draft Regulations). This is for the reason of ordering noted above and is not intended to carry any implication that these social and environmental aspects are less important than other provisions, nor does it mean that in law. For the avoidance of doubt, however, we will bring draft regulations 38 (on Obligations relating to taxes etc) and 39 (on Conditions for performance of contracts) out of the grouping of 'Miscellaneous' provisions and will put them in a new section with a more precise heading. It should be pointed out that social and environmental

⁵ Please see <http://www.scotland.gov.uk/Topics/Government/SPD/17555/19895>.

⁶ Public Works Contracts Regulations 1991 (SI No. 1991/2680); Public Supply Contracts Regulations 1995 (SI No. 1995/201); Public Service Contracts Regulations 1993 (SI No. 1993/3228); Utilities Contracts Regulations 1996 (SI No. 1996/2911) as amended by Utilities Contracts (Amendment) Regulations 2001 (SI No. 2001/2418).

⁷ Draft regulation 38 (Obligations relating to taxes, environmental protection, employment protection and working conditions), draft regulation 39 (Conditions for performance of contracts) and draft regulation 45 (Sub-contracting).

aspects also appear at various stages of the procurement process in these Regulations, in line with what the Directives allow.

Several respondents asked for the provision on abnormally low tenders (Article 55 of the Public Sector Directive) to be a stand-alone regulation, as it is in the Directive. We have considered this option, but believe it is more logical for this provision to be retained within the regulation on award criteria (draft regulation 30), because a bid may be excluded from the competition on these grounds.

4. Definitions

Several responses queried the use of the terms 'contractor', 'services provider', 'supplier' and 'economic operator' in the Regulations. We would like to clarify that these terms have all been defined in draft regulation 2 (Interpretation). The term 'contractor' is used in relation to public works contracts; 'services provider' in relation to public services contracts; and 'supplier' in relation to public supply contracts. The term 'economic operator' (defined in draft regulations 2 and 4) is used when reference is needed to all three entities. The distinction between these four terms is maintained throughout the Regulations.

Several responses explicitly agreed with the definition of 'buyer profile' in draft regulation 2, while some others suggested alternatives. In view of comments made in this consultation exercise, we agree that the term should be further clarified.

It was pointed out that the definition of 'award' needs revisiting in the light of the 'Alcatel' requirement to have a standstill period between the identification of the winning tenderer and the actual conclusion of the contract. We agree and this will be reviewed before the final Regulations are made.

In relation to draft regulation 3 (Contracting authorities), two responses asked why Scottish bodies were included in the list of contracting authorities in draft regulation 3 and suggested that this could be confusing. OGC's view, and that of the Scottish Executive, is that contracting authorities need to be listed in both the Regulations applying to England, Wales and Northern Ireland and those applying to Scotland. This is because the Scottish Regulations will apply to public contracts 'in or as regards' Scotland, and the Regulations applying to England, Wales and Northern Ireland state that their application does not extend to Scotland. Therefore, if Scottish public bodies were not listed in the Regulations applying to England, Wales and Northern Ireland, a contract awarded by a Scottish public body for performance in England, Wales or Northern Ireland would not be covered by the Regulations.

5. Article 11 / draft regulation 22 (Central purchasing bodies)

Many respondents agreed with the need for guidance on central purchasing bodies (CPBs). Guidance was thought to be needed on the mechanics for setting up a CPB in practice, on the need for transparency, and on whether contracting authorities still need to enter into direct contractual arrangements when using a CPB. These issues will be considered in drafting the guidance.

Various responses raised the issue of who would be responsible if the CPB did not comply with the rules. We are considering this point and will include it in guidance.

Several respondents were unclear whether only a contracting authority could act as a CPB. We can confirm that only a contracting authority can be a CPB – this is made clear in Article 1(10) of the Directive – but there is nothing to prevent a private sector body from acting as an agent for contracting authorities.

As stated in the consultation document, guidance will cover how CPBs can provide goods and organise framework agreements for other contracting authorities in compliance with the rules.

Some responses asked why the regulation referred to both "work and works". This is an intentional clarification in the Regulations. "Works" is defined in draft regulation 2 as meaning any of the activities

specified in Schedule 2; “work” is intended to be a more general term, to cover any works not listed in Schedule 2.

In response to queries raised, we can confirm that all contracting authorities awarding framework agreements must comply with the rules in the Regulations on such agreements, whether or not they are operating as a CPB.

6. Article 19 / draft regulation 7 (Reserved contracts)

This provision was welcomed by all those who commented on it, and one response said it was “a vast improvement on the current Special Contracts Arrangement scheme”.

Several respondents asked for the Regulations to use the word “supported”, rather than the term “sheltered” which was used in the Directive. Accordingly, we intend to modernise the language used in the Regulations.

The guidance on reserved contracts will make clear that the provision can apply to all procurement approaches such as framework agreements, dynamic purchasing systems and the use of central purchasing bodies.

To answer queries raised in several responses, we can confirm that contracts reserved under this provision will need to follow the award procedures set out in the new Regulations and be open to similar organisations across the European Union.

7. Article 25 / draft regulation 45 (Sub-contracting)

The responses explicitly commenting on the optional nature of this provision for contracting authorities were equally split between those who agreed with the approach and those who believed it should be mandatory. As the majority of responses to the consultation were in favour of giving contracting authorities the maximum possible flexibility generally, and since 62% of responses to the 2004 consultation explicitly agreed that Article 25 should be implemented as optional, we intend to retain the optional nature of the provision in the final Regulations.

It was suggested that it would be more useful if contracting authorities could request information on the proportion of work which would be allocated to sub-contractors at selection stage, as this would more easily allow them to check the technical ability of proposed sub-contractors. We would like to remind parties that the information on sub-contracting provided for in Article 25 may only be sought at the tender stage, and that the intention of the provision is only to allow data to be collected (e.g. for statistical purposes). Contracting authorities may not take the information into account when awarding the contract.

In order to assess at selection stage whether candidates will be able to perform the contract, contracting authorities may request information about the technical ability of any organisation who will be performing the contract, including proposed sub-contractors, just as they may for the main economic operator.

8. Article 27 / draft regulation 38 (Obligations relating to taxes etc)

Of the responses explicitly commenting on the optional nature of this provision in the draft Regulations, slightly more supported a mandatory, rather than an optional, approach. However, as 70% of responses to the 2004 consultation agreed that the provision should be implemented as optional, and since the majority of responses to this consultation were in favour of allowing contracting authorities the maximum possible flexibility generally, we intend to retain the discretion for contracting authorities. This repeats the approach taken in the current Procurement Regulations to providing

information on obligations relating to employment protection and working conditions, and squares with the devolved responsibility for procurement decisions.

Several respondents commented that the wording of draft regulation 38 was slightly different to the Directive text and inadvertently increased the regulatory requirement on suppliers. We will amend the Regulations to avoid going beyond what is required by the Directive.

9. Article 29 / draft regulation 18 (Competitive dialogue)

Many responses asked for clear guidance on competitive dialogue, to cover both how it will work in practice and to give clarity on some of the terminology in the Directive and Regulations. Almost all those who commented requested a flexible interpretation.

Several respondents highlighted that a number of major projects, such as Building Schools for the Future, are currently being procured and involve PFI contracts. It was felt guidance needed to be provided as soon as possible if the competitive dialogue procedure needed to be used for these projects. OGC has advised against using the competitive dialogue procedure before the Regulations implementing the new Directives come into effect.

We recognise the need for guidance on competitive dialogue and intend to supply it before the Regulations come into force. As stated in the consultation document, this guidance will include:

- an explanation of the differences between the competitive dialogue procedure and the negotiated procedure;

- clarification of how competitive dialogue applies to PFI / PPP projects and whether the competitive negotiated procedure will still be possible for PFI / PPPs;

- clarification of terms such as “particularly complex contracts”, “technical means”, “legal and/or financial makeup”;

- what is meant by contracting authorities being allowed to “specify prices or payments”;

- an explanation of the process of applying award criteria to reduce the number of potential solutions, prior to the final invitation to tender;

- the scope for post-tender negotiations, and what is meant by being able to “clarify aspects” or “confirm commitments” of the tender.

Some respondents asked that we include a definition of “particularly complex contracts” in the Regulations; however, as two others pointed out, a definition of this term is already given in draft regulation 18(1). We do not intend to provide a further definition in the Regulations, as this could inadvertently restrict the scope to use competitive dialogue, but the issue will be covered in the guidance.

In addition, respondents requested that guidance cover:

- what is meant by “descriptive documents”;

- how to safeguard Intellectual Property Rights during the dialogue;

- advice on how contracting authorities can limit up-front bid costs;

- the link to the European Commission’s Green Paper⁸ on PFI / PPPs;

⁸ COM(2004)327

the possibility of reimbursing participants' expenses, the timing of such payments, and what is covered by 'expenses';

what to do if ultimately no suitable tenders are submitted under the dialogue.

We will consider all these additional points in drafting the guidance.

In relation to section 3.2.5 of the consultation document, which explained that the UK lobbied hard to ensure the Directive text on competitive dialogue fitted as closely as possible with UK best practice on the award of PFI and PPP contracts, some responses referred to the Warwick Agreement⁹, which included a commitment to ensure a level playing field between PFI / PPP and conventional procurement options. Here we are simply giving effect to the new provision in the Directive, which applies equally to all particularly complex procurements whether PFI/PPP or not, so is entirely consistent with the Warwick Agreement.

Several respondents enquired why draft regulation 30(1) on award criteria referred back to paragraphs (6) and (9) of regulation 18 on competitive dialogue. This reflects the provision in Article 29 that contracts under the competitive dialogue may only be awarded on the basis of 'most economically advantageous tender' (MEAT), and not on the basis of lowest price. This is in contrast to the open, restricted and negotiated procedures, where the Directive provides that both options are possible. To make this reference clearer in the final Regulations, we intend to replace the words "subject to regulation 18" in draft regulation 30(1) with the words "subject to regulation 18(27)".

Several respondents expressed concern over whether the competitive dialogue procedure may be used for procurements other than PFI / PPP contracts. The competitive negotiated procedure has been successfully used on a number of non PFI/PPP contracts in the UK and elsewhere. We believe that competitive dialogue is more widely available as a procurement route than the competitive negotiated procedure, and guidance on the meaning of "particularly complex contracts" will make it clear that neither option is restricted to PFI/PPP.

Draft regulation 18(21)(a) provides that during the dialogue contracting authorities "may discuss all aspects of the contract with the participants selected". We can confirm that this includes price.

Several responses also raised the issue of how the Freedom of Information Act 2000 interfaces with the requirement for confidentiality during the dialogue. As the requirement for confidentiality is set out in the Directive, we can confirm that any information requested under the Freedom of Information Act would not be released during the period of time set out in the Directive, under the exemption set out in section 44 of the Act. This is an absolute exemption and no public interest test would be required.

10. Article 32 / draft regulation 19 (Framework agreements)

The inclusion of framework agreements in both the Directive and the Regulations was welcomed by respondents.

Several conflicting views were expressed on the definition of framework agreements in the draft Regulations, and on the issue of whether a framework agreement can be a contract. We accept that it is possible for a framework agreement to be a contract, for example where a framework agreement places an obligation on the contracting authority to purchase goods, works or services for pecuniary interest. However, where this is the case, the framework agreement (or framework contract) can be treated in the same way as any other contract under the EU rules and we believe that the framework agreement provisions in Article 32 of the Directive are meant to apply to framework agreements which are not themselves contracts as defined by the Directive.

It was also suggested that a framework agreement which does not place an obligation to purchase items for pecuniary interest could still be a contract under UK law. We agree that this is possible, but

⁹ The Warwick agreement was negotiated in July 2004, between the various component parts of the Labour party, including the Labour government and the trade unions.

in this case it may still not be a public contract for goods, works or services falling within the scope of the EU rules.

Many respondents stressed the need for clear guidance on framework agreements, particularly in relation to the “exceptional circumstances” under which a framework agreement may be set up for longer than four years. Several respondents said that the use of framework agreements is a source of confusion for contracting authorities, especially where framework agreements are being established to deliver significant sized projects such as Partnerships for Schools. We agree that further guidance on framework agreements is necessary and, as stated in the consultation document, we intend to update the existing guidance¹⁰ to include:

- clarification of the “exceptional circumstances” for agreeing frameworks of more than four years;
- how to categorise goods and services within a framework;
- aspects of running a mini-competition;
- the fact that framework agreements can be reserved for supported employment businesses and factories;
- the requirement to include a specified period of time and value in contracts called off under the framework;
- what is meant by “contracting authorities shall consult in writing the economic operators capable of performing the contract”;
- the use of pricing mechanisms.

In view of responses to the consultation on the draft Regulations, the guidance will also cover:

- the circumstances under which a mini-competition is required, and the extent to which the initial terms of the framework agreement may be redefined;
- in terms of who in the framework agreement is invited to participate in mini-competitions, how contracting authorities will know which parties are ‘capable of performing the contract’;
- whether contracting authorities may use other contracting authorities’ frameworks if they themselves were not specifically listed in the OJEU notice;
- how the Alcatel standstill period applies to framework agreements;
- whether contracting authorities can procure longer term call-offs given the four year limit on framework agreements;
- whether framework agreements set up before the implementation of the new procurement Regulations can continue to run.

The queries on framework agreements most frequently raised during the consultation exercise are also answered below.

Framework agreements can be concluded with either a single provider or with several providers, for the same goods, works or services. In the latter case, the Directive and implementing Regulations state that there must be at least three providers, provided that sufficient candidates have satisfied the selection criteria and have submitted compliant bids meeting the award criteria. Where frameworks

¹⁰ Available at: http://www.ogc.gov.uk/embedded_object.asp?docid=1000330.

are awarded to multiple providers, contracting authorities may either award call-offs directly to the supplier providing the most economically advantageous tender; or, where the terms laid down in the framework agreement are not sufficiently precise for the particular call-off and need to be refined or supplemented, contracting authorities must hold a mini-competition with all providers who “are capable of meeting the particular need”.

Mini-competitions need not therefore include every provider in the framework – only those “capable of meeting the particular need”. A framework may cover a number of different supplies or services, and there is no obligation to invite those providers who had not agreed, when the framework was awarded, to provide the particular supplies or services which are the subject of the call-off. It is not, however, possible to select a subset of suppliers to join the mini-competition on the basis of revisiting selection criteria such as technical capacity or financial viability.

When a call-off is awarded under a framework agreement, no basic terms can be renegotiated, nor can the specification set out in the framework agreement be substantively changed. But there is scope to supplement or refine the basic terms to reflect particular circumstances for the individual call-off. Examples of this would include amending or introducing particular delivery timescales, invoicing arrangements or additional security needs, or where the terms include a pricing mechanism.

When a framework agreement is set up, the OJEU notice must state the contracting authorities entitled to call-off under the terms of the framework agreement. These authorities can either be named individually, or a generic description may be used - for example, Government Departments, health authorities, all contracting authorities in a particular region and so on. Contracting authorities not covered by the original OJEU notice may not make use of the framework agreement; therefore, it may often be worth drawing the description in generic terms, to enable maximum take-up across the public sector. We would recommend that where generic terms are used the notice should include a reference to where details of the authorities covered can be found.

The OJEU notice must also include the estimated total value of the goods, works or services for which call-offs are to be placed. As with other contracts, this value should not normally be exceeded without a new competition taking place.

On the ‘exceptional circumstances’ needed for a framework agreement to run for more than four years, we believe that a longer duration could be justified in order to ensure effective competition in the award of the framework agreement where four years would not be sufficient to provide a return on investment. This would be likely to include large scale refurbishment and improvement programmes. Legal advice should be sought before letting a framework agreement beyond four years, particularly if the period is significantly greater than four years (which would tend to call into question whether a framework agreement is the most suitable form of procurement).

It was suggested that the draft Regulations removed the option, present in the Directive, for framework agreements to be set up with more than one provider. However, we believe the Regulations correctly transpose the possibility of having framework agreements with multiple economic operators: draft regulation 19(7) sets out the conditions for “when the contracting authority concludes a framework agreement with more than one economic operator”.

It was suggested that guidelines on mini-competitions should be set out in the Regulations, rather than just in accompanying guidance. We do not intend to include these in the Regulations, as to do so could inadvertently reduce the flexibility within the provision represented in the Directive text.

One respondent cited experience of contracting authorities awarding framework agreements but then deciding to contract outside the framework for the same products. Assuming that the framework agreement was not in itself a contract, this approach is entirely legitimate. The obligation on contracting authorities is to secure the best possible value for money; they are free to use framework agreements when these provide value for money, and to go elsewhere if they do not, regardless of whether or not they have been included in the list of authorities covered.

One respondent enquired whether separate guidance would be provided on the frameworks provision in the Utilities Regulations (draft utilities regulation 18). As this provision is not new in the Utilities Directive and implementing Regulations, we do not intend to issue specific guidance on framework agreements for utilities.

11. Article 33 / draft regulation 20 (Dynamic purchasing systems)

As stated in the consultation document, guidance on dynamic purchasing systems (DPS) will include:

clarification of the "exceptional circumstances" needed to justify the continuation of a dynamic purchasing system (DPS) which operates for longer than 4 years;

clarification on the length of contracts within the DPS, and whether there are any restrictions to the length;

how the simplified contract notice gets published;

what is meant by "commonly used purchases" and "solely electronic";

whether customers can be charged for using a DPS by the authority setting up the system.

Responses generally welcomed the fact that these points will be covered in guidance. Several respondents suggested that examples of "commonly used purchases" could be usefully included, and it was also pointed out that guidance should cover Intellectual Property Rights Protection, Data Protection and confidentiality.

In response to queries raised, we would emphasise that any economic operator is entitled to be considered for admittance into a DPS throughout its life. This is an intentionally different system to framework agreements, where only those providers originally party to the agreement may be approached for call-offs made under the agreement.

One respondent also asked whether a contracting authority, in deciding which tender "best meets the award criteria" should still use either the lowest price or the most economically advantageous tender (MEAT) award criteria set out in draft regulation 30. We can confirm that this is the case, although we would remind parties that UK policy is to award all public contracts on the basis of MEAT rather than lowest price alone, as the former equates to value for money.

12. Article 45 / draft regulation 23 (Personal situation of the candidate or tenderer)

Draft regulation 23, implementing Article 45, contains a provision on mandatory exclusions for certain offences relating to fraud and corruption. Several responses suggested that the list of offences in draft regulations 23(1) needs extending to cover areas such as cartel offences and certain parts of the Anti-terrorism, Crime and Security Act 2001 and the Proceeds of Crime Act 2002. We would like to stress that only offences within the meaning of Article 45 of the Directive can be grounds for exclusion under this provision, but we will reconsider the list of offences in draft regulation 23 before the final Regulations are made.

Several respondents also suggested the Regulations should make clear whether spent convictions are grounds for exclusion. We are considering whether this should be the case.

Article 45 of the Directive includes an optional provision for Member States to derogate from the mandatory exclusions provision on grounds of "overriding requirements in the general interest". We believe this derogation is intended to cover situations such as national emergencies and the preservation of life and security. Such situations are provided for more generally in Article 30 of the Treaty of Rome. In line with the Government's approach towards implementation of the Directives

generally, we have transposed all the optional provisions in the Directive as these can provide benefits for contracting authorities. This general approach was supported in the 2004 consultation exercise, and by the majority of responses to this consultation. Of those who specifically commented on the derogation in this consultation, three respondents regretted its inclusion in the draft Regulations and three actively supported it. A small number of responses thought that the circumstances under which the derogation could be used should be referred to in the Regulations. As these circumstances are not listed in the Directive text, we do not intend to build them into the final Regulations. We do, however, intend to provide guidance on the derogation and will make clear that it should only be used in exceptional circumstances such as those related to national emergencies.

Many responses stated the need for guidance on the whole of draft regulation 23 implementing Article 45, including on the use of the derogation, and we agree that this is essential. Several detailed responses set out views on what the guidance on Article 45 should cover and some responses raised complex points, some aspects of which had not previously been submitted. In view of this, we intend to discuss issues further with those who responded in detail before the final guidance document is produced. These discussions should include:

what, if any, pro-active steps contracting authorities should take to check bidders' convictions;

the process for checking records with the Criminal Records Bureau (CRB), including the level of disclosure;

how contracting authorities can access records in other Member States;

the extent to which convictions from competent jurisdictions outside the EU should trigger exclusion, and the practicalities involved in finding out about such convictions;

whether sub-contractors should also be excluded, and the extent to which subsidiary, parent or sister companies should be covered by the provision;

what is meant by the application of the Article to "the economic operator, its directors or any other person who has powers of representation, decision or control of the economic operator";

what procedures contracting authorities should follow before deciding to use the derogation (one respondent suggested Ministerial approval should be required);

how to address the need for an appeals process, raised by several respondents;

whether the provision on mandatory exclusion will apply retrospectively, a point raised in several responses;

what time limits would be appropriate. Several responses made the point that the time limit for exclusion should vary depending on the offence, with very serious offences triggering a longer exclusion; and that it should reflect circumstances such as whether the conviction was for a repeat offence, whether the company reported the offence, and any mitigating steps the company had taken. It was also pointed out that the Government has an interest in encouraging providers to report and root out bad practice, rather than hiding it.

A number of responses asked us to consider whether pending convictions could be grounds for exclusion. In our view this would go beyond the scope of the Directive and we do not intend to include such a provision in the final Regulations. The issue will be considered for the accompanying guidance.

Several responses also raised the issue of how contracting authorities should go about accessing records of convictions in other EU Member States. We agree that this point is important, and raised it

for discussion at the last meeting of the European Commission's Advisory Committee on Public Procurement in October. We would expect the point to be included in the guidance on Article 45.

Concern was raised about whether information received from the Criminal Records Bureau would be subject to the Freedom of Information Act 2000 (FOIA). We can confirm that sensitive personal information is excluded from the FOIA and its disclosure is protected under the Data Protection Act 1998. We will make this clear in guidance.

It was commented that draft regulation 23(4)(a) made references to individuals rather than employees and one respondent asked whether this was intended to cover cases where the economic operator is a sole trader. We can confirm that the regulation was drafted to cover sole traders, directors and companies.

13. Article 54 / draft regulation 21 (Electronic auctions)

Several responses asked that either the Regulations or guidance state that electronic auctions are unsuitable for contracts that are labour intensive or involve the transfer of staff. Another response suggested e-auctions are inappropriate for certain types of supplies to the NHS. OGC does not intend to say that e-auctions are unsuitable for any type of contract beyond the exclusion for "intellectual performances" stated in the Directive¹¹, as to do so in the Regulations would narrow the scope of the Directive. However, our guidance will make clear that procurements using e-auctions should not be based on price alone, since contracting authorities must conduct an initial full evaluation of the tenders before starting the e-auction. It is in this full evaluation that, under UK policy, contracting authorities must look at all aspects of value for money, including quality and whole life cost. We would also like to highlight that the use of e-auctions does not absolve contracting authorities of any obligations relating to TUPE or the Code of Practice on Workforce Matters, where these apply.

Several respondents suggested that guidance on e-auctions should make clear how these work with different procedures, such as the negotiated procedure. As stated in the consultation document, guidance on e-auctions will be updated to cover the use of e-auctions under the different procurement procedures, including the negotiated procedure and framework agreements.

In addition, guidance will clarify what is meant by "precision" in draft regulation 21(4), which states that "the contracting authority may only hold an electronic auction to precede the award of a contract when the contract specification can be established with precision".

14. Social and environmental criteria

Respondents commenting on social and environmental issues broadly split into those who felt the Regulations should go beyond the scope of the Directives to take social and environmental criteria into account, and those who believed the Regulations as drafted correctly transpose the Directives' text and provide for issues which are relevant to the contract to be taken into account at the specification, selection and award stages.

A number of respondents stated that points from the Recitals of the Directive should be brought into the Regulations. For example, it was suggested that draft regulation 23 (Criteria for the rejection of economic operators) should include matters listed in Recital 34 such as the breach of laws on employment conditions; draft regulation 30 (on award criteria) was said to be missing wording from Recitals 1, 5, 6 and, in particular, the social criteria listed in Recital 46; and it was argued that draft regulation 39 (on contract conditions) should include wording from Recitals 33 and 34 about the scope to consider social and employment issues, including International Labour Organisation (ILO)

¹¹ Article 1(7) of the Public Sector Directive (Definitions) states that "certain service contracts and certain works contracts having as their subject-matter intellectual performances such as the design of works, may not be the object of electronic auctions".

Conventions, skills and training provisions, health and safety at work, and support for people who are unemployed and people with disabilities.

As explained in section 2, Recitals are not legally required to be implemented. The Government's general policy is not to include such provisions when implementing EU Directives as this could result (in this case) in contracting authorities inadvertently increasing the risk of legal challenge to procurements or awarded contracts when trying to take advantage of the flexibility to include social or environmental criteria. OGC's forthcoming Note on the scope to include social criteria in public procurement will cover aspects from the Recitals which are not part of the operative text in the Articles. This will build on a suite of existing guidance on the scope to take account of social and environmental issues under both current and new EU rules, which includes guidance¹² on environmental issues in purchasing, fair trade, adult basic skills and race equality in public procurement.

Many respondents commented that local authorities have powers under the Local Government Act to promote the social and environmental well-being of their communities. We would like to point out that the EU procurement rules do not prevent this, and it is beyond the Government's powers to include domestic legislation on local government when implementing these Directives, because the Directives do not refer to it.

Several respondents mentioned TUPE and the Code of Practice on Workforce Matters and said the Regulations should refer to these obligations. These obligations are already set out in other legislation, so their inclusion in these Regulations would serve no purpose. Moreover, as with the Local Government Act point above, the Government does not have the power to do so as part of the implementation of the new Procurement Directives, as these obligations are not listed there. However, the guidance on social issues will make clear that contracting authorities must comply with relevant social and employment legislation and Codes of Practice throughout the procurement process. The Regulations are fully compatible with these obligations.

Several respondents stated that 'best value' or 'value for money' should encompass quality considerations rather than just lowest price. Responses welcomed the fact that the definition of 'most economically advantageous tender' (MEAT) included the wording 'from the point of view of the contracting authority' in draft regulation 30. Government policy for many years has been that value for money means the optimum combination of whole life costs and quality to meet the user's requirement. It is not about lowest price.

One respondent welcomed the provisions on social and environmental criteria but said that bidders needed to understand exactly which "environmental characteristics" the contracting authority is looking for. We would like to take this opportunity to restate that criteria at the award stage must relate back to the specification – they must be relevant to the subject of the contract.

As a general point, we would like to reiterate that both the Directives themselves and the UK Regulations provide the scope to take account of social, environmental and other issues where they are relevant to the subject of the contract and consistent with the criteria allowed at each stage of the procurement process.

15. Support for SMEs

Several responses highlighted the need to improve SME access to public contracts, particularly with regard to draft regulation 24 (Information as to economic and financial standing) and supplier accreditation. A number of responses also raised points relating to SMEs in the use of framework agreements, electronic auctions, CPBs and DPS. Two responses suggested that the Regulations should add a requirement for contracting authorities to advertise contracts outside the scope of the Directives to reflect ECJ judgements such as 'Telaustria'.¹³ In the case of contracts whose value is below the threshold at which the Directives apply, this is considered by some respondents to be of

¹² Available on OGC's website: <http://www.ogc.gov.uk/index.asp?id=1000084>.

¹³ C-324/98

particular benefit to SMEs. Consistent with the Government's general policy against adding in regulations not required to be implemented under EU Directives, we do not plan to add such a provision to the UK Regulations. (The draft Scottish Regulations include such a provision, but this is to take account of a particular legal requirement in the Scotland Act 1998 which only applies in Scotland).

Similarly, points relating to SMEs in the use of framework agreements, e-auctions, CPBs and DPS are not for the Regulations, as SME issues are not addressed in the Directives.

However, OGC strongly agrees that barriers should be removed for SMEs, Voluntary and Community organisations (VCOs) and Black and Minority Ethnic businesses (BMEs) to tender for public contracts. OGC and DTI's Small Business Service are leading a number of initiatives¹⁴ in this area, including a project announced by the Chancellor to investigate and reduce barriers caused by requirements for supplier accreditation, and the new National Tendering Opportunities Portal, which will provide a central point for the advertisement of lower value Central Government contracts.

In terms of assessing the financial standing of an economic operator, draft regulation 24 states that contracting authorities may "where appropriate" request a three-year financial record, but that where this is not appropriate, other information to demonstrate an economic operator's economic and financial standing may be provided. OGC has already published guidance¹⁵ that Government advice is now to request only two years' accounts or, if these are not available, other appropriate information. This is to avoid creating a disadvantage for SMEs or new businesses.

16. 'Alcatel' standstill period

Several respondents referred to the required legislative changes in the UK to implement the ECJ 'Alcatel' judgement¹⁶ by introducing a 10-day mandatory standstill period between the notification of the award decision and the date of contract conclusion for all procurements subject to the full scope of the Procurement Directives.

These amendments were the subject of a separate consultation exercise¹⁷, which ended on 10 October 2005. A summary of how the feedback received has influenced the final 'Alcatel' amendments to the Regulations will be published on OGC's website as soon as possible, along with further guidance in the form of a Question and Answer document.

The 'Alcatel' amendments will be included in the final Regulations implementing the new EU Procurement Directives.

17. Other points raised

Several respondents referred to standard forms. We can confirm that the European Commission has published new standard forms, and that reference to these forms will be made in the final Regulations.

Several responses also suggested that the Regulations should include a provision on Alternative Dispute Resolution. As explained in the introduction, we are not able to add provisions in the Regulations that are not in the original Directives. This is a matter of best practice.

¹⁴ OGC is running a series of initiatives under the BRTF Programme to help create a more open, competitive and innovative marketplace, which is inclusive of SMEs, VCOs and BMEs. For more information please see <http://www.ogc.gov.uk/index.asp?docid=1002158>.

¹⁵ *Smaller Supplier... Better Value?* is available at http://www.ogc.gov.uk/embedded_object.asp?docid=2077.

¹⁶ C-81/98

¹⁷ See <http://www.ogc.gov.uk/index.asp?docid=1003990>

It was suggested that draft regulation 2(4)¹⁸ is unnecessary in the Regulations. We agree and will remove it from the final version.

A number of minor drafting points were raised and a few typographical errors noted. We are grateful for these observations and will address them in the final Regulations.

18. Specific points in the Utilities Regulations

The main comments made in relation to the Utilities Regulations focused on the exemption mechanism in draft utilities regulation 9. One response enquired about the identity of the 'competent authority' in draft utilities regulation 9(1)(a). We can confirm that this is the Office of Government Commerce and this will be made clear in the final Regulations and in guidance. Several utilities responses also requested clear guidance on the criteria that utilities must meet to apply successfully for exemption from the Regulations. This will be covered in guidance.

In relation to draft utilities regulation 11 (Thresholds), one respondent asked whether the value in pounds sterling will continue to only change biennially. We can confirm that this is the intention.

19. Guidance

All respondents welcomed our plans for guidance and particularly stressed the need for clear guidance on framework agreements, competitive dialogue, electronic auctions, CPBs, DPS and the mandatory exclusions provision in Article 45.

We intend to publish the following pieces of guidance as soon as possible:

- Reserved contracts
- Electronic auctions
- Framework agreements
- Central Purchasing Bodies
- Dynamic Purchasing Systems
- Mandatory exclusions (Article 45)
- Competitive dialogue
- Note on Social Issues in Purchasing
- Exemption mechanism for utilities

In the meantime detailed guidance on existing EU provisions is available in OGC's Introduction to the EU Rules, and guidance on the new provisions is available in OGC's Training Module on the New Public Procurement Directives¹⁹. Additional guidance was requested on time limits and the open, restricted and negotiated procedures. We do not intend to publish further guidance on these areas, but would refer interested parties to the two documents listed above which, among other points, set out the conditions and time limits governing the use of the open, restricted and negotiated procedures. We will consider the points requested for additional guidance when these documents are reviewed.

Several respondents asked for the opportunity to review particular pieces of guidance before they are published. We do not plan to consult publicly on guidance, although we may need to discuss certain provisions with specific interested parties, such as the provisions in Article 45. However, we would welcome all comments on the guidance once it is published, and will review it over time based on the feedback we receive.

¹⁸ Draft regulation 2(4): "References in these Regulations to a regulation are references to a regulation in these Regulations and references to a Schedule are references to a Schedule to these Regulations. "

¹⁹ These are available at: <http://www.ogc.gov.uk/index.asp?id=1000084>

20. Next steps

The Regulations will now be finalised and laid before Parliament to meet the implementation deadline of 31 January 2006. The final Regulations will be published on the website of the Office of Public Sector Information (<http://www.opsi.gov.uk/>). They are expected to come into force on 31 January 2006.

As stated in the introduction, we intend to provide guidance to procurers on the new provisions in the Directives as soon as possible.

This Response document is available on OGC's website at:
<http://www.ogc.gov.uk/index.asp?docid=1003745> along with the original consultation documents.

Office of Government Commerce, December 2005.