



Office of Government Commerce

OFFICE OF GOVERNMENT COMMERCE

CONSULTATION DOCUMENT

**THE APPROACH TO IMPLEMENTATION OF THE NEW PUBLIC
SECTOR PROCUREMENT DIRECTIVE**

MAY 2004

OFFICE OF GOVERNMENT COMMERCE

CONSULTATION DOCUMENT

THE APPROACH TO IMPLEMENTATION OF DIRECTIVE 2004/18/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 03/02/04 ON THE COORDINATION OF PROCEDURES FOR THE AWARD OF PUBLIC WORKS CONTRACTS, PUBLIC SUPPLY CONTRACTS AND PUBLIC SERVICE CONTRACTS

Executive Summary

This consultation document concerns the implementation of the new European Directive on procurement in the public sector.

This Directive brings together the three existing Directives on public sector procurement (supplies, works, services) into one text and the other main changes centre on clarifying and modernising the existing texts to make the rules more helpful to today's public sector procurers and suppliers.

This Directive has already been adopted at European level and cannot be substantively changed in the implementation process.

OGC would welcome views on the proposed approach to implementation and has also drawn attention to the following specific articles:

Article 9	Methods of calculating contract value
Article 11	Central purchasing bodies
Article 19	Reserved contracts and sheltered workshops
Article 25	Information on sub-contracting
Article 27	Obligations relating to taxes, environmental protection etc
Article 29	Competitive Dialogue
Article 32	Framework agreements
Article 33	Dynamic purchasing systems
Article 40	Contract Documents
Article 45	Personal situation of the candidate or tenderer
Article 54	E-auctions

OGC would welcome views on the general approach and specific issues by 9 August 2004. Comments should be sent to eleanor.kinchen@ogc.gsi.gov.uk

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Introduction:

Chapter 1. Background information

- 1.1 This consultation document invites views from interested parties on the UK's approach to transposition of Directive 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public works, supply and services contracts.
- 1.2 The Directive was adopted by the EU's Council of Ministers and the European Parliament on 3 February 2004. It comes into force on the day it is published in the Official Journal of the European Union and must be implemented by the UK within 21 months of that date. The text of the Directive is attached at Annex B.
- 1.3 The Directive sets out the procedures to be followed at each stage of the procurement process leading to the award of contracts above certain thresholds for works, services and supplies by contracting authorities as defined (state, regional or local authorities and bodies governed by public law). It replaces four similar existing EC Directives¹.

1 Directive 93/36/EEC concerning the award of public supplies contracts
Directive 93/37/EEC concerning the award of public works contracts
Directive 92/50/EEC concerning the award of public service contracts
Directive 97/52/EEC, the Public Authorities Directive, which amended the previous Directives

These Directives have been implemented in the UK via Regulations (Statutory Instruments) under section 2(2) of the European Communities Act 1972:

1.4 The total public procurement spend across Europe represents over €1500 billion which is over 16% of EU GDP. The procurement Directives are therefore of great significance. They are based on the principles of competitive tendering, transparency, non-discrimination and equal treatment, and facilitate the achievement of value for money for the taxpayer as well as promoting the single European market.

1.5 Timetable for the implementation of the Directive:

The Directive must be implemented into UK national law as Regulations under section 2(2) of the European Communities Act 1972 within 21 months of its publication (see Article 80 of the Directive). This means that implementation will need to be completed by 31st January 2006. It is a requirement of Community law that EC legislation should be implemented in an effective, timely and proportionate manner. In line with general UK policy on implementing EC Directives, we intend to transpose the text of this Directive on time. Non-implementation or incomplete implementation would trigger infraction proceedings, and the UK would be liable to substantial penalties.

1.6 Devolved Administrations:

Northern Ireland and Wales will be implementing with England while Scotland has elected to implement independently. Scotland will therefore be circulating its own consultation paper and responses should be sent directly to Iain Moore, Scottish Procurement Directorate, Scottish Executive, Meridian Court, 5 Cadogan Street, Glasgow G2 6AT (telephone 0141 242 5596).

2. Timetable and practicalities for consultation responses

Purpose of consultation

2.1 OGC seeks the views of interested parties on its approach to the transposition of the Directive in general and in particular, on the following issues:

- Section 4. Methods of calculating contract value
- Section 5. Central purchasing bodies
- Section 6. Reserved contracts and sheltered workshops
- Section 7. Information on sub-contracting
- Section 8. Obligations relating to taxes, environmental protection etc
- Section 9. Competitive Dialogue
- Section 10. Framework agreements
- Section 11. Dynamic purchasing systems
- Section 12. Contract Documents

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)

- Section 13. Personal situation of the candidate or tenderer
Section 14. E-auctions

Intended consultees

- 2.2 We are seeking responses from public procurers including those in Government Departments and Local Authorities as well as from the Chartered Institute of Purchasing and Supply and potential or actual suppliers. We would also welcome views from the legal community, the academic community and any other parties with an interest in the application of the procurement rules.

Contact details

- 2.3 The Department would prefer any comments to be sent electronically to eleanor.kinchen@ogc.gsi.gov.uk. Alternatively, written comments should be sent to:

Eleanor Kinchen
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26 - 30 Great Peter Street
LONDON
SW1P 2BY

telephone: 020 7271 1441

Timing and closing date

- 2.4 We intend to allow 12 weeks for consultation. The deadline for the receipt of responses is 9 August 2004.

Outcome

- 2.5 Responses to this document will help inform decisions on the drafting of the Regulations which implement the Directives. The draft Regulations will be circulated next year for consultation prior to Ministerial approval and being laid before Parliament within the deadline for implementation.

Confidentiality

- 2.6 Your response to this consultation document may be made publicly available in whole or in part at the Department's discretion. If you do not wish all or part of your response (including your identity) to be made public, please state in the response that you wish the whole document to remain confidential or alternatively which parts you wish us to keep confidential. Where confidentiality is not requested, responses may be made available to any enquirer, including enquirers outside the UK, or published by any means, including on the internet.

Chapter 3. Summary of consultation issues

- 3.1 Directive 2004/18/EC aims to simplify, clarify and modernise the provisions of the existing Directives. Specifically it consolidates the three Directives, for public works, supplies and services contracts respectively, into a single text. Many of the basic provisions remain the same as in the existing Directives.

- 3.2 In addition, given that the original Directives date back to the 70's and 80's, new provisions have been added to take account of modern procurement methods and developments in best practice. These include explicit provisions on framework agreements, E-auctions and so-called Dynamic Purchasing Systems for the first time. There is also a provision on competitive dialogue – a new procedure for large, complex projects. Issues surrounding these four new features, along with several others, are highlighted and discussed below in the main body of this consultation document.
- 3.3 There is also greater clarity in this Directive on the extent to which social and environmental issues can be given consideration during the procurement process – e.g. by using “green” specifications, production process standards and variants and by taking account of relevant quality and whole life cost issues at the award stage. There has been considerable interest in social and environmental issues from Member States and this Directive recognises this. Because much of the scope for environmental and social considerations in this Directive are clarifications rather than new positions, practitioners are free to start taking advantage of these possibilities before the Directive is implemented. However, comments on the various references to these issues are, of course, welcome. Only substantially new provisions such as sheltered workshops are discussed in detail in this consultation document.
- 3.4 There is no scope to make substantive changes to the provisions as they are drafted in this Directive. There has already been considerable effort made to clarify and simplify the Directive in a succinct fashion at the European level and this has influenced our approach to transposition. We have agreed with Ministers that we should avoid unnecessary elaboration, or any elaboration which risks being at odds with the meaning of the Directive.
- 3.5 There are a limited number of provisions where the Directive gives Member States the discretion to choose whether or not to transpose them. These are:

- Article 11 - Central Purchasing Bodies
- Article 19 - Reserved Contracts
- Article 25 - Information on sub-contracting
- Article 27 - Obligations relating to taxes, environmental protection etc.
- Article 29 - Competitive Dialogue
- Article 32 - Framework Agreements
- Article 33 - Dynamic Purchasing Systems
- Article 54 - E-auctions

We are intending to transpose all of these new provisions and all are discussed in this consultation document. This does not mean that UK contracting authorities will have to use all of the approaches covered by these Articles. It simply means that there will be the opportunity to do so.

- 3.6 In addition, there are two provisions where Member States are required to set up domestic systems in order to ensure effective implementation. These are:

- Article 19 - Reserved Contracts
- Article 45 - Personal situation of the candidate or tenderer (Mandatory Exclusion)

Again these are discussed in more detail below.

Main Body of Consultation:

4. Methods of calculating contract value

- 4.1 Article 9 details methods of calculating the value of public contracts, framework agreements and dynamic purchasing systems.

The majority of the Article is effectively an amalgamation of existing provisions in relation to methods for calculating contract value, which appear in the current Works, Services and Supplies Directives. The provisions on framework agreements and dynamic purchasing systems in the Directive are new and therefore the provisions in this Article dealing with the calculation of their values are also new.

The majority of this Article is straightforward. However there are several specific issues relating to the wording of this Article on which we welcome comments.

- 4.2 In Article 9(1), the term “amount payable” is used. However, our intention is to transpose this phrase as “consideration payable”. Our reasoning is that “amount payable” is monetary in nature whereas “consideration payable” could relate to the provision of wider remuneration for contractors, service providers and suppliers² and allow for the concept of exchange.

For example, a contract for the provision of a computer system to a university could be remunerated, not by monetary means, but rather by allowing the provider to use the system for promotional purposes.

“Consideration” is the generally recognized UK term covering all remuneration to suppliers and it is already used in the existing Regulations. We believe that the wider meaning of this term is implicit in the new text.

- 4.3 There is additionally a lack of uniformity of terminology in this Article, as both “value” and “cost” are used to cover similar concepts, which we believe is confusing. Both are used in the phrase “calculation of the estimated value shall take account of both the **cost** of the works and the total estimated **value** of the supplies necessary for executing the works” (our emphasis) (see Article 9(4)). This implies there is a difference between the two terms. Our intention would be to use “value” throughout.

- 4.4 Article 9 (7) relates to the time periods to be used for public supply or service contracts which are regular in nature or which are intended to be renewed within a given period. This paragraph provides two alternative ways of calculating the estimated value of these aggregated contracts. You will note that option b) in this provision provides –

“(b) or the total estimated value of the successive contracts awarded during the twelve months following the first delivery, or **during the financial year if that is longer than twelve months**”. (our emphasis)

Previously, in the existing Directives and Regulations, “term of contract” was used instead of “financial year”. This new wording is unclear. We will be

² Collectively referred to in the Directive as “economic operators” –see footnote 3 of this document.

consulting the Commission on this point but, in the meantime, would welcome any comments on this new wording.

- 4.5 Finally, we would also welcome all views in general on Article 9.

5. Central purchasing bodies

- 5.1 Article 11 relates to central purchasing bodies which are explicitly referred to for the first time. This Article provides that Member States may provide in their implementing legislation that contracting authorities may purchase works, supplies and /or services from or through a central purchasing body. Where contracting authorities do purchase from or through such a body, they will be deemed to have complied with the requirements in the Directive where the central purchasing body has complied with them.

- 5.2 A central purchasing body is defined in Article 1(10) as –

“a contracting authority which;

- acquires supplies and/or services intended for contracting authorities or

- awards public contracts or concludes framework agreements for works, supplies or services intended for contracting authorities.”

It is important to note that the central purchasing body must be a contracting authority itself. The advantage of using a central purchasing body is that, provided it followed the provisions set out in the Directive initially, other contracting authorities who it supplies or for whom it contracts do not have to follow the rules a second time.

- 5.3 We intend to fully implement this Article. The Article resolves the doubt which was cast on the use of central purchasing bodies by the judgment of the European Court of Justice in Teckal (Case C-107/98). It was held in that case that contracts concluded between legally distinct public bodies one of which was controlled by the other were subject to the Directives unless the control was similar to that exercised over internal departments and the controlled body carried out the essential part of its activities with the controlling body.
- 5.4 However it is worth stressing that this particular Article only applies to central purchasing bodies, as defined in the Article. Currently contracting authorities may also be making use of agents and private sector bodies for obtaining goods and services. This Article does not change the situation or procedure with regard to these bodies i.e. the contracting authority is still responsible for ensuring compliance with the provisions of the public procurement Directives when using these other bodies.
- 5.5 Given that we know there is considerable interest on the scope to make use of central purchasing bodies in the UK, we would like to invite any views on this Article, especially given the issue discussed in paragraph 4.4 above. We would be particularly interested to know how current UK practice fits in with this new Article.

6. Reserved contracts and sheltered workshops

- 6.1 Article 19 provides that Member States “may reserve” the right to participate in public contract award procedures to sheltered workshops or provide for such contracts to be executed in the context of sheltered employment programmes in certain specified circumstances.
- 6.2 We intend to implement this provision so that contracting authorities have the option of reserving relevant contracts for sheltered workshops or for such contracts to be executed in the context of sheltered work. This reflects the policy line agreed at the time of the negotiations on this Article in Brussels.
- 6.3 This is a significant social issue. There is already a similar scheme operating in the UK for below the threshold contracts (Special Contracts Arrangements). However, by extending the scope to “above the threshold” contracts, this provision could further benefit sheltered organizations. Having said this, it must be remembered that such organizations will only have a certain capability and capacity to meet the requirements of public sector contracts. It is therefore anticipated that realistically this provision will only affect a relatively small proportion of public sector contracts.
- 6.4 We are currently working with the Department for Work and Pensions on any necessary clarification needed for the application of this Article clear in the UK. In particular, we need to be clear on the terminology used in this Article. For example, we must agree definitions of “sheltered workshops” “sheltered employment programmes” and “handicapped persons”.

It is important to note that, although contracting authorities may choose to reserve contracts for such organizations, they must still advertise this opportunity and allow similar organizations from other Member States to take part in the competition. This means that we must be particularly careful that the definitions we use in our Regulations do not discriminate against sheltered organizations from other Member States where the definitions may be different. Similarly we must also ensure, as far as possible, that UK sheltered organizations will not be disadvantaged from bidding for reserved contracts in other Member States because of the definitions we or they choose.

- 6.5 In line with our general approach to these “permissive” provisions, we will want the Regulations to leave decisions on when to make use of this provision to contracting authorities. At the same time, we will need to ensure the drafting of our Regulations also preserves the Government’s value for money policy, within the general principle of keeping to the substance of the Directive text. We envisage guidance being issued on how this provision is to operate in practice.

7. Information on sub-contracting

- 7.1 Article 25 allows contracting authorities to ask their tenderers to indicate in their tenders any share of the contract in question which the tenderer intends to sub-contract. Additionally it allows Member States to require contracting authorities to do this.

- 7.2 For policy reasons of providing flexibility for contracting authorities, we will want to transpose this Article as optional rather than mandatory, i.e. that a contracting authority **may** ask the tenderer to indicate any share of the contract he may intend to sub-contract to third parties and any proposed subcontractors.
- 7.3 This is of particular importance to small and medium enterprises (SMEs) who may be more likely to gain a share in public procurement contracts via the sub-contracting route. Therefore, given the UK Government's policy interest in stimulating the participation of SMEs in government contracts, we would be especially interested in gaining a better understanding of how implementation of this Article could impact on SMEs.

8. Obligations relating to taxes, environmental protection, employment protection provisions and working conditions

- 8.1 Article 27 provides that contracting authorities may state in the contract documents the body or bodies from which a tenderer may obtain the 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 area where the contract is to be carried out. Additionally, this Article empowers the Member States to oblige their contracting authorities to do this.

This Article also provides that should the contracting authority supply such information, they should require tenderers during the contract award procedure to indicate that they have taken account of such obligations.

- 8.2 There are existing provisions in the current Directives and Regulations which relate to providing information on obligations to employment protection provisions and to working conditions. This Article extends this provision to obligations relating to taxes and environmental protection.
- 8.3 We intend to repeat the approach taken in the current Regulations giving contracting authorities discretion (i.e. rather than an obligation) to state where tenderers or candidates may obtain information relating to obligations on taxes etc. This approach is in line with our policy of ensuring that all provisions are proportionate and do not add unnecessary burdens or bureaucracy.

9. Competitive Dialogue

- 9.1 Article 29 provides for competitive dialogue. This is a new procedure aimed at providing a flexible approach to the award of complex projects, when the end result that is sought is known, but not how this might be achieved, either in terms of financial or legal structure or technical requirements.
- 9.2 The final text for competitive dialogue was achieved after lengthy negotiation and lobbying, with the aim that the procedure should fit as much as possible with UK best practice on the award of PFI contracts as set out in guidance. In implementing this new procedure our aim will be to stick as closely as possible to the final text, because any substantive departure would undoubtedly raise questions that the UK was trying to interpret the provision

to suit our own circumstances. We would, however, welcome comments on the final Directive text.

10. Framework agreements

- 10.1 Article 32 provides that Member States may provide that contracting authorities may use framework agreements. Article 1(5) of the Directive defines a framework agreement as-

“an agreement between one or more contracting authorities and one or more economic operators³, the purpose of which is to establish the terms governing contracts to be awarded during a given period, in particular with regard to price and, where appropriate, the quantity envisaged.”

This is the first time that a provision on framework agreements has been explicitly included in the public sector Directives. However the use of framework agreements is well established in the UK and has long been recognised by the Commission. In particular, Article 5 of the Utilities Directive 93/38/EEC already contains a provision on such agreements. The definition of a framework agreement in the Directive closely follows the similar definition in the Utilities Directive.

- 10.2 A framework agreement, in this context, is a general term for agreements with economic operators which set out terms and conditions under which specific purchases (call-offs) can be made throughout the term of the agreement. Such a framework agreement is not a contract to which the Directives naturally apply. It is only at the call-off stage that a contract is formed in EC terms. However, under Article 32, the framework agreement is, itself, treated as a contract for the purposes of advertising, selection and award procedures, so that these procedures do not have to be applied to each call-off. There are specific rules, in the new Article, for calling-off under a framework. These include rules on so-called “mini-competitions”, a situation where the basic terms of the framework are not precise enough for a particular call-off and a competition is run within the framework to find the supplier most capable of meeting the refined terms. A framework agreement may not exceed four years except in exceptional circumstances (see fourth indent of Article 32(2)).
- 10.3 We had been pressing for explicit recognition of framework agreements in the new Directive and feel this provision fully meets our objectives and is in line with our current practice. Our intention is therefore to implement this provision fully with the minimum, if any, elaboration and to make it clear that contracting authorities may set up and use framework agreements as described where appropriate.
- 10.4 We have already issued guidance on framework agreements on our website <http://www.ogc.gov.uk/index.asp?id=1000084>. We would like to find out if this guidance provides suppliers and authorities with the information necessary.

³ The term “economic operator covers contractors (for works contracts), suppliers (for supplies contracts) and service providers (for services contracts) (see Article 1(8) of the Directive).

11. Dynamic purchasing systems

- 11.1 In Article 33, Member States ‘may provide’ that contracting authorities may use dynamic purchasing systems. Where contracting authorities are allowed to use dynamic purchasing systems then they must abide by the rules laid out in Article 33.
- 11.2 A dynamic purchasing system is defined in Article 1(6) and is a completely electronic process for making commonly used purchases. Dynamic purchasing systems are limited in duration to four years, except in exceptional cases (see Article 33(7)). They are essentially a completely electronic version of a framework agreement but unlike a framework agreement, dynamic purchasing systems are open throughout their period of operation to any economic operator which satisfies the selection criteria and has submitted an indicative tender that complies with the specification.
- 11.3 This is a new provision and we intend to enable contracting authorities to make use of dynamic purchasing systems. This provision might benefit from clarification so long as it does not change the meaning. However this is a complex procedure and we would welcome views.

12. Contract Documents

- 12.1 Article 40, together with other provisions in this Directive, contains references to “descriptive document and any supporting documents”. The previous Directives referred to “contract documents and supporting documents”.
- 12.2 In the existing Regulations, the term “contract documents” is used and we are likely to continue with that term as an equivalent to “descriptive document and any supporting documents”.
- 12.3 Regulation 2(1) of the Public Supply Contracts Regulations 1995 (S.I. 1995/201) defines contract documents as “the invitation to tender for or to negotiate the contract, the proposed conditions of contract, the specifications or descriptions of the goods required by the contracting authority, and all documents supplementary thereto”. Regulations 2(1) in both the Public Services Contracts Regulations 1993 (S.I. 1993/3228) and in the Public Works Contracts Regulations 1991 (S.I. 1991/2680) contain similar definitions slightly amended to take account of their subject matter. We would like views on whether or not we should retain this definition of contract documents in the new Regulations and, if not, what other formulation might be used.

13. Personal situation of the candidate or tenderer

- 13.1 Article 45 contains a new provision concerning the mandatory exclusion of candidates or tenderers on the basis of certain criminal convictions as set out in Article 45(1), i.e. participation in a criminal organisation, corruption, fraud and money laundering.
- 13.2 The Article also contains the usual “voluntary” exclusions on convictions generally, on bankruptcy, grave professional misconduct, non-payment of taxes, non-payment of social security payments and misrepresentation of information etc. However, our focus is on the new element of this Article:

mandatory exclusion.

- 13.3 The Article states that the contracting authorities must exclude candidates if they are **aware** of such convictions and refers to **competent authorities**, who could when requested supply contracting authorities with the relevant information about such convictions. We need to consider, therefore, what this means in practice in terms of being “aware” and in terms of the provision of information, both within the UK and across the European Community. Discussions are ongoing with the Home Office and other lead Departments on these issues.
- 13.4 The Article does provide derogation from this mandatory exclusion on the basis of overriding requirements in the general interest.

14. E-auctions

- 14.1 Article 54 provides Member States with the explicit option of allowing contracting authorities to use reverse electronic auctions (‘e-auctions’). An electronic auction is defined in Article 1(7) of the Directive as-

“a repetitive process involving an electronic device for the presentation of new prices, revised downwards, and/or new values concerning certain elements of tenders, which occurs after an initial full evaluation of the tenders, enabling them to be ranked using automatic evaluation methods.”

The definition also provides that

“Consequently certain services 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.”

- 14.2 The Article provides that the award of a public contract can be preceded by an e-auction when the contract specifications can be established with precision. It lays out what information about the e-auction needs to be included in the contract notice and specifications. Otherwise the usual Directive rules apply to the running of the procurement process depending on whether an open, negotiated or restricted procedure has been followed or whether a mini competition under a framework is being conducted. A full initial evaluation of the tenders based on the award criteria and weighting set must be made before an e-auction takes place. There are several rules governing the actual running of the e-auction that are established in this Article. Following the e-auction and the information ascertained, the contract must be awarded in accordance with the lowest price or EMAT⁴ award criteria as laid out in Article 53 of the Directive.
- 14.3 Although this is a new provision, e-auctions are already being used in public procurement in the UK and Article 54 is therefore helpful in clarifying their use. This does not mean however that there will be a compulsion to use e-auctions, indeed e-auctions in the UK should only be used as part of an

⁴ EMAT stands for Economically Most Advantageous Tender and is equivalent to the UK central Government policy of Value For Money (VFM)

EMAT approach and where appropriate.

- 14.4 It is worth emphasising that the approach to e-auctions, outlined in the new Article, is entirely consistent with a value for money approach. As explained above, an initial evaluation on the basis of all relevant EMAT (VFM) criteria is made before the e-auction phase. In addition, the e-auction itself can cover all criteria that are “quantifiable” – not just price.
- 14.5 In light of the significant efficiency savings which e-procurement systems can deliver and the work already underway in this field in the UK, we intend to fully implement this provision. This will make it clear that e-auctions may be used for all types of contracts subject to the exceptions set out in the Directive. In general, we do not want to qualify or restrict this provision to particular kinds of contracts because we want to allow maximum scope for use of future e-tools should they emerge.

ANNEX A – PARTIAL REGULATORY IMPACT ASSESSMENT

1. Purpose and Intended Effect of the Measure

Objective

1.1 The EU public procurement rules seek to ensure that public sector bodies award contracts in an efficient and non-discriminatory manner. Directive 2004/18/EC aims to simplify, clarify and modernise the existing EU rules for public procurement. The Directive brings together the three separate existing Directives⁵, for public works, supplies and services contracts into a single text. To take account of modern procurement techniques, there are new provisions facilitating the use of e-procurement, providing for competitive dialogue in the award of complex contracts, and explicitly providing for the use of framework agreements. There is also greater clarity on the extent to which social and environmental issues can be given consideration during the procurement process.

Background

1.2 In 2001 total public procurement spend represented 16.2% of EU GDP - around €1500 billion. The EU public procurement rules aim to ensure that this public money is spent in an appropriate manner. They are based on the principles of competitive tendering, transparency and non-discrimination, and facilitate the achievement of value for money for the taxpayer as well as promoting European trade.

Devolution

1.3 Northern Ireland and Wales will not be implementing independently while Scotland has elected to do so.

Risk assessment

1.4 This Directive should not involve additional risk.

1.5 This Directive re-enacts most of the provisions in the existing Directives, while simplifying, clarifying and modernising them. It will benefit public sector bodies awarding contracts by improving efficiency and effectiveness and by allowing them to take advantage of modern procurement techniques in order to achieve value for money. The points of clarification provide greater legal certainty to public bodies and their suppliers, and the simplification will reduce the burden on all in terms of adhering to the requirements of the Directives.

Even if the European Directives did not exist, UK policy and the EC Treaty would require contract authorities to follow similar rules, such as obligations to advertise, because they ensure value for money and transparency.

⁵ Directive 93/36/EEC concerning the award of supplies contracts
Directive 93/37/EEC concerning the award of works contracts
Directive 92/50/EEC concerning the award of services contracts
Directive 97/52/EC which amended the previous Directives

1.6 Not having such legislation would, amongst other things, allow other EU member states to adopt 'buy national' policies to the detriment of British companies, would risk corruption, and jeopardise the achievement of the UK policy of value for money (VFM) if contracts are not awarded through a competitive process.

1.7 Many of the new elements of this Directive are in any case permissive, in that the contracting authorities have the choice to make use of them. It is not compulsory for contracting authorities to use facilities, such as frameworks, but if they do choose to, they must follow the rules set out in the Directive. Many of the new facilities are already being used in Member States, such as with frameworks and e-auctions in the UK. The Directive simply clarifies their use under the legal framework.

2. Options

2.1 The options are constrained by the requirements of the Directive, which has already been adopted at the European level. Non-implementation would trigger infraction proceedings, and the UK would be liable to substantial penalties. There is therefore no 'do nothing' option.

2.2 Within these constraints there are a number of articles in the Directive where we have choices as to how, and in some cases, whether, to implement particular provisions. We are consulting on the majority of such issues:

Article 9	Methods of calculating contract value
Article 11	Central purchasing bodies
Article 19	Reserved contracts and sheltered workshops
Article 25	Information on sub-contracting
Article 27	Obligations relating to taxes, environmental protection etc
Article 28	National procedures
Article 29	Competitive dialogue
Article 32	Framework agreements
Article 33	Dynamic purchasing systems
Article 40	Contract Documents
Article 45	Personal situation of the candidate or tenderer
Article 54	E-auctions

However, as these provisions are permissive and reflect, in many cases, existing best practice, these provisions cannot be seen as adding burdens or costs irrespective of how or whether we choose to implement them.

3. Costs and Benefits

Business sectors affected

3.1 It is the public sector that must comply with the rules, and therefore there is no direct effect on business.

3.2 There may be an indirect effect on those businesses that contract with the public sector, where the contracts concerned exceed the thresholds set by the Directives. However, given that this Directive simplifies and clarifies existing rules, it should not be adding to any burdens on either procurers or suppliers which already exist.

Equity and Fairness

3.3 There should be no disproportionate effect on particular business sectors, and public sector bodies in other EU Member States will also be subject to the rules in the same way.

Compliance Costs

3.4 There will be no compliance costs for business.

Environmental/Social costs

3.5 There will be no costs imposed of an environmental or social nature.

4. Consultation with small business: the Small Firm's Impact Test

As discussed in section 3, the Directive affects the public sector and should not impose additional burdens on SMEs. The Small Firm Impact Test is therefore not relevant here.

5. Competition assessment

This Directive, as with the previous procurement Directives, is intended to facilitate greater competition by opening up markets.

6. Enforcement and sanctions

6.1 There is an EC Public Sector Remedies Directive⁶ which requires Member States to provide for effective and rapid domestic review mechanisms addressing alleged breaches of EC public procurement law and national implementing rules. This Remedies Directive is, therefore, a crucial element in ensuring the effective application of the procurement rules set out in this Directive.

6.2 Under the Remedies Directive, Member States must have bodies which are empowered to review the application of public procurement procedures, to administer quick and effective interim measures to suspend such procedures or decisions, to prevent and correct infringements, and, ultimately, to set aside⁷ unlawful decisions and award damages. These bodies can be judicial or administrative in nature and Member States have a certain amount of flexibility in how they choose to administer their domestic review proceedings. In the UK, the judicial model was chosen. A tenderer who considers that a procurement has been conducted in breach of the EC procurement directives, can take proceedings to the High Court (Court of Session in Scotland).

6.3 There is a review planned of the Remedies Directive early in 2005.

7. Consultation

In developing its policy and negotiating line leading up to the agreement of the new Directive, OGC consulted widely including the Chartered Institute of Purchasing and Supply, Confederation of British Industry, Department for Environment, Food and Rural Affairs, the Scottish Executive, the Welsh Assembly Government, Northern

⁶ Directive 89/665/EEC

⁷ A 'set aside' is when a decision is declared illegal and to all intents and purposes null and void.

Ireland, Heads of Procurement in other Government Departments, Office of the Deputy Prime Minister, Small Business Service and Trade Union Congress.

8. Monitoring and review

8.1 In monitoring and reviewing the application of the Directive, the Commission will be assisted by the Advisory Committee for Public Contracts made up of representatives from Member States.

8.2 In both the existing and new Directives, there is a requirement on Member States to supply the Commission with statistics on public procurement in the aim of monitoring the affect of these public procurement rules.

9. Summary and Recommendation

91. Now that this Directive has been adopted at the European level, we have no option but to implement it into UK law. The impact of this Directive is limited because:

- Many of the provisions and rules in the new Directive are already in place in the existing Directives.
- Many of the new provisions are permissive. They allow contracting authorities the choice to make use of them.
- Many of the new provisions are best practice and are already being made use of.
- The requirements of this Directive are on contracting authorities not on the private sector.

9.2 As discussed in section 2, there are a number of articles in the Directive where we have the option to implement particular provisions. We believe it is right for contracting authorities to have these provisions available but we are currently consulting on our approach.

ANNEX B – THE DIRECTIVE TEXT



New Public Sector Directive.pdf

If you have difficulty opening this document, the Directive is available online at http://www.europa.eu.int/eur-lex/en/archive/2004/l_13420040430en.html