

Procurement Policy Note - Quarterly Update



December 2008

Introducing a new quarterly update on procurement policy developments

Purpose of this update

Topics and issues regularly arise on public procurement rules and policy that are of interest to OGC stakeholders. While OGC will continue to publicise significant developments via Procurement Policy Notes (PPNs), we are now launching the new quarterly PPN to complement these updates, consolidate key messages and to 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. OGC welcomes 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 so if you are interested in seeing them they may be accessed here –

http://www.ogc.gov.uk/procurement_policy_and_application_of_eu_rules_procurement_policy_notes.asp

In this update:

1. New guidance on Competitive Dialogue and use of framework agreements
2. New amending Regulations - CPV codes and Postal Services
3. Update on the implementation of the new Remedies Directive
4. Update on outcomes from the Supplier Feedback Service
5. Comment on recent ECJ cases and infractions – implications for UK public procurement
6. Updated model terms and conditions for goods and services
7. Policy Update

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1. Competitive Dialogue and Frameworks

When the 2006 procurement Regulations were made, OGC produced a set of guidance notes covering the new provisions. Over the last few months we have been working to update these to reflect developments and emerging practice since the Regulations came into effect. Of particular note is the HMT/OGC guidance note on the Competitive Dialogue procedure, and the recently published guidance on framework agreements. All guidance notes may be found here -

http://www.ogc.gov.uk/procurement_policy_and_application_of_eu_rules_guidance_on_the_2006_regulations.asp

2. Amending Regulations

i) New Common Procurement Vocabulary codes

CPV codes changed on the 15 September. Authorities publishing notices after this date have to use the revised codes or risk having the notice rejected by the Office of Official Publications. The codes have been uploaded on the SIMAP website and commercial e-senders have been making the necessary changes as well. New amending Regulations have been made to change existing references to CPV codes in the Procurement Regulations to the updated versions. Please see:

http://www.opsi.gov.uk/si/si2008/pdf/uksi_20082256_en.pdf.

ii) Post Office amending Regulations

Another set of amending Regulations are being made as a result of the move of the Postal Business of the Post Office to the Utilities Sector. Further details were published in PPN12/08 –

http://www.ogc.gov.uk/documents/PPN_-_consultation_on_the_Postal_Services_Amending_Regulations.pdf

3. Remedies Directive implementation

OGC has now finished the first stage of the consultation on the new Remedies Directive. We will publish a summary of replies received, as well as our response to the consultation, in early 2009. The

second stage of consultation on the draft Regulations will follow this. For more information, please see:

http://www.ogc.gov.uk/the_policy_and_legal_framework_update_on_remedies_negotiations.asp

4. Supplier Feedback Service Update

OGC's Supplier Feedback Service has been in operation since April 2007. It provides a route for suppliers to raise concerns about poor public sector procurement practice. To date, the Service has received 40 enquiries. Of the cases taken forward, 19 have been resolved and 11 are still in progress. Examples of issues encountered include:

- Failure to advertise a contract where required by the procurement rules. The contract had already been awarded, but following OGC involvement, the authority committed to improved practice in future procurements.
- A contract for "Part B" services was extended without competition. The authority reconsidered and decided to put their requirement out to tender.
- Award sub-criteria were not disclosed, bidders were treated unequally and there were issues relating to debriefing. The authority suspended the award of the contract and investigated. After considering the recent ECJ "Lianakis" case (see note below), the authority decided to restart the procurement. OGC provided some guidance to help avoid any similar issues going forward. The supplier was satisfied with this action.
- In a number of cases OGC worked with the authority to provide further feedback to enquirers relating to the evaluation of their prequalification questionnaires or bids - highlighting the need for contracting authorities to be as open as possible in providing useful feedback to suppliers.
- In other cases, OGC was able to demonstrate that the authority had not done anything wrong. For example, a complainant believed a government agency had been engaging in "corrupt activity" by not providing him with opportunities to bid. We

were able to demonstrate that all potentially suitable opportunities had been advertised in accordance with the procurement rules and there was therefore no case to answer.

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) by end December 2008.

OGC would also be grateful if you could promote the Supplier Feedback Service to your stakeholders. A reference to the Supplier Feedback Service in departments' own procurement dispute resolution procedures, as a contact after attempts at resolving issues locally have been exhausted, would be helpful. If appropriate, you may also wish to consider including a link to the service from the procurement pages of your website:

http://www.ogc.gov.uk/procurement_policy_and_practice_ogc_supplier_feedback_service.asp

5. Comment on recent ECJ cases and infractions - implications for UK public procurement

Please note: this update provides a summary of some recent legal cases but it is not intended as legal advice or a definitive statement of the legal position. Contracting authorities are advised to consult their own legal advisors for guidance.

Key issues to note:

▪ Ensure clear communication with suppliers

A common theme is the need to communicate effectively with suppliers throughout the procurement. As a principle, contracting authorities should always provide as much information as possible, consistent with equal treatment and commercial confidentiality, not just the minimum legally required. Moreover, the legal obligations are themselves being clarified by recent judgments of both the European Court of Justice and the national courts, which make clear that giving incomplete or inadequate information to suppliers during the procurement process risks successful challenge.

▪ Keep suppliers informed at both selection and award stage

A recent ECJ case which has attracted interest is C-532/06, a reference for a preliminary ruling in *Lianakis & others v Alexandroupolis & others*. This

case makes clear it is not sufficient to provide bidders with high-level contract award criteria; all sub-criteria, and weightings (where used), must be made available so that bidders can take these into account when preparing bids.

The Commission began an infraction case against a UK authority which failed to give information about the scoring mechanism or pass mark for a pre-qualification questionnaire (PQQ), and also failed to give adequate debriefing about why a candidate failed to meet the selection pass-mark.

OGC has also received several cases through the Supplier Feedback Service about unclear PQQ requirements and scoring methods. As well as risking formal challenge, lack of clarity may disproportionately disadvantage smaller businesses, which may not be well versed in bidding for government contracts.

The general message is clear: principles of equal treatment and transparency mean that suppliers are entitled to full and effective information on matters which might influence their submissions, and to effective debriefing on the reasons for their rejection.

▪ Criteria used at selection and award stage

Lianakis also emphasises that "selection" and "award" are distinct processes, even in contracts under the open procedure, and "selection" criteria concerning technical and professional ability are not to be used in the award process. It also supports the Commission's views that "experience" should only be used as a selection, not an award, criterion even for the award of specific contracts under framework agreements.

There may be some counter-arguments concerning "experience" and OGC intends to make some observations to the Commission about this. However, unless and until informed to the contrary, contracting authorities should avoid any use of "experience" as an award criterion.

▪ Implications of ECJ case "Auroux v Roanne"

ECJ Case C-220 / 05 *Jean Auroux & others v Commune de Roanne* has attracted comment. This judgment had three main findings: a public works contract does not require the contracting authority to become the owner of that work in order to become subject to the rules; revenue to be received from third parties must be included when calculating the value of a public works contract for the purposes of the thresholds; and award of a contract is not exempt from the rules notwithstanding it is awarded to another contracting authority, who will in turn apply the procurement rules to consequent contracts.

This judgment might have practical implications, for example for local authorities that wish to engage a development partner with whom to regenerate a run-down area. OGC intends to issue more detailed guidance in this area: in any event, public bodies should carefully consider their own specific circumstances in the light of “Auroux”, before embarking on agreements, and it is recommended that specific legal advice is sought.

6. Updated Model Terms and Conditions for Goods and Services

OGC has published refreshed and updated model terms and conditions for goods and services, including additional guidance, following a consultation process with stakeholders in Government and the private sector. [Click here](#) to access the documents, which can be found in the Policy and Standards framework.

These models embody good procurement practice and are designed for low to medium risk procurements, with values above the OJEU thresholds.

Following a recent Government announcement, departments in central civil Government are now encouraged to pay their suppliers within 10 days of receipt of a valid invoice. This is to help businesses that are faced with increased cash flow problems in the current economic climate. It should be noted however that the standard payment terms (which can be modified) set out in these model contracts, and therefore a model for contractually-binding arrangements, remain at 30 days.

Key changes

These new versions include amended and new provisions that reflect a number of key policy changes in the following areas:

- A new clause allowing assignment of invoices to factoring companies without prior consent, which allows smaller businesses to raise finance more easily.
- Explicit clauses around prompt payment and the Late Payment of Commercial Debts Act, that encourage good payment practice.
- Strengthened data security clauses following the publication of the data handling procedures in government report (June 08) (please note in specified circumstances these clauses are

mandatory for new contracts. [Click here](#) for more guidance on data security in contracts)

Guidance and use

The guidance notes on the practical application of these terms and conditions should be referred to prior to use. Specialist advice may also be required.

Contracting authorities are strongly encouraged to adopt these terms and conditions, with any tailoring necessary to reflect individual circumstances, on a case-by-case basis.

7. Policy Update

Glover Review and SMEs: As part of the 2008 Budget, Anne Glover was asked to lead a committee to examine what the Government could do to make it easier for Small and Medium Sized Enterprises (SMEs) to supply to the public sector. The Government has welcomed the recommendations within the Glover Committee’s report *“Accelerating the SME Economic Engine: through transparent, simple and strategic procurement”*. More information can be found on the [OGC website](#).

Equalities: As part of the Equality Bill proposals, the Government will be exploring the ways in which public procurement might be used within the EU rules, to further equality outcomes. OGC leads a cross-Whitehall working group which seeks to identify whether options exist and how they might be implemented using procurement to further equality outcomes in a way that achieves value for money in our spending of taxpayers’ money, whilst minimising the burdens placed on both the public and private sectors. Once agreed, proposals will inform work on the new Equality Duty and the Equality Bill proposals as a whole.

Innovation: OGC is working with DIUS to promote innovation in public procurement and we are now developing an easy-to-read pamphlet on the subject to complement the guidance soon to be issued on Innovation Procurement Planning.

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