

# Procurement Policy Note - Quarterly Update



March 2009

Welcome...

## Purpose of this update

Topics and issues regularly arise on public procurement rules and policy that are of interest to OGC stakeholders. While we will continue to publicise significant developments via Procurement Policy Notes (PPNs), this quarterly PPN Update acts to complement these updates, consolidate key messages and raise awareness of other issues that might not warrant a PPN on their own, but are still likely to be of interest to public procurers. We welcome any feedback and suggestions from readers on the content and format of this update.

## Dissemination

You are encouraged to circulate this Procurement Policy Update within your organisation, agencies, non-departmental public bodies (NDPBs), and any other bodies for which you are responsible, in particular drawing this to the attention of anyone with a procurement or commissioning role. This and future updates will be disseminated via the same contact list as PPNs.

PPNs are sent to heads of procurement in central government departments. This is because:

- A past consultation showed that heads of procurement wanted to be responsible for disseminating policy material to bodies for which we are responsible;
- OGC is not in a position to maintain updated distribution lists for potentially thousands of recipients and a cascade approach is more manageable.

However, PPN notices, and Procurement Policy Updates are published on the OGC website at the link below.

[http://www.ogc.gov.uk/procurement\\_policy\\_and\\_application\\_of\\_eu\\_rules\\_procurement\\_policy\\_notes.asp](http://www.ogc.gov.uk/procurement_policy_and_application_of_eu_rules_procurement_policy_notes.asp)

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# Procurement Policy Note – Quarterly Update

## 1. Progress on the implementation of the Remedies Directive

OGC is preparing to consult stakeholders for the second time on the implementation of the new EU Remedies Directive (Council Directive 2007/66/EC). The new Directive amends the original two Remedies Directives that apply to the public sector and utilities sector. The main new provisions aim to harmonise the standstill provisions between Member States and introduce ineffectiveness as a remedy for illegal direct awards, which are considered to be the most serious breach of the procurement rules. The deadline for transposition is 20 December 2009.

OGC ran the first of two consultations in the Autumn of 2008. This sought opinions on the approach to the Directive's implementation, and requested feedback on various optional elements. The consultation evoked a positive response which helped to inform key policy decisions. A summary of the responses will be published as part of the second consultation exercise, which is due to commence in April 2009, and will include draft Regulations.

More information can be found on the OGC website at:  
[http://www.ogc.gov.uk/procurement\\_policy\\_and\\_application\\_of\\_eu\\_rules\\_european\\_procurement\\_directives.asp](http://www.ogc.gov.uk/procurement_policy_and_application_of_eu_rules_european_procurement_directives.asp)

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## 2. Completing contract award notices

At the last statistics working group meeting the European Commission commented on the improvement in the number of contract award notices being published by contracting authorities. The ratio of contract award notice to contract notices being published is now over 80%. The Commission is pleased with this although they have commented that the completion of relevant fields within the notices, particularly the price of the awarded contract or total value of framework, is not as good as it should be.

Although the procurement rules allow for authorities to withhold some information from award notices in certain circumstances, the Commission's view is that this should only be applied exceptionally. The number of notices that do not include prices

suggests that some authorities are omitting this information as a matter of course. The Commission pointed out that the OJEU notices provide for authorities to state either the actual award price or the lowest and highest offers received, so there really is little reason for this field not to be completed.

OGC encourages authorities to fully complete the notice as much as possible, as this will help with our aim of using award notices as a means to gather the annual statistical information. Finally, a gentle reminder that award notices should also be submitted for Part B service contracts and those awarded under the negotiated procedure without a call for competition.

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## 3. Comment on recent infractions and enquiries

Please note this update provides a summary arising from some recent legal cases, but is not intended as legal advice or a definitive summary of the legal position. Contracting authorities are recommended to consult their own legal advisors for specific advice.

The December 2008 update emphasised that the "selection" and "award" stages of a procurement process are separate, even in the open procedure where they occur simultaneously. The criteria used at one stage must not be duplicated. Providing suppliers with information about the marking or scoring methodologies used at both the "selection" and "award" stages is an important way of ensuring transparency.

European Court of Justice and national case-law emphasises the need to give suppliers full information about criteria, sub-criteria and scoring mechanisms at both "selection" and "award" stages. A recent infraction case has made clear that transparency includes identifying any "pass mark" set by the authority at the selection stage, for example in a pre-qualification questionnaire. Also, where specific questions require a satisfactory response, or the candidate will be rejected irrespective of his total score, those questions must be identified clearly to the candidates. Contracting authorities should ensure that where they propose to reject a supplier from a procurement exercise on the basis of the response to a particular question that such rejection is in line with the legally

permissible criteria for rejection that apply at each stage of the procurement process.

Under the public procurement rules, candidates and tenderers are entitled to a written debrief, but sometimes authorities also provide supplementary verbal information. To avoid possible misunderstandings or lack of clarity, it is strongly recommended as good practice that any verbal debrief should be minuted and a copy made available to the supplier

When the Restricted Procedure is used authorities sometimes ask tenderers to confirm their agreement to the authority's proposed terms and conditions of contract, and might permit tenderers to propose changes to these contractual terms where any amendments: (a) do not alter the requirement fundamentally, (b) do not favour a particular bidder or (c) assist operational effectiveness/contract management. Where changes to an authority's terms are allowed in the circumstances described at (a) – (c) above amendments should apply to all suppliers equally. It is noted that the situation is likely to be different where the Competitive Dialogue is used.

- **Correctly identifying requirements in the OJEU contract notice**

A recent infraction case highlights the need to correctly set out all the intended or likely types of services, works or supplies in Sections II.5 and II.1.6 of the contract notice. This applies to all cases, but may require particularly close attention for wide-ranging or complex requirements being procured under a competitive dialogue (or negotiated) procedure. In a recent procurement, (undertaken under the negotiated procedure) a contracting authority sought a wide-ranging partnership for service delivery. However despite including a considerable variety of services in the contract notice, during negotiations the authority found that effective delivery would require certain services not included in the notice. When the authority awarded a contract including those services that were not originally advertised, the European Commission brought infringement proceedings against the UK.

Contracting authorities should also be aware of the heading of the contract notice as published in the OJEU. Although this heading is not the direct responsibility of the contracting authority, public bodies are advised to check contract notices published at their behest and advise the Publications Office if the allocated heading appears to be inadequate or potentially misleading, this possibility may be greater where the requirement is complex or wide-ranging. Any significant divergence

between the Contract Notice Heading and the requirement set out elsewhere in the Contract Notice could invite scrutiny from the Commission because of a potential lack of transparency.

- **Henry Bros (Magherafelt) Ltd and others v Dept of Education**

In a recent UK court case, Henry Bros (Magherafelt) Ltd and others v Dept of Education Northern Ireland, [2008] NIQB 105 the Court considered the extent to which a particular pricing mechanism - fee percentage - assisted a contracting authority in identifying the most economically advantageous tenders (MEAT) to appoint suppliers to a construction framework. In this case the fee percentage mechanism was used without reference to any cost/pricing information on the assumption that the underlying costs would be the same for each bidder. The Court held that this assumption was incorrect and that the use of fee percentage as the sole competitive pricing criterion was inappropriate. The Court noted that the fee percentage mechanism could be used legitimately together with an element of costing/pricing. This did not mean that tenderers would always have to provide costing examples at the framework selection stage. However, the use of this approach required some pricing/costing element in order to be compliant with Community and domestic public procurement rules.

- **Dirk Ruffert v Land Niedersachsen**

Public bodies should note the judgment of the ECJ in case C-346/06 - reference for a preliminary ruling Dirk Ruffert v Land Niedersachsen. The ECJ ruled that a legislative measure requiring that public contracts only be awarded to undertakings that paid their employees at least the minimum prescribed by collective agreement at the place where the contracts were to be performed was incompatible with the freedom to provide services. The ECJ held that such a requirement may deter bidders from member states where the wages are lower, and could therefore be seen as a restriction on the freedom to provide services that could not be justified as being necessary for the protection of workers. It should be noted, however, that this judgement does not preclude the mandating of a minimum wage that is prescribed by law, such as the National Minimum Wage in the UK, or a collective agreement or arbitration award that has been declared as "universally applicable" in the Member State concerned (see Posting of Workers Directive 96/71/EC).

This judgment means that imposing a contract condition requiring the payment of the London Living Wage to workers on a contract creates a risk of legal challenge against the UK, on the basis that it is restricting the freedom to provide services. It is therefore recommended that such minimum wage requirements should only be pursued on a voluntary basis.

- **Federal Security Services v Chief Constable for the Police Service of Northern Ireland and Resource Group Ltd**

The current public procurement rules do not permit the UK courts to overturn a public contract once awarded (this will change in certain circumstances once the new Remedies Directive (2007/66 EC) is implemented in domestic law).

However, in the above recent case, (Northern Ireland High Court, ref DEE7416) the court granted an injunction against the implementation of a “Part B” services contract which had been let without any standstill period. Although “Part B” services are not covered by the 10 day standstill under the Public Procurement Regulations, the Court took note of ECJ judgments that Part B services are subject to general Treaty principles (and, where of cross border interest, appropriate advertising may be required). The procurement in this case was for a large scale contract which had been advertised and was known to be of cross-border interest. The award was subject to some dispute.

The Court considered that awarding the contract in those circumstances, with no standstill to allow an opportunity of challenge, would breach the principles of transparency, effectiveness of remedies and equal treatment. The Court held that the restriction of remedies to an award of damages did not apply to this contract which had been let in circumstances that did not comply with those principles.

Contracting authorities are advised to ensure proper compliance with the standstill period where it applies. Even where the 10 day mandatory standstill does not apply, Treaty principles may require the application of a standstill of reasonable duration (but not necessarily 10 days) in some cases.

- **Auroux v Roanne**

As mentioned in the December 2008 update, this ECJ case has caused a degree of interest particularly in the context of “development agreements” between developers and public bodies. We are planning to issue some preliminary guidance

on development agreements in light of the Roanne/Auroux ECJ case before the end of May.

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#### 4. Supplier Feedback Service Update

It has been a busy start to the year for the OGC Supplier Feedback Service (SFS), seeing a total of 10 new cases and 23 closed since December’s Quarterly Update.

One case which was brought to our attention involves the use of recruitment websites for the engagement of contractors and consultants.

Our customer had explained how, on certain recruitment websites, there were often requirements for interim consultants and ‘contractors’ within the public sector. These appointments were not for staff to be ‘employed’ but for consultants to provide services to a contracting authority.

When expressing interest in these contracts, our customer found that they were already filled either by other contractors or by larger consultancy companies without any further competition.

The main concern was about the lack of transparency surrounding the ‘hiring’ of contractors in this way, and how it contradicts the principles of the Treaty and the Public Contracts Regulations 2006.

When departments and their agencies are hiring interim contractors or consultants in this way, it is possible that these exercises may be caught as ‘Part A’ services, as defined in schedule three of the Regulations. If this is the case, then these services should be procured accordingly, ensuring that the relevant procurement rules are followed, and with particular regard to the aggregation rules.

Other cases include:

- A supplier contacted us after a Local Government Body rejected their expression of interest before the cut off date advertised in the OJEU Notice. A quick call from the SFS allowed us to bring the problem to the authority’s attention, which resulted in the competition being reopened until the right closure date, and the supplier’s expression of interest was accepted.
- Another supplier contacted us after submitting a tender in the North West. Although they had completed a PQQ and passed, they were unable to identify why they had failed in their bid despite receiving a written debrief. The SFS was able to talk to the contracting authority and explain to

the supplier where they had fallen short in their bid and offer some helpful guidance. The supplier was grateful for the feedback and now has a better understanding of how to complete tender documentation.

- Although slightly outside of our remit, we were able to point a sub-contractor to a contracting authority to discuss their concerns relating to the equipment used by a prime contractor on a new framework. It was through this intervention that the supplier was able to get a better understanding of the terms of the contract and that he may not lose out on business as he had first thought.

#### ***Supplier Feedback Service: How you can help.***

Please forward any change in first-line contact to Andie Beaven (<mailto:andie.beaven@ogc.gsi.gov.uk> or 01603 704811).

OGC would also be grateful for your support in spreading awareness about the Supplier Feedback Service. This may be helpful in case your stakeholders are ever approached by the SFS, or in case they wish to use the SFS themselves (despite the name, it is not only suppliers that can use the SFS!). Any support is welcome, though one suggested avenue might be to include a reference to the Supplier Feedback Service in your guidance on relevant dispute resolution procedures. Or, if appropriate on the procurement pages of your website. The web link is below – thanks in anticipation!

[http://www.ogc.gov.uk/procurement\\_policy\\_and\\_practice\\_ogc\\_supplier\\_feedback\\_service.asp](http://www.ogc.gov.uk/procurement_policy_and_practice_ogc_supplier_feedback_service.asp)

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#### **5. Latest Procurement Policy Notes.**

December to February:

##### **[Use of the Accelerated Restricted Procedure](#)**

- This PPN contains information relating to the European Commission's decision to relax rules on the use of the accelerated restricted procedure for procurements in 2009 and 2010.

##### **[Supported Factories and Businesses - updated guidance](#)**

- OGC guidance on reserved contracts in the Public Procurement Regulations 2006 has been updated. The new, more detailed guidance, covers how this provision should be applied and how contracting authorities

can ensure they achieve value for money when reserving contracts.

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#### **6. Policy Update**

##### **Glover Report and SMEs**

Work is underway on projects to implement the 12 recommendations made in the Glover Report which examined ways to make it easier for SMEs to access public sector contracts. Key projects include the development of a single, free to use portal to advertise contracts across the whole public sector, flagging contract opportunities suitable for individual SMEs or consortia of SMEs and making the tendering process simpler through a standardised PQQ and more flexible approach to accreditation. All recommendations will be delivered by end 2010.

The first stakeholder forum event will be held on Wednesday 22<sup>nd</sup> April. Anyone interested in being part of the forum and attending the event should e-mail [access4all@ogc.gsi.gov.uk](mailto:access4all@ogc.gsi.gov.uk) with their details!

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##### **Innovation:**

The Department for Innovation, Universities and Skills (DIUS) has been working closely with OGC to develop the Innovation Procurement Plan (IPP) concept. Guidance and a practical toolkit have been published, to help Departments develop their plans. Both documents are available on the [DIUS website](#) and the [OGC Policy & Standards Framework portal](#) where more information about innovation and procurement can be found. Further guidance on innovative procurement mechanisms and practical case studies can be found in the DIUS/OGC publication [Finding and Procuring Innovative Solutions](#).

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##### **Updated specifications – Information Communication Technology (ICT)**

Sustainable procurement criteria are already available for a range of products purchased by Central Government departments and executive agencies. These can be found at [Buy Sustainable – Quick Wins](#).

New updated specifications for Information Communication Technology (ICT) – including monitors and desktops – were signed off by the CESP (Centre of Expertise in Sustainable Procurement) Programme Board in December 2009 and are now **mandatory**. Compliance with the new standards will be monitored by CESP.

The new criteria support the Cabinet Office Greening ICT Strategy and will also help the UK Government achieve its aim of being amongst the EU leaders in sustainable procurement. The criteria have been drawn from existing accreditation standards IEEE 1680 which underpins the Electronic Product Environmental Assessment Tool (EPEAT®) and ECMA 370 Standard. Defra (the Department with lead responsibility for sustainable products procurement criteria) has carried out a Cost Benefit Analysis and market capacity evaluation in line with the UK Government's "Value for Money" procurement policy.

A cost-benefit analysis for imaging equipment is being undertaken and will be available mid March 2009.

For more information, please contact Kay Williams on [kay.williams@defra.gsi.gov.uk](mailto:kay.williams@defra.gsi.gov.uk)

- A key challenge is to embed the Joint Statement in contracts on a day-to-day basis;
- There are good opportunities to influence existing contracts, even when they are long-term over many years;
- Departments should be able to monitor re-tender dates, to identify where opportunities exist to tie in the Joint Statement to new contracts.

The output from the seminar has been included in the review of the Joint Statement being conducted for the Public Services Forum.

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### **OGC/NAO contract management guidance.**

The National Audit Office and the OGC have published joint guidance to replace our previous guidance on contract management.

More information can be found by following the link below:

[http://www.ogc.gov.uk/documents/Management\\_Framework\\_Good\\_Practice\\_FINAL.pdf](http://www.ogc.gov.uk/documents/Management_Framework_Good_Practice_FINAL.pdf)

You are encouraged to promote the use of this updated guidance within your organisation.

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### **Workforce Issues in Contracting**

On 16 February Cabinet Office and OGC hosted a seminar covering the Joint Statement on Access to Skills, Trade Unions and Advice in Government Contracting. A link to the document can be found at [http://www.cabinetoffice.gov.uk/workforcematters/080715\\_joint\\_statement.aspx](http://www.cabinetoffice.gov.uk/workforcematters/080715_joint_statement.aspx).

56 colleagues attended the event – drawn from the Government procurement community, policy teams with an interest in skills and trade unions, and from local government and the NHS.

Key messages included

- The Joint Statement is part of a wider agenda around corporate social responsibility in procurement;
- Awareness of the Joint Statement needs to be raised amongst the Government procurement community and with suppliers;

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